

P.E.R.C. NO. 2006-91

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-2006-067

NEW JERSEY TRANSIT POLICE  
SUPERIORS, FOP LODGE #37,

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 New Jersey Transit Police Superiors, FOP Lodge #37. The FOP asserts that the employer's enforcement of its excessive absenteeism policy and specifically its issuance of a counseling notice to a sergeant violated the sick leave and anti-discrimination provisions of the parties' collective negotiations agreement. The Commission concludes that while a public employer has a prerogative to verify that sick leave is not being abused and 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, determinations to impose discipline for sick leave abuse or excessive absenteeism may be arbitrated, absent an alternate statutory appeal procedure. An employer cannot unilaterally determine that an employee abused sick leave without affording the employee an opportunity to contest that determination. The Commission concludes that the allegation that NJ Transit unjustly disciplined the sergeant and violated the contractual sick leave and anti-discrimination provisions 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, C. Elston & Associates, LLC,  
attorneys (Catherine M. Elston, 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 New Jersey Transit Police Superiors, FOP Lodge #37. The FOP asserts that the employer's enforcement of its excessive absenteeism policy and specifically its issuance of a counseling notice to sergeant Joel Baldwin violated the sick leave and anti-discrimination provisions of the parties' collective negotiations agreement.

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 FOP represents all NJ Transit police superior officers below the rank of captain. 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 XV 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 XI prohibits discrimination against any employee because of FOP membership or activity or because of race, creed, color, age, sex, or national origin.

Article XVIII is entitled Sick Leave. Section 1 provides:

Sick leave is the absence of a SO [Superior Officer] 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:

A SO 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 SO is capable of performing his/her normal duties and his/her return will not jeopardize the health of him/herself or of other employees.

Section 7 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.

P.B.A. Local 304 represents NJ Transit's police officers below the rank of sergeant. The sick leave provisions of the contract covering that negotiations unit and this one are essentially the same and all police officers are subject to General Order 3.11. NJ Transit and the PBA entered into a

consent agreement in an arbitration proceeding concerning this 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." However, a grievance arbitrator later found that the counseling process was being used in an improper disciplinary fashion, despite that agreement. The arbitrator 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 was confirmed. NJ Transit has moved for reconsideration of that ruling.<sup>1/</sup>

On December 1, 2005, a lieutenant issued a counseling form to Sergeant Joel Baldwin. The reason for counseling stated: "On Saturday 11/12/05 and Monday 11/28/05 you called off duty

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<sup>1/</sup> The award is described in more detail in a companion case decided today. New Jersey Transit Corp., P.E.R.C. No. 2006-90. Later in this decision we address NJ Transit's request that we not consider this award.

sick/family illness. This created 2 sick occurrences within a 30 day period in violation of General Order 3.11 (Attendance) section VIII-A." Under Corrective Action, the form stated "Future violations of the above policy could result in disciplinary action as noted in General Order 3.11." Baldwin signed an acknowledgment stating that he had been counseled and understood both the incident triggering the counseling and "the corrective action to be taken." Baldwin also received a memorandum entitled Absenteeism dated December 1, 2005 from the lieutenant. The memorandum stated:

I have reviewed your absenteeism record and have found that you are in violation of . . . General Order 3.11, for the second time.

You called out sick on 11/28/05, prior to your RDOs, in violation of Section VIII-(H). You were verbally counseled on 9/26/05 for previous violations of this section.

This letter is to serve as a written warning that future violations may result in discipline.

On December 15, 2005, the FOP filed a grievance on Baldwin's behalf alleging that NJ Transit had violated Articles XI and XVIII by issuing the counseling form. The grievance asserts that Sergeant Baldwin's absences were taken in accordance with the contract; medical documentation was provided for most of the absences; some absences were necessitated by medical procedures for an immediate family member and thus did not constitute "patterns" of absence; and Baldwin had not exceeded his



contractual sick time allotment. The grievance also asserts that General Order 3.11 conflicts with Articles XI and XVIII. The FOP seeks removal of the counseling form and all related documents from Baldwin's personnel file; compliance with the contract and "all other policies, regulations, awards, decisions, guidelines, and/or existing law relevant to this matter"; and compensatory damages should similar violations recur.

The grievance was denied. The FOP 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 merits of the grievance or any contractual defenses the employer may have.<sup>2/</sup> We specifically

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2/ The employer seeks to have this petition consolidated with two other petitions, one involving the FOP's negotiations unit and the other involving the PBA's negotiations unit and both involving the same General Order. We deny that request. This case involves particularized claims and facts  
(continued...)

decline to consider whether the grievance documents raised the claims that the FOP seeks to arbitrate. We also do not consider the merits of the NJ Transit/PBA arbitration award, but we do note that the award is relevant to understanding this negotiability dispute since the FOP is asserting that the counseling form issued to Baldwin violated its agreement in the same way that the arbitrator found the counseling forms issued to PBA-represented employees violated that contract.

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

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2/ (...continued)  
not shared by the other two cases. In analyzing this case, we do not consider a related court proceeding involving the contractual arbitrability of Sergeant Alan West's grievance.

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 impose discipline for sick leave abuse or excessive absenteeism may be arbitrated, 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 counseling conferences with employees about their sick leave use, arbitration will be permitted when the record shows 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 the PBA and NJ Transit concluded that counseling was in fact being used as an automatic form of discipline even if negotiated sick leave benefits were being properly used. The counseling form and accompanying memorandum issued to Baldwin likewise found that he had violated the General Order and warned him that further discipline could ensue if he did not take corrective action. Further, the employer has not addressed the negotiability of the FOP's claim that it discriminated against Baldwin. The contentions that NJ Transit unjustly disciplined Baldwin and violated the contractual sick leave and anti-discrimination provisions may be reviewed through arbitration.<sup>3/</sup> See Washington Tp. Bd. of Ed., P.E.R.C.

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<sup>3/</sup> We disagree with the FOP's assertion that all counseling conferences must automatically be considered disciplinary under guidelines issued by the New Jersey Division of Criminal Justice pursuant to N.J.S.A. 40A:14-181. Under those guidelines, a progressive discipline system may (not must) include counseling as an initial step. We believe  
(continued...)

No. 2004-68, 30 NJPER 135 (¶53 2004) (discrimination claims may be considered by arbitrator in reviewing disciplinary action).

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

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3/ (...continued)  
that counseling may be conducted in a non-disciplinary way for non-disciplinary purposes. Newark. The arbitrator's opinion cites some non-disciplinary purposes.