

P.E.R.C. NO. 2008-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Petitioner,

-and-

Docket No. SN-2007-076

IFPTE, LOCAL 200,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the New Jersey Turnpike Authority for a restraint of binding arbitration of grievances filed by IFPTE, Local 200. The grievances contest the denial of temporary disability benefits to a group of employees and challenge the employer's new temporary disability procedures. The Commission holds that the grievances are preempted by the Temporary Disability Law and its implementing regulations. The Commission also holds that the new requirements to fill out forms are reasonable.

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.

P.E.R.C. NO. 2008-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Petitioner,

-and-

Docket No. SN-2007-076

IFPTE, LOCAL 200,

Respondent.

Appearances:

For the Petitioner, Genova, Burns & Vernioia, attorneys
(Brian W. Kronick, of counsel; Carolyn Buccerone, on
the brief)

For the Respondent, Campbell Lynch, LLP, attorneys
(Brian P. Campbell, on the brief)

DECISION

On June 5, 2007, the New Jersey Turnpike Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of grievances filed by IFPTE, Local 200. The grievances contest the denial of temporary disability benefits ("TDB") to a group of employees and challenge the employer's new temporary disability procedures. We hold that the grievances are preempted by the Temporary Disability Law and its implementing regulations. We also hold that the new requirements to fill out forms are reasonable and restrain arbitration.

The parties have filed briefs and exhibits. The Authority has submitted the certification of its director of human resources. Both parties have asserted facts in their briefs that are not supported by certifications. The Authority alleges problems of abuse with the previous TDB program. Local 200 alleges facts regarding the previous procedural practice of the TDB program. These assertions will not be considered in our decision. See N.J.A.C. 19:13-3.5 (facts asserted in briefs must be supported by certifications based upon personal knowledge).

Local 200 represents the Authority's supervisors. The parties' collective negotiations agreement is effective from September 29, 2003 through September 23, 2007. The grievance procedure ends in binding arbitration.

Article XIII is entitled Leaves of Absence. Section 3 is entitled Temporary Disability Leave Policy and provides TDB of 100% regular salary to eligible employees after exhaustion of all paid leave credit. It also provides, in part:

- d) In all cases, the illness must be substantiated by the employee notifying the Medical Section of the attending doctor's name, address and telephone number. The Medical Section may contact the physician for further details when necessary.
- g) An employee who is on extended Disability Leave must have a medical certification from the Turnpike Authority physician before returning to duty.

On December 27, 2005, the Authority's director of human resources issued a memorandum to all full-time employees. The memorandum set forth new procedures for TDB and eliminated single-day usage. The memorandum stated:

I am writing to you with regard to our Temporary Disability program. There will be no change in the benefits or eligibility at this time. We have a generous disability plan for those employees who are truly disabled and unable to work at the Authority.

As part of our overall policy review, we are planning to provide greater protection and safety for those individuals who need to utilize the disability plan. The changes will take place on January 1, 2006.

You will notice some changes in plan administration:

1. Immediately after filing for Temporary Disability Benefits, individuals will be subject to an independent medical examination coordinated by our third party administrator, Inservco Insurance Services (Inservco).
2. After filing a claim for benefits, individuals will be contacted immediately for a medical examination conducted by Inservco within seven (7) days. Consent to this independent medical examination is a condition of applying for temporary disability benefits. Individuals will be required to bring to this examination all medical and treatment records.
3. Individuals must also execute a HIPAA release form when filing for temporary disability benefits, authorizing the release of additional medical records.

4. Additionally, follow-up examinations will be conducted on a thirty (30) day interval by Inservco and through the Inservco list. The Authority reserves the right to utilize the same medical management for individuals currently on disability.
5. Please note that the Authority will no longer authorize single day usage of the temporary disability benefits.

Inservco will also be helping us to monitor disability utilization to protect all of us against false claims. In order to maintain the high benefit levels at the Authority, the Plan must be utilized in a more efficient manner. Those individuals who are improperly filing or maintaining disability claims will be subject to discipline up to and including termination as well as other appropriate remedies. We look forward to your cooperation as we begin implementation of our plan management.

All individuals utilizing temporary disability benefits will be subject to Inservco supervision except those individuals suffering from chronic diseases or on maternity leave. With your help, we can enhance the quality of life for everyone on the Authority team. We are prepared to continue these benefits for you and look forward to your cooperation regarding the temporary disability benefits implementation.

From September 14, 2006 to January 9, 2007, 14 grievances were filed alleging that employees were not paid for temporary disability absences.^{1/} The grievances seek these remedies:

^{1/} The human resources director's certification and the parties' briefs refer to 12 grievances, but there are 14 grievances submitted as exhibits and 14 grievances listed on the grievance hearing decision.

payment under the TDB program; elimination of the requirement to complete new TDB forms; elimination of the medical examination by the Authority's doctors; and elimination of approvals by the third party administrator. All of the grievants refused to submit to a medical examination by the Authority's doctor. All of the grievances were denied at the first step.

On February 1, 2007, a grievance hearing was conducted before a four-member panel. Two members of the panel voted to uphold the grievances and two members voted to deny the grievances. On February 15, Local 200 demanded arbitration. It identified this issue:

Several members were denied Temporary Disability benefits in violation of Articles I, XII, XIII and XIX. A grievance hearing was held resulting in a split decision. The employer has failed to follow the long standing practice in the application of the benefit and has added new requirements [to] be met before considering their eligibility for the negotiated benefit. As per Article XIV we are submitting the matter to arbitration.

This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park 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 contractual arbitrability or merits of this grievance or any contractual defenses the employer may have.

