

P.E.R.C. NO. 2006-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-2006-066

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. The Commission concludes that the allegation that NJ Transit unjustly disciplined the sergeant and violated contractual sick leave provisions may be reviewed through arbitration. The Commission further finds that the discrimination and retaliation allegations in the grievance may also be arbitrated.

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 Maryelyn Conway 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.^{1/}

On March 19, 2004, Sergeant Maryelyn Conway wrote an e-mail to NJ Transit concerning a planned move of the sergeants' office

^{1/} The award is described in more detail in a companion case decided today. New Jersey Transit Corp., P.E.R.C. No. 2006-89. Later in this decision we address NJ Transit's request that we not consider this award.

in Secaucus to a construction area. The e-mail raised several health and safety issues about the move.

On November 15, 2004, Conway was issued a counseling form dated October 31, 2004. The Reason for Counseling stated:

While conducting a periodic review of attendance, it was noted that you are in violation of General Order 3.11 section VIII.H.; to wit, you were absent on 5 occasions in conjunction with your regular day off for the calendar year 2004 up to the above noted date. This constitutes a pattern of illness that needs to be addressed. Will verify with NJT Medical Department the chronic condition. Once verified, no further action to be taken.

Under Corrective Action, the form stated:

Sergeant Conway provided two physician's notes documenting illnesses for August 23 and October 11, 2004. Sergeant Conway advises that she has chronic medical conditions that were documented with the NJT Medical Department upon hire.

Conway signed an acknowledgment stating that she had been counseled and understood the incident triggering "the corrective action to be taken."

On November 16, 2004, a lieutenant called Conway and instructed her to report to NJ Transit's medical department for an examination on November 22 and to provide the department with any medical documentation concerning her condition. A confirming e-mail was sent to Conway.

On November 24, 2004, the FOP filed a grievance on Conway's behalf. The grievance alleges that NJ Transit violated Articles XI and XVIII and states:

By issuing a counseling form to Sgt. Conway on November 15, 2004 that was dated October 31, 2004, for sick days prior to that date, Sgt. Conway has been discriminated against and harassed on the basis of gender. Sgt. Conway never exceeded her sick time allotment since she was hired. She provided documentation for her sick time and/or verbally notified the department of the reason for her use of sick time. On November 1, 2004, Sgt. Conway passed the department's annual physical examination. With regard to her last sick day before the date of the counseling form, Sgt. Conway's personal physician released her to work. Yet, Sgt. Conway was ordered to submit to a fitness for duty examination and, in addition to an e-mail ordering her to submit to said exam and to bring medical documentation in support of her condition, received a personal phone call from Lt. Lucarelli at her home to advise her to report for the exam. Neither the fitness for duty examination, the e-mail requiring documentation of Sgt. Conway's condition, nor the phone call is part of the routine application of the sick leave policy or past practice. In fact, other male officers with more sick time than Sgt. Conway have not been counseled, nor have they been sent for a Fitness for Duty examination due to use of sick time.

The purpose of the examination that Sgt. Conway was ordered to undergo was also not for the purpose stated in the sick leave policy which is to 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 other employees" (Section 4). The counseling form states that Lt. Lucarelli wished to verify with NJT Medical Department Sgt. Conway's chronic

condition. This is not a proper purpose of the sick leave policy. The fitness for duty exam was also improper in light of Sgt. Conway's recent departmental exam and physician's note releasing her to work. This section of the sick leave policy is also applicable to an SO who has been on sick leave for three or more consecutive working days which Sgt. Conway was not. The fitness for duty examination and phone call to Sgt. Conway's home was, therefore, for an improper purpose, a violation of the sick policy (Article XVIII), a violation of past practice, a violation of HIPPA, and constitutes discriminatory and harassing acts against her in violation of Article XI which also acted to violate her privacy.

The counseling is also retaliation for her memo of March 19, 2004 wherein Sgt. Conway put New Jersey Transit on notice of various health violations relating to the Secaucus Transfer. Such retaliation is a violation of Article XI of the collective bargaining agreement.

Finally, the fitness for duty examination, e-mail and phone call to Sgt. Conway's home violated General Order 3.11 in that this policy was never changed when the schedules were altered from 5-2 to 4-3. Such a change will make it more likely that a sick day will fall either before or after a scheduled day off. As such, no "pattern" can be established from Sgt. Conway's use of sick time based upon this outdated policy. Furthermore, there is an arbitrary application of the provisions of this policy including that section for which Sgt. Conway has been charged.

The FOP seeks to have NJ Transit stop violating the contract and discriminating against and harassing Conway, including her use of sick time; expunge the counseling form and related

documents from her personnel file; and pay compensatory damages should similar violations recur.

The grievance was denied and the FOP demanded arbitration. An arbitration hearing was held on November 29, 2005 and another hearing was scheduled for March 15, 2006. 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.^{2/} We specifically 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

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 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.

note that the award is relevant to understanding this negotiability dispute since the FOP is asserting that the counseling form issued to Conway 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 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 issued to Conway likewise found that she had violated the General Order and warned her that her pattern of absences needed to be corrected. The contentions that NJ Transit unjustly disciplined Conway and violated the contractual sick leave provisions may be reviewed through arbitration. Further, the employer has not addressed the negotiability of the FOP's specific claims that it retaliated against Conway because she raised health and safety concerns; discriminated against her because of her sex; invaded her privacy by divulging details of her illness; and improperly required her to undergo a fitness for duty examination for reasons not specified in the General Order and these claims may be arbitrated as well.^{3/} See Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-68,

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

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