

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF GUTTENBERG,

Petitioner,

-and-

Docket No. SN-2005-007

P.B.A. LOCAL 88,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Town of Guttenberg for a restraint of binding arbitration of a grievance filed by P.B.A. Local 88. The PBA challenges the application of the employer's sick leave absence counseling policy. The Commission concludes that a public employer has a prerogative to verify that sick leave is not being abused. However, the Commission concludes that arbitration of the grievance challenging the issuance of letters in the nature of reprimands that discuss an officer's absenteeism would not substantially limit the employer's policy goal of monitoring and verifying employee use of sick leave.

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, The Murray Law Firm, LLC, attorneys
(Laurette Asante, on the brief)

For the Respondent, Lindabury, McCormick & Estabrook,
P.A., attorneys (Donald B. Ross, of counsel; Eric B.
Levin, on the brief)

DECISION

On July 26, 2004, the Town of Guttenberg petitioned for a scope of negotiations determination. The Town seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 88. The PBA challenges the application of the employer's sick leave absence counseling policy.

The parties have filed briefs, exhibits, affidavits and certifications. These facts appear.

The PBA represents police supervisors. The parties' most recent collective negotiations agreement is effective from July 1, 1996 through June 30, 2003. The grievance procedure ends in binding arbitration.

Article XI is a sick leave provision. It provides that: employees notify the department at least one hour before the commencement of their duty tour; an employee may be required to submit acceptable medical evidence when he or she is out on sick leave for three or more consecutive days or has established a pattern of sick leave use; the department may require an examination by its physician paid for by the Town; the department has the right to discipline any employee who misrepresents facts or malingers; and employees may be requested to present a medical certificate for each illness over eight in a calendar year.

On April 25, 2002, Police Director John R. LoPresto issued Order #02-27. That order is entitled Absence Control Policy. It provides:

PURPOSE: To establish a reasonable sick absence policy that will assure that the Guttenberg Police Department and the public that we serve are ensured professional, efficient and economic service.

POLICY: Any police personnel absent from duty for ten (10) or more sick days or . . . absent for more than four (4) sick occasions within a period of less than one year will be subject to a sick absence review and possible counseling by their supervisors.

Any sick occasion that falls within the above stated parameters will result in a Sick Absence Review that will require a twenty-four (24) month comprehensive review and analysis for the preceding period.

Police Officer(s) can/will be placed on a Medical Certification List which would

require an examination by a physician stating the reason for the absence.

COUNSELING: Police officers that are the subject of any sick absence review will be closely monitored to ensure compliance. Reasonable justification (i.e., injury on duty) will be given consideration. A counseling document will be issued and reviewed with the police officer involved. Notice will be given that disciplinary action will commence if there is no immediate improvement.

DISCIPLINE: Any disciplinary action when warranted will be administered based upon the nature, number and proximity of individual sick absence records. Further offenses will be based upon prior disciplinary infractions and could result in more severe penalties or sanctions unless just cause is shown.

On April 29, 2002 and April 13, 2003, the PBA filed grievances asserting that the policy conflicted with the sick leave portions of the contract. Both grievances were denied and were not pursued through arbitration.

On March 22, 2004, PBA Executive Board Member Michael A. D'Amore filed a grievance regarding "the absentee discipline action against me." D'Amore stated that the departmental disciplinary policy conflicts with Article XI. The grievance refers to an April 2003 letter from the Town's attorney and comments that the letter does not state that any disciplinary action would be taken against any unit member. The grievance asks the mayor to correct the situation.

On March 29, 2004, the Town's attorney responded. He stated that the policy had been in effect for almost two years and that the grievance was therefore untimely; the policy does not violate the contract and carries out a managerial prerogative to verify and monitor the use of sick leave; counseling is not discipline; and counseling the grievant was appropriate considering his recent attendance history.

On May 3, 2004, the PBA's attorney wrote to the Town's attorney that the grievance was timely because the policy was a continuing grievable transgression; counseling is not part of the negotiated agreement; and placing a memorandum in an officer's file is disciplinary.

On June 3, 2004, the Town's attorney responded that it is a mistake to characterize the counseling as disciplinary and reiterated that a grievance challenging the counseling policy is untimely. The letter ended by stating that if Officer D'Amore wanted to challenge the way the policy had been applied to him, the appropriate grievance should be filed.

On May 21, 2004, the PBA demanded binding arbitration. The demand describes the grievance to be arbitrated as:

Officers are being improperly disciplined under an invalid sick leave policy unilaterally established by Director LoPresto which violates Article XI - Sick Leave of the Collective Bargaining Agreement. Both the establishment of the policy and the actions taken thereunder are improper.

According to LoPresto, D'Amore was counseled four times in 2002, four times in 2003, and four times in 2004. LoPresto states that during counseling sessions with D'Amore, in addition to reviewing his absences and trying to determine if he was experiencing any medical problem, LoPresto told D'Amore that he would give him a counseling document that would serve as a monitoring device and notification of his use of sick leave. Two other officers were counseled in 2002 and one other in 2003.

