P.E.R.C. NO. 84-141

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Petitioner,

-and-

Docket No. SN-84-61

LOCAL UNION 692, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the Township of West Orange for a restraint of binding arbitration of three grievances that Local Union 692, IAFF, AFL-CIO has filed. The Commission restrains binding arbitration of a grievance concerning the establishment of a sick leave verification policy except to the extent the grievance may raise the mandatorily negotiable issue of who pays for any required medical examinations. The Commission declines to restrain binding arbitration of a grievance concerning the carrying-over of personal days which an employee allegedly was not given the opportunity to use. The Commission further declines to restrain binding arbitration of a grievance claiming that an employee was entitled to a paid leave of absence to attend Reserve or National Guard Drills without having his work time rescheduled.

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Appearances:
For the Petitioner, Marvin Corwick, Business Administrator

For the Respondent, Fox and Fox, Esqs. (David I. Fox, of Counsel, Fredric M. Knapp, on the Brief)

DECISION AND ORDER

On February 24, 1984, the Township of West Orange ("Township") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Township seeks to restrain binding arbitration of certain grievances that Local Union 692, International Association of Firefighters, AFL-CIO ("Local 692") filed against the Township. The grievances concern verification of sick leave, denial of personal days, and employees attending Reserve and National Guard drills without having their work days rescheduled.[1/]

1/ On March 5, 1984, the Township filed an amended petition seeking to restrain binding arbitration of a fourth grievance filed by Local 692. That grievance concerned the filling of an administrative position when an individual employee is absent. Local 692 has since withdrawn this grievance so the amended scope petition is moot.

The parties have filed briefs and documents. In addition, on March 7, 1984, Commission designee Arnold H. Zudick conducted a hearing on the Township's request for interim relief pending the Commission's determination of the merits. He completely restrained binding arbitration of the grievance concerning sick leave verification and partially restrained binding arbitration of the grievances concerning personal leave and reserve guard duty.

Local 692 is the exclusive representative of the Township's uniformed firefighters and captains. The parties have entered a collective negotiations agreement effective between January 1, 1983 and December 31, 1983. The grievance procedure culminates in binding arbitration.

Before considering the arbitrability of each of the grievances, we stress the narrow boundaries of our scope of negotiations jurisdiction. Thus, in Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (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.

Thus, we do not consider the merits of Local 692's contractual claims or the Township's asserted contractual defenses.

An arbitrator's award involving police or fire employees is within the scope of negotiations if it involves either a mandatory or permissive subject of negotiations. Paterson PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"); In re Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981). In Paterson, the Supreme Court set forth the following tests for determining whether a subject is mandatorily or permissively negotiable:

> 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 an inconsistent term in their agreement. State Supervisory Employees, supra, 78 N.J. at 81. 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. Woodstown-Pilesgrove, supra, 81 N.J. 591. 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 policy-making 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 pp. 92-93.

The first grievance involves the Township's sick leave verification policy. The following facts appear.

On July 20, 1983, the Chief-Director of the Township's fire department issued a memorandum entitled Sick Time Procedure to all fire department personnel. That memorandum stated:

> Fire Department personnel who are absent from duty on six (6) or more occasions, during the year, will be required to report to Administration with their Deputy Chief for a complete evaluation of their sick time absence.
>
> An evaluation of the medical reports will also be reviewed by township physician Dr. Anthony Quartell.
>
> Unsatisfactory accountability or continued absence will require a medical report from their personal physician for each absence due to sickness (1 day or more).

On November 1, 1983, Local 692 filed a grievance contesting this policy. The grievance claimed that the policy was inconsistent with the parties' past practices and could not be instituted without negotiations. The Township denied this grievance and asserted it was factually inaccurate and untimely and concerned a non-arbitrable managerial prerogative.

