

P.E.R.C. NO. 2003-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY STATE-OPERATED
SCHOOL DISTRICT,

Petitioner,

-and-

Docket No. SN-2002-74

NON-CERTIFIED ADMINISTRATORS
AND SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Jersey City State-Operated School District for a restraint of binding arbitration of a grievance filed by the Non-Certified Administrators and Supervisors Association. The grievance asserts that a supervisor was injured on the job, sought to return to work, and was unjustly denied permission to return to work. The grievance seeks reimbursement for sick, vacation and credit days taken after he was denied permission to return to work. The Commission concludes that this dispute does not involve a claim for reimbursement for a work-related injury and that a factual dispute over the physical condition of an employee seeking to return to work is legally arbitrable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Murray & Murray, attorneys
(Patricia Reddy-Parkinson, on the brief)

For the Respondent, Feintuch, Porwich & Feintuch,
attorneys (Philip Feintuch, on the brief)

DECISION

On June 14, 2002, the Jersey City State-Operated School District petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by a maintenance supervisor represented by the Non-Certified Administrators and Supervisors Association ("Association").^{1/} The grievance asserts that the supervisor was injured on the job, sought to return to work, and was unjustly denied permission to do so. The grievance seeks reimbursement for sick, vacation and credit days taken after he was denied that permission.

^{1/} The Jersey City Education Association has litigated this matter on behalf of the Association.

The parties have filed briefs, exhibits and certifications.^{2/} These facts appear.

The Association represents all non-certified administrators or supervisors, including those employees in the title of maintenance supervisor. The parties' Memorandum of Agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

William Miller is a maintenance supervisor. On March 3, 1998, he fell when the chair he was sitting in broke. He struck his head and experienced dizziness and blurred vision. On April 22, Miller's doctor reported that Miller was having problems with gait and balance and that he was receiving physical therapy. He recommended that Miller not return to work for an indefinite period since it would be unsafe for him to climb ladders.

On July 16, 1998, Miller's doctor cleared him for return to duty as of August 17, 1998. But on July 28, the doctor advised the District that he believed that Miller could not perform some of his job duties due to poor balance. On August 10, the District wrote to Miller's doctor seeking clarification as to whether Miller's inability to perform his duties was related to a prior condition. In a handwritten note on the bottom of the District's August 10 letter, the doctor responded that Miller had a different

^{2/} We do not accept the Association's September 10, 2002, letter brief, submitted after the District's reply brief, the last filing allowed by our rules. See N.J.A.C. 19:13-3.5.

condition than the one mentioned by the District, that he was cured, and that his current problems were not related to his prior condition.

Miller sought clearance to return to work on August 17, 1998. That request was denied. The Director of Human Resources noted that Miller was swaying from side to side. She informed him that he was not fully cleared to return to work because of his prior medical condition. Miller did not return to work at that time.

On July 29, 1999, the District's doctor cleared Miller to return to work and stated that he could perform his maintenance supervisor duties with some restrictions. Miller returned to work on August 24, 1999. He had been absent 248.5 work days.

On December 17, 1999, a workers' compensation claim filed by Miller was settled.

On January 20, 2000, the Association filed a grievance asserting that Miller was unjustly denied the right to return to work on August 1, 1998. The grievance seeks restoration of 81 1/2 sick days, 36 vacation days, and 131 credit days, which Miller apparently used until he returned to work on August 24, 1999. The grievance was denied and the Association demanded arbitration. This petition ensued.

An arbitration hearing was held on June 17, 2002. The arbitrator stayed a decision pending the outcome of the District's scope petition.

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 cannot consider the contractual merits of the grievances or any contractual defenses the parties may have. We specifically do not consider whether the grievance is contractually arbitrable.

The District asserts that N.J.S.A. 18A:30-2.1 preempts arbitration of a grievance seeking restoration of sick days for an alleged work-related injury. That education law provides, in part:

a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3.

The District maintains that notwithstanding any concurrent jurisdiction to decide whether an injury is work-related, the Commissioner of Education has exclusive jurisdiction to determine whether sick days should be restored.

The Association argues that N.J.S.A. 18A:30-2.1 does not preempt arbitration because the dispute does not involve a work-related absence. It asserts that the grievance alleges that the District prevented Miller from returning to work on several occasions when he was able to do so, thereby requiring him to use sick, vacation and credit days. The Association points to the Director of Human Resources's certification which states that Miller's Service Connected Disability Leave ceased as of August 18, 1998 and that she informed him he was required to use his accumulated days while unable to work. The Association asserts that the Commissioner has no jurisdiction and that an arbitrator must decide whether the District prevented Miller from returning to work.

The District responds that the grievance implicates N.J.S.A. 18A:30-2.1 because, as written, it seeks the recrediting of days lost due to injury on the job. The District also contends that it has a non-negotiable managerial prerogative to determine whether an employee is fit to return to his duties.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), contains the standards for determining mandatory negotiability:

A subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would

significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

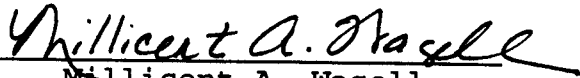
The parties' dispute is over whether the District must reimburse Miller for leave time for a period the District claims he was unfit to work due to a condition that was not work-related. The Director of Human Resources certified that Miller was not permitted to work because of a prior condition. Miller concurs that the days sought do not involve his work-related injury. We therefore need not consider the employer's argument that arbitration is preempted over a claim for reimbursement for a work-related injury.

The employer may set physical requirements for a position and require employees to maintain those standards. Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984). However, a factual dispute over the physical condition of an employee seeking to return to work is legally arbitrable. Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER 281 (¶20123 1989); Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988).

ORDER

The request of the Jersey City State-Operated School District for a permanent restraint of arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Ricci and Sandman voted in favor of this decision. None opposed. Commissioners Mastriani and DiNardo abstained from consideration. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002