_____The grievances involve both the application of the TDB policy as well as a broader challenge to the Authority's right to establish portions of the policy itself. Paid injury leave is a mandatorily negotiable subject absent a statute or regulation preempting negotiations. See, e.g., Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124 (¶29062 1998); Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978). A statute or regulation will preempt negotiations over a mandatorily negotiable term and condition of employment only if it "expressly, specifically and comprehensively" establishes how that working condition is to be established. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations).

The Legislature has enacted the Temporary Disability Law, N.J.S.A. 43:21-25 et seq., to protect employees from loss of earnings due to nonoccupational illness or accident. The

Department of Labor and Workforce Development ("DOLWD") has adopted regulations implementing this statutory benefit.

N.J.A.C. 12:18-2.1 allows employers to adopt private disability plans approved by the Division of Temporary Disability Insurance. Private plans must provide benefits that are at least equal to the State plan. The Authority's plan is a private plan. N.J.A.C. 12:18-2.2(h) provides that changes to the amount and duration of private plan benefits shall be made with the approval of the Division.

N.J.A.C. 12:18-2.4 permits an employer to choose a doctor to examine employees and provides:

(a) An employee covered under a private plan shall have the right to choose his or her own attending licensed medical practitioner, but he or she may be required to submit, not more often than once a week, to an examination by a licensed medical practitioner designated by the employer, insurer or organization paying benefits.

(b) Where a covered employee has utilized a licensed medical practitioner, and that licensed medical practitioner has examined the covered employee and has diagnosed him or her with a disabling condition, and where the licensed medical practitioner has certified that the employee's condition renders him or her unable to perform the duties of his or her employment for a given period of time, the employer, insurer or organization paying benefits may only deny benefits to the covered employee during that period so certified where:

1. The employer, insurer or organization paying benefits has contacted the covered employee's personal licensed medical

practitioner and has reached a mutual agreement therewith as to a change in the period of the covered employee's disability;

2. A licensed medical practitioner designated by the employer, insurer or organization paying benefits has examined the covered employee and has determined that the covered employee is no longer disabled. Where such a determination has been made, benefits shall not be paid beyond the date of the examination;

3. A covered employee refuses to submit to or fails to attend an examination conducted by a licensed medical practitioner designated by the employer, insurer or organization paying benefits, in which case the covered employee shall be disqualified from receiving all benefits for the period of disability in question, except as to benefits already paid; or

4. The employer, insurer or organization paying benefits has obtained credible factual evidence showing that the covered employee is performing activities that demonstrate that he or she is able to perform the duties of his or her regular employment. In such instances, benefits shall not be paid beyond the date that such factual evidence is obtained.

N.J.A.C. 12:18-2.6 provides that an employee who is denied benefits under a private plan or who disagrees with a benefits determination has a right to appeal the decision to the DOLWD within one year. N.J.A.C. 1:12A-1.1 et seq. sets forth the procedures for the appeal.

The Authority argues that since TDB is governed by statute and regulation, arbitration of this dispute is preempted. Local 200 argues that the denial of single-day TDB, the requirement to

fill out forms, and other incidental terms and conditions of employment flowing from the required medical examinations are mandatorily negotiable.

We first address whether an employee may challenge a denial of TDB through binding arbitration. The regulatory scheme granting employees TDB provides that an employer may deny TDB under four circumstances. N.J.A.C. 12:18-2.4(b). It further permits employees to appeal a disability decision to the DOLWD. N.J.A.C. 12:18-2.6. This regulatory scheme specifically, expressly and comprehensively sets an employment condition and thereby eliminates the employer's discretion to vary it. Bethlehem Tp. Bd. of Ed.; New Jersey State Judiciary, P.E.R.C. No. 2004-28, 29 NJPER 503 (¶159 2003) (statute sets appeal procedure for statutory benefit). Thus, it is the DOLWD that decides whether the employer appropriately denied TDB. Any appeals of the individual denials of TDB must be filed with the DOLWD.

Next, Local 200 challenges the requirement that employees visit the Authority's doctor within seven days of their claim. Local 200 argues that the conditions under which the medical examinations are conducted could create inconvenience and undue hardship and expense to employees.^{2/}

^{2/} We need not reach whether, as Local 200 suggests, there may be severable, negotiable mileage reimbursement or
(continued...)

N.J.A.C. 12:18-2.4(a) specifically provides that the employer may subject the employee to medical examinations not more than once a week. This regulation has specifically granted to the employer the right to have individual employees see a physician of the employer's choosing and has specifically disqualified employees from receiving TDB if they refuse to see that physician. Thus, arbitration over the choice of doctor is preempted. Bethlehem; see also Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982) (public employer has non-negotiable managerial prerogative to use reasonable means to verify employee illness or disability).

Local 200 also challenges the requirement that employees fill out an application for TDB and a medical release form. We have not been supplied with copies of the forms and have no basis to conclude that they do anything more than supply the third party administrator and physician with the information they need to perform their role as defined by statute and regulation. In addition, we have held that an employer can adopt a reasonable and unintrusive requirement that employees fill out a form certifying they were sick. Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984). We therefore conclude that the

2/ (...continued)
compensation claims associated with traveling to the Authority's doctors. No facts regarding those issues have been presented.

Authority's requirement that employees seeking TDB fill out these forms is not unreasonable. Thus, we restrain arbitration.

ORDER

The request of the New Jersey Turnpike Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Fuller and Watkins voted in favor of this decision. Commissioner Buchanan abstained from consideration. None opposed.

ISSUED: December 20, 2007

Trenton, New Jersey