Local 692 then demanded binding arbitration. In its demand, Local 692 stated, in part:

> Grievance involving sick leave policy. West Orange adopted, unilaterally, a sick leave procedure which is inconsistent with the contract between the parties and the past practice. It is a violation of the retention of benefits provision of the contract and other contract provisions. Specifically, the effect of the new policy is to require medical evaluations in an unreasonable fashion and to put the employees to the expense of obtaining a medical report from their personal physician. This has not been required in the past. Other specifics of this grievance are set forth in it.

Local 692 does not now dispute that the Township had a non-arbitrable right to institute a sick leave verification policy. See In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982) ("Piscataway"). It contends, however, that the

question of whether the employer or the employees should pay for any required medical examinations concerns a mandatorily negotiable term and condition of employment. See In re City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), appeal pending App. Div. Docket No. A-2397-83T3 ("Elizabeth").

The Township argues that the entire grievance is non-arbitrable because initially it only raised the validity of the sick leave verification policy, not the issue of who must pay for any required medical examinations.2/

The Township's right to adopt a sick leave verification policy under Piscataway is no longer in issue. The question of who pays for any required medical examinations is, however, in issue for purposes of this negotiability determination. While the grievance itself appears to be silent on that issue, Local 692's demand for arbitration squarely places it in question.3/ We held in Elizabeth that the question of who pays for required medical examinations is mandatorily negotiable in the abstract and may be submitted to binding arbitration. See also In re City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983). Accordingly, we will permit arbitration of this grievance to the limited extent it may raise the question of who pays for any required medical examination.

2/ The Commission's designee agreed and restrained arbitration over the entire grievance.

3/ We do not address the contractual question of whether Local 692 could specify this issue for the first time in the demand. That question is a matter of procedural arbitrability and is for the arbitrator to decide.

The second grievance concerns the Township's denial of an employee's request that he not lose his personal leave days. The following facts appear.

Article XVIII, Section A permits all employees to take three paid personal days off. Section C of that Article gives the Chief-Director the right to limit the number of employees who can take personal days off at the same time and the number of consecutive days off an employee may take.

On January 2, 1984, Local 692 filed a grievance on behalf of a firefighter who claimed he was not able to use two of his personal days off during the preceding year because of manpower shortages. The grievance asked that the Township allow him to carry-over his two personal days into 1984.

On January 5, 1984, the City-Director denied this grievance as untimely. Local 692 then demanded binding arbitration.

Local 692 does not dispute that the Township may deny personal leave requests if it will not be able to meet its staffing requirements otherwise. It argues, however, that the Township does not have a right to bar employees entirely from using their personal days at other times and that the Township did not give the grievant an adequate opportunity to use his personal leave days.[4/]

4/ The Commission's designee ruled that the grievance was arbitrable to the extent it involved the question of whether the grievant received an adequate opportunity to use his personal leave days, but was not arbitrable to the extent it involved minimum manning or compulsory overtime determinations.

The Township argues that it met its obligation to give the grievant an adequate opportunity to enjoy his personal leave days and that he waived his right to take these days. The Township further argues that employers must have complete control over the number of men allowed off duty at any one time.

It has been well-established for over a decade that an employee's ability to take personal leave is a mandatory subject of negotiations. See, for example, Burlington County College Faculty Ass'n v. Bd. of Trustees, Burlington County College, 64 N.J. 10, 14 (1973); Bd. of Ed. of Piscataway Twp. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (App. Div. 1977). The parties certainly could have agreed to allow employees to carry-over unused personal leave days from year to year until such time as they could use them without interfering with the employer's minimum manning requirements. Whether or not they so agreed and whether or not the grievant had an adequate opportunity to enjoy his personal leave days are questions for the arbitrator, not us. Accordingly, we will not restrain arbitration over this grievance.

The third grievance concerns the question of whether the Township may require employees attending Reserve or National Guard drills to work during rescheduled hours. The following facts appear.

