

P.E.R.C. NO. 2020-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-049

MIDDLESEX EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Board's request for a restraint of arbitration of a grievance filed by the Association. The grievance challenges the imposition of a doctor's note requirement for a teacher's future sick days that designates the principal as the superintendent's proxy to request and receive doctor's notes, and requires that doctor's notes be submitted within three days of returning to work. Finding that the Board has a managerial right to verify illness, including to determine who will administer a doctor's note policy, the Commission restrains arbitration of the challenge to the doctor's note requirement and to the assignment of the principal as proxy to request and receive doctor's notes. Finding that the imposition of a three day period to submit a doctor's note is a negotiable procedural issue, the Commission declines to restrain arbitration on that aspect of the grievance.

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, Sciarrillo, Cornell, Merlino,
McKeever & Osborne, LLC, attorneys (Dennis McKeever, on
the brief)

For the Respondent, Detzky, Hunter & DeFillippo, LLC,
attorneys (David J. DeFillippo, of counsel and on the
brief)

DECISION

On February 19, 2019, the Middlesex Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Middlesex Education Association (Association). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) by requiring the grievant to submit a doctor's note within three days of an absence when taking sick leave and designating the principal as the proxy to receive the doctor's notes rather than the superintendent.

The Board filed briefs, exhibits, and the certification of attorney Paul E. Griggs. The Association filed a brief,

exhibits, and the certification of its President, Robert Delude. These facts appear.

The Association represents all full-time and part-time certified personnel and all non-certified personnel (with certain exceptions enumerated in the CNA) employed by the Board. The Board and Association are parties to a CNA in effect from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration.

Article 18.1.3 of the CNA provides:

It shall be the obligation of the employee to certify that the absence resulted from personal illness. Upon request, the employee shall present a physician's statement of illness to the Superintendent.

The grievant is a tenured teacher assigned to the Von E. Mauger Middle School for the 2018-2019 school year. On November 2, 2018, Superintendent Madison issued a letter to the grievant stating:

It has been brought to my attention that you have exceeded your 2018-19 allotment of sick and personal days (see attached). At this point you do not have any remaining paid time off and in fact have 4 days without pay thus far this school year.

On September 11, 2018 you were informed by Mr. Sirna that a doctor's note will be necessary each time you are absent. As per Article 18.1.3 in the negotiated agreement, "It shall be the obligation of the employee to certify that the absence resulted from personal illness. Upon request, the employee shall present a physician's statement of illness to the Superintendent." To date, 4 absences do not have an associated

physician's statement: September 5, 20, 21, 25, 2018. You will have until November 12, 2018 to provide the necessary physician statement for each absence.

The note dated October 30, 2018 from Dr. Srinivasa Potluri, is not adequate to excuse possible future absences. Please be advised that for any future absences, your pay will be deducted and you will need a specific physician's statement submitted to Mr. Sirna within 3 days of your return to work. Moving forward, I designate Mr. Sirna as my proxy to request and collect all documentation from your physicians.

On November 14, 2018, the Association filed a grievance alleging that the November 2 letter violated the CNA by requesting that the grievant provide doctor's notes for future absences, requiring that the doctor's notes be provided within three days of her return to work, and designating Principal Sirna as the Superintendent's proxy to request and receive doctor's notes. The Board held a Step 3 grievance hearing on January 7, 2019 and denied the grievance on January 10. On January 16, the Association filed a Request for Submission of a Panel of Arbitrators. 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.

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.

[Id. at 404-405.]

The Board asserts that the grievance is not arbitrable because it has a managerial prerogative to verify employee illness by requesting a doctor's note for future absences. It argues that the CNA is silent as to a timeline to submit the note, but that it may request a doctor's note at any time. The Board contends that nothing in the CNA or the law precludes it

from delegating the Superintendent's sick leave verification responsibility to the building principal as her designee.

The Association asserts that the requirements that the grievant submit a doctor's note for any future absences (rather than upon request per the CNA) and that she produce said doctor's note within three days of her return to work (despite no such time limit in the CNA) are arbitrable challenges to the Board's application of its sick leave verification policy. It argues that the directive to submit doctor's notes to Principal Sirna instead of the Superintendent violates the CNA.

