P.E.R.C. NO. 2003-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BELMAR,

Petitioner,

-and- Docket No. SN-2003-29

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1032, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Belmar for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1032, AFL-CIO. The grievance asserts that the Borough violated a contractual clause requiring it to avoid harassing employees and to treat them with common decency, courtesy, and respect and a contractual clause concerning sick leave verification. The alleged violation occurred when the Borough required a police dispatcher to be examined by a Borough doctor the day she called in sick and to be escorted to that examination by a police officer. The Commission concludes that this case does not involve a routine application of a verification policy, but rather an unusual requirement imposed in an unusual manner. The Commission holds that this grievance presents a claim recognized to be within the scope of negotiations by prior cases and that, on balance, the employee's interests in arbitrating this claim of harassment and improper treatment outweighs the employer's interest in unilaterally insisting that employees be examined by the employer physician before their own.

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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, Jr., on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys (Nicole DeCrescenzo, on the brief)

DECISION

On December 5, 2002, the Borough of Belmar petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1032, AFL-CIO. The grievance asserts that the Borough violated a contractual clause requiring it to avoid harassing employees and to treat them with common decency, courtesy, and respect and a contractual clause concerning sick leave verification. The alleged violation occurred when the Borough required a police dispatcher to be examined by a Borough doctor the day she called in sick and to be escorted to that examination by a police officer.

The parties have filed briefs and exhibits. Local 1032 has submitted the police dispatcher's certification. The Borough has submitted its attorney's certification attaching certain exhibits, but has not submitted any certifications based on personal knowledge. These facts appear.

Local 1032 represents the Borough's clerical employees except the Borough administrator's clerk, the police chief's secretary, and the Borough clerk. The parties' contract is effective from January 1, 2001 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article II is entitled Sick Leave. Section E, Verification of Sick Leave, provides:

> 1. An employee who shall be absent on sick leave for three (3) or more consecutive working days shall be required to submit acceptable medical evidence substantiating the illness.
>
> a. In the case of a chronic or recurring nature causing an employee's periodic or repeated absence from duty for one day or less, only one medical certificate shall be required for every six (6) month period as sufficient proof of need of leave of absence of the employee; provided, however, the certificate must specify that the chronic or recurring nature of the illness is likely to cause subsequent absences from employment.
>
> b. An employee who has been absent on sick leave for periods totaling seven (7) non-verified days in any one (1) calendar year consisting of periods of less than three (3) days, may be required by the Borough Administrator to 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 (1) certificate shall be necessary for a period of six (6) months.
>
> 2. The Borough may require an employee who has been absent because of personal illness, as a condition of his/her return to duty, to be examined at the expense of the Borough, by a physician designated by the Borough. Such examination shall establish whether the employee is capable of performing his/her normal duties and that his/her return will not jeopardize his/her health or the health of other employees, except for periodic required physical and mental examinations. Only in such cases will the Borough be required to pay for physicians' expenses or fees.

Article XVIII is entitled Nondiscrimination. It provides:

> The Borough and the Union agree that no one shall be subjected to harassment nor to abusive language, and that everyone shall be treated within the accepted standards of common decency, courtesy and respect.

Anita Leather is a police dispatcher. She has been employed by the Borough for 21 years. She routes and responds to calls for 911, police, fire, first aid, and the street department as well as other departments of both Belmar and South Belmar.

On September 21, 2001, the police chief wrote a letter to Leather. The letter stated:

> The Department noticed you March 12, 2001 outlining your excessive use of sick leave, in conjunction with other days off. This type of sick leave has continued with you calling out September 14, 2001 in conjunction

> with your two days off and again September 18, 2001 with your days off.
>
> In order for the Department to closely scrutinize your sick leave, the next time you have occasion to call out sick, you are to report to Dr. Garla, the Borough's Workmen's Comp physician. When you call out sick, you are to notify the Desk Officer that Lt. Hill should be contacted with reference to this sick time. Lt. Hill will then call Dr. Garla, making an appointment for you to see the borough physician. Current contract language allows this as long as the Borough pays for this appointment, which they will be doing.

Leather asserts that she and her family suffered serious illnesses over the years and that she had never been accused of sick leave abuse and had always provided verification even when not required.