On November 25, 1983, a firefighter filed a grievance claiming that the Township violated the retention of benefits clause of its contract when it required him to make up weekend

work time which was spent on leave to attend drills of the National Guard. The Chief-Director denied this grievance. He relied on a letter from a Personnel Management Analyst I of the Civil Service Commission. That letter stated that while under N.J.S.A. 38A:4-4 a public employee must be given a paid leave of absence in order to participate in National Guard weekend drills which conflict with scheduled work days, a public employer is permitted to reschedule the employee's hours and days of work so that scheduled work days will not conflict with an employee's weekend drills.

Local 692 then demanded binding arbitration. The demand stated, in part:

> Grievance regarding Reserve or National Guard leave for weekend drills. It is past practice under the contract between the parties, which protects such past practices at Article XXXIV, a copy of which is attached, that employees who attend weekend drills, receive full pay and are not required to make up the time spent on weekend drills as the result of rescheduling. The employee in question, Fireman Jennings, was docked his time spent on weekend drills and was told that the time must be made up. The grievance regarding this and the rejection of the Chief-Director of the Fire Department are enclosed. The Mayor has also denied this grievance.

Local 692 asserts that N.J.S.A. 38A:4-4, the Township's own ordinance,[5/] and the parties' past practice all entitle employees to a paid leave of absence for weekend army drills without having to make this work up.

5/ The Township ordinance provides:

> Any permanent employee, part-time or full-time, who is a member of the National Guard, Naval Militia, Air National Guard, or a reserve component of any of the Armed Forces of the United States and is required to engage in field training, shall be granted a military leave of absence with regular pay for the period of such training as is authorized by law. The paid leave of absence shall be in addition to his vacation. Permanent part-time employees shall receive pay for such leave on a pro-rated basis.

The Township contends that it has a non-negotiable managerial prerogative to reschedule weekend work for other days when a conflict with any Reserve or National Guard drill will otherwise occur.[6/]

Both the Commission and the appellate courts have consistently held that provisions concerning paid or unpaid leaves of absence, including leaves for personal reasons or sickness, directly and intimately affect the work and welfare of public employees and do not significantly interfere with any inherent managerial prerogatives pertaining to the determination of governmental policy. Ordinarily employees on a leave of absence are not required to make up work time missed, although such a requirement could be negotiated. Burlington County College Faculty Ass'n, supra; Piscataway, supra; South Orange-Maplewood Education Ass'n v. South Orange-Maplewood Bd. of Ed., 146 N.J. Super. 457 (1977); In re City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982); In re Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981); In re Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981); In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); In re Willingboro Bd. of Ed., P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), cert. den. 87 N.J. 320 (1981). This case merely involves a question of whether the employer agreed to grant a particular type of a paid

6/ The Commission's designee restrained arbitration on the question of whether the Township was allowed to reschedule the work week, but permitted arbitration on Local 692's past practice contention.

leave of absence -- leave for attending Reserve or National Guard drills -- without requiring employees on leave to make that time up.[7/]

Thus, the instant grievance is arbitrable unless a specific statute or regulation preempts arbitration. We do not believe that one does.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory"), the Supreme Court held that a negotiated agreement could not contravene specific statutes or regulations which expressly "set" particular terms and conditions of employment. The Court stressed the limits of this holding:

> We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer.
> Id. at p. 80.
>
> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement.
> Id. at p. 81.

See also Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (negotiation is preempted only if statute or regulation fixes a term or condition of employment "expressly, specifically, and comprehensively").

7/ The specific and narrow contractual question in dispute is whether, through an ordinance and a past practice, the Township implicitly agreed that its employees may have a paid leave of absence -- similar to a vacation or sick leave -- for the purpose of attending a Reserve or National Guard drill without having to make up the time at work. That question is for the arbitrator.

N.J.S.A. 38A:4-4 provides:

> (a) All officials and employees of this State or of any board or commission of the State or of any county, school district or municipality who are members of the organized militia shall be entitled to leave of absence from their respective duties without loss of pay or time on all days during which they shall be engaged in active duty, active duty for training or other duty ordered by the Governor; provided, however, that the leaves of absence for active duty or active duty for training shall not exceed 90 days in the aggregate in any one year.
>
> (b) Leave of absence for such military duty shall be in addition to the regular vacation allowed such officers and employees by the State, county or municipal law, ordinance, resolution, or regulation.

