P.E.R.C. NO. 2000-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Petitioner,

-and- Docket No. SN-99-88

F.M.B.A. LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Montclair for a restraint of binding arbitration of a grievance filed by F.M.B.A. Local 20. The grievance contests portions of a sick leave policy. The Commission concludes that the grievance is not legally arbitrable to the extent it seeks to prevent the employer from initiating discipline for sick leave abuse for employees who have not exhausted their annual allotment of 15 sick days per year. The grievance is legally arbitrable to the extent it alleges that the policy violates contract provisions governing the circumstances in which sick leave may be taken or requiring notice or discussion of such policies prior to implementation. The Commission concludes that while an employer has a prerogative to establish a sick leave verification policy, those portions of a policy which provide for fines, warnings, suspensions or termination after a specific number of absences involve discipline and may be negotiated and arbitrated.

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, Genova, Burns & Vernoia, attorneys (Robert C. Gifford, on the brief)

For the Respondent, Oxfeld Cohen, attorneys (Sanford R. Oxfeld, of counsel; Brian W. Kronick, on the brief)

DECISION

On April 30, 1999, the Township of Montclair petitioned for a scope of negotiations determination.[1/] The Township seeks a restraint of binding arbitration of a grievance filed by F.M.B.A. Local 20. The grievance contests portions of a sick leave policy.

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

The Township is a non-Civil Service employer. The FMBA represents all full and part-time members of the fire department, excluding the fire chief. The Township and the FMBA are parties

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1/ The petition was held in abeyance for several months pending settlement efforts.

to a collective negotiations agreement effective from January 1, 1996 through December 31, 1998. The grievance procedure ends in binding arbitration.[2/]

Article XXIII of the contract is entitled sick leave. Section 1.(a) provides that "[a]ll employees covered by this Agreement shall receive fifteen (15) days of sick leave each calendar year to be used for non-occupational injury or illness."

The fire department's Operating Procedures Manual includes a section on "Sick Leave Review." That section provides:

> Fire Department personnel who are absent from duty on six (6) or more occasions during the year will be required to report to the Fire Chief with their Tour Chief for a complete review of their sick time absences.
>
> Unsatisfactory accountability or continued absence will require a medical report from their personal physician for each absence due to sickness (1 day or more).
>
> An evaluation of the medical reports will also be reviewed by the Township Physician.

The Township applies this policy to two categories of absences: (1) sick leave days which are not eligible for coverage under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §2611 et

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2/ The parties are in interest arbitration. The Association's petition lists "sick leave accumulation and bank" as an unresolved item and the employer's response identifies "Article XXIII, Sick Leave" as an unresolved item.

seq. and (2) absences, other than vacation or personal days, for which an employee is not authorized to take sick leave.3/

The Township asserts that the sick leave review policy has been in effect since 1994. While it states that it does not discipline employees who appropriately use sick time, an employee who is chronically absent or abuses sick leave may be subject to discipline. It uses "occasions of absence" as a guide for determining which employees may be chronically absent. An "occasion of absence" may be one day or any number of consecutive scheduled work days. The Township focuses on "occasions" of absence as opposed to number of sick days, since it considers that each occasion presents scheduling problems.

On November 18, 1998, Township representatives, the fire chief and FMBA members discussed this policy. Shortly thereafter, the Township reviewed the sick leave time of all unit members with six or more occasions of absence in the prior twelve months. Those unit members who were found to have abused sick leave were given an oral reprimand.

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3/ Under the FMLA, an employee is entitled to 12 weeks of unpaid leave during any 12-month period for, among other things, a serious health condition, defined generally as a condition requiring either inpatient hospital care or continuing treatment by a health care provider. 29 U.S.C. §2612(a)(1)(D); 29 C.F.R. §825.114.

On November 23, 1998, the FMBA filed a grievance protesting what it alleges is a new sick leave policy. The grievance states:

> F.M.B.A. Local 20 hereby grieves the Departments new sick leave policy in that:
>
> 1. The policy, having a retroactive application, violates due process; and
>
> 2. While the Department may monitor sick leave, it may not impose discipline without just cause (Art. XXIV) for absences less than 15 days (Art. XXIII 1.A).
>
> We demand the policy be applied prospectively only and that each individual be addressed based upon his/her own facts and not be suspended or discharged for less than fifteen occasions.

