P.E.R.C. NO. 2002-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MORRIS and
MORRIS COUNTY SHERIFF,

Petitioner,

-and- Docket No. SN-2001-67

MORRIS COUNTY CORRECTIONS
PBA LOCAL NO. 298,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the County of Morris and Morris County Sheriff for a restraint of binding arbitration of a grievance filed by Morris County Corrections P.B.A. Local No. 298. The grievance alleges that the implementation of a chronic and excessive absenteeism policy violated the parties' collective negotiations agreement. The restraint is granted to the extent the grievance challenges the employer's right to monitor sick leave after six and one half days per year. The restraint is otherwise denied.

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, Courter, Kobert, Laufer & Cohen, attorneys (Stephen E. Trimboli, on the brief)

For the Respondent, Lynch, Martin, Kroll, attorneys (Raymond G. Heineman, on the brief)

DECISION

On June 28, 2001, the County of Morris and the Morris County Sheriff petitioned for a scope of negotiations determination. The petitioners seek a restraint of binding arbitration of a grievance filed by Morris County Corrections P.B.A. Local No. 298. The grievance alleges that the implementation of a chronic and excessive absenteeism policy violated the parties' collective negotiations agreement.

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

The PBA represents all corrections officers employed at the Morris County Jail. The parties' collective negotiations

agreement is effective from January 1, 1999 to December 31, 2002. The grievance procedure ends in binding arbitration of grievances relating to the terms of the agreement. Non-contractual grievances, including those challenging the imposition of minor discipline, are not subject to binding arbitration.

Article 10 is entitled sick leave. Employees are credited with 15 days of sick leave annually for each succeeding calendar year of full-time employment. Sick leave is defined as absence from duty due to employee illness, accident, exposure to contagious disease or caring for a seriously ill immediate family member. Section 3 provides:

> Notice of absence is required as follows:
>
> ILLNESS: Each employee is required to notify his supervisor by one and one-half (1 1/2) hour before starting time on each day of absence. Should the employee be unable to reach his/her supervisor, then the ranking available person of the particular division on duty shall be notified. It is recognized that there may be instances when it is impractical or impossible to give daily notice as in the case when an employee is hospitalized or seriously disabled in which case it shall be sufficient that the employee or member of the employee's family notify the supervisor or ranking available person giving reason for absence and information as to the degree of illness or disability and the amount of time required for recuperation. Absent such instances the daily requirement shall be enforced.
>
> Failure to give notice as required will result in loss of sick leave for that day and may constitute cause for disciplinary action. Failure to report absences from duty for five (5) consecutive days shall constitute a resignation pursuant to Civil Service Rules and Regulations.

Section 4 provides:

> Effective January 1, 2000, a certificate from a licensed physician in attendance shall be required as proof of need of leave of absence or the need of the employee's attendance upon a member of the employee's immediate family. In the event of absence from duty due to illness for four (4) or more days at one time, the employee shall be required to submit a physician's certificate to his supervisor to justify payment of sick leave.
>
> An accumulation of ten (10) sick occurrences, where an occurrence is recognized as one (1), eight (8) hour day or more and the occurrences having been at various times during a calendar year (January through December) may be approved without a physician's certificate. All sick occurrences in excess of ten (10), must be accounted for with a physician's certificate if the time is to be approved with pay. An employee may request that the Undersheriff or Warden review a sick occurrence requiring a physician's certificate. This request must be made in writing prior to the submission of the payroll in which the "sick occurrence" occurred. A copy of this request must also be given to the employee's supervisor. At the discretion of the Undersheriff or Warden, sick leave in excess of the ten (10) occurrences may not require a physician's certificate, depending on the submission of physicians' certificates submitted for prior occurrences and the employee's use of past sick time.

In November 2000, the Morris County Sheriff's Office, Bureau of Corrections, promulgated Policy and Procedure number OP2:41. This document is entitled Chronic and Excessive Absenteeism. It provides:

> I. PURPOSE
>
> To establish policy and guidelines for a program intended to monitor and reduce chronic and excessive absenteeism among employees of the Morris County Bureau of Corrections.