In addition, N.J.S.A. 11:24A-2 provides:

> An employee who is a member of the national guard or naval militia of this State or the military or naval forces of the United States required to undergo field training therein, shall be entitled to additional leave of absence with pay for the period of such field training.

The Civil Service has promulgated the following pertinent rule N.J.A.C. 4:1-17.3(d) provides:

> A permanent employee who is a member of the national guard or naval militia or of a reserve component of any of the Armed Forces of the United States who is required to undergo annual field training or annual active duty for training shall be granted a leave of absence with pay for such period as provided by regulation. Said leave shall be in addition to regular vacation leave.

N.J.A.C. 4:3-17.1 provides:

> (a) This section details the mandatory treatment of employees who are required to attend drills of the National Guard or any of the branches of the Reserves. It shall also recommend standard

treatment where not required by law. This policy is effective September 6, 1973.

(b) Definitions

1. A "drill", as used in this section, means inactive duty training on a regular periodic basis.

* * *

(c) Stipulations:

1. Members of the National Guard:

i. Employees who are members of the National Guard must be given time off with full pay to attend required drills. Such time off shall be in addition to vacation, sick and administrative leave.

ii. An appointing authority may, however, reschedule an employee's hours and days of work in order to enable an employee to attend drills and still fulfill all employment responsibilities without the need for additional time off.

2. Reservists:

i. Employees who are members of a Reserve component of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard need not be given time off to attend drills; however, pursuant to State law, these employees are entitled to full reinstatement in the event of discharge or suspension because of a Reserve obligation. An appointing authority is obligated only to pay the Reservist-employee for days and hours actually worked.

ii. An appointing authority may reschedule an employee's hours and days of work in order to enable an employee tc attend drills and still fulfill all the employment responsibilities.

(d) Although it is not obligatory, the Department of Civil Service recommends that appointing authorities treat members of the reserve and the National Guard similarly regarding time off or rescheduling for drills.

In the instant case, the cited statutes or regulations do not specifically divest public employers of all discretion to grant paid leaves of absence for attending National Guard drills without rescheduling the work time missed. The letter from the Civil Service Commission's Personnel Management Analyst I merely confirms that the Township may have some discretion to reschedule or not reschedule work, but does not foreclose the argument, made here, that the employer in its ordinance and in its collective negotiations agreement has exercised its discretion to treat a paid personal leave for this purpose as, in effect, additional days of vacation.[8/] Whether or not the Township has in fact exercised its discretion in that manner is a question for the arbitrator, not this Commission. Accordingly, we hold that the grievance alleging that the Township violated article XXXIV by requiring the grievant to make up time spent on National Guard drills is arbitrable.

ORDER

The Township's request for a restraint of arbitration over the grievance of Local 692, IAFF, AFL-CIO concerning sick leave is granted except to the limited extent it may raise the

8/ We need not decide whether the cited statutes, regulations, and ordinance in fact confer a right upon the affected employees not to have their work rescheduled. The answer to that question may not be easy and may turn upon such distinctions as the difference between "field training" and "drills" on the one hand and "active" duty and "inactive" duty on the other. Compare, for example, N.J.A.C. 4:1-17.3(d) and N.J.A.C. 4:3-17.1. See, e.g., In re Thomas (Civil Service Commission, May 4, 1982). Once we have determined that public employers and employees may legally agree that time spent on leave will not be rescheduled, then arbitration is an available forum to determine whether any such contractual right exists and should be enforced.

question of who pays for any required medical examination.

The Township's request for a restraint of arbitration over the grievance concerning the carrying-over of personal days is denied.

The Township's request for a restraint of arbitration over the grievance concerning paid leaves of absence to attend National Guard drills is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners, Butch, Hipp, Newbaker, Suskin and Wentzler voted in favor of this decision. Commissioner Graves voted for this decision except she would not restrain arbitration of the sick leave verification issue.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984