P.E.R.C. NO. 2012-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Petitioner,

-and-

Docket No. SN-2011-034

NJCSA CUMBERLAND COUNCIL 18,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Millville for a restraint of binding arbitration of a grievance filed by NJCSA Cumberland Council 18. The grievance asserts that the City of Millville violated the parties' collective negotiations agreement when it required a laborer to undergo a fitness for duty examination as discipline for utilizing sick leave. The Commission holds that the City has a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work.

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, Gruccio, Pepper, DeSanto & Ruth, P.C., attorneys (Stephen D. Barse, of counsel)

For the Respondent, O'Brien, Belland & Bushinsky, LLC, attorneys (Jeffrey R. Caccese, of counsel)

DECISION

On October 18, 2010, the City of Millville petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by NJCSA Cumberland Council 18.[1/] The grievance asserts that the City required a laborer to undergo a fitness for duty examination in violation of the parties' collective negotiations agreement and as discipline for utilizing sick leave. We restrain arbitration.

1/ The petition was filed after the hearing on Council 18's grievance that was held on September 17, 2010.

The parties have filed briefs and the City filed exhibits. The City has also filed the certification of Regina Burke, Chief Auditor of the City.[2/] These facts appear.

Council 18 represents the City's full-time non-supervisory civilian employees. The City and Council 18 are parties to a collective negotiations agreement with a term of January 1, 2008, through December 31, 2010. The grievance procedure ends in binding arbitration. Article 14, "Sick Leave", Section 5 provides:

> The City agrees that for non-work related medical conditions, the City will not require a fitness for duty examination from Occupational Health or any other City designated medical provider unless an employee has been absent from work for at least ten (10) working days due to a medical condition. For absences of five (5) days or more, but less than ten (10) days the employee shall submit a City prescribed return to work form from his/her treating doctor, which states clearly that the employee can return to work "with no employment 'restrictions' or 'conditions'."

The City is a Civil Service jurisdiction. The Civil Service Commission job description for "Laborer" is one who "performs varied types of manual and unskilled laboring work and may drive a truck in connection with laboring work on

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2/ The Commission requires that all briefs recite all pertinent facts supported by certification(s) based upon personal knowledge. See N.J.A.C. 19:13-3.6(f)(1). Council 18 did not file a certification.

occasion; does other related duties as required." Examples of work performed by a "laborer" are "loads, lifts, and moves supplies, furniture and equipment; digs trenches and does manual grading; collects rubbish and other refuse; cuts grass; loads and unloads trucks; shovels snow, gravel & sand; digs out stumps of trees; may operate construction and/or maintenance equipment." Burke certified that the grievant was expected to perform all these job duties.

Burke certified that the grievant used 18 sick days between January 12, 2010 and April 7, 2010.[3/] The certification states that the grievant's supervisor expressed concern to Burke that the grievant was having difficulty performing his job duties. Based on that concern and the absences due to illness, the City determined that the grievant should undergo a fitness for duty examination to determine if he could perform the essential functions of his job.

Three grievances were filed with the City by Council 18 on April 15, April 29 and May 13, 2010 claiming that the grievant had been suspended from work on April 8, 2010 and required to undergo a fitness for duty evaluation. The City responded in writing to the grievances and informed the grievant and his

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3/ The grievant used 16 full sick days and four 1/2 sick days during the period. The last absence was for two full days on April 7 and 8, 2010.

employee representative that he was not suspended from work but that he was required to obtain documentation from his personal physician indicating that he was medically cleared to return to work for full duty with no restrictions and to be evaluated for fitness for duty by Occupational Health before returning to work. On May 6, the grievant provided a doctor's note from his personal physician stating that he was cleared to return to work. On May 7 the grievant was evaluated by Occupational Health and was medically cleared and he immediately returned to work.

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.
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> [Id. at 154]

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item

> intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> [Id. at 404-405]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. No preemption argument is asserted.

The City argues that public employers have a managerial prerogative to require that an employee submit to a fitness for duty examination based on the City's legitimate concerns that the grievant's use of sick time and the personal observations of his supervisor and, therefore, this issue is not legally arbitrable.

Council 18 responds that the requirement for the grievant to undergo a fitness for duty exam was for disciplinary reasons as he was only out for two days (April 7 and 8, 2010) when he was ordered by the City to undergo the exam prior to returning to work.[4/] Council 18 further asserts that, even if the City's

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4/ The cases relied upon by Council 18 are inapposite. New (continued...)

actions with respect to the grievant were not disciplinary in nature, the City's violation of the Agreement is legally arbitrable.

We have held that public employers have a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work and we have thus restrained arbitration of grievances contesting such tests. See, e.g., See New Jersey Transit, P.E.R.C. No. 2007-15, 32 NJPER 317 (¶132 2006) (police officers required to conduct firearm re-qualification training after returning from sick leave); City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (¶32017 2000) (requiring a psychological exam); State of New Jersey, P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996)(prerogative to conduct fitness testing); City of Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1996); cf. Bridgewater Tp. v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984) (physical fitness and agility tests for police officers are not mandatorily negotiable). Following these precedents, we hold that the City may unilaterally require that an employee undergo fitness for

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4/ (...continued)
Jersey State Judiciary, P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004) (employees absent for more than 15 days in 12 month period required to submit doctors' notes for future absences); New Jersey Transit, P.E.R.C. No. 2006-89, 32 NJPER 168 (¶76 2006) (counseling of police officers after proper use of sick leave was a form of discipline).

duty testing before being allowed to return to work after using sick leave.

We will accordingly restrain arbitration.

ORDER

The request of the City of Millville for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel and Wall voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: October 27, 2011

Trenton, New Jersey