P.E.R.C. NO. 96-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAHWAY VALLEY SEWAGE AUTHORITY,

Petitioner,

-and- Docket No. SN-95-110

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 8-149,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Rahway Valley Sewerage Authority for a restraint of binding arbitration of a grievance filed by Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 8-149. The grievance contests the Authority's adoption of an absenteeism policy for non-salaried employees. The Commission finds that the Authority's decisions to place certain employees on a "sick list" and to require a doctor's note to verify future absences is not in and of itself disciplinary or otherwise mandatorily negotiable. The Commission further finds that the grievance challenges the establishment of an absenteeism policy rather than a particular denial of benefits or a disciplinary determination and thus arbitration must be restrained.

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Appearances:

For the Petitioner, Stanton, Hughes, Diana & Zucker, attorneys (Mark Diana, of counsel)

For the Respondent, McDonough, Kiernan & Campbell, attorneys (Kevin M. Kiernan, of counsel)

DECISION AND ORDER

On June 19, 1995, the Rahway Valley Sewerage Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 8-149. The grievance contests the Authority's adoption of an absenteeism policy for non-salaried employees.

The parties have filed a certification, exhibits and briefs. These facts appear.

Local 8-149 represents the Authority's regular and full-time blue-collar, hourly employees. The parties entered into a collective negotiations agreement effective from July 1, 1992 through June 30, 1995. Article V is entitled Management Rights. It

reserves to management the right to establish a code of regulations governing the Authority's operation and to change, modify or promulgate rules and regulations. Article XXVIII is entitled Sick Leave. Sections A, B, C and D provide:

> A. All employees covered by this Agreement shall be granted sick leave with no loss of regular straight time pay of one (1) working day for each month of service (to a maximum of twelve (12) days per year).
>
> B. For new employees this accumulation shall begin only after completion of the probationary period.
>
> C. Sick leave may be utilized only for bona fide illness or disability purposes, and a certificate by the attending physician shall be required at the discretion of the Executive Director, after the second consecutive day of illness. However, it is specifically understood that the Executive Director, or his designee, may require a physician's note sooner if a pattern of absence or an abuse of the sick leave privilege is suspected.
>
> D. In the event of the absence of a shift employee, such employee shall notify the Authority at least one (1) hour prior to their scheduled shift. Such employee shall call prior to his/her scheduled shift for any day during which a sick day will be taken, unless the employee notifies the Authority in advance that he/she will be absent for more than one (1) day. In the event advance notification is given, the employee shall call the Authority at least four (4) hours prior to his/her return to his/her normal shift.

Article XXXX is entitled Duration. It provides that the contract shall remain in effect until June 30, 1995 and that the Authority will notify Local 8-149 of any proposed modifications by certified

mail. The contractual grievance procedure ends in binding arbitration.

On June 22, 1994, the Authority issued an absenteeism policy for non-salaried employees. That policy was revised on July 27, 1994 and again on September 14, 1994. As last revised, the policy places employees on a "sick list" after they have used a certain number of sick leave days and requires them to bring in a doctor's not for future absences.

On September 21, 1994, Local 8-149 filed a grievance denominated 9-2194. The grievance specifically asserts that the new policy violates Section A of Article XXVIII by reducing the number of authorized sick days without penalty from 12 to 11 a year and Section D of that article by extending call-in procedures to all employees instead of only shift employees.[1/]

On October 13, 1994, the Authority's assistant director denied the grievance. He asserted that the Authority had a contractual right under Article V and a managerial prerogative to adopt sick leave verification and notification procedures.

On November 17, 1994, Local 8-149 demanded arbitration. This petition ensued.

1/ Local 8-149 had also filed earlier grievances contesting the original policy (no. 6-2394) and the first revised policy (no. 7-2794). Local 8-149 has not requested arbitration over grievance no. 6-2394 and the employer has not sought a restraint of arbitration over grievance no. 7-2794, asserting instead that it is now moot. We do not consider the legal arbitrability of either grievance.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> 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. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the Authority may have.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), we held that the employer had a prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." Id. at 96. We distinguished the mandatorily negotiable issue of whether a policy had been properly applied to deny sick leave benefits. We summed up this distinction by saying:

> In short, the Association may not prevent the Board from attempting to verify the bona fides of a claim of sickness, but the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick. Id. at 96.

Since Piscataway, we have decided dozens of cases involving sick leave verification policies. We have repeatedly stated and held that an employer has a prerogative to require employees on sick

leave to produce doctors' notes verifying their sickness. See, e.g., State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Hudson Cty., P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993); City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989): City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988); Jersey City Med. Center, P.E.R.C. No. 87-5, 12 NJPER 602 (¶17226 1986); Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984). But we have also repeatedly stated and held that the issues of who pays for doctors' notes and what the disciplinary penalties will be for violating a policy are mandatorily negotiable. See, e.g., City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992); Mainland Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Aberdeen Tp., P.E.R.C. No. 90-24, 15 NJPER 599 (¶20246 1989).

Under these precedents, the Authority's decisions to place certain employees on a "sick list" and to require a doctor's note to verify any future absence is not in and of itself disciplinary or otherwise mandatorily negotiable. Accordingly, Local 8-149 may not contest those decisions through binding arbitration. See, e.g., Camden; Paterson. The absenteeism policy does not reduce the number

of available sick leave days. Further, the employer may require its employees to report a known illness at least one hour before they otherwise would have reported to work as part of its verification policy. Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 91-71, 17 NJPER 151 (¶22061 1991). Because grievance no. 9-2194 specifically challenges the establishment of this absenteeism policy rather than a particular denial of benefits or a disciplinary determination, arbitration must be restrained.

ORDER

The request of the Rahway Valley Sewerage Authority for a restraint of binding arbitration of grievance no. 9-2194 is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Klagholz was not present.

DATED: March 28, 1996
Trenton, New Jersey
ISSUED: March 29, 1996