

P.E.R.C. NO. 2001-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF RAHWAY,

Petitioner,

-and-

Docket No. SN-2001-20

LOCAL 32, OPEIU, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Rahway for a restraint of binding arbitration of a grievance filed by Local 32, OPEIU, AFL-CIO. The grievance contests the City's refusal to allow an employee to participate in a sick leave bank. The Commission grants a restraint of arbitration to the extent the grievance seeks to have an arbitrator order the Board to reimburse the employee for sick bank days without a sick bank program having been approved by the Department of Personnel. The Commission finds that an arbitrator can decide whether a sick bank program exists, either by agreement or practice.

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.

P.E.R.C. NO. 2001-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF RAHWAY,

Petitioner,

-and-

Docket No. SN-2001-20

LOCAL 32, OPEIU, AFL-CIO,

Respondent.

Appearances:

For the Petitioner, Genova, Burns & Vernioia, attorneys
(Brian O. Lipman, on the brief; Lynn S. Degen, on the
reply brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, P.C., attorneys
(Kevin P. McGovern, on the brief)

DECISION

On November 3, 2000, the City of Rahway petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Local 32, OPEIU, AFL-CIO. The grievance contests the City's refusal to allow an employee to participate in a sick leave bank.

The parties have filed briefs and exhibits. The City has filed a certification of its business administrator. These facts appear.

Local 32 represents clerical employees employed by the City. These employees were formerly represented by Local 702,

PESU and were covered under a collective negotiations agreement effective from July 1, 1995 through June 30, 1999. The grievance procedure ends in binding arbitration. The City and Local 32 have recently negotiated a new agreement, but this grievance arose under the expired agreement with PESU. The City is a civil service jurisdiction.

Mary Ann Kosinski was employed as a senior bookkeeping machine operator and received a disability retirement on July 25, 2000. Before her retirement, Kosinski exhausted all of her paid sick time. In 1999, Kosinski was allowed to use all of her accumulated sick leave and was also allowed to use sick bank time donated by other employees. That was the only time this employer has permitted the use of a sick leave bank.

After Kosinski went on an unpaid leave of absence on May 1, 2000, Local 32 requested that she be permitted to draw from the sick leave bank. The City denied Local 32's request. At the time, the parties were engaged in negotiations for a successor agreement and Local 32 proposed a sick leave donation provision be included in the new agreement. The proposal was later withdrawn.

On August 7, 2000, Local 32 filed a grievance on Kosinski's behalf. It asserts that the employer denied her right to participate in the sick bank because of on-going contract negotiations. The grievance alleges a past practice of allowing employees to participate in a sick bank and seeks a remedy of reimbursement of sick bank days.

The business administrator states in his certification that he denied the request because the union had protested the use of a sick bank and because New Jersey Department of Personnel ("DOP") regulations prohibit the use of a sick bank unless prerequisites established by DOP are followed.

On September 13, 2000, Local 32 demanded arbitration. This petition ensued.

The City asserts that a DOP regulation, N.J.A.C. 4A:6-1.22(f), prohibits it from granting Kosinski's request. It also asserts that a single occurrence does not establish a past practice.

Local 32 asserts that sick leave, in general, and sick leave banks, in particular, are negotiable terms and conditions of employment so long as they do not violate any law. Local 32 states that an arbitrator must consider the City's arguments concerning DOP regulations and the lack of a contractual provision.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park 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 cannot consider the merits of the grievance or the employer's contractual defenses. We specifically do not consider the Board's assertion that the contract does not contain a sick leave bank provision or that the one use of a sick leave bank does not constitute a past practice.

Local 195, IFPTE v. State, 88 N.J. 393 (1982) articulates a three-part test for determining 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 404-05.

Sick leave banks provide sick leave payment to employees who have exhausted their individual complement of sick leave days. Sick leave banks intimately and directly affect employee work and welfare. Employee participation in such programs does not significantly interfere with any governmental policy determinations so, unless preempted by statute or regulation, such programs are mandatorily negotiable. Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000).

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.A.C. 4A:6-1.22(f) provides:

(f) In local service, an appointing authority may establish a donated leave program which shall be consistent with the provisions of (a) through (e) above, with approval of the Commissioner.

1. The appointing authority shall submit to the Commissioner a donated leave program proposal no later than 30 days before the planned implementation of the program. The proposal shall include a summary of consultations with affected negotiations representatives concerning the program and name the donated leave program administrator for the appointing authority.
2. The appointing authority shall not implement a donated leave program unless the program has been approved by the Commissioner.
3. The appointing authority shall retain all records concerning implementation of an approved donated leave program subject to Department of Personnel audit.
4. The appointing authority may suspend or terminate the donated leave program at any time upon 30 days written notice of such suspension or termination to the Commissioner, all affected employees and labor negotiations representatives.

This regulation does not mandate that local employers establish donated leave programs nor prohibit them from doing so.

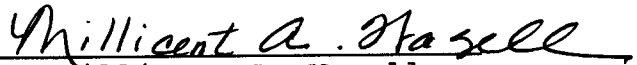
It specifically authorizes employers to establish such programs after consulting with negotiations representatives and securing DOP approval.

Local 32 claims that such a program exists, either by agreement or practice. It is not our role to resolve that contractual question. Ridgefield Park. Nothing in the DOP regulation prohibits the parties from making such an agreement or an arbitrator from deciding whether such an agreement exists. Should an arbitrator find an agreement, any remedy could not contravene the DOP regulation. Since it appears to be undisputed that the City did not submit a program proposal to DOP, an arbitrator could not order benefits under such a program until that program had received DOP's approval. We will not speculate on what other remedy might be appropriate. Any argument that the employer is estopped from not permitting Kosinski to receive sick bank days would have to be resolved in a judicial forum. Northern Burlington Cty. Reg. Bd. of Ed., P.E.R.C. No. 2001-19, 26 NJPER 436 (¶31172 1900); see also Middletown Tp. PBA v. Middletown Tp., 162 N.J. 361 (2000).

ORDER

The request of the City of Rahway for a restraint of binding arbitration is granted to the extent, if any, the grievance seeks to have an arbitrator order the Board to reimburse Mary Ann Kosinski for sick bank days without a donated leave program having been approved by the Department of Personnel. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: April 26, 2001
Trenton, New Jersey
ISSUED: April 27, 2001