On April 2, 2002, Leather experienced difficulty in breathing and speaking, violent coughing, a severe headache, nausea, and vomiting.[1/] Her husband made an appointment for her to see her personal physician at 3:00 p.m. that day. At about 10:45 a.m., her husband also called the police department to say that she was ill, that she had a doctor's appointment that day, and that she would not be able to work her shift starting at 3:00 p.m.

1/ The facts in this paragraph and the next two paragraphs are based on Leather's certification and are set forth in her words.

Lieutenant Hill called Leather's home 30 minutes after her husband called the department. He insisted on speaking to Leather even though her husband said she was very ill and was sleeping. Leather's husband woke her up. Hill told her that she was required to report to the Borough's doctor to verify that she was sick. She explained that she had an appointment with her own doctor, but Hill insisted. Hill sent a marked police car with a uniformed officer to pick her up at her house and drive her to the doctor's office. Hill entered the car quickly, trying to avoid being seen by neighbors who did not know that she was a dispatcher and might think she was being arrested. The police officer escorted her into the doctor's office and waited while she saw the doctor.

Leather had never met the Borough physician and the doctor did not know her medical history. The doctor verified that she had a fever and told her that her blood pressure was high. The doctor was surprised when Leather told her that she had an appointment to see her own doctor later that day and encouraged her to keep her appointment. She asked if Leather had told her employer about this appointment and Leather answered yes. The doctor asked why Leather was there; Leather responded that she was ordered to come.

The Borough's physician submitted a report to the chief about the visit. Under Assessment and Plan, she wrote:

> Mild upper respiratory infection. Her symptoms of nasal congestion, sore throat, some sinus pressure, and ear congestion appear to be viral in nature. At this point, her condition does not warrant antibiotics and should be self-limited. Her blood pressure was also borderline elevated. I have advised her to follow up with her primary medical doctor for this. . . .

After seeing the Borough physician, Leather visited her own doctor that afternoon. The doctor diagnosed her with a viral upper respiratory infection and held her out of work though April 4, 2002. The employer received the doctor's report on the April 2 visit. Leather's condition was eventually diagnosed as a severe episode of chronic vocal chord disorder.

The next day, Local 1032 filed a grievance alleging that the way Leather was treated violated Article XVIII. The grievance sought these remedies: "a written apology; the Borough to cease harassing Ms. Leather; and any and all documents relating to this matter be expunged from her personnel file."

A Local 1032 staff representative wrote the chief a letter dated April 3, 2002 and attached it to the grievance. The letter stated:

> Anita Leather was scheduled to work at 3:00 p.m. on April 2nd; she called out sick at approximately 11:00 a.m. Lt. Hill called and insisted on speaking with her even when told she was asleep. Anita was awakened and although she explained to him that she had a doctor's appointment the next day (today), Lt. Hill insisted that she immediately go to

> the Borough's doctor.[2/] She was told that since she's a Borough employee they had the right to demand she comply. As she was too sick to drive, Lt. Hill sent a police car to her home to pick her up. She was driven to the Borough doctor's office; the officer waited for her inside the doctor's office (which took about a half hour), and then she was driven back home.
>
> Lt. Hill called me in response to the phone message I left for you and insisted that the Borough had a right to do this and that the contract supported his action. Under the circumstances, we have no choice but to file a Step 2 grievance with you. . . .

The letter concluded by asking the Borough to "show some compassion for employees who are ill, instead of harassing them."

The Borough did not discipline Leather for calling in sick on April 2, 2002. But on April 8, the chief wrote a memorandum to Leather. He wrote that at the end of 2001 she had only three sick days left even though she had accumulated 315 sick days during 21 years of service; this type of excessive use of sick leave is unacceptable and disciplinary action could be taken for chronic absenteeism; and she had been advised about her sick leave usage in September of 2001. The chief also wrote that in his conversation with the doctor, "it was evident that your condition was questionable at best for taking off from your

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2/ This sentence is inconsistent with Leather's certification that her husband told Hill that the appointment was for 3:00 p.m. on April 2. Hill did not file a certification.

duties as a dispatcher."[3/] He further wrote that the Borough sincerely hoped that she would get in better shape to overcome illnesses, but that a pattern had developed of her using sick leave prior to days off and that the Borough would be forced to discipline her if the pattern continued.

On April 23, 2002, Local 1032 amended its grievance to also allege a violation of the sick leave verification section of Article II. The amended grievance sought the same remedies as the initial grievance. Neither the amended grievance nor the original grievance sought a declaration that the Borough could not require examinations by a Borough doctor of employees suspected of sick leave abuse.

