P.E.R.C. NO. 93-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and- Docket No. SN-93-32

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, BRANCH NO. 9,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains, in part, binding arbitration of a grievance filed by the Firemen's Mutual Benevolent Association, Branch No. 9 against the City of Elizabeth. The grievance challenges a general order concerning sick leave. Arbitration is restrained to the extent the grievance challenges a requirement that firefighters submit medical verification if they are sick for more than two days or nights or if they have used more than five sick days during the year. On this record, the Commission declines to restrain arbitration over the portion of the grievance challenging the requirement that sick employees be examined by the City's physician.

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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys (Robert E. Murray, of counsel; Cherie L. Maxwell, on the brief)

For the Respondent, LaCorte, Bundy & Varady, attorneys (Robert F. Varady, of counsel)

DECISION AND ORDER

On October 26, 1992, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Firemen's Mutual Benevolent Association, Branch No. 9 ("FMBA"). The grievance challenges a general order concerning sick leave.

The parties have filed certifications, exhibits, and briefs. These facts appear.

The FMBA represents the uniformed members of the City's fire department except for certain superior and probationary

officers. Rule 2318 of the department's rules and regulations states that "verification of sick leave shall be determined by provisions in the Collective Bargaining Agreement." Article 27 of the parties' collective negotiations agreement provides:

> The present sick leave plan pertaining to non-occupational injuries and illness shall continue in effect for the duration of this Agreement. The City may require proof of illness of any employee on sick leave.

According to the FMBA, the plan for sick leave incorporated by the collective bargaining agreement includes these elements:

1. A firefighter had to call in sick at least 1 hour before his tour of duty was to begin.
2. Verification of illness was required only if a firefighter missed more than 1 shift (1 shift equals 2 consecutive days).
3. No verification was required for a cumulative number of sick days whether they were consecutive or not.

The grievance procedure ends in binding arbitration of certain disputes.

On August 15, 1991, the Elizabeth Fire Department adopted a document entitled Sick and Injury Leave Policy Statement. The document states, in part:

> <u>Sick Leave</u>
>
> Any member who:
>
> 1. Is out sick for more than two (2) days or nights, or
> 2. Has used more than five (5) sick days during the year, must see the Department Physician for a Disability Report. A member out sick for one (1) or two (2) days may return to work without clearance from the Department Physician. You shall also be guided by #2316 to #2326 of the Rules and Regulations.

> Dr. Garcia, except when he is on vacation, can be seen on Monday, Tuesday, Thursday and Friday mornings. The member shall call his office (354-4371) in the morning for an appointment. When Dr. Garcia is on vacation, call the secretaries' office for alternate arrangements.
>
> Disability Reports will be submitted the first week of sick leave and at least biweekly after the first report. Disability Reports shall be given to your company and forwarded to the Duty Chief. Biweekly in this case means every two weeks.
>
> Injury Leave
>
> * * *
>
> Before returning from injury leave of more than two (2) days the member will see the Department Physician for clearance to return to work. Bring a copy of the treating physician's report for Dr. Garcia to see.

The City pays the cost of any required examinations.

The Fire Director has certified that a copy of this policy was provided to the FMBA president in May or June 1991, and that the policy became effective on August 15, 1991. The current president, who assumed office in June 1992, has certified that the policy was not submitted to the FMBA for correction or approval and that the policy was never instituted or enforced. The president asserts instead that the parties negotiated a policy calling for verification if, and only if, an employee was absent more than two consecutive days.

On August 28, 1992, the attorney for the FMBA wrote a letter to the Fire Director. That letter objected to a proposed new policy calling for firefighters absent five days or more in a year

to report to the City physician on the day the firefighter calls in sick. The letter stated that it might not be possible to report to the City physician on the day a firefighter was ill since many firefighters live outside the City; a firefighter might prefer to go to his own doctor for a diagnosis and treatment; and the City physician might not be impartial. The letter also asserted that the new policy violated Article 27 which incorporated the sick leave plan in effect at the time the agreement was executed and which allegedly permitted the employees to visit their own doctor if verification was requested. The letter also protested communications between the department and the physician chosen to examine firefighters to determine whether they could return to light duty; the letter cites one instance in which a deputy chief allegedly called the doctor to advise him that certain light duty tasks were available to an individual about to be examined.

On October 1, 1992, the FMBA demanded binding arbitration "in regards to the issue of the General Order changing the sick leave and injury policy." 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 merits of the grievance.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

We will not restrain arbitration of a grievance involving firefighters unless the alleged agreement is preempted or would substantially limit government's policymaking powers.

The City in its brief generally asserts that it has a prerogative to establish a policy requiring employees to verify sick leave and in its reply brief specifically asserts that it has a prerogative to require verification after five days of absence during the year. The FMBA asserts that it contests the City's unilateral adoption of a sick leave policy, not the initiation of such a policy.

A public employer has a non-negotiable right to require an employee to provide proof of illness, including a doctor's verification, in order to be eligible for sick leave benefits. See, e.g., South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982).[1/] We have thus restrained binding arbitration over requirements that police officers and firefighters verify sick leave. City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988). But the application of a policy to deny sick leave benefits and the payment for doctors' visits are mandatorily negotiable issues. Piscataway; City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985).

1/ The Commission decision in Piscataway rejected the Hearing Examiner's recommendations relied upon by the FMBA.

Here, the City had a non-negotiable right to establish a policy requiring verification of illness of any employee who has been out more than two consecutive days or nights or more than five days during the year. From a negotiability standpoint, it is immaterial that the City had not previously required employees absent more than five days to submit doctors' notes. Camden; Jersey City Med. Center, P.E.R.C. No. 87-5, 12 NJPER 602 (¶17226 1986). We will therefore restrain binding arbitration over that requirement.

The general order also requires sick employees to be examined by the City's physician. The employees have a substantial interest in being examined and treated by their own physicians and there is no countervailing indication in the record that the City's policymaking powers would be substantially limited by permitting employees to have their illnesses examined, treated, and verified by their own physician.2/ Nor does this case involve a dispute over the bona fides of a particular verification. On this record, we therefore decline to restrain arbitration over this aspect of the grievance.

2/ We distinguish a situation in which the employer seeks to ensure that an employee who has been absent for a period of time is fit to return to duty.

In the absence of any other specific arguments, we decline to consider the negotiability of the injury leave section of the policy or any other aspects of the grievance.

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is granted to the extent the grievance challenges the requirement that firefighters submit medical verification if they are sick for more than two days or nights or if they have used more than five sick days during the year. The request for a restraint of binding arbitration is otherwise denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: March 29, 1993
Trenton, New Jersey
ISSUED: March 30, 1993