

P.E.R.C. NO. 85-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-84-77

NEWARK TEACHERS UNION, LOCAL
481, AFT/AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of grievances which the Newark Teachers Union, Local 481, AFT/AFL-CIO filed against the Newark Board of Education. The grievances alleged that the Board violated its collective negotiations agreement with the Union when it docked the pay of all teachers absent on certain days before and after scheduled school recesses. The Commission concludes that the grievances predominantly involved the mandatorily negotiable issues of sick and personal leave entitlement.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-84-77

NEWARK TEACHERS UNION, LOCAL
481, AFT/AFL-CIO,

Respondent.

Appearances:

For the Petitioner, Louis C. Rosen, General Counsel
(Andrew D. Manns, Jr., Assistant Counsel)

For the Respondent, Tomar, Gelade, Kamensky,
Klein & Lehmann, Esqs. (Sidney H. Lehmann of Counsel)

DECISION AND ORDER

On March 22, 1984, the Newark Board of Education ("Board") filed a Petition for Scope of Negotiation Determination with the Public Employment Relations Commission. The Board seeks to restrain binding arbitration of two grievances which the Newark Teachers Union, Local 481, AFT/AFL-CIO ("NTU") has filed against it. These grievances allege that the Board violated its collective negotiations agreement with NTU when it docked the pay of all teachers absent on certain days before and after scheduled school recesses.

The parties have filed briefs and documents. The following facts appear.

NTU is the majority representative of the Board's teachers. The Board and NTU have entered a collective negotiations

agreement effective from July 1, 1982 through June 30, 1985. That agreement contains a grievance procedure which ends in binding arbitration.

On January 21, 1983, the Board docked the pay of a number of the NTU's negotiation unit members for absences in connection with three different school recess periods. The Board alleged that these employees were absent on November 10 and/or 15, 1982; November 24 and/or 29, 1982; and December 23 and/or January 3, 1983. Each pair of dates constitutes the day before and after a scheduled school closing under the school calendar. The Board claimed that Article V, Section 3E3 of its collective negotiations agreement with NTU sanctioned its action. That section covers absenteeism and specifically provides:

All employees are required to work the last scheduled working day before, and the next scheduled working day following the scheduled holiday(s). Failure to report before and after the scheduled holiday shall result in loss of pay for said occurrence. (EXCEPTION: Personal day and extended sick leave).^{1/}

In February, 1983, NTU filed a grievance alleging that the Board violated its contract with NTU when it docked the pay of NTU unit members for their alleged absences. It claimed in particular that the Board violated Article V, Section 3E3 and that the Board violated contractual salary guarantees and a clause prohibiting unilateral changes in Board policies and practices setting terms and conditions of employment.

^{1/} There is no exception for short term sick leave. Apparently employees are not entitled to such sick leave if they are absent on a day covered by Article V, Section 3E3.

The grievance demanded, in part, that the Board immediately supply the NTU with a list of all negotiations unit members whose pay was docked on January 21, 1983; immediately return all improperly docked monies together with 15% interest; and stop making unilateral changes in practices, policies, and procedures affecting terms and conditions of employment.

On February 24, 1983, a Hearing Officer employed by the Board conducted a grievance hearing. At that hearing, NTU asserted that some of its negotiations unit members had their pay improperly docked even though they requested personal days and that Article V, Section 3E3, as the parties allegedly agreed when that clause was first negotiated in 1980 and as the Board allegedly applied it since then, did not apply if the recess period included administrative days in addition to the actual holiday.^{2/} The Hearing Officer denied the grievance based on his interpretation of the contract.

NTU appealed the denial of the grievance through the various steps of the grievance procedure. The Board's Human Resource Services Committee denied the grievance because it found the contractual language specific and controlling.

A second grievance later arose when the Board, on April 29, 1983, docked pay of negotiations unit members absent

^{2/} For example, employees were docked for failure to report on November 15, 1982, the Monday after school was closed on Thursday November 11 (Veterans Day) and Friday, November 12 (an administrative day). NTU contends that the parties understood that Article V, Section III E3 would not apply to an absence on November 15, 1982 since it followed an administrative day, not a "holiday."

on April 11, 1983, the day after the end of spring recess. This grievance also travelled through the steps of the grievance procedure with the same assertions, requested remedies, and denials.

On March 12, 1984, the NTU sought binding arbitration of its grievances. The instant petition ensued.^{3/}

The Board contends that the instant grievance involves its claimed managerial prerogative under State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981) to discipline employees. It further contends that the instant teachers are not entitled to submit these grievances to binding arbitration under N.J.S.A. 34:13A-5.3^{4/} because they allegedly have statutory

^{3/} The Board asked for an interim restraint of binding arbitration pending the determination of these grievances; on March 22, 1984, Commission designee Edmund G. Gerber denied that restraint.

