P.E.R.C. NO. 88-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF PHILLIPSBURG,

Petitioner,

-and- Docket No. SN-87-58

P.B.A. LOCAL NO. 56,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the Town of Phillipsburg to restrain arbitration of a grievance filed by PBA Local 56. The grievance alleges that the Town violated the parties' collective negotiations agreement when it placed Patrolman Dale Dunfee on unpaid leave for four days. The Commission finds that the grievance involves an application of the Town's managerial prerogative to insure that employees are fit for duty and specifically Dunfee's claim that he lost compensation for a period when he was allegedly fit to work and was willing to and did cooperate with the Town's efforts to check on his physical condition.

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Appearances:

For the Petitioner, Peter J. Miller, Town Manager

For the Respondent, Loccke and Correia P.A.
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On March 13, 1987, the Town of Phillipsburg ("Town") filed a Petition for Scope of Negotiations Determination. The Town seeks a restraint of arbitration of a grievance filed by Patrolman Dale Dunfee, a member of P.B.A. Local No. 56 ("PBA"). The grievance alleges that the Town violated the collective negotiations agreement when it placed Dunfee on unpaid leave for four days.

The parties have filed briefs and documents. These facts appear.

The PBA is the majority representative of all full-time personnel in the police department, excluding all superior officers. The parties entered an agreement effective from January 1, 1986 through December 31, 1987. The grievance procedure ends in binding arbitration.

On December 13, 1986, Dunfee visited a physician, Dr. Kozakowski, for treatment of a persistent headache. When medication did not relieve the condition, Dunfee saw the doctor again on December 16 and was advised to wear a soft cervical collar.

On December 17, Dunfee took a half day of sick leave. Before leaving work Dunfee was advised by Sergeant Marino that he had exhausted his sick leave and would be required to submit a doctor's note for his half-day absence on December 17, before again reporting for work.

Dunfee obtained the collar after work and wore it at home until December 19. He reported for work on December 20, wearing the collar but without a doctor's note.[1/] Lieutenant Erdie would not allow Dunfee to work with the collar, believing that it restricted Dunfee's ability to turn his head and it didn't look good. Dunfee disagreed, but offered to work without the collar. Erdie sent him home advising him to get a note from his doctor stating whether he could work while wearing the collar.

Shortly thereafter, Erdie phoned Dunfee at home and told him that the chief of police had directed that Dunfee not be allowed to work on December 21 and 22, and that the chief would call Dunfee on the 22nd to direct him to a doctor of the Town's choosing for an examination.

1/ Dunfee's grievance states that the collar had helped his condition and he felt he would continue to improve by wearing the collar at work.

The chief phoned Dunfee on the 22nd and advised him to see his own physician and obtain a note concerning his ability to work. Dunfee called his doctor that afternoon and picked up the note the next day.[2/] Dunfee was in court on the 23rd and was unable to call either the chief or Erdie. His wife took the note in to the department later that day and presented it to Lieutenant Stettner. Stettner advised her that Dunfee should not come in on December 24 and that the chief would phone him.

On December 24, Dunfee phoned the chief. The chief stated that he disagreed with Dr. Kozakowski's opinion and he would still not allow Dunfee to work. The chief had told Dr. Kozakowski that the Town believed that an officer wearing a cervical collar could not discharge his duties.[3/]

Dunfee obtained a note from Dr. Kozakowski dated December 29, stating that Dunfee was able to work without any limitation.[4/] Dunfee was permitted to resume his duties on December 29. When he received his next paycheck he had been docked

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2/ Dunfee stated in his grievance that but for Lt. Erdie's statement that the chief wanted Dunfee to be examined by a Town-selected physician he would have seen his doctor on December 20 to obtain a note.

3/ Sometime between December 20 and December 23, the Town manager had phoned the Town's orthopedic surgeon who advised that a soft cervical collar would impede an officer's ability to perform his duties. Dunfee was not seen by the Town's physician.

4/ A more detailed report about Dunfee's condition dated January 3, 1987 was subsequently submitted.

four days pay, three days of regular pay for December 22, 24 and 25, and holiday pay for Christmas 1986.

