

P.E.R.C. NO. 2006-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-2006-065

P.B.A. LOCAL 304,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Corporation for a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The PBA asserts that the employer's continuing enforcement of its excessive absenteeism policy violated the sick leave provisions of the parties' collective negotiations agreement as interpreted in a recent grievance arbitration award. The Commission concludes that while an employer has a prerogative in the abstract to conduct conferences with employees about their sick leave use, arbitration will be permitted when the record indicates that counseling conferences were in fact a form of discipline imposed for a sick leave violation already found. In this case, an arbitrator has already found that counseling was being used as an automatic form of discipline even if negotiated sick leave benefits were being properly used. The Commission holds that this grievance's contention that the arbitration award is being ignored and employees are still being improperly disciplined may be reviewed through arbitration.

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, Zulima V. Farber, Attorney General of New Jersey (Sharon Price-Cates, Deputy Attorney General, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Marcia J. Tapia, on the brief)

DECISION

On March 9, 2006, New Jersey Transit Corporation petitioned for a scope of negotiations determination. NJ Transit seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The PBA asserts that the employer's continuing enforcement of its excessive absenteeism policy violated the sick leave provisions of the parties' collective negotiations agreement as interpreted in a recent grievance arbitration award.

The parties have filed briefs and exhibits. NJ Transit has submitted the certification of its Director of Administration and Support Services. These facts appear.

The PBA represents NJ Transit police officers below the rank of sergeant. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article II of the agreement states that "all management rights repose in [NJ Transit] except as specifically modified or limited by the terms of this Agreement." Article XVI provides that NJ Transit may establish and enforce reasonable rules and regulations regarding all aspects of the operation of the police department as well as the maintenance of discipline.

Article XIX is entitled Sick Leave. Section 1 provides:

Sick leave is the absence of any employee from work because of illness, accident, contagious disease or necessity to care for a child, spouse or parent when he/she is ill.

Section 3 indicates that sick leave is earned at the rate of ten hours per month (i.e, one day per month for these employees since they work ten-hour shifts), up to a maximum of 100 hours per calendar year. Unused sick leave may be accumulated. Section 4 provides:

An employee who is absent on sick leave for three (3) or more consecutive working days may be required to submit a physician's certificate as evidence substantiating their illness at the discretion of the Employer. The Employer may require an employee who has been absent because of personal illness, as a condition of their return to work, to be examined by a physician at the expense of the employer. Such examination shall establish whether the employee is capable of performing

their normal duties and the return will not jeopardize the health of the employee or of other employees.

Section 8 provides:

The employing officer must be satisfied that the sickness is bona fide. Satisfactory evidence as to sickness, preferably in the form of a certificate from a reputable physician, may be required if abuse is indicated. An employee falsely claiming sick time will be subject to disciplinary action.

General Order 3.11 is entitled Attendance. It became effective on January 1, 1996, was revised on August 23, 1996, and was reevaluated on August 23, 1998.

Section II is entitled Policy. It provides, in part, that "[a]n employee who demonstrates a continued problem with attendance will be subject to disciplinary action, up to and including termination."

Section VII is entitled Medical Documentation. It provides:

A. An employee who is absent on sick leave for three (3) or more consecutive working days may be required to submit a physician's certificate as evidence substantiating their illness at the discretion of the employer.

B. The employer may require an employee who has been absent because of personal illness, as a condition of his/her return to work, to be examined by a physician at the expense of the employer. Such examination shall establish whether the employee is capable of performing his/her normal duties and his/her return will not jeopardize the health of himself/herself or of other employees.

C. If excessive absence is indicated, medical documentation may be required any

time and must be in the form of a certificate from a licensed physician. Failure to provide documentation upon request will result in a denial of sick leave payment and will lead to disciplinary action, up to and including termination.

Section VIII is entitled Excessive Absenteeism. It provides:

A. When an employee is absent from duty claiming illness on two or more occasions within any 30 calendar day period, the Responsible Management Supervisor will discuss and document the reasons for the absences with the employee and a notation will be entered on the employee's attendance record indicating the employee was counseled.

B. Should the employee present medical certification of the illnesses, a notation will be entered to this effect on the employee's attendance record.

C. Any and all notations on the Attendance record will be acknowledged by both the Responsible Management Supervisor and the employee by properly affixing his/her signature in the appropriate area. Should the employee refuse to sign the form, a notation indicating such will be placed on the attendance record. Such a refusal may be witnessed and initialed by another department employee.

D. The mere number of absences does not automatically establish abuse of sick leave.

E. When an employee is absent from duty, claiming personal illness on four (4) or more occasions within any six (6) month period, the Responsible Management Supervisor will review the reasons for the absence with the employee. If discipline is appropriate, the employee will be warned and advised in writing that steps should be taken to improve his/her attendance or he/she may be required

to submit satisfactory evidence as to future illness.

F. When an employee is absent from duty claiming personal illness on six (6) or more occasions within any six (6) month period, the Responsible Management Supervisor will once again discuss the absences with the employee, then advise and reinstruct the employee in writing that future absences as specified below in section "VIII. G" may be excessive and subject to disciplinary action.

G. When an employee is absent on one (1) other occasion within sixty (60) calendar days after receipt of the letter specified in section "VIII. F" above, the Responsible Management Supervisor may continue disciplinary proceedings against the employee for excessive absenteeism.

H. When the employee's absences fall into a pattern regardless of the number of occasions, appropriate disciplinary action will be taken, up to and including termination.

The parties subsequently entered into a consent agreement in an arbitration proceeding concerning this general order.

