P.E.R.C. NO. 2005-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and- Docket No. SN-2004-002

FMBA LOCAL NO. 6,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Trenton for a restraint of binding arbitration of a grievance filed by FMBA Local No. 6. The grievance challenges the City's requirement that all doctors' certificates verifying sick leave indicate the condition for which the employee was treated and the application of that requirement to an individual firefighter. The Commission has balanced the employees' strong privacy interest in protecting against inquiries into their medical conditions and the employer's strong interest in seeking to verify illness when necessary to ensure compliance with sick leave rules, to protect against sick leave abuse, and to ensure that employees are fit for duty. The Commission holds that nothing in this record suggests that the grievant was a sick leave abuser or otherwise not entitled to sick leave and permits the FMBA to proceed to binding arbitration over the application of this aspect of the sick leave policy. An arbitrator may determine exactly what medical information the employer was seeking from the employee, what information the employee provided, and whether seeking that information violated the parties' contract. The Commission also permits a broader challenge to the establishment of this aspect of the verification policy, but holds that the arbitral remedy sought is overbroad in that it would prevent the employer from ever seeking those medical details to combat sick leave abuse, ensure that returning employees are fit for duty, or comply with other contractual or statutory obligations.

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, Laufer, Knapp, Torzewski & Dalena, LLC, attorneys (Stephen E. Trimboli, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys (Craig S. Gumpel, on the brief)

DECISION

On July 10, 2003, the City of Trenton petitioned for a scope of negotiations determination.[1/] The City seeks a restraint of binding arbitration of a grievance filed by FMBA Local No. 6. The grievance challenges the City's requirement that all doctors' certificates verifying sick leave indicate the condition for which the employee was treated and the application of that requirement to an individual firefighter.

The parties have filed briefs and exhibits. The FMBA has submitted the certification of its president. The City has

1/ The parties asked us to hold this petition in abeyance for several months pending their settlement discussions.

submitted the certification of a deputy fire chief. These facts appear.

The FMBA represents firefighters. The parties' collective negotiations agreement is effective from July 1, 2000 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article VI, Section 3 is entitled Sick Leave. It provides, in part:

> A. Each employee is entitled to remain on sick leave for a period of up to one year, with full pay, for each separate illness or injury which is not service-connected. . . .
>
> B. The F.M.B.A. clearly recognizes the right of the City to require that members on sick leave be examined as often as the City sees fit by the Police and Fire Surgeon, or any other physician designated by the City or said Surgeon. If the member is found fit for duty, the member will be ordered to duty.

Article XI is entitled Miscellaneous. It provides, among other things, that changes in working conditions are subject to negotiations with the FMBA. Article XVI is entitled Applicable Laws and provides that contract provisions shall be subject to and shall not annul or modify existing applicable provisions of federal or State laws.

The employer's Standard Operating Procedure (SOP) 2.1.04 was adopted on March 1, 1995 and revised on April 10, 2003. Under "Returning to Duty," section 2 provides:

> A treatment slip, when required, must have the name and address of the treating physician, the date or dates of office visits, the condition that the member was treated for, and that the member is now able to return to duty. Members may report back to work without their doctor's treatment slip, but that slip must be provided within three (3) business days of returning to duty.

Sections under "Treatment and Return to Duty Slips" provide, in part:

> 1. The Department reserves the right to require the submission of treatment slips, or to require that members on sick leave be examined by the City physician for sick leave verification purposes, when and as often as the Department deems necessary.
>
> 2. Notwithstanding the foregoing, at a minimum, Treatment or Return to Duty Slips will be required as follows:
>
> a. 1st and 2nd incidents of sick leave in a calendar year:
>
> (1) If only one or two days - no treatment or return slip needed for the first three days of sick leave per year. . . .
>
> (2) If no more than four duty days - treatment slip from your own doctor.
>
> * * *
>
> (4) More than four duty days - treatment slip from your own doctor - AND a return slip from the city's health center. . . .
>
> * * *
>
> b. 3rd incident during a calendar year:
>
> (1) If no more than four duty days - treatment slip from your own doctor.

(2) More than four duty days - Treatment slip from your own doctor and a return slip from the health center. . . .

c. 4th or more incident during a calendar year:

(1) Treatment slip from your own doctor and a return slip from the health center no matter what the duration of the sick leave. . . .

3. Members subject to the sick leave verification requirement of the Department's Standard Operating Procedure on Chronic and Excessive Absenteeism shall adhere to those requirements.

The City has provided a statistical chart of sick leave usage from 1992 through 2002. That chart shows an increase in the average sick time used per employee from 3.16 days in 1992 to 11.13 in 2002.

On March 22 and 23, 2003, a firefighter called out sick. On March 24, a deputy chief issued Memorandum M-47 instructing a captain to ensure that the firefighter submitted an appropriate treatment slip that included "the condition the member was treated for."