On December 9, 1998, the fire chief denied the grievance. The chief stated that the policy had been in effect for the past few years; sick leave reviews had taken place during that time; and the policy was not retroactive. He also maintained that the Township had a managerial prerogative to implement a sick leave policy.

On February 16, 1999, the FMBA demanded arbitration. This petition ensued.

On May 17, 1999, the Township Deputy Manager wrote a memorandum to the FMBA president titled "Disciplinary Procedure for Chronic Absenteeism." The memorandum summarized a recent meeting the two had had on the sick leave policy; rescinded all disciplinary actions for absenteeism effected between November 18, 1998 and May 17; and stated that the department would not review

records prior to November 18, 1998 in applying the sick leave policy. The memorandum made other adjustments to the policy to address the FMBA's concerns, but it rejected the FMBA's position that unit members were entitled to use 15 sick days per year before being subject to discipline for chronic or excessive absenteeism. Finally, the Deputy Manager summarized how the policy would work:

> The progression of corrective discipline for chronic absenteeism is:
>
> - verbal warning
> - first level written warning
> - second level written warning
> - first level suspension
> - second level suspension
> - termination
>
> If an employee has received a corrective disciplinary action at the time of his or her last absence and he or she has six or more occasions of absence in the twelve months immediately prior to the most recent absence, that employee will receive corrective discipline at the next level above the discipline received upon the last absence. However, in a case where there are at least three months between the last absence and the most recent absence, the disciplinary action will not escalate to the next level but rather will be at the same level given at the time of the last absence. An employee [who] has fewer than six absences in the immediately preceding twelve months will not receive any discipline. Also, absences properly applied for and approved by the Township as covered under the Family and Medical Leave Act will not count as occasions of absence for the purposes of determining whether or not an employee should receive discipline for absenteeism.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed., 78 N.J. 144 (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]

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

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.... 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 policy- making 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. [Id. 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.

The Township maintains that the grievance is not legally arbitrable, both because monitoring sick time is a managerial prerogative and because N.J.S.A. 40A:14-19 et seq. provides an alternate statutory appeal procedure for reviewing discipline of non-Civil Service firefighters. That statutory scheme provides for Superior Court review of suspensions, fines, reductions in rank and discharges of firefighters in non-Civil Service jurisdictions. See N.J.S.A. 40:14-19; 40A:14-22. Further, the Township asserts that it can discipline employees consistent with the agreement even if they have used less than fifteen sick days in a calendar year.

The FMBA recognizes that the Township has a managerial prerogative to verify sick leave and agrees that the "verification policy itself" is not legally arbitrable. However, it contends

that it may legally arbitrate the grievance to the extent it challenges the adoption of the policy without prior discussions with the FMBA; protests the establishment of penalties based solely on the number of absences; and alleges a change in the circumstances in which contractual sick leave may be taken.

Further, it maintains that N.J.S.A. 40A:14-19 et seq. pertains only to fines, suspensions and terminations, and that the statute does not bar binding arbitration for the first and second level warnings provided for in the policy. In that vein, it states that it is not grieving any individual disciplinary determination, but is challenging the retroactive application of a policy that authorizes discipline even if a firefighter uses less than the 15 sick days provided by contract.

The Township responds that the FMBA's grievance did not protest the Township's alleged failure to discuss the policy or its effect on the circumstances in which contractual sick leave may be taken. It therefore argues that we should restrain arbitration over these issues. The Township also emphasizes that there is no disciplinary determination to arbitrate, since it rescinded all disciplinary actions issued from November 18 through May 17, 1999.