^{4/} N.J.S.A. 34:13A-5.3, as amended effective July 30, 1982, provides in pertinent part:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

*

*

*

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes in-

(continued)

protection under the tenure law or other statutory appeal procedures for contesting disciplinary determinations.

NTU contends that these grievances predominately involve the mandatorily negotiable subjects of entitlement to sick leave and personal leave. It claims that certain employees may have been denied a valid right to use sick leave by the Board's interpretation of Article V, Section 3E3 and that even if this article was designed to reduce excessive absenteeism, the denial of claimed sick leave benefits and withholding of pay are arbitrable under In re Piscataway Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1983) ("Piscataway I") and In re Piscataway Tp. Bd. of Ed., P.E.R.C. No. 83-111, 9 NJPER 152 (¶14072 1983) ("Piscataway II"). For example, if NTU's interpretation of Article V, Section 3E3 is correct, employees with short term illnesses could have availed themselves of sick leave on work days following "administrative" days instead of "holidays." It further claims that many employees requested personal days and thus may have come within the exception to Article V, Section 3E3.^{5/} Finally, NTU asserts, even if these grievances do involve

4/ (continued)

volving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

(Emphasis supplied).

5/ Until it receives a list of all employees who were docked for absences, NTU asserts, it cannot ascertain the claimed basis -- sick leave, personal leave, or other -- for each employee's absence.

discipline, they may be submitted to binding arbitration under the amendment to section 5.3 as interpreted in CWA v. City of East Orange, __ N.J. Super. __ (App. Div. April 24, 1984) ("East Orange") and Bergen County Law Enforcement Group v. Bergen County Freeholders, 191 N.J. Super. 319 (App. Div. 1983), since these employees allegedly do not have statutory protection or statutory appeal procedures applicable to these specific disciplinary determinations.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other question which might be raised is not to be determined by the Commission in a scope proceeding. These are questions appropriate for determination by an arbitrator and/or the courts. Id at 154.

Thus, in the instant case, we do not consider the merits of either the Board's or NTU's interpretation of Article V, Section 3E3. That determination is for an arbitrator if the matter is legally arbitrable. Instead, we focus on the abstract question of the legal arbitrability of NTU's claim that the Board could not automatically dock the pay of absent employees who may have been entitled to sick leave or personal leave.

We believe these grievances predominantly involve the mandatorily negotiable and arbitrable subjects of entitlements to sick leave and personal leave benefits.^{6/} Under Piscataway I and II, a public employer has a non-negotiable managerial prerogative to establish sick leave verification policies, but any claims that sick leave benefits have been improperly withheld may be submitted to binding arbitration. Similarly, in In re Barnegat Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER ____ (¶ ____ 1984) ("Barnegat"), we held that an employer may require verification of the proper use of personal leave once the parties have contractually agreed that personal leave may only be used for certain specified reasons at certain specified times, but any claims that personal leave benefits have been improperly withheld may be submitted to binding arbitration. Here, the parties apparently negotiated Article V, Section 3E3 with an eye towards reducing absenteeism before and after "holidays."^{7/} The principal issues raised by these grievances are how expansive the Board's rights under that clause are and, conversely, how restricted the employees' opportunities under that clause are to avail themselves of sick leave, personal leave, or other forms of normally excused absences. The Board, following its interpretation of the article, docked the pay of absent employees; NTU, based on its narrower interpretation of the article, claims that the Board's action improperly

^{6/} We specifically disagree with the Board's assertion that these grievances over the withholding of sick and personal leave benefits involved discipline.

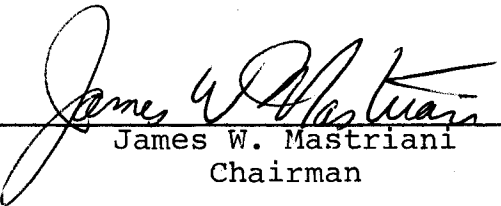
^{7/} We are not suggesting that this case involves the establishment of a verification policy under the Piscataway cases. The contract provision in this case does not pertain to methods of verifying whether or not an employee was properly absent; it pertains to the subject of excused and unexcused absences. This case also does not involve an employee's failure to comply with a sick leave verification policy.

denied sick leave and personal leave benefits. Under Piscataway I and II and Barnegat, the docking of employee pay, allegedly in abrogation of rights to sick leave and personal leave, raises an arbitrable issue.^{8/} Accordingly, we deny the Board's request for a restraint of binding arbitration.

ORDER

The request of the Newark Board of Education for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin, Butch, Hipp and Wenzler voted for this decision. Commissioners Newbaker and Graves abstained. None opposed.

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984

^{8/} We note that even if the Board's interpretation of Article V, Section 3E3 is correct, employees could still attempt to invoke the specific exceptions to that article for personal days and extended sick leave. The grievance responses of the Board's agents do not explain why the claims of employees asserting a right to take personal days were denied.