

P.E.R.C. NO. 2008-11

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LIVINGSTON,

Petitioner,

-and-

Docket No. SN-2007-064

P.B.A. LOCAL NO. 263,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Livingston for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 263. The grievance alleges that the Township violated the contractual sick leave policy by calling an officer at home. The Commission determines that prohibiting the employer from calling an employee until after three consecutive days would substantially limit the employer's ability to determine if there was sick leave abuse and that an employer's right to verify sick leave does not require a prior finding of sick leave abuse.

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, Genova, Burns & Vernioia, attorneys  
(Andrew P. Oddo, on the brief)

For the Respondent, Arsenault, Whipple, Farmer, Fassett  
& Azzarello, LLP, attorneys (Kelly Daniels, on the  
brief)

DECISION

On May 7, 2007, the Township of Livingston petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 263. The grievance alleges that the Township violated the contractual sick leave policy by calling an officer at home. Because the employer has a non-negotiable prerogative to verify sick leave, we restrain arbitration.

The parties have filed briefs and exhibits. The PBA has submitted a certification from its president. These facts appear.

The PBA represents police officers in the ranks of patrol officer, corporal and sergeant. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration. Article XII is entitled "Sick Leave." Section 4 provides:

The Township may not call or visit an officer's residence until after three (3) consecutive days out sick. However, the Township reserves the right to call or visit an officer's residence if the officer exhibits a pattern of sick time abuse, or calls out sick after denial of holiday and/or vacation time off.

This dispute involves a patrol officer who has been employed by the Township for almost 20 years. A few months before the incident that prompted the grievance, the officer underwent two surgeries in a two-month period for a serious illness.

On July 14, 2006, the officer called in sick for his 7:00 a.m. to 7:00 p.m. shift. At 9:37 a.m., a supervisor called his home to verify his illness.

On July 23, 2006, the officer filed a grievance. According to the grievance, the supervisor said that he was "checking up on my sick status, if I was home and how I was feeling." The grievance alleges violations of Article XII and Article V, Policemen's Rights. It seeks: 12 hours sick leave credit; discipline for the administrators and superior officers involved;

and a procedure for superior officers to follow when employees call out sick.

The grievance was denied at the first step. On July 24, 2006, the chief also denied the grievance. His response stated that the uniform division commander had wanted to know whether an incident of "mass absenteeism" had been pre-planned, caused by a common illness, or was just a coincidence. The response also stated that the grievant's use of sick time extending normal periods of time off displayed a pattern of abuse.

On November 9, 2006, the PBA demanded arbitration. The PBA contends that calling the officer at home constituted discrimination and harassment of the officer and the PBA membership in retaliation for PBA members' filing grievances and complaints. 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 defense the Township may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), permits arbitration 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.<sup>1/</sup> No preemption issue is presented.

A public employer has a non-negotiable managerial prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." Id. at 96. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988). Sick leave verification serves a non-negotiable management need to ensure that employees do not abuse contractual sick leave benefits. Piscataway, 8 NJPER at 97. It does not impinge upon a union's ability to negotiate sick

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<sup>1/</sup> The Township argues that the sick leave provision is illegal and should be stricken from the agreement. We do not strike clauses from agreements. However, if a police or firefighter union seeks to arbitrate a provision that would substantially limit the employer's policymaking powers, we will restrain arbitration.

leave benefits or an individual's ability to use sick leave for proper purposes or prevent an employee from arbitrating a grievance asserting that such leave was improperly denied. Ibid.

The PBA cites City of Passaic, P.E.R.C. No. 89-77, 15 NJPER 93 (¶20041 1989), aff'd NJPER Supp.2d 221 (¶194 App. Div. 1989), in support of its argument that the grievance is permissively negotiable. That case, however, is distinguishable. There, the contract provided that officers out sick or injured were not required to stay at home if their doctor felt it unnecessary, but the officers had to let the desk officer know where they could be reached. The employer issued a policy requiring officers to notify the desk officer of the reason for leaving, new location, phone number at that location, time expected to be out, and time they returned. We held that a grievance challenging those more burdensome reporting requirements was at least permissively negotiable because if the union were to prevail in arbitration, the employer would still know the whereabouts of employees on sick leave and could still demand medical proof of illness. Enforcement of the contract provision would not have substantially limited the employer's ability to verify illness.

Here, prohibiting the employer from calling an employee until the employee has been absent three consecutive days would substantially limit the employer's ability to determine if sick leave abuse was occurring. An employer's right to verify sick

leave does not require a prior finding of sick leave abuse. We accordingly restrain binding arbitration.

Hudson Cty., P.E.R.C. No. 2001-023, 27 NJPER 4 (¶32003 2000), a case cited by both parties, is also distinguishable. In that case, the employer rejected the sick leave verification of 30 corrections officers who did not work mandatory overtime and suspended them for three to five days each. We permitted arbitration over the minor disciplinary sanctions. No such sanction has been imposed here.

We also restrain arbitration over the claim that the employer telephoned the officer for the purpose of discriminating and harassing him and the PBA in retaliation for the PBA membership's filing grievances and complaints. A claim that a prerogative was exercised in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., must be raised through an unfair practice proceeding. See, e.g., Raritan Tp., P.E.R.C. No. 2000-97, 26 NJPER 284 (¶31113 2000). We note that there does not appear to be any dispute over the application of the verification policy such as a denial of sick leave benefits or discipline for sick leave abuse.

ORDER

The request of the Township of Livingston for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: August 9, 2007

Trenton, New Jersey