

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY
(OCEAN VICINAGE),

Petitioner,

-and-

Docket No. SN-2004-70

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 (Ocean Vicinage) for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey, Professional Case-Related Unit. The grievance asserts that the Vicinage violated the parties' collective negotiations agreement when it required employees who had exceeded 15 days of sick leave in a 12-month period to provide doctors' notes for any future sick leave. The Commission grants a restraint to the extent the grievance challenges the employer's power to require employees absent more than 15 days (or 105 hours) in a 12-month period to submit doctors' notes for future absences. The request for a restraint is denied to the extent, if any, the grievance addresses the issue of payment for doctors' notes.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY
(OCEAN VICINAGE),

Petitioner,

-and-

Docket No. SN-2004-070

PROBATION ASSOCIATION OF NEW JERSEY,
PROFESSIONAL CASE-RELATED UNIT,

Respondent.

Appearances:

For the Petitioner, Elaine D. Dietrich, Counsel to the
Director, Administrative Office of the Courts
(Thomas Russo, staff attorney, on the brief)

For the Respondent, Mark Cimino, attorney, on the brief

DECISION

On May 12, 2004, the New Jersey State Judiciary (Ocean Vicinage) petitioned for a scope of negotiations determination. The Vicinage seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey, Professional Case-Related Unit (PANJ). The grievance asserts that the Vicinage violated the parties' collective negotiations agreement when it required employees who had exceeded 15 days of sick leave in a 12-month period to provide doctors' notes for any future sick leave.

The parties have filed briefs and exhibits. The Vicinage has filed the certification of its Human Resources Manager. These facts appear.

PANJ represents all non-supervisory, case-related professional employees. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration. Article 18 is entitled Sick Leave. Section 18.2 provides:

All sick leave shall be provided pursuant to the provisions of N.J.A.C. 4A:6 and all applicable laws, regulations and policies of the Judiciary and State of New Jersey and consistent with the Letter of Agreement. Accordingly, in each full calendar year employees shall be entitled to fifteen (15) days sick leave.

Section 18.4(a) and (b) provide:

(a) Excessive Absenteeism shall be defined as paid or unpaid days away from the job for illness or injury that exceed six (6) consecutive pay periods for illnesses or injury which does not otherwise require acceptable medical documentation (e.g., absences of five or more days which already require proof of illness constituting acceptable medical evidence or for chronic illness for which the employee has already supplied such proof of illness). Upon reaching six (6) occurrences, the employee shall be advised, in writing, that further sick leave will require proof of illness constituting acceptable medical evidence for each occurrence. Upon such notification the employee will be required to submit acceptable medical documentation for any absence during the subsequent six pay periods.

(b) The six (6) consecutive pay periods in 18.4(a) are "rolling" periods back from the current date of sick leave absence. The submittal of proof of illness constituting acceptable medical evidence after the six (6) consecutive pay periods shall be evaluated by the appointing authority or their designee. Employees required to submit proof of illness constituting acceptable medical evidence for six (6) occurrences in six (6) consecutive pay periods must continue to do so for the next six (6) pay periods. The obligation to submit proof of illness constituting acceptable medical evidence beyond the next six (6) pay periods can be extended if further absences have occurred or other reasonable basis exists or terminated. Any extension is subject to a review by the appointing authority or his/her designee at the end of the sixth pay period.

In the Fall of 2002, the human resources office audited attendance records. In her certification, the Human Resources Manager stated that approximately 20% of the workforce had an absence rate exceeding either 6 days in a period of 6 consecutive bi-weekly pay periods or 15 sick days in a 12-month period. The Vicinage calculates sick leave by the hour and counts 7 hours as a full day; thus, an employee has used 15 days when he or she has charged 105 hours of sick leave.

On December 3, 2002, the Manager sent a letter to employees in the 20% of the workforce exceeding the above rates of absence. The letter stated:

We have recently completed a review of your use of sick time. Pursuant to my responsibility under the New Jersey Administrative Code, 4A:6-1.4D, "an appointing authority may require proof of

illness or injury when there is reason to believe that an employee is abusing sick leave; an employee has been absent on sick leave for 5 or more consecutive work days; or an employee has been absent on sick leave for an aggregate of more than 15 days in a 12 month period".

Further, pursuant to your contract, please refer to the PANJ/PC Agreement, Article 18.4(a) (b) (c) (d) (e) (f). . . .

According to our records, as of March 7, 2003,

() You had been absent on sick leave for an aggregate of more than 15 days in the past 12 month period for a total of ____ hours.

() You have been absent on sick leave for (6) six or more occurrences in (6) six consecutive pay periods beginning on _____ and ending on _____.

Therefore, effective immediately, you must produce a medical certification from a licensed medical provider for any sick absence from work. For the next 12 months your attendance will be monitored and after 6 months, your record will be reviewed and reconsideration will be given as to whether a doctor's note will continue to be required. Should there be any mitigating circumstances that HR may not be aware of, please take this opportunity to contact either me, or Veronica Reagan to discuss those circumstances.

