

P.E.R.C. NO. 2020-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Petitioner,

-and-

Docket No. SN-2019-042

UNITED SERVICE WORKERS UNION,
IUJAT, LOCAL 255,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of Local 255's grievance contesting the Township's issuance of memoranda informing certain employees of their allegedly excessive/abusive sick leave usage patterns and requiring them to provide a doctor's note for future sick days for the remainder of the year. Finding that a public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to require employees suspected of abusing sick leave to submit a doctor's note for future use of sick leave, and that the memoranda was non-disciplinary counseling intended to notify employees of their sick leave usage and inform them of the sick leave verification policy that would be applied, the Commission restrains 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, Cleary, Giacobbe, Alfieri & Jacobs
LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Rothman, Rocco, LaRuffa LLP,
attorneys (Eric J. LaRuffa, of counsel)

DECISION

On January 16, 2019, the Township of Old Bridge (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the United Service Workers Union, IUJAT, Local 255 (Local 255). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA) by issuing disciplinary memoranda to certain unit members and requiring them to provide a doctor's note for every sick day used.

The Township filed a brief, reply brief, exhibits, and the certification of its Human Resources Manager. Local 255 filed a

brief, exhibits and the certification of its Labor Relations Representative/Business Agent.

The Township requested an interim restraint of a binding arbitration scheduled for July 16, 2019, pending disposition of the scope of negotiations petition by the Commission. On May 23, 2019, a Commission Designee granted that request. I.R. No. 2019-25, 45 NJPER 399 (¶107 2019). The Designee made findings of fact and conclusions of law with citations to and discussion of pertinent Court and Commission decisions. We summarize those findings and conclusions.

Local 255 represents the Township's public works and sanitation employees. The Township and Local 255 are parties to an MOA effective from January 1, 2016, through December 31, 2020, that was ratified on April 4, 2018.

Article IX, section B of the CNA provides for 13 or 15 sick days per year that may be accrued from year to year.^{1/} Article IX, section H of the CNA requires any employee out sick more than three consecutive days to provide a doctor's note verifying the illness and expected date of return.

On August 27, 2018, Avril Limage, the Township's Human Resources Manager generated a report purporting to show the use

^{1/} Depending on their date of hire, employees received either 15 or 13 paid leave days per years, four and two of which, respectively, were designated as personal leave. Unused leave could be accrued.

of sick leave by all Township employees to discern any abuse, or excessive use, of sick time. Limage identified and flagged employees engaging in the following patterns of behavior: (1) taking sick time on Fridays and/or Mondays; (2) taking sick leave the day before and/or after a holiday; and (3) employees generally using an excessive amount of sick time in the 2018 calendar year. Limage considered those employees who had used ten or more days of sick leave in 2018 by end of August to have taken excessive sick leave because at that point they had exhausted most of their annual allotment of sick leave.

On September 11, 2018, after identifying alleged unusual absence patterns and excessive sick leave, counseling/performance memoranda were issued. The counseling notices referenced the employees' excessive use of sick leave and advised that a doctor's note verifying any alleged illness would be required for all future sick leave used during the 2018 calendar year. One of those counseling notices provides:

This memorandum serves as a counseling notice for your abuse/chronic and excessive use of sick leave (use of more than 10 full days used in 2018 as of 9/10/2018 without a medical note or FMLA leave documentation on file and/or multiple patterned absences).

Employee's performance is not acceptable for the following specific reasons:

A review of your sick time usage indicates that to date, you have used 20 sick days for the year. In addition, you have repeatedly used sick time on Fridays and/or Mondays as

well as in conjunction with vacation and holidays. Use of sick days to extend weekends, holidays and/or vacations is prohibited.

This conduct demonstrates a preliminary pattern of sick leave abuse and is prohibited by the Township. The excessive and abuse of sick leave not only disrupts the delivery of services to the Township of Old Bridge, but also negatively affects your co-workers. In order for your department to function and be productive, each employee's attendance is very important.