On January 23, 1987 Dunfee filed a grievance alleging that he was able to work beginning December 20, 1986. He sought to be paid the wages he was docked. The grievance alleged that the Township had violated the agreement by placing him on an involuntary leave without pay (Article IX) and had abused its right to determine whether an officer was fit for duty (Article XXIIA.2.). The chief denied his grievance.

A hearing was conducted before the Town manager on February 24, 1987. On March 3, he issued a report denying the grievance.[5/] The PBA demanded arbitration and this petition ensued.

The Town argues that it has a non-negotiable managerial right to require proof that an employee is physically sound before allowing him to return to active duty.

The PBA states that the grievance does not contest the right to require verification, but contends the application to

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5/ The report distinguishes between the directive to Dunfee to submit proof that he was sick or disabled when he took a half-day sick leave on December 17 and proof that he was fit for duty when he reported for work on December 20. The grievance neither challenges nor states whether any action was taken against Dunfee for failure to produce verification that his December 17, 1986 absence was due to illness or disability. We assume, but do not know, that Dr. Kozakowski's December 29, and January 3, 1987 notes refer to Dunfee's condition on December 17, since treatment began before that date.

Dunfee, which resulted in four days of lost wages, is arbitrable. It also contends that the Town's actions delayed Dunfee's request to his doctor for a note attesting that he was fit for duty.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

> 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. [78 N.J. at 154]

Accordingly, we only determine whether the Town could legally agree to arbitrate the grievance. We do not determine whether it had a contractual right to place Dunfee on unpaid leave.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters.[6/] The Court stated:

6/ The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

> 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. [Id. at 92-93; citations omitted]

Thus this grievance is arbitrable if it concerns either a mandatory or permissive subject for negotiations.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982), we held that a public employer has a managerial right to implement reasonable measures to verify employee illness or disability. This principle also extends to an employer's right to verify that an employee's illness or disability has abated by the time he reports back for duty. See Bor. of Park Ridge, P.E.R.C. No. 87-55, 12 NJPER 851, 853 (¶17328 1986); Bor. of Sayreville, P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986); City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198

N.J. Super. 382 (App. Div. 1985); N.J.A.C. 4:1-17.18(d) (allowing a civil service employer to require an employee returning from sick leave to be examined by a physician to determine fitness for duty); cf. City of Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1987). We further held in Piscataway that while "the mere establishment of a verification policy is the prerogative of the employer, the application of the policy may be subject to contractual grievance procedures." 8 NJPER at 96. A matter predominantly involves the application rather than the establishment of a sick leave verification policy when the employer has formulated the policy; the employee has complied with the policy; and the employer has then decided to withhold sick leave benefits from the particular employee. See Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984), where we held not arbitrable a grievance contesting denial of sick leave based upon an employee refusal to supply requested verification. In Newark the grievance challenged the employer's right to establish a verification program and not a dispute over whether the employee was eligible for sick leave.

The Town has the managerial prerogative to insure that employees are fit for duty. Therefore, under the circumstances, it had the right to send Dunfee home on December 20. The Town had a concern about Dunfee's fitness: he came to work wearing a cervical collar. Therefore, the PBA could not have submitted to arbitration a grievance concerning not being paid for this day. Dunfee did not have any sick days and the Town acted pursuant to its managerial prerogative in sending him home.

But this case does not involve that question. Rather, it involves the Town's application of that prerogative. It specifically involves the Town's actions in docking him on December 22, 24 and 25. Dunfee did not refuse to produce verification of his fitness for duty on those dates. Instead Town officials allegedly delayed Dunfee's attempt to verify his condition and then disagreed with his doctor's assessment. This dispute primarily involves a disagreement between the officer's physician and Town officials as to whether the officer was fit for duty on those days.7/ Dunfee lost compensation for a period when he was allegedly fit to work and was willing to and did cooperate with the Town's efforts to check on his physical condition.

ORDER

The Town's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
March 18, 1988
ISSUED: March 21, 1988

7/ Dunfee was required to verify his December 17, 1986 illness. He did not bring the required verification with him when he reported to work on December 20. Had the grievance challenged a loss of pay for his failure to supply the verification, we would restrain arbitration of that portion of the grievance. See Newark.