Continued absences and/or failure to produce a doctor's note will result in denial of any remaining sick leave and disciplinary action. . . .

In closing, I wish to remind you of the impact your absences have on your department and on your co-workers. It is my sincere hope that this situation will be rectified without further action.

According to the Manager, this letter was not sent to any employee who was on a bereavement leave or an approved absence under the federal Family and Medical Leave Act (FMLA) or the State Family Leave Act. According to PANJ, only employees who had expressly requested FMLA leave were excused from the requirement. Two employees who received the letter were later removed from warning status when it was determined that they had taken (but not expressly requested) leaves covered by the FMLA.

The Vicinage reviewed the attendance records of employees six months after they received warning letters. If their absences had fallen below the thresholds specified in the letter, they no longer had to supply doctors' notes.

On December 17, 2002, PANJ filed a grievance contesting the requirement that employees submit doctors' notes if their absences exceeded 15 days in a 12-month period. The grievance asserted that adding this requirement to the one specified in the sick leave article violated the parties' contract; the Vicinage's duty to negotiate in good faith under the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; and "fundamental fairness."

On January 22, 2003, the Manager denied the grievance. She concluded that the letters accorded with the parties' agreement and Department of Personnel regulations.

In February of 2003, the form letter was changed. The first sentence of the next to last paragraph now states:

"Continued absences and/or failure to produce a doctor's note may result in your absences being considered as unauthorized and as such may be subject to disciplinary action."

The Municipal Division Manager denied the grievance for the same reasons as the Human Resources Manager. A Judiciary Hearing Officer also denied the grievance. He concluded that the Vicinage had a non-negotiable managerial prerogative to adopt a sick leave verification policy determining when employees must submit doctors' notes and that sending the letter did not violate the FMLA. PANJ 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 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 the grievance or any contractual defenses the employer may have.

Public employers generally have a managerial prerogative to establish a sick leave verification policy and use reasonable means to verify employee illness. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). That prerogative includes the right to determine the number of absences that will trigger a doctor's note requirement and the time frame in which absences will be counted. Morris Cty., P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001); State of New Jersey, P.E.R.C. No. 2000-32, 25 NJPER 448 (¶30198 1999) (employer has prerogative to count absences over a 12-month period rather than a calendar year). However, the application of a sick leave verification policy to impose a disciplinary penalty may be reviewed through binding arbitration or an appropriate alternate statutory appeal procedure.

In its initial brief, the Vicinage requests that we restrain arbitration to the extent the grievance challenges its power to require employees exceeding 15 days of sick leave in a 12-month period to submit doctors' notes for future absences. We grant that request. Accord State of New Jersey. It is immaterial that the Vicinage calculates sick leave by hours rather than full days; that calculation is part of its prerogative to determine the amount of absences triggering the requirement of a doctor's note. And this case does not involve the application of a sick leave policy to withhold a sick leave benefit or impose a

disciplinary penalty. Contrast Morris Cty. (employer imposed a verbal reprimand for excessive absenteeism); North Hunterdon-Voorhees Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 98-147, 24 NJPER 313 (¶29149 1998) (letters in personnel file constituted reprimands for excessive absenteeism rather than evaluations of teaching performance). If the employer withholds a benefit or imposes a minor disciplinary penalty, an arbitrator can legally determine whether the employer had just cause to do so and can consider PANJ's FMLA claims in that context.^{1/}

In its responding brief, PANJ asserts that the employer must negotiate over who pays for a doctor's note. The employer replies that, while the issue of who pays for required doctors' notes is a negotiable subject, this subject was not part of the underlying grievance. We agree that who pays is mandatorily negotiable. Elizabeth. Whether this issue is properly before an arbitrator is for the arbitrator to determine. Ridgefield Park.

Finally, PANJ argues that the scope petition should be dismissed because the parties' contract states that arbitrability challenges should be submitted to the Commission within 20 days after arbitration is requested. The record does not indicate that PANJ seeks to arbitrate its contractual contention or that the employer seeks a restraint of arbitration over such a claim.

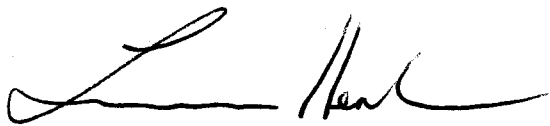
^{1/} Major discipline may be reviewed through an appeal to the Merit System Board.

Accordingly, we need not address the legality of the contractual provision further. New Jersey State Judiciary, P.E.R.C. No. 2004-28, 29 NJPER 503 (¶159 2003).

ORDER

The request of the New Jersey State Judiciary (Ocean Vicinage) for a restraint of binding arbitration is granted to the extent the grievance challenges the employer's power to require employees absent more than 15 days (or 105 hours) in a 12-month period to submit doctors' notes for future absences. The request for a restraint is denied to the extent, if any, the grievance addresses the issue of payment for doctors' notes.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

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

DATED: October 28, 2004
Trenton, New Jersey
ISSUED: October 28, 2004