Accordingly to D'Amore, LoPresto has never counseled him; instead he simply handed him the counseling documents or left them in his mailbox at police headquarters. The PBA has submitted D'Amore's April 9, 2003 counseling document, which appears to indicate that the document would be placed in an absence file and a personnel file. The March 18, 2004 counseling document does not indicate that it will appear in any file. The text of the two counseling documents reads:

After a thorough review of your sick absence record for the past twenty-four (24) months, which included oral and written documents, there appears to be no noticeable improvement in your attendance record. Every police officer assigned to the Guttenberg Police Department is expected to make every reasonable effort to report for duty pursuant to his assigned work schedule. Any further absences in your current attendance record may be interpreted as non-responsive to command efforts and directives and will be deemed as malingering.

The department will continue to monitor your sick absence record closely. Any

further absence without substantial justification will result in departmental disciplinary action.

The Guttenberg Police Department and the citizens of this community deserve every measure of assurance that public safety will be maintained at the highest professional level possible. Absenteeism has to be weighed against the public right to efficient and economic service.

You are advised to accept this counseling as constructive criticism and make a conscious effort to improve your sick absence performance immediately.

D'Amore states that after receiving these documents, but without having any counseling sessions, he was charged with neglect of duty, unauthorized absences, and violating disciplinary regulations. A hearing is pending on those charges.

The Town argues that the grievance is untimely. It further argues that it has a managerial prerogative to establish a sick leave verification policy.

The PBA argues that the policy the employer established conflicts with the contract and that a counseling document does not provide any advice or assistance, but is merely a reprimand from a superior officer. The PBA contends that placing these documents in personnel files allows the police director to use them during personnel file reviews and when an officer is considered for promotion.

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 defense the Town may have, including whether the grievance was timely filed. State of New Jersey, P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995).

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking 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]

Arbitration will be permitted if the subject of the dispute is mandatorily or 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 policymaking powers. No preemption issue is presented.

A public employer has a prerogative to verify that sick leave is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The employer's right to verify illness includes the right to determine the number of absences that trigger a doctor's note requirement. State of New Jersey. The employer's prerogative may also include conducting a conference with an employee to find out why the employee was absent and to determine whether a disciplinary sanction is warranted. See, e.g., Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991). But once the employer decides

that there has been abuse and imposes a disciplinary sanction, arbitration may be invoked.

In Mainland, counseling was a sanction imposed after a conference to discuss the employee's absence record. We noted that disciplinary sanctions for absenteeism could include counseling, letters of reprimand, docking of pay, withholding of increments, tenure charges, and nonrenewal or termination of nontenured staff members. Consistent with Mainland, in Morris Cty., P.E.R.C. No. 2002-33, 28 NJPER 58 (133020 2001), we held that once an employer determines that an employee has "chronic or excessive absenteeism" and decides that the employee must be "put on notice through a documented verbal discussion, to be confirmed in writing, in an effort to correct the problem," the employer has in essence issued a verbal reprimand. Employees may then invoke a contractual right to contest that notice through binding arbitration.

Consistent with Mainland and Morris, we conclude that arbitration of the grievance challenging the issuance of the letters discussing D'Amore's absenteeism would not substantially limit the employer's policy goal of monitoring and verifying employee use of sick leave. The language of the letters, their context, and their placement in the employee's personnel file indicate an intent to criticize D'Amore for taking too much sick leave. In particular, the counseling documents indicate a

determination that his attendance record has not noticeably improved and that the counseling should be construed as constructive criticism. These counseling documents are more in the nature of a reprimand issued after a review of an employee's attendance record than a memorialization of a conference conducted to determine why an employee has been absent and to ascertain whether any disciplinary action should be taken.

The grievance is also legally arbitrable to the extent it alleges that D'Amore was given a contractually unauthorized form of discipline for sick leave abuse. N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and disciplinary review procedures and allows parties to agree to binding arbitration as a means of resolving certain disciplinary disputes. See Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); Mainland Reg.^{1/} While an employer has a prerogative to establish a sick leave verification policy, those portions of a policy that provide for fines, warnings, suspensions or termination after a specific number of absences move beyond verification and into the area of discipline. Disciplinary disputes arising under such a policy may be arbitrated to the extent permitted by section 5.3.

^{1/} Police officers may negotiate for arbitral review of minor discipline, including reprimands. City of Cape May, P.E.R.C. No. 2001-18, 26 NJPER 434 (¶31171 2000).

That statute authorizes an agreement to arbitrate this dispute over a form of minor discipline.

Finally, in its brief, the PBA states that it is not challenging the implementation of the policy and that the policy will still be in place, even if it prevails in arbitration. We will accept the representation that the PBA does not seek to arbitrate the implementation of the policy, but only its application to D'Amore.

ORDER

The request of the Town of Guttenberg for a restraint of binding arbitration over the application of its Absence Control Policy to Michael D'Amore is denied.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

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

DATED: November 23, 2004
Trenton, New Jersey
ISSUED: November 24, 2004