P.E.R.C. NO. 2003-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and- Docket No. SN-2003-9

UNIFORMED FIRE FIGHTERS ASSOCIATION
OF JERSEY CITY, IAFF LOCAL 1066,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Jersey City for a restraint of binding arbitration of a grievance filed by the Uniformed Fire Fighters Association of Jersey City, IAFF Local 1066, AFL-CIO. The grievance contests changes in sick leave procedures. The Commission restrains arbitration over a change in a doctor's note requirement and in the definition of excessive absenteeism. The Commission declines to restrain arbitration over a requirement that employees endeavor to schedule elective surgery on days off.

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, Alexander W. Booth, Jr., Corporation Counsel (Paul W. Mackey, First Assistant Corporation Counsel, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys (Jason E. Sokolowski, on the brief)

DECISION

On August 19, 2002, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Uniformed Fire Fighters Association of Jersey City, IAFF Local 1066, AFL-CIO. The grievance contests changes in sick leave procedures.

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

The City is a civil service jurisdiction. Local 1066 represents non-supervisory fire fighters. The City and Local 1066 are parties to a collective negotiations agreement effective

from January 1, 2002 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article 2 is entitled Maintenance and Modifications of Work Rules article. It provides that all wages, hours of work and general working conditions contained in rules and regulations, ordinances, resolutions and directives will be maintained during the life of the agreement. It also provides that proposed new rules or modifications of existing rules governing working conditions which are not within management's exclusive discretion will be negotiated prior to implementation.

Article 15 of the parties' agreement is entitled Injury and Sick Leave. That article provides:

> A. Subject to the provisions of paragraph E of this Article, if a Fire Fighter is incapacitated and unable to work because of an injury sustained in the performance of his fire fighting duties, he/she will be entitled to injury leave with full pay during the period in which he/she is unable to perform such duties. Such leave, not to exceed one (1) year, will be determined by the director of the Division of Medical Services and the Director of Fire. Such leave will not be arbitrarily or unreasonably withheld. In the event the Fire Fighter receives worker's compensation with regard to said injury, such temporary disability checks will be returned to the City for so long as the Fire Fighter on injury leave.
>
> B. Subject to the provisions of paragraph E of this Article, Fire Fighters will be granted sick leave without loss of pay whenever they are unable to work for reasons of health, up to one (1) year for each illness, pursuant to N.J.S.A. 40A:14-16. Such leave will be determined by the Director of Fire. Such leave will not be arbitrarily or unreasonably withheld.

> C. Any Fire Fighter who is injured in the line of duty and is transported to a hospital will be accompanied by a Fire Fighter and/or Fire Officer. In the event of multiple transports, only one accompanying employee will be necessary per medical facility.
>
> D. All use of injury and sick leave pursuant to this Article shall be in accordance with procedures established by General Orders of the Department.
>
> E. The rights granted to Fire Fighters hereunder shall not preclude the right of the City to take appropriate action to remove from the payroll Fire Fighters who are either on special assignment or on paid leave after no more than six (6) months from the original date of injury or leave, provided the Fire Fighter is permanently disabled.
>
> F. All Fire Fighters who do not utilize sick leave in any year as defined below, shall be granted four hundred and fifty ($450.00) dollars for each such year payable prior to the 15th of December of said year. A year, under this paragraph, shall be defined as the 1st of December through the end of the 30th of November. On duty injuries will not cause any Fire Fighter to be denied the additional compensation.

On January 27, 1999, the chief issued General Order 9902 concerning medical services and sick leave procedures, including sick leave verification requirements. That General Order was modified on November 28, 2001 and became General Order 2001-31. The following modifications are at issue:

Section 2.1.1 of General Order 9902 provided:

> A Fire Officer or Fire Fighter who has been on sick leave three (3) consecutive calendar days or less may report to duty without medical certification from his private physician by reporting to the proper medical authority which is listed in this General Order.

Section 2.1.1 was modified to state:

> A member who has been on sick leave three (3) consecutive calendar days or less may report back to duty without a medical certificate from his/her private physician.
>
> Exception: A member who has received a Form 1798 within the previous calendar year is required to have a physician's certificate for all sick leave occurrences for the ensuing year.

