

P.E.R.C. NO. 2004-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY,

Petitioner,

-and-

Docket No. SN-2004-1

PROBATION ASSOCIATION OF NEW JERSEY
(Professional Case-Related Unit),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the New Jersey State Judiciary for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case-Related Unit). The grievance seeks to have vacation and sick days restored to a senior probation officer who had surgery as a result of an on-the-job injury. The Commission grants a restraint to the extent the grievance seeks to appeal the decision of the employer to deny the SLI benefits. The request is denied concerning the employer's alleged failure to comply with its contractual obligation to notify the employee of her SLI appeal rights.

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, Peter C. Harvey, Attorney General
(Karen M. Griffin, Deputy Attorney General, on the
brief)

For the Respondent, Fox and Fox, LLP, attorneys
(Dena E. Epstein, on the brief)

DECISION

On July 3, 2003, the New Jersey State Judiciary petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case-Related Unit). The grievance seeks to have vacation and sick days restored to Roberta Howard, a senior probation officer who had surgery as a result of an on-the-job injury.

The parties have filed briefs and exhibits. The employer has submitted the certification of Court Executive Margaret Doherty. PANJ has submitted the certification of Roberta Howard. These facts appear.

PANJ represents all non-supervisory, case-related professional employees in all trial court operations, including probation officers, senior probation officers, master probation officers, substance abuse evaluators, and family court coordinators. The Judiciary and PANJ are parties to a collective negotiations agreement effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration, but permits either party to submit disputes over arbitrability to this Commission no later than 20 days after the request for arbitration. These employees are also subject to civil service rules and procedures.

The Legislature has authorized paid leaves of absence for State employees injured on the job. N.J.S.A. 11A:6-8 is entitled Sick Leave Injury in State Service. It provides:

Leaves of absence for career, senior executive and unclassified employees in State service due to injury or illness directly caused by and arising from State employment shall be governed by rules of the board. Leaves of absence for career and unclassified employees of a political subdivision directly caused by or arising from employment shall be governed by rules of the political subdivision. Any sick leave with pay shall be reduced by the amount of workers' compensation or disability benefits, if any, received for the same injury or illness.

The Merit System Board has adopted regulations implementing this statutory benefit. See N.J.A.C. 4A:6. N.J.A.C. 4A:6-1.6 is entitled Sick Leave Injury (SLI) requirements: State service. It

provides for paid leaves of absence of up to one year for work-related injuries and illnesses. N.J.A.C. 4A:6-1.7 sets forth procedures for reporting sick leave injuries and requires that an employer review requests for SLI benefits and within 20 days either grant the request and forward its recommendation to the New Jersey Department of Personnel, or deny the request and advise the employee in writing of the reasons for the denial and of the right to appeal to the Merit System Board (MSB) within 20 days.

Article 18 of the parties' agreement is entitled Sick Leave. It states that all sick leave shall be provided pursuant to the provisions of N.J.A.C. 4A:6.

Article 10, Section 1, Step 4 of the agreement provides, in part:

If arbitrability of a grievance or the ability of an arbitrator to determine a particular matter is at issue, jurisdiction to resolve the issue shall rest solely with the arbitrator, provided however that either party may submit an appropriate issue in this regard to the Public Employment Relations Commission if the submission is made no later than twenty (20) days after the request for arbitration.

Roberta Howard began employment in the Judiciary's Middlesex vicinage as a probation officer in 1982 and is currently a senior probation officer. James Murray is the chief probation officer and manager of the Middlesex vicinage. Margaret Doherty is

responsible for processing employee applications for sick leave and is the custodian of personnel files.

On April 15, 1999, Howard suffered a work-related shoulder injury. On May 14, the vicinage determined that she was eligible for SLI benefits. Howard was out of work intermittently from April 15 through January 6, 2000. None of these absences were charged to sick, vacation or administrative leave. Howard had physical therapy three times a week, but continued to have pain and discomfort in her shoulder. When she did not feel any improvement, she sought an opinion from her personal doctor. After reviewing Howard's MRI, that doctor recommended surgery.

On January 5, 2000, Howard informed the vicinage that she would be undergoing surgery on her shoulder on January 12 and would be out of work for approximately six additional weeks. She asked if the absences would be charged to her accumulated sick leave or injury leave. On January 7, the employer's Human Resources Manager informed Murray that Howard's surgery was not authorized by the employer's doctor and therefore she should be charged sick time or request a leave of absence. Also on January 7, a representative of Horizon Casualty Services notified the Vicinage Training Coordinator that Howard's treating doctor found that her shoulder was normal with arthritic changes and that she could return to work full duty.

On January 13, 2000, Murray informed Howard that the Human Resource Office had informed him that she had not been approved for SLI coverage for her recent surgery. Murray asked Howard to notify him whether she wished to be charged sick time or apply for a medical leave. From January 12 through June 23, 2000, Howard was absent a total of 112 days; 109 were charged to her accrued sick leave and 3 were charged to her accrued vacation leave time. Doherty states that in a January phone call, Howard did not express any disagreement with the decision concerning her sick leave. Howard states that at no time did anyone inform her that she could appeal the decision to deny her SLI.

On June 11, 2002, PANJ filed a grievance asserting that since a Worker's Compensation judge had ruled that Howard should be paid by the employer an amount agreed to by her attorney and the State, she is entitled to have her vacation and sick time reinstated.

On July 2, 2002, a step one grievance hearing was held. The Human Resources Manager denied the grievance, concluding that the request for paid time away from work was essentially a request for SLI benefits and that if Howard was dissatisfied with the employer's decision to deny SLI benefits, an appeal had to be filed with the MSB.

