

P.E.R.C. NO. 2019-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BURLINGTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2018-054

CITY OF BURLINGTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Board's request for a restraint of binding arbitration of a grievance filed by the Association contesting the denial of sick leave. Finding that the Board has a managerial prerogative to verify sick leave with a physician's note, but that the application of a sick leave policy to deny sick leave is arbitrable, the Commission declines to restrain 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, Comegno Law Group, P.C., attorneys
(Jeffrey R. Caccese, of counsel and on the brief;
Alexandra A. Stulpin, of counsel and on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, on the brief)

DECISION

On June 27, 2018, the City of Burlington Board of Education (Board), filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the City of Burlington Education Association (Association). The grievance asserts that the Board violated Article XIII(F) of the parties' collective negotiations agreement (CNA) when the Board required the grievant to submit a physicians's note for his absence on February 8, 2018.

The Board filed a brief, exhibits, and the certification of its Superintendent, Dr. Patricia T. Doloughty, Ed.D. The Association filed a brief.^{1/} These facts appear.

The Association represents all non-supervisory professional employees, secretarial and clerical employees, custodial, utility, maintenance and field persons. The Board and Association were parties to a CNA in effect from July 1, 2015 to June 30, 2018. The grievance procedure ends in binding arbitration.

Article XIII (Absence on Account of Illness), Section F of the CNA, states as follows:

When an employee is in the care of a physician, and absence of more than three (3) days is necessary, the superintendent of schools should be given a physician's certificate of the illness. In each case of absence, the employee shall furnish the office a signed statement, certifying to personal illness, before being allowed pay for days absent on account of personal illness. Statement, certifying to absence, shall be made on official forms prepared by the superintendent of schools, and obtained from the building principals. Record of all absences will be kept on file in the superintendent's office.

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. However, in the Association's brief, counsel states that "there appears to be no dispute over the facts recited by the Board in its brief (Bb at 5) and as certified by Superintendent Doloughty."

Doloughty certifies that the Philadelphia Eagles Super Bowl Parade was scheduled for Thursday, February 8, 2018, which fell on a regularly scheduled school day. In anticipation of the parade, on February 6 at 12:46 p.m., she sent an email communication to all City of Burlington Public School District staff, which provided in pertinent part:

Five (5) personal business day requests were approved for Thursday, February 8, 2018. No more will be approved. Please note Article XII[I] of the negotiated contract, Absence on Account of Personal Business - "Requests for personal days shall be granted upon five (5) calendar days' notice to the superintendent or his designee."

If it is determined that the number of staff members absent on Thursday, February 8th, cause a school emergency or jeopardize opening the schools, all approvals will be rescinded.

Please also be aware that a doctor's note can be requested, by code, for any staff absence. If you do not come to work because of personal illness on Thursday, February 8, 2018, you will be required to provide a doctor's note that indicates that you were unable to come to work due to illness.

According to Doloughty, on February 7, February 8 and February 12, 2018 the grievant was absent for reported personal illness days.^{2/} On February 12, Doloughty's office sent an email communication to the grievant requesting a physician's note for his reported personal illness day on February 8. On February 14,

^{2/} The grievant was not questioned about his absences on February 7 or 12, 2018.

the grievant responded to the request for a physician's note with the following email communication:

"I have been sick with the Flu for the last two weeks. I was out on Wednesday, February 7 and Monday February 12. I did not see a physician due to the fact that they do not want people with the Flu in their offices and it is a viral infection."

On the same day, a written memorandum was sent to the grievant advising him to request in writing by February 22 that the February 8 absence shall be construed as either a personal business absence or an unpaid leave absence.

On March 14, 2018, the Association filed a grievance on behalf of the grievant and all other similarly situated members contesting the denial of sick leave on February 8, 2018 and asserting that such denial is discipline without just cause. On March 27, the grievance was denied by Doloughy as follows:

At our meeting, [the grievant] stated that he did not call for a doctor's appointment and did not see a doctor. He was not diagnosed with the flu. He was not told not to come to the doctor's office. He was not diagnosed with a viral infection.

Board of Education Policy 3212 Attendance States:

"In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave."

N.J.S.A. 18A:30-4 Physician's certificate required for sick leave states:

"In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave."

The grievance is denied because both Board Policy 3212 Attendance and N.J.S.A. 18A:30-4, allow the Superintendent to require a physician's certificate to obtain sick leave.

On March 29, 2018, the Association requested a hearing before the Board concerning the denial of the grievance. The Board affirmed the denial.

On May 21, 2018, the Association filed a demand for arbitration. 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 contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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.

The Board argues that it has a managerial prerogative to verify sick leave with a physician's note, and that N.J.S.A. 18A:30-4 also provides it with the same right. The Association responds that the grievance is not challenging the Board's request for a doctor's note. The grievance challenges the Board's alleged abuse of its sick leave verification policy as applied to the grievant. Specifically, the Board's denial of a sick day to grievant and its alleged failure to insist on a physician visit at Board expense if it was required.

N.J.S.A. 18A:30-4 establishes a board's ability to require a physician's certificate to verify sick leave. Moreover, a public employer's managerial prerogative to use reasonable means

to verify employee illness or disability is well-settled in Commission precedent. See e.g., Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This includes the right to require that employees taking sick leave produce doctor's notes, as well as the right to determine the number of absences that will trigger a doctor's note requirement and the time frame in which absences will be counted. See, e.g., New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Butler Bor., P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). However, the application of a sick leave verification policy, i.e. whether an employee was improperly denied sick leave, may be challenged through contractual grievance procedures. See, e.g., Piscataway Tp. Bd. of Ed.; Teaneck Twp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992). Additionally, the disciplinary penalties for abusing sick leave and the cost of obtaining verification are mandatorily negotiable. See, e.g., Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022

1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); State of New Jersey (Dept. of Treasury).

The Association has clarified that its grievance is not challenging the Board's ability to verify grievant's illness. It is challenging the application of the sick leave policy to the grievant, specifically the denial of sick leave on February 8, 2018 after the Board allegedly failed to insist that he obtain a doctor's note at the Board's expense. Thus, the grievance as framed by the Association is mandatorily negotiable. Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF; Piscataway Tp. Bd. of Ed.

ORDER

The request of the City of Burlington Board of Education for a restraint of binding arbitration of a grievance filed by the City of Burlington Education Association is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: January 17, 2019

Trenton, New Jersey