Section 2.4 of General Order 9902 provided:

> Excessive absenteeism is defined as repeated short periods of being absent on sick leave, or prolonged periods of absence without hospitalization and any valid form of medical documentation from a physician or another medical specialist.

Section 2.4 is now Section 2.3.1 and provides:

> Excessive absenteeism is defined as repeated short periods of being absent on sick leave, or prolonged periods of absence.

A new Section 6 entitled Elective Surgery was added. It provides:

> Any member wishing to have elective surgery shall endeavor to have such surgery on their own scheduled time off. The appointing authority maintains the right to withhold pay when it is appropriate.

On January 25, 2002, Local 1066 filed a grievance contesting the changes in the sick leave procedures and requesting meetings to discuss such changes. Although no documentation has been submitted, we assume the grievances were denied at all levels. On February 22, Local 1066 demanded arbitration. This petition ensued.

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 City argues that it has a non-negotiable managerial prerogative to establish sick leave verification policies, including the right to require verification from employees who are on sick leave for three consecutive calendar days and who have previously received written reprimands via a Form 1798. With respect to its modification of the definition of "excessive absenteeism," it asserts that it has the prerogative to determine the standard of conduct that may give rise to discipline, but that an individual may challenge a disciplinary action that flows from application of the standard. It asserts that under the old

policy, members with horrendous sick leave records could continue to be absent so long as they provided medical documentation, and the City had no ability to take action against them.

Finally, the City contends that the request that members attempt to have elective surgery on their days off is not a term and condition of employment, but is a decision of the member to use or not to use sick leave. The City states that this provision will allow it to deny leave to employees who have previously been disciplined for excessive absenteeism and who have undergone repeated cosmetic surgeries that were not medically necessary. It states that members may request arbitral review of any sick leave denial.

Local 1066 counters that negotiations over the changes in sick leave procedures would not substantially limit the City's ability to identify and address possible sick leave abuse. It contends that the new doctor's note requirement for employees who have received a form 1798 is intended as a punishment and, therefore, may be arbitrated pursuant to our case law holding that penalties for violating sick leave policies are mandatorily negotiable. In addition, it asserts that the City's prerogative to verify sick leave does not include the right to change the definition of excessive absenteeism. It argues that the change actually bars an employee from verifying short or prolonged periods of absence due to sickness. Finally, with respect to the elective surgery section, Local 1066 states that this provision

never appeared in any general order and the City has violated the parties' agreement by inserting this provision without negotiations.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), we applied the negotiability tests to the issue of sick leave verification. We held that the employer had a prerogative to establish a 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. Ibid.

Since Piscataway, we have decided dozens of cases involving sick leave verification policies. We have repeatedly held that an employer has a prerogative to require employees to produce doctors' notes verifying their illness. But we have also repeatedly held that the issue of who pays for doctors' notes and what the penalties will be for violating a policy are mandatorily negotiable. See Passaic Cty., P.E.R.C. No. 2002-63, 28 NJPER 234 (¶33085 2002) and cases cited therein.

Within this framework, we hold that the City had a prerogative to institute a doctor's note requirement for employees who have received a form 1798 within the past year. The prerogative to verify sickness includes the right to determine how many absences trigger a verification requirement and the right to define the period in which those absences will

be counted. See Morris Cty., P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001); Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995). It also includes the right to change a sick leave policy to specify new situations where a doctor's note will be required. See Passaic (employer had prerogative to change sick leave policy to require doctors' notes for employees calling out sick on weekends). Consistent with these cases, the City has a prerogative to require verification based on the number of absences and the employee's prior history within a given period of time. The doctor's note does not become a penalty simply because it is required of employees who have previously been reprimanded. Compare Morris Cty. (describing range of penalties that could be imposed for excessive absenteeism as including, by way of illustration, counseling, letters of reprimand, docking of pay, and termination or nonrenewal).