On November 11, 2002, PANJ filed an appeal with the MSB alleging that the employer failed to advise Howard of her right

to appeal in accordance with N.J.A.C 4A:6-1.7. Briefs have been filed by both parties before the MSB, but no decision has been issued.

The parties agreed to bypass Step 2 of the grievance procedure and move to Step 3. On February 3, 2002, the employer's hearing officer denied the grievance. He concluded:

The subject matter of this grievance is management's denial of Ms. Howard's request for SLI benefits. Because a statute and regulation expressly and comprehensively provide for the eligibility requirements, benefit periods and reporting and appeal procedures, I find that it preempts management from negotiating an alternative means for the resolution of SLI disputes. The Merit System Board has the exclusive initial jurisdiction to address Ms. Howard's dispute. Nevertheless, even if the subject matter is not preempted by statute and regulation, the Agreement does not provide for the SLI benefits requested by Ms. Howard. Moreover, I find that the grievance was untimely filed. Accordingly, the grievance must be denied.

On March 12, 2003, PANJ demanded arbitration. On April 11, the employer asked the arbitrator to stay arbitration proceedings pending the filing of a scope petition. On April 17, PANJ responded that under Article 10, a scope petition was untimely. On May 30, the employer renewed its request to the arbitrator for a stay. 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 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 or any contractual defenses the employer may have.

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

[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.

The employer argues that since SLI benefits are governed by statute and regulation, arbitration of this dispute is preempted.

The employer further argues that its scope petition, filed four months after the demand for arbitration, is not out of time because the relevant portion of Article 10 conflicts with the statutes and regulations governing the filing of scope petitions, and because it put the union and the arbitrator on notice in April 2002 that it would be filing a petition.

PANJ asserts that the issue to be decided by the arbitrator is whether the employer breached its contractual requirement to provide all sick days in accordance with N.J.A.C. 4A:6 and when it failed to advise Howard of her SLI appeal rights. It argues that the denial of these benefits impacts Howard's terms and conditions of employment and that neither N.J.S.A. 11A:6-8 nor N.J.A.C. 4A:6-1 fully or partially preempts the employer's contractual obligation to provide sick leave under the provisions of N.J.A.C. 4A:6. PANJ also argues that negotiations over leave benefits and procedural aspects of leave benefits do not significantly interfere with the employer's determination of governmental policy.

The employer replies that the agreement's reference to N.J.A.C. 4A-6 is limited to the amount of sick leave (15 days) granted to each employee and the manner in which it will be administered. It states that the contract does not specifically address the SLI provisions outlined in 4A:6-1.6 and 1.7. It

further argues that these provisions are comprehensive and cannot be incorporated by reference into the agreement.

Administrative leave, sick leave, and vacation leave are mandatorily negotiable subjects unless a statute or regulation preempts negotiations. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); State of New Jersey (Dept. of Corrections) and CWA, 240 N.J. Super. 26 (App. Div. 1990); Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Barneгат Tp. Bd. of Ed., P.E.R.C. NO. 84-123, 10 NJPER 269 (¶15133 1984). A statute or regulation will not preempt negotiations unless it specifically, expressly and comprehensively sets an employment condition, thereby eliminating the employer's discretion to vary it. See, e.g., Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Contractual claims for restoration of lost leave time can generally be submitted to binding arbitration. See, e.g., Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997). Previous cases involving restoration of sick days have not, however, involved State employees covered by the Department of Personnel's SLI program.^{1/}

^{1/} The Director of Unfair Practices refused to issue a Complaint based on an unfair practice charge alleging that
(continued...)

We first address whether a State Judiciary employee may challenge a denial of SLI benefits through binding arbitration. The regulatory scheme granting employees the right to seek SLI benefits provides that the employer may grant a request for benefits and forward its recommendation to the Department of Personnel which, upon review, must notify the employee and the employer whether or not the benefits have been approved; or the employer may deny the request and advise the employee in writing of the reasons for the denial and of the right to appeal to the Merit System Board. This regulatory scheme specifically, expressly and comprehensively sets an employment condition, and thereby eliminates the employer's discretion to vary it. Bethlehem Tp. Bd. of Ed. Thus, ultimately it is the Department of Personnel that decides whether to grant or deny SLI benefits and grievance arbitration is not the forum for review of that determination. Any appeal of a denial must be filed with the Merit System Board.

1/ (...continued)
the State of New Jersey arbitrarily and improperly denied employees SLI. State of New Jersey, D.U.P. No. 2002-10, 28 NJPER 230 (¶33083 2002). The Director held, in part, that a claim alleging a violation of a contractual obligation to provide SLI benefits in accordance with DOP rules amounted to a mere breach of contract claim not cognizable in an unfair practice proceeding. The Director did not hold that a grievance challenging the denial of SLI benefits could be enforced in binding arbitration.


We next address whether PANJ may arbitrate the employer's alleged failure to comply with its contractual obligation to notify Howard of her SLI appeal rights. The DOP regulations do not appear to preclude such a claim. We will not, however, speculate over what remedy an arbitrator could award.

Finally, we address PANJ's argument that the employer breached the parties' contract by filing its scope petition four months out of time. The parties have not indicated that PANJ seeks to arbitrate this issue or that the employer seeks a restraint of arbitration over it. Accordingly, we need not address it further.

ORDER

The request of the New Jersey State Judiciary for a restraint of binding arbitration is granted to the extent the grievance appeals the decision of the employer and the Department of Personnel to deny Roberta Howard SLI benefits. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani abstained from consideration. Commissioner Katz was not present.

DATED: November 17, 2003
Trenton, New Jersey

ISSUED: November 18, 2003