The FMBA asserts that in the past, the City did not require that a doctor's note specify the exact nature of an illness, but that a note stating that the firefighter was under a doctor's care was sufficient. The City asserts that the requirement that firefighters disclose the nature of the illness or injury causing them to call off sick has been in effect since at least 1967.

On April 10, 2003, the FMBA filed a grievance objecting to the disclosure of the firefighter's illness. The grievance stated, in part:

> Memorandum M-47 issued April 8, 2003 and S.O.P. #2.1.04, Returning to Duty, Paragraph 2, on which it relies, violate the Collective Bargaining Agreement, including but not limited to Article VI, Sick Leave, Article XI, Miscellaneous and Article XVI, Applicable Laws.
>
> As a remedy, we request that Memorandum M-47 dated April 8, 2003 be rescinded and S.O.P. #2.1.04, Returning to Duty, Paragraph 2, be modified to delete the following: "the condition that the member was treated for."

The grievance was not resolved and on May 14, 2003, the FMBA 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 City 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. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] 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 require verification of the condition for which sick leave is taken. It contends that its legitimate need to verify sick leave and ensure that firefighters are fit to perform their duties outweighs any privacy interests of the firefighters and that the increase in average annual sick leave usage reinforces its interest in such verification.

The FMBA recognizes the City's prerogative to establish a verification policy, but asserts a right to arbitrate the interpretation, application and enforcement of that policy. It also argues that the portion of the policy that requires firefighters to provide the medical reasons for their absences violates their privacy rights under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. (ADA), and the New Jersey Constitution and common law. The FMBA further argues that the City's interest in knowing that firefighters can perform their duties can be served by having a doctor's note state that they are or are not able to work and that the City does not have adequate safeguards to prevent the dissemination of confidential medical information.

The City replies that the confidentiality of doctors' notes was addressed by the parties in a meeting on August 5, 2003. After that meeting, the department began keeping employee medical records in a locked cabinet in the office of the Deputy Chief of Personnel, where only he has access to them. The City also replies that the ADA does not prohibit an employer from asking employees to identify the condition that caused their sick leave usage.

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 a 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 that unduly interferes with the employee's welfare and that a grievance contesting an allegedly unreasonable implementation may be arbitrated. Borough of Dumont, 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).

This grievance involves both the application of the employer's sick leave verification policy and a broader challenge to the employer's right to establish portions of the policy itself. In assessing both challenges, we must balance the parties' interests under the particular facts of the case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). Although we do not enforce rights under the ADA, we can consider how that statutory scheme balances the privacy rights of employees with the operational interests of employers as we examine the parties' interests under our negotiability tests. Cf. Paterson (statute that did not preempt negotiations nevertheless relevant in deciding extent of public employer's discretionary powers).

Under the ADA, an employer:

> shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and

> consistent with business necessity. [42 U.S.C. §12112(d)(4)(A)]

Federal regulations implementing the ADA provide similar protections. 29 C.F.R. 1630.13(b); 1630.14(c). The appendix to 29 C.F.R. 1630.13(b) explains that:

> The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with the business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

A recent Court of Appeals decision has addressed the application of the ADA's protections against unnecessary inquiries into medical conditions to a sick leave verification policy. Conroy v. New York State Dept. of Correctional Services, 333 F.3d 88 (2d Cir. 2003). In Conroy, an employee challenged a policy requiring employees to provide medical information when the employee took sick leave, claiming that it violated the ADA. The district court granted summary judgment to the employee, finding that the policy offended the ADA because it amounted to a potentially improper inquiry into an employee's disability or perceived disability. The Court of Appeals agreed that the policy fell within the ADA's general prohibition against certain inquiries into medical conditions. However, the Court determined that

genuine issues remained over whether the employer had proven a legitimate defense of business necessity, particularly given the type of work involved, correctional services, and given a perceived abuse of sick leave policies. The Court remanded the matter for further findings on the applicability of the defense. The Court noted that factual development as to what criteria the employer used to identify a corrections officer as a perceived time and attendance abuser would be particularly helpful. The Court expressed concern about administrators casting their nets too widely in identifying time and attendance abusers.

The Court continued:

> A "goal of weeding out that small group of employees who consistently maintain attendance records that are far below . . . standards" is probably consistent with business necessity law. Nonetheless, if the policy ultimately affects a class of so-called attendance abusers that is much larger than "that small group of employees" with truly egregious attendance records, or if the policy is applied inconsistently, [the employer] . . . will find it more difficult to prove business necessity. [Id. at 101]

The Court's analysis of the ADA dovetails with our application of the negotiability balancing test. Employees have a strong privacy interest in being protected against inquiries that could lead to the disclosure of illnesses or disabilities unrelated to sick leave abuse. And the employer has a strong interest in

seeking to verify illness when necessary to ensure compliance with sick leave rules and to protect against sick leave abuse.[2/]