On April 25, 2002, the chief denied the grievance. After a May 17 meeting, the chief wrote to Local 1032 and reiterated the Borough's position concerning Leather's sick leave usage. Local 1032 demanded arbitration and this petition ensued.

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

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3/ Leather certifies that the doctor did not tell her that her condition was questionable and the report does not say so.

> 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 this grievance or any contractual defenses the Borough may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [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]

No preemption claim is made in this case.

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 prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." Id. at 96. However, we distinguished the mandatorily negotiable issue of

whether a policy has been properly applied to deny sick leave benefits. We stated:

> In short, the Association may not prevent the Board from attempting to verify the bona fides of a claim of sickness, but the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick. [Id. at 96]

We then added:

> Further, even if an employee suffers no deprivation of a sick leave benefit, he may contest the application of the policy if particular home visitations or telephone calls were for purposes other than implementing reasonable verification policy or constituted an egregious and unjustifiable violation of a employee's privacy. Such allegations could be grieved or arbitrated under N.J.S.A. 34:13A-5.3 and the contract. [Ibid]

Since Piscataway, we have often reiterated that a sick leave policy might be implemented in an unreasonable manner which unduly interferes with the employee's welfare and that a grievance contesting an allegedly unreasonable implementation may be arbitrated. Dumont Bor., P.E.R.C. No. 2003-7, 28 NJPER 337 (¶33118 2002); Maplewood Tp., P.E.R.C. No. 2000-9, 25 NJPER 374 (¶30163 1999); Somerset Cty., P.E.R.C. No. 91-119, 17 NJPER 344 (¶22154 1991). In Dumont, we declined to restrain arbitration of a grievance contesting a home visit that was not a routine application of a sick leave verification policy. We stated:

> An arbitrator may evaluate whether the visit was conducted for reasons other than

> implementing a sick leave verification policy or constituted an "egregious and unjustifiable violation" of [the employee's] privacy. Piscataway. While the Borough suggests that a single visit cannot be an "egregious" violation of privacy, that is for an arbitrator to decide. [Id. at 340]

The instant case fits squarely within Piscataway, Dumont and our other cases holding that employees may contest an application of a sick leave policy if it was allegedly conducted for improper reasons or allegedly constituted an egregious and unjustifiable violation of an employee's privacy. Like Dumont, this case does not involve a routine application of a verification policy, but rather an unusual requirement (examination by the Borough's physician before the employee's own doctor) imposed in an unusual manner (escort by a police officer to the doctor's office).

Local 1032 does not assert that the Borough could not require a doctor's verification of Leather's illness. Nor does it assert that an employee can never be required to be examined by the Borough's physician. What it does assert is that the Borough violated its contractual commitment not to harass employees and to treat them with common decency, courtesy and respect by the particular manner in which it insisted that Leather be immediately examined by its doctor before she could be examined by her doctor. And what it seeks is limited to a declaration that the Borough apologize for its conduct, stop harassing Leather, and expunge any related documents from her

personnel file. We do not pass judgment on whether the Borough violated its contractual commitment; we simply hold that the grievance presents a claim recognized to be within the scope of negotiations by our prior cases. On balance, the employees' interests in arbitrating this claim of harassment and improper treatment outweighs the employer's interest in unilaterally insisting that Leather be examined by its physician before her physician.

This case does not require us to decide whether an employer can ever unilaterally require that employees be examined by the employer's doctor instead of their own doctors as part of a sick leave verification program. We have held that an employer has a prerogative to prevent an employee from returning to work until his or her fitness for duty has been established by that employer's physician. See City of Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1987). But we have also declined to restrain arbitration of a firefighters' grievance contesting a general order that required sick employees to be examined by the City's physician. City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993). In Elizabeth we stated:

> The employees have a substantial interest in being examined and treated by their own physicians and there is no countervailing indication in the record that the City's policymaking powers would be substantially limited by permitting employees to have their illnesses examined, treated, and verified by their own physician. [19 NJPER at 213]

Local 1032 is not asking the arbitrator to prohibit the employer from ever requiring examinations by the Borough doctor so we do not consider that issue further.

ORDER

The request of the Borough of Belmar for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani and Ricci voted in favor of this decision. None opposed. Commissioners Katz and Sandman were not present.

DATED: March 27, 2003
Trenton, New Jersey
ISSUED: March 28, 2003