

P.E.R.C. NO. 2006-85

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROSELLE PARK,

Petitioner,

-and-

Docket No. SN-2006-033

P.B.A. LOCAL NO. 27,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Roselle Park for a restraint of binding arbitration of a petition filed by P.B.A. Local No. 27. The PBA contests a progressive discipline component in the employer's sick leave policy. The Commission concludes that a public employer has a managerial prerogative to verify that sick leave is not abused and to determine the number of absences and situations that trigger a doctor's note requirement. However, the Commission finds that an employer does not have a prerogative to establish a non-negotiable progressive discipline system for violating a sick leave and absenteeism policy. The Commission holds that both the general concept of progressive discipline and the specific steps of a progressive discipline system are negotiable.

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, Niedweske Barber, P.C., attorneys  
(Linda J. Niedweske, on the brief)

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

DECISION

On October 19, 2005, the Borough of Roselle Park petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 27. The PBA contests a progressive discipline component in the employer's sick leave policy.

The parties have filed briefs and exhibits. The Borough has submitted its police chief's certification. These facts appear.

The PBA represents all full-time patrol officers. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article 16 of the agreement governs sick leave. Sections A, B, E, and F provide:

A. Each employee with less than one (1) year of full-time service shall be entitled to one (1) day of sick leave with pay for every month of employment.

B. Each employee with more than one (1) year of full-time service shall be entitled to one hundred twenty (120) hours of sick leave, with pay, per annum

E. Each employee who is absent on account of sickness in excess of two (2) successive working days shall be required to submit to the Borough a written statement from the attending or treating physician verifying the nature and extent of the sickness.

F. The Borough shall have the right at any time to have an employee, who is absent on account of sickness, examined by a physician at the Borough's expense upon his/her return to work in order to report on his/her condition.

The Roselle police force consists of 34 officers and seven civilians. On January 1, 2004, the chief issued a sick time policy in response to what he believed to be an excessive amount of sick leave and hook ups (taking a sick day before or after another leave day). The policy specified a list of progressive sanctions for excessive and increasing use of sick time. No grievances were filed contesting the issuance of that policy.

On February 17, 2005, the chief revised the policy to add two sections. He believed that the revision was necessary to control absences and prevent abuses by adding verification

requirements and imposing discipline. This revised policy stated that "progressive disciplinary action" would be imposed against an employee who had too many sick time "hook-ups" or a pattern of sick time use, but it did not specify what sanctions would be imposed for violations.

On March 14, 2005, the PBA filed a grievance asserting that the policy violated Article 16. The Borough denied the grievance, asserting that it had a managerial prerogative to require verification of illnesses and that it had not limited the proper use of sick leave. The PBA demanded arbitration and identified this grievance to be arbitrated: "The issuance and implementation of February 24, 2005 Departmental sick time usage policy and any action taken thereunder. The policy violates Article 16. . . ." 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 merits of the grievance or any contractual defenses the Borough 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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. No statute or regulation is asserted to preempt arbitration.

The Borough argues that it has a managerial prerogative to verify the proper use of sick leave and to impose progressive discipline, subject to any disciplinary determination being challenged through arbitration. The PBA argues that the Borough's prerogative to verify sick leave does not extend to imposing a progressive discipline system discipline without negotiations.

A public employer has a managerial 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 and the situations that trigger a doctor's note requirement. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶ 26080 1995).

The only issue now in dispute involves progressive discipline.<sup>1/</sup> While an employer has a prerogative to establish a

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<sup>1/</sup> On April 6, 2006, we asked the PBA's attorney to clarify whether there were any issues besides progressive discipline that the PBA believed remained in dispute. No response was filed so on May 4, we informed the parties that this case

(continued...)

verification policy, it does not have a prerogative to establish a non-negotiated progressive discipline system for violating a sick leave and absenteeism policy. N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and review procedures and allows parties to agree to binding arbitration as a means of resolving minor disciplinary determinations against police officers. Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004); Passaic Cty., P.E.R.C. No. 2002-63, 28 NJPER 254 (¶33005 2002). In particular, both the general concept of progressive discipline and the specific steps of a progressive discipline system are negotiable. Morris Cty. College Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985); City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); 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). The revised policy specifies that progressive discipline shall be invoked in certain circumstances and the PBA is concerned that the concept of progressive discipline includes the steps set forth in the previous version of the policy. Whether or not that concern is warranted is a question for an arbitrator, not us, to answer. Ridgefield Park. Accordingly, we will not restrain

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1/ (...continued)  
would proceed to decision on the progressive discipline issue only.

arbitration over the progressive discipline aspects of the revised policy.

ORDER

The request of the Borough of Roselle Park for a restraint of binding arbitration over the progressive discipline aspects of the Borough's sick leave policy is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: May 25, 2006

Trenton, New Jersey