Paragraph 2 of that agreement stated: "It is acknowledged by the parties that the term 'counseling' under General Order 3.11, is not regarded as discipline by the Employer, except that evidence of counseling [or the lack thereof] may be introduced by either party in a subsequent disciplinary proceeding."

On October 5, 2005, a grievance arbitrator issued an award in a case in which NJ Transit and the PBA framed this issue for his consideration: "Did the Employer violate the terms of Agreements of the parties when it issued counseling notices for

incidents of sick leave use and if so what shall be the remedy?" The arbitrator found a conflict between the parties' agreement and the terms of General Order 3.11. He specifically found that counseling notices had frequently accused officers of violating the order on excessive absenteeism; counseling notices had warned officers that future use, but not necessarily abuse, could lead to "further disciplinary action"; one officer was removed from a favorable assignment, allegedly due to his having used sick leave; supervisors were required to threaten each officer who had used sick leave twice within 30 days "with further disciplinary measures should he use additional sick leave even if he finds the use was obviously justified"; and the counseling process was being used in an improper disciplinary fashion, despite the parties' agreement not to consider counseling a form of discipline. He did not advocate a change in the consent agreement; but he determined that the agreement "must be applied in a manner wherein the threat of unsupportable disciplinary action is eliminated and the counseling not be described as the result of a violation of the exercise of the negotiated right to sick leave benefits other than on the occasion of abuse." The arbitrator thus prohibited such disciplinary uses of counseling; but he did not "preclude a supervisor from meeting with a subordinate officer to explain a denial of a request for sick leave or to discuss his/her medical situation, the purpose and

value of sick leave accumulation or the consequences of falsifying requests for sick leave." In addition, the arbitrator recognized the employer's right to investigate and authenticate a sick leave request even after it was granted and used. The award directed that the modifications outlined in the conclusions should be adopted immediately.

NJ Transit moved to vacate the award in Superior Court and the PBA cross-moved for confirmation. On March 22, 2006, the award was confirmed. NJ Transit has moved for reconsideration of that ruling.

On November 14, 2005, the PBA, believing that the employer had ignored the award issued the month before, filed a class action grievance. The grievance alleges that the employer intimidated officers by enforcing its sick time policy and thus violated Article XIX and "all other articles, policies, regulations, awards, decisions, agreements, guidelines, orders and/or existing law relevant to the instant matter." The PBA seeks an order requiring the employer to cease enforcing policies that it knows violate the agreement and to remove all papers referring to any alleged violations from its files. The grievance did not cite any specific applications of the sick time policy to particular employees.

Saying it lacked specific information, the employer did not issue a decision at the first three steps of the grievance

procedure.^{1/} The PBA demanded arbitration and this petition ensued.^{2/}

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 merits of the grievance or any contractual defenses the employer may have. We specifically decline to consider the contention that the grievance violated or repudiated the negotiated grievance procedure because it allegedly did not contain enough facts to permit investigation.

^{1/} The record does not indicate that the parties discussed the grievance. As evidenced by all the papers filed with us, much could have been said that might have facilitated a less litigious resolution or a narrowing of the issues. The Commission encourages such dialogue. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 187 (¶69 2004), aff'd 31 NJPER 290 (¶113 App. Div. 2005).

^{2/} The employer seeks to have this petition consolidated with two other petitions involving the majority representative of the employer's superior officers and involving the same General Order. We deny that request. Those two cases, unlike this one, involve particularized claims and facts about individual employees.

We also do not consider the merits of the earlier arbitration award, but we do note that this award is relevant to understanding this negotiability dispute since the grievance arose from the PBA's belief that the employer was ignoring it.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters. 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 statute or regulation is asserted to preempt negotiations.

Our well-settled case law provides the framework for analyzing the legal arbitrability of this grievance. 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). That prerogative includes the right to monitor sick leave use and to determine the number of absences that warrant further scrutiny or trigger a doctor's note requirement. New Jersey State Judiciary, P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); State of New Jersey, P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Rahway Valley Sewerage Auth.,

P.E.R.C. No. 83-80, 9 NJPER 52 (¶14026 1982). That prerogative also encompasses conducting conferences with employees who exceed a designated number of absences or conducting a conference with an individual employee to determine why he or she was absent and whether discipline is warranted. Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004); Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). However, determinations to withhold a sick leave benefit may be arbitrated. Piscataway. So too may determinations to impose discipline for sick leave abuse or excessive absenteeism, absent an alternate statutory appeal procedure. City of Union City, P.E.R.C. No. 2006-77, ___ NJPER ___ (¶_____ 2006); City of Jersey City, P.E.R.C. No. 2003-57, 29 NJPER 108 (¶33 2003); Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000). An employer cannot unilaterally determine that an employee abused sick leave without affording the employee an opportunity to contest that determination. Piscataway at 96.

While an employer has a prerogative in the abstract to conduct conferences with employees about their sick leave use, arbitration will be permitted when the record indicates that counseling conferences were in fact a form of discipline imposed for a sick leave violation already found. Guttenberg; Morris Cty., P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001); Mainland.

We note the employer's assertion that counseling under General Order 3.11 is not a disciplinary action, but the arbitrator in the recent case between these parties concluded that counseling was being used as an automatic form of discipline even if negotiated sick leave benefits were being properly used and he made several findings of fact supporting that conclusion - e.g., that the counseling notices themselves accused officers of excessive absenteeism and that superior officers were required to threaten officers being counseled with "further disciplinary action" if they took more sick leave, even if it was justified. The instant grievance was filed six weeks after the arbitrator issued his award and essentially claims that the award is being ignored and that employees are still being improperly disciplined. That contention may be reviewed through arbitration.

ORDER

The request of the New Jersey Transit Corporation for a restraint of binding arbitration 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