Be advised that you shall be required to produce a doctor's note verifying your illness for all future sick leave absences during the 2018 calendar year. Please provide all doctors' notes to the Manager of Human Resources.

Should you have any questions or concerns, please do not hesitate to contact me.

On September 17, 2018, Local 255 filed a grievance contesting the sick leave memoranda as violating the contract by creating a "warning level" for use of more than ten sick days in a calendar year, imposing a doctor's note requirement for single sick days, and questioning the use of sick leave used on Mondays, Fridays, or before or after holidays. The grievance requested that the memoranda be rescinded. The Township denied the grievance and Local 255 filed a request for arbitration with the Commission (Docket No. AR-2019-324). The request states:

"The Employer violated the collective bargaining agreement by requiring certain bargaining unit employees to provide a doctor's note for every sick day used."

The Township's scope of negotiations petition ensued.

The Commission's scope of negotiations 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.

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.]

Scope of negotiations determinations must be decided on a case-by-case basis. See Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998).

The Township asserts that it has a managerial prerogative to require verification of sick leave to prevent abuse. It maintains that non-disciplinary counseling memoranda are not arbitrable. Citing Roselle Park Bor., P.E.R.C. No. 2006-85, 32 NJPER 162 (¶72 2006), it argues that the employer has the right to determine the number of absences and the situations that trigger a doctor's note requirement, and may require sick leave verification at any time. The Township asserts that counseling memoranda to notify employees of performance deficiencies, not to impose discipline, are not arbitrable.^{2/} It maintains that the counseling memoranda were not designed to criticize or penalize, but to notify of performance deficiencies, specify the manner of deviation, and attempt to improve performance in the area of

^{2/} The Township cites Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008); Monmouth Cty. Pros., P.E.R.C. No. 2014-91, 41 NJPER 61 (¶18 2014); and Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295 (¶83 2017).

attendance/sick leave usage by noting how the deficiencies would be monitored going forward.

Local 255, citing Delaware Valley Regional Bd. Of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295 (¶83 2017), asserts that the tone and text of the "counseling" notices are disciplinary and were issued without just cause. It argues that the Township lacked justification to require that the employees who were issued notices be required to verify every day of sick leave usage whereas their co-workers only have to do so after three consecutive sick leave days.

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 regardless of the amount of days used. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This prerogative encompasses requiring employees suspected of abusing sick leave to bring in a doctor's note for any future absence. See, e.g., 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); and Rahway Valley Sewerage Auth., P.E.R.C. No. 96-69, 22 NJPER 138 (¶27069 1996) ("the Authority's decisions to place certain employees on a 'sick list' and to

require a doctor's note to verify any future absence is not in and of itself disciplinary or otherwise mandatorily negotiable.")

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).

After reviewing the applicable precedents, the Designee observed:

Here, the Township adopted a policy that certain patterns of sick leave usage, such as at least ten sick days utilized before the end of the year, and patterns of Mondays/Fridays or days before/after holidays being taken off, would trigger a doctor's note requirement for any future sick leave days during calendar year 2018. The memoranda informing the affected employees did not impose discipline, but notified them of their sick leave usage patterns and why they would therefore be required to submit a doctor's note for future sick days for the remainder of 2018.

* * *

Furthermore, the Commission has stated that such counseling, which the employer has represented as non-disciplinary, cannot be viewed as prior discipline for purposes of progressive discipline in any future disciplinary proceeding. See City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); and West Windsor-Plainsboro

Reg. Bd. of Ed., P.E.R.C. No. 97-99, 23 NJPER
168 (¶28084 1997).

[I.R. No. 2019-025 at 12-13]

The Designee concluded that arbitration should be restrained "because the Township had a managerial prerogative to issue memoranda to certain unit members identifying their sick leave usage patterns and notifying them that future sick leave would require a doctor's note."

We concur with the Designee's analysis and will make the restraint of arbitration permanent.

ORDER

The Township's application for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni recused himself.

ISSUED: August 15, 2019

Trenton, New Jersey