We turn to the City's change in the definition of excessive absenteeism. Preliminarily, we reject the City's argument that negotiations over this aspect of the policy are preempted by New Jersey Department of Personnel regulations. Those regulations list "chronic or excessive absenteeism" as one of the grounds for instituting major or minor discipline against a permanent career service employee. See N.J.A.C. 4A:2-2.3(a)(4) and N.J.A.C. 4A:2-

3.1. However, the regulations do not define the term or specify whether it includes medically documented absences.

With respect to the second prong of Paterson, we focus on the principle that while an employer must negotiate disciplinary review procedures, it has the exclusive power to determine whether to initiate discipline. City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988) (citing Sponsor's statement to A-706, which became L. 1982, c. 103, amending N.J.S.A. 34:13A-5.3). By allowing the City to charge an employee with excessive absenteeism even if the absences are medically verified or justified, the change alters the circumstances in which the City may initiate discipline. However, it does not affect the employee's right, which the City recognizes, to arbitrate any minor discipline flowing from a determination that he or she has been excessively absent or an arbitrator's power to determine that a disciplinary sanction based on "excessive absenteeism" as defined by the employer was with or without just cause. We therefore conclude that the change is encompassed in the City's prerogative to initiate discipline.

Moreover, Local 1066 does not dispute the City's contention that the prior policy prevented the City from taking action against an employee because of medically documented long-term absences - regardless of their length, frequency, impact on operations, or predicted duration. In this posture, negotiations over the definitional change would substantially limit the City's

ability to maintain an effective and efficient workforce. Compare Svarnas v. AT&T Communications et al., 326 N.J.Super. 59, 78-79 (App. Div. 1999) (excessive and chronic absences need not be accommodated under New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 through -42, although some medical leaves may be a required accommodation); Malone v. Aramark Services, Inc., 334 N.J. Super. 669 (Law Div. 2000) (public policy does not require that an employee's job be held open for as long as it takes to recover from a work-related injury); Bellamy v. Aberdeen Tp., 96 N.J.A.R.2d (CSV) 770 (1996) (affirming removal for chronic absenteeism of civil service employee who, after exhausting paid leave and being granted two one-month unpaid leaves, would have been unable to work for another eleven months).

We stress that the definitional change does not automatically impose a penalty on individuals whom the City determines have been excessively absent. Nor does it prevent an employee from verifying his or her illness: the general order of which it is one part requires that in some circumstances.

Finally, we consider the general order's provision that an employee shall endeavor to schedule elective surgery on days off - a provision which Local 1066 maintains chills the use of negotiated sick leave.

Sick leave directly and intimately affects the terms and conditions of employment and is generally mandatorily negotiable absent a preempting statute or regulation. See Hoboken Bd. of

Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd NJPER Supp.2d 113 (95 App. Div. 1982), pet. for certif. dismissed as improvidently granted 93 N.J. 262 (1983); Piscataway Tp. Bd. of Ed., 152 N.J. Super. 235, 243-244 (App. Div. 1977); City of Orange, P.E.R.C. No. 2001-46, 27 NJPER 124 (¶32046 2001); see also Newark State-Operated School Dist., 28 NJPER 154 (¶33054 App. Div. 2001); Hackensack Bd. of Ed., 184 N.J. Super. 311 (App. Div.), certif. denied 91 N.J. 217 (1982) (education statute prohibits use of sick leave for family illness or childrearing leave).

The City does not contend that any statute or regulation bars use of sick leave for "elective surgery," a term that could be read as encompassing any non-emergency surgery. Indeed, it maintains that the provision only "suggests" that surgery be scheduled on days off and simply reiterates its contractual right to deny paid leave to unit members who have poor attendance records or have undergone repeated cosmetic surgeries. By contrast, Local 1066 interprets the new provision as requiring members to schedule elective surgery on days off, and maintains that it violates the parties' agreement concerning when sick leave will be approved.

The City has not shown that allowing an arbitrator to resolve the parties' competing claims about the intent and impact of the elective surgery provision would substantially limit any governmental policy interest. The City acknowledges that, even

without the change, it had the right to deny leave requests, subject to an employee's right to contest the denial. In this posture, arbitration of Local 1066's claim that the change alters contract provisions allowing sick leave to be used for elective surgery would not substantially limit the City's right to review leave requests or require sick leave verification.

ORDER

The City of Jersey City's request for a restraint of binding arbitration is granted insofar as the grievance challenges the November 28, 2001 changes to section 2.1.1 and the change in the definition of "excessive absenteeism." It is denied with respect to the challenge to a new section 6, Elective Surgery.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners, Buchanan, Mastriani and Ricci voted in favor of this decision. Commissioner DiNardo abstained from consideration. Commissioners Katz and Sandman were not present.

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