Nothing in this record or the employer's briefs suggests that this grievant was a sick leave abuser or otherwise not entitled to sick leave.[3/] The deputy chief's memorandum does not specify what aspect of SOP 2.1.04 triggered the grievant's obligation to submit a treatment slip, but it could have been as minimal as a third absence during one calendar year. Under these circumstances, we will permit the FMBA to proceed to binding arbitration over the application of this aspect of the sick leave policy. An arbitrator may determine exactly what medical information the employer was seeking from the employee, what information the employee provided,

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2/ The employer has submitted portions of an enforcement guidance memorandum issued by the ADA Division of the Equal Employment Opportunity Commission. The memorandum, in question/answer format, asks whether an employer may request an employee to provide a doctor's note or other explanation to substantiate his or her use of sick leave. It answers that an employer is entitled to know why an employee is requesting sick leave. The memorandum, issued before Conroy, does not address the specific issue of whether or when the employer can require that a doctor's note specify an employee's medical condition.

3/ We note that there is a separate SOP on Chronic and Excessive Absenteeism that does not appear to have been invoked. It is not in our record.

and whether seeking that information violated the parties' contract.4/

The employer's reliance on the Health Insurance Portability and Accountability Act of 1996 (HIPAA) is misplaced. That statute regulates health care providers, health plans, and health care clearinghouses. According to the Department of Health and Human Services (HHS), HIPAA protects individually identifiable health information created, received, or maintained by a covered entity in its health care capacity. When an individual gives his or her medical information to a covered entity as the employer, such as when submitting a doctor's statement to document sick leave, that medical information becomes part of an employment record. As such, that information is not protected by HIPAA. HHS notes, however, that as an employer, a covered entity may be subject to other laws and regulations applicable to the use or disclosure of information in an employee's employment record. 67 Fed. Reg. 53182, 53192 (8/14/2002). This case does not involve a covered entity, and it does involve separate privacy interests addressed by the ADA.

Similarly, the New Jersey Public Employee Occupational Health and Safety Act, N.J.S.A. 34:6A-25 et seq., does not provide that a public employer may require disclosure of the condition an employee is being treated for as part of a routine sick leave verification

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4/ In light of this holding, we need not reach the FMBA's arguments that the disclosure requirement violates the New Jersey Constitution and common law.

program. N.J.A.C. 12:100-10.4(a) does provide that an employer "shall assure that employees who are expected to do interior structural firefighting are physically capable of performing duties that may be assigned to them during emergencies." But section (b) of that regulation requires that compliance with section (a) be accomplished in conformity with the provisions of the ADA. While the employer has an important interest in ensuring that employees are fit for duty, this case does not address that right or its limits. In fact, the FMBA recognizes the City's right to have its own doctor examine a firefighter to ensure fitness for duty.

Finally, we note that Monahan v. City of New York, 10 F. Supp.2d 420, 424 (S.D.N.Y. 1998), aff'd 214 F.3d 275 (2d Cir. 2000), cert. den. 531 U.S. 1035 (2000), and Loughran v. Codd, 432 F. Supp. 259, 263 (E.D.N.Y. 1976), two cases relied on by the employer, are inapt. Monahan involved home visits and Loughran involved a requirement that employees on sick leave remain at home. Neither addressed the issue of requiring employees to disclose the condition they are being treated for as part of a sick leave verification program.[5/]

The grievance challenges not only the application of the sick leave verification policy to the grievant, but also the

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5/ In North Hudson Reg. Fire & Rescue, I.R. No. 2001-10, 27 NJPER 215 (¶32076 2001), a Commission designee made no finding as to whether a requirement that doctors' notes specify a diagnosis is subsumed within the prerogative to require a doctor's note to verify illness.

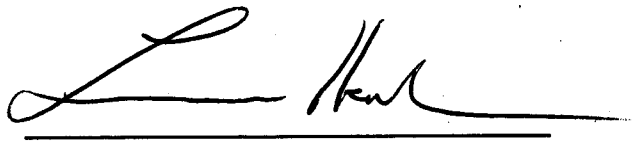
establishment of that aspect of the policy that requires specification of every affected employee's condition, regardless of individual circumstances. In particular, the grievance seeks an arbitral remedy requiring the employer to delete the requirement that treatment slips provide details about the employee's medical condition.

Applying the same analysis we did over the application of the policy to the grievant, we will also permit a broader challenge to the establishment of this aspect of the employer's sick leave verification policy. However, the arbitral remedy sought is overbroad in that it would prevent the employer from ever seeking those medical details to combat sick leave abuse, ensure that returning employees are fit for duty, or comply with other contractual or statutory obligations. Any further discussion at this juncture about the appropriateness of a particular arbitral remedy should a contractual violation be found would be speculative. Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981). We encourage the parties to try to jointly develop an overall policy that protects employee privacy without compromising the employer's prerogative to verify employee illness and weed out sick leave abuse.

ORDER

The request of the City of Trenton for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed. Commissioner Katz abstained from consideration.

DATED: September 30, 2004
Trenton, New Jersey
ISSUED: September 30, 2004