

P.E.R.C. NO. 2000-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-99-87

STATE LAW ENFORCEMENT CONFERENCE
OF THE NEW JERSEY STATE POLICEMEN'S
BENEVOLENT ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey for a restraint of binding arbitration of a grievance filed by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association. The grievance alleges that the employer violated the parties' collective negotiations agreement concerning verification of sick leave. The Commission holds that arbitration would substantially limit the employer's prerogative right to adopt a 12-month period for counting sick leave days authorized by Civil Service regulations.

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, John J. Farmer, Jr., Attorney General
(Sally Ann Fields, Senior Deputy Attorney General, on the
brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Charles Schlager, Jr., on the brief)

DECISION

On April 28, 1999, the State of New Jersey petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association (SLEC). The grievance alleges that the employer violated the parties' collective negotiations agreement concerning verification of sick leave.

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

SLEC represents a law enforcement unit that includes campus police officers. The employer and SLEC are parties to a collective negotiations agreement effective from July 1, 1995 through June 30, 1999. The grievance procedure ends in binding arbitration. The agreement also provides that Merit System laws and regulations apply in the administration of the agreement.

Article XXI, Section I, provides:

An employee who has been absent on sick leave for periods totalling fifteen (15) days in one (1) calendar year consisting of periods of less than five (5) days, shall submit acceptable medical evidence for any additional sick leave in that year unless such illness is of a chronic or recurring nature requiring recurring absences of one (1) day or less in which case only one certificate shall be necessary for a period of six (6) months.

N.J.A.C. 4A:6-1.4(d) provides:

An appointing authority may require proof of illness or injury when there is a reason to believe that an employee is abusing sick leave; an employee has been absent on sick leave for five or more consecutive work days; or an employee has been absent on sick leave for an aggregate of more than 15 days in a 12-month period.

On October 27, 1998, a grievance was filed on behalf of campus police officers at the College of New Jersey alleging that Article XXI, Section I was being violated. The grievance stated:

The College should abide by the terms of the contract. We agreed if we use more than 15 sick days in a calendar year, we will provide the employer with a doctor's note. All verbal and written request for a note prior to proof of abuse should stop and previous notifications retracted.

The grievance was denied by the College's Human Resources Assistant. He wrote, in part:

Your concern is the result of a discrepancy between the State/PBA Agreement and New Jersey Administrative Code with regards to these issues. Article XXI of the Union Agreement states: "An employee who has been absent on sick leave for periods totaling fifteen (15) days in one (1) calendar year consisting of periods of less than five (5) days, shall submit acceptable medical evidence for any additional sick leave in that year..." The corresponding clause in The New Jersey Administrative Code [N.J.A.C. 4A:6-1.4(d)] states that "an appointing authority may require proof of illness or injury when an employee has been absent on sick leave for an aggregate of more than 15 days in a 12-month period." In your particular instance, the sick days you used were taken over a 12-month period of time, crossing over the change to a new calendar year.

Please be advised that it is the State's position that the New Jersey Administrative Code takes priority over all state/union agreements. Furthermore, it is also the State's position that management has the right at any time to request medical verification for employee sick leave absences. This position is supported by case law.

On January 26, 1999, SLEC demanded arbitration. This petition ensued.

The State contends that the regulation preempts negotiations over using a 12-month period for counting sick leave days. It also asserts that it has a managerial prerogative to establish a sick leave verification policy based on a 12-month period rather than a calendar year.

SLEC states that the issue is whether the employer violated the parties' agreement by requiring employees to produce a doctor's note for periods totaling 15 days in a 12-month period instead of a calendar year. It does not challenge the employer's right to determine when to require doctor's notes when a question or pattern of abuse exists or what number of days triggers the need for sick leave verification.

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 these grievances or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), sets forth these tests for determining negotiability:

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]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

We first address the preemption test. Negotiations will not be preempted unless a statute or regulation speaks in the imperative by fixing an employment condition eliminating the employer's discretion to vary it through negotiations. State Supervisory Employees Ass'n, at 80-82. N.J.A.C. 4:6-1.4(d) permits the employer to require proof of illness or injury when there is a reason to suspect abuse or when an employee has been absent for an aggregate of more than 15 days in a 12-month period. It does not require that the employer use a 12-month

period, rather than a calendar year, for determining whether an aggregate of 15 sick leave days has been reached. Accordingly, it does not preempt negotiations or arbitration over that decision.

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 managerial prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." 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., 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 abusing sick leave 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,

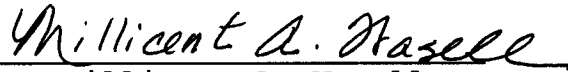
18 NJPER 131 (¶23061 1992); Mainland Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Aberdeen Tp., P.E.R.C. No. 90-24, 15 NJPER 599 (¶20246 1989).

In State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995), we held that the employer had a managerial prerogative to require employees who had exceeded the minimum number of absences specified by N.J.A.C. 4A:6-1.4(d) to submit doctor's notes, instead of personal affidavits, verifying their illnesses. We recognized the employer's prerogative to decide the number of absences triggering a doctor's note requirement. While that case involved a calendar year period for counting sick leave days, we believe that the prerogative to set the number of days encompasses a prerogative to define the period in which the days will be counted. The employer's inquiry is focussed on determining when a number or pattern of sick leave days warrants verification; that concern may arise if days are taken in clusters before and after January 1 as well as if they are all taken within a calendar year. The Civil Service regulations recognize the validity of such a concern. We hold that arbitration would substantially limit the employer's right to adopt the 12-month period authorized by the regulation.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato and Ricci voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Madonna abstained from consideration.

DATED: October 28, 1999
Trenton, New Jersey
ISSUED: October 29, 1999