A public employer has a prerogative to verify that sick leave is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). That prerogative includes the right to determine how many absences trigger a verification

requirement, State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995), and the right to define the period in which those absences will be counted. State of New Jersey, P.E.R.C. No. 2000-32, 25 NJPER 448 (¶30198 1999). However, whether a sick leave policy has been properly applied to withhold sick pay is mandatorily negotiable, as is the issue of what disciplinary penalties will be imposed for abusing sick leave. See City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); 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); Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976); see also Cty. College of Morris Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985)(progressive discipline concepts are mandatorily negotiable). Further, we have found to be legally arbitrable a grievance alleging that a sick leave verification policy changed the circumstances in which contractual sick leave could be taken. Borough of Rutherford, P.E.R.C. No. 97-47, 22 NJPER 400 (¶27218 1996).

Within this framework, we find that the Township had a prerogative to adopt a policy that requires a review of sick leave use whenever an employee has six occasions of absence within a twelve month period. Further, the Township had a prerogative to

determine that employees may be disciplined for abuse of sick leave even where they have not exhausted all of the sick leave benefits to which they are contractually entitled in a given year. The premise of Piscataway and related cases is that employers have a right to monitor whether sick leave is being used for the purpose for which it is intended, regardless of how much sick leave an employee might have earned in a particular year. See Piscataway (sick leave policy served "a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits." 8 NJPER at 96 (emphasis added); compare Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984)(restraining arbitration of grievance challenging sick leave verification policy, despite Association's contention that the policy infringed on employees' statutory entitlement to ten sick days per year). Therefore, the grievance is not legally arbitrable to the extent it seeks to prevent the employer from initiating discipline for sick leave abuse for employees who have not exhausted their annual allotment of 15 sick leave days.

However, the grievance is legally arbitrable to the extent it alleges that the policy violates contract provisions governing the circumstances in which sick leave may be taken, see Rutherford, or requiring notice or discussion of such policies prior to implementation. See City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988)(non-binding discussion of sick leave policy prior to implementation would not substantially limit

governmental policymaking). The Township does not argue that these issues are not legally arbitrable, but contends only that we should restrain arbitration because they were not specified in the grievance documents. We cannot consider such a contractual arbitrability defense in a scope of negotiations proceeding, and we therefore decline to restrain arbitration. Ridgefield Park; Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992)(whether grievance raises particular claim presents contractual arbitrability question); see also Camden; North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707 (¶16245 1985).

Finally, we turn to the disciplinary aspects of the policy.

N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and disciplinary review procedures and allows parties to agree to binding arbitration as a means of resolving certain disciplinary disputes. Therefore, we have held that a grievance contesting a fixed schedule of penalties in an absenteeism policy may be legally arbitrated, even if the grievance does not contest the discipline of a particular employee. See UMDNJ; Teaneck; Mainland Reg.; Glassboro. While an employer has a prerogative to establish a sick leave verification policy, those portions of a policy which provide for fines, warnings, suspensions or termination after a specific number of absences move beyond verification and into the area of

discipline. Those elements of a sick leave policy may therefore be negotiated and arbitrated absent an applicable exception in 5.3.

No such exception pertains here. N.J.S.A. 40A:14-19 et seq. does not provide an alternate statutory procedure to review challenges to the adoption of a progressive discipline policy or to consider arguments that the penalties set forth in such a policy contravene the parties' agreement. Instead, the statute would be triggered only when action is taken against an individual pursuant to the policy. As noted, the FMBA is not challenging that type of disciplinary determination.4/

ORDER

The request of the Township of Montclair for a restraint of binding arbitration is granted to the extent the grievance challenges the establishment of a sick leave review policy that could result in unit members being disciplined for abusing sick

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4/ In any case, we note that, after the 1996 amendments to 5.3, N.J.S.A. 40A:14-19 et seq. does not preempt binding arbitration of minor discipline -- defined as fines or suspensions of five days or less. See Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); Rutgers, the State Univ., P.E.R.C. No. 98-2, 23 NJPER 448 (¶28209 1997); compare Montclair Tp., P.E.R.C. No. 90-44, 16 NJPER 1 (¶2100 1989)(finding, pre-1996, that clause was not mandatorily negotiable to the extent it provided for binding arbitration of suspensions and discharges but declining to decide whether written reprimands of non-civil service firefighters could be submitted to binding arbitration).

leave even though they used less than 15 sick days per year. It is otherwise denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 29, 2000
Trenton, New Jersey
ISSUED: June 30, 2000