N.J.S.A. 18A:30-4 establishes a school board's ability to require a physician's certificate to verify sick leave. Moreover, a public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to verify sick leave at any time. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985);^{1/} Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The employer's right to verify illness includes the right to determine the number of absences and the situations that trigger a doctor's

^{1/} In Elizabeth, the Appellate Division's published decision affirmed our analysis of the issue, stating: "By holding that the city had a managerial prerogative to require sick leave verification at any time, the commission protected the governing body's interest in identifying and dealing with sick leave abuse." Id. at 386.

note requirement, regardless of whether the employees have exhausted their earned sick leave. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); State of New Jersey, P.E.R.C. No. 2000-32, 25 NJPER 448 (¶30198 1999); and Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000). This prerogative encompasses requiring employees suspected of abusing sick leave to bring in a doctor's note for any future absence. See, e.g., New Jersey State Judiciary (Ocean Vicinaje), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); Burlington Cty., P.E.R.C. No. 97-3, 22 NJPER 274 (¶27147 1996); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); Spring Lake Bor., P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988); and Rahway Valley Sewerage Auth., P.E.R.C. No. 96-69, 22 NJPER 138 (¶27069 1996).

Here, requiring the grievant to submit a doctor's note for future absences is part and parcel of the Board's managerial prerogative to prevent abuse of sick leave by verifying illness at any time. Thus, the grievance is not arbitrable to the extent it contests the Board's decision to require a doctor's note from the grievant for future absences.

However, "the application of a policy, the denial of sick leave pay, sick leave procedures, penalties for violating a policy, and the cost of a required doctor's note are all mandatorily negotiable" and may be challenged through contractual

grievance procedures. Monmouth Cty. Sheriff's Office, P.E.R.C. No. 2016-50, 42 NJPER 354 (¶100 2016), quoting City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992). Specifically, the Commission has held that the deadline by which an employee is required to submit a doctor's note to verify sick leave may be a negotiable and arbitrable procedural issue. County of Passaic, P.E.R.C. No. 2002-63, 28 NJPER 234 (¶33085 2002). In Passaic, the union contested a sick leave policy requiring employees to submit doctors' notes for weekend call outs and docking their pay if they did not. The Commission restrained arbitration over the challenge to the employer's prerogative to verify weekend sick leave call outs via doctor's note, but declined to restrain arbitration over the policy's directive that "employees who do not substantiate their illness will be docked accordingly and may be subject to disciplinary action." The Commission held:

We do not believe that the employer's interest in seeking to reduce sick leave abuse compels an automatic docking of pay in all cases, potentially including some cases where workers were truly ill but could not see a doctor on a weekend. Visiting a doctor on a Saturday or Sunday may not be possible if emergency care is not needed and a doctor's office is closed; an inability to obtain a doctor's note may be excusable in some instances.

[Passaic, 28 NJPER 235.]

Here, the Board has instituted a 3-day period in which the grievant is required to submit a doctor's note or be docked pay.

Consistent with Passaic, we find that the issue of how many days Association members have to submit a doctor's note following use of sick leave is a negotiable procedural issue that is severable from the Board's prerogative to verify illness. Therefore, that aspect of the grievance challenging the 3-day period to submit a doctor's note is arbitrable.

Finally, we restrain arbitration of the Association's challenge to the Board's decision to have the principal request and receive doctor's notes as a proxy for the superintendent. We find that the first prong of the Local 195 test is not met because the identity of the managerial employee designated to receive doctor's notes does not intimately and directly affect the work and welfare of Association members, and even if it did, the employees' interests in the matter would be outweighed by the significant interference to the Board's governmental policy interest in preventing sick leave abuse caused by preventing the Board from determining who will most efficiently administer its sick leave verification policies.

ORDER

The request of the Middlesex Board of Education for a restraint of binding arbitration is granted to the extent it contests the Board's decision to require a doctor's note from the grievant for future absences and designates the principal as the superintendent's proxy to request and receive doctor's notes, but

denied to the extent it contests the Board's imposition of a 3-day period to submit the doctor's note.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: August 15, 2019

Trenton, New Jersey