

P.E.R.C. NO. 92-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Petitioner,

-and-

Docket No. SN-92-5

KEARNY POLICEMEN'S BENEVOLENT
ASSOCIATION LOCAL 21,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by Kearny Policemen's Benevolent Association Local 21 against the Town of Kearny. The grievance asserts that the police chief violated the parties' collective negotiations agreement when he placed letters in the personnel files of certain police officers who had not exceeded their contractual sick leave benefits.

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Appearances:

For the Petitioner, Kenneth J. Lindenfelser,
Assistant Town Attorney

For the Respondent, Schneider, Cohen, Solomon, Leder &
Montalbano, attorneys (David Solomon, of counsel)

DECISION AND ORDER

On July 25, 1991, the Town of Kearny petitioned for a scope of negotiations determination. The Town seeks a restraint of binding arbitration of a grievance filed by Kearny Policemen's Benevolent Association Local 21. The grievance asserts that the police chief violated the parties' collective negotiations agreement when he placed letters in the service jackets (personnel files) of certain police officers who had not exceeded their contractual sick leave benefits. The letters informed them that their absenteeism would be closely monitored and chronic or excessive absenteeism would not be tolerated.

The parties have filed exhibits and briefs. These facts appear.

The PBA represents the Town's police officers below the rank of sergeant. The negotiated grievance procedure ends in binding arbitration.

On January 23, 1991, the police chief issued a general order. The order stated that police officers were entitled to paid sick leave, but this benefit had been abused. After noting that chronic or excessive absenteeism was cause for removal from service under N.J.A.C. 4:1-16.9,^{1/} the order stated:

Effective immediately all personnel who manifest an absence record which might bring them into violation of Civil Service rule will receive a letter from the department as to their status. Their sick record will then be closely monitored.

Anyone found in violation of the aforementioned civil service rules will have appropriate disciplinary action taken against them up to and including removal from the service.

The chief then issued letters to all officers who had approached or surpassed their limit of sick days during 1990. A typical letter listed the number of sick days taken in 1990, the number with a doctor's slip, and the number without a doctor's slip. After repeating that chronic or excessive absenteeism was cause for removal, the letter stated:

The purpose of this letter is to advise you that your absenteeism record will be closely monitored

^{1/} This regulation has been recodified. See N.J.A.C. 4A:2-2 and 2.3.

as a result of the number of days taken off in 1990.

Chronic or excessive absenteeism will not be tolerated.

The letter concluded by inviting the officers to discuss any questions with the chief. A copy of the letter was placed in each officer's service jacket.

On February 5, 1991, the PBA filed a grievance. It asserted that the chief violated the contractual provision entitled "Pay Treatment for Extended Illness" by issuing written notices to any employee using more than ten sick days, regardless of whether the sick leave was covered by a doctor's note. The grievance requested that the chief rescind the notices and withdraw them from the service jackets.

After the grievance was denied, the PBA demanded binding arbitration. It identified this issue to be arbitrated:

Issuance of and placement of absentee notices in employee's Service Jacket, to employees who have not exceeded the negotiated sick leave provisions in contract.

This petition ensued.^{2/}

The Town asserts that it has a managerial prerogative to monitor sick leave and to include informational letters about sick leave in service jackets. The PBA responds that the letters are disciplinary and may be contested through binding arbitration. The

^{2/} The Town obtained an interim restraint of arbitration pending this decision. I.R. No. 92-6, ___ NJPER ___ (¶___ 1991).

Town replies that even if the letters are disciplinary, the PBA's grievance cannot be arbitrated and police officers must instead file individual grievances.

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. [Id. at 154]

We thus do not review the contractual merits of the grievance or any defenses the employer may have. Nor do we consider the argument that only individual officers have standing to file grievances contesting unjust discipline.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory

Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policymaking powers.

The Town has a prerogative to monitor sick leave and to verify that it is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). Given that prerogative, we have restrained binding arbitration over a requirement that a police officer submit doctors' notes for future absences, Bor. of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988), and over a list of firefighters required to verify sick leave, City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212

1988). We have also held, however, that the withdrawal of sick leave benefits for allegedly abusing sick leave and the cost of doctors' notes are mandatorily negotiable issues. See, e.g., Newark Bd. of Ed., P.E.R.C. No. 85-25, 10 NJPER 549 (¶15255 1984); City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985).

In Hudson Cty, I.R. No. 91-3, 16 NJPER 463 (¶21200 1990), our designee distinguished between non-disciplinary notices and disciplinary reprimands. The designee restrained binding arbitration of grievances to the extent they contested non-disciplinary notices informing employees that they had used specified amounts of sick leave and would be required to provide doctors' notes for future absences. Camden; cf. City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983) (promulgation of list of employees suspected of abusing sick leave not an unfair practice). But the designee permitted binding arbitration to the extent the grievances contested disciplinary warnings for absenteeism.

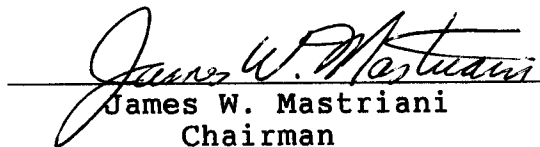
We hold, under all the circumstances, that the disputed letters, standing alone, are not disciplinary. The notices record the employee' absenteeism statistics; quote the applicable regulation; inform the employee that he or she will be monitored during the next year; and invite questions. The employer stresses that the notices speak in a neutral tone and do not trigger the withholding of any sick leave benefits. In addition, the employer characterizes the notices as informative, not disciplinary. We accept this characterization. The notices do not implicate a

schedule of discipline or warn of any misconduct. Compare City of Newark, P.E.R.C. No. 90-95, 16 NJPER 265 (¶21113 1990) (restraining arbitration over daily personnel reports containing statistics and other evaluative information); North Plainfield Bd. of Ed., P.E.R.C. No. 89-94, 15 NJPER 252 (¶20102 1989) (restraining arbitration over evaluation recording number of absences). Under these circumstances, we will restrain binding arbitration of the PBA's grievance.^{3/}

ORDER

The request of the Town of Kearny for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: September 30, 1991
Trenton, New Jersey
ISSUED: October 1, 1991

^{3/} We note that the grievance does not contest the accuracy of the notices or argue that days were improperly charged.