II. POLICY

It is the policy of the Bureau of Corrections to recognize that reliable employee attendance is essential to the orderly operation of the facility. Excessive absenteeism creates ...[undue] hardship upon fellow employees and disruption to the daily operation of the facility. Therefore, in order to address instances of chronic or excessive absenteeism, the following guidelines shall apply:

III. GUIDELINES

1. Absence from duty shall be:
   a. Sick with/without leave
   b. Workman's compensation
   c. Any other time off excluding:
      1. Vacation
      2. Personal Time
      3. Compensatory Time
      4. Administrative Time
      5. Bereavement Time
      6. Jury Duty
      7. Military Time
      8. Family Leave

2. When an employee demonstrates a developing pattern of poor attendance, the Administrative Lieutenant shall initiate a historical overview of the subject employee's previous attendance records. Employees are expected to maintain regular attendance. Employees who are absent more than six and one-half (6.5) days in a calendar year shall have their attendance monitored.

Among the items that shall be considered in evaluating possible attendance problems are:

a. Absence from duty for seven (7) or more days in each of two (2) of the past three years, or an aggregate total of fourteen (14) or more days in two of the past three years, under circumstances that suggests improper

absenteeism and/or inability to meet standards of reliable attendance.

b. Absence from duty for seven (7) or more days per year for half of the employee's time of employment under circumstances that suggest unacceptable absenteeism and/or inability to meet standards of reliable attendance.

c. Instances where it appears that the employee has pattern absences. Pattern absences shall be considered an excessive number of absences concurrent with either the employee's weekend or other approved leave, vacation, administrative leave, bereavement, etc.

d. Any other circumstances suggesting improper absenteeism or inability to meet the standards of reliable attendance.

3. Employees demonstrating chronic or excessive absenteeism will be put on notice through a documented verbal discussion, to be confirmed in writing, in an effort to correct the problem. The employee will be informed that corrective actions will be undertaken including a formal written reprimand and suspension, without pay, if absenteeism is not improved and maintained, at an acceptable leave. Discipline up to and including termination may result if corrective measures are not successful.

4. For repeat absences in subsequent calendar years, corrective actions will continue from the previous steps taken if the employee continues a pattern which will lead to an excessive rate of absenteeism for the year.

5. A case file will be opened for each and all offenses. The Administrative Captain will report complete histories to the Chief on any identified problems being

> investigated. The Administrative Captain will retain all case files and documentation of any corrective actions for future reference.
>
> 6. Employees on legitimate New Jersey Family Leave or Federal Family and Medical Leave Act absences will not be subject to disciplinary action or deemed in violation of this policy.
>
> 7. Any questions pertaining to this policy shall be directed to the Chief for prompt resolution.
>
> 8. Nothing in this policy shall prevent the Bureau of Corrections from taking disciplinary action against any staff member for misuse/abuse of sick leave or falsely calling in sick or injured or any other violation of rules and regulations pertaining to leaves not addressed herein.

On November 23, 2000, the PBA filed a grievance opposing the implementation of the sick leave policy as interfering with the contractual agreement.

On December 7, 2000, Chief Ralph McGrane responded that the establishment of an attendance policy is a managerial prerogative. On December 19, Sheriff Edward Rochford responded that the PBA did not specify the part of the contract the policy allegedly violated.

On December 21, 2000, the PBA's grievance chairman asserted that it was the PBA's opinion that the contract gives officers 15 sick days but under the new policy, they will be disciplined after using 6 1/2 days. His reply also stated that, under the contract, officers get 10 occurrences in a year and that if an officer uses four days in a row, that is one occurrence.

On December 27, 2000, the Sheriff responded. He wrote:

> Corporal Sklareski mentions that the new "Chronic and Excessive Absenteeism" Policy imposes discipline on any officer who uses six and one-half sick days per this. This is incorrect.
>
> First, the "Chronic and Excessive Absenteeism" policy is not merely a sick leave abuse policy. It applies to all forms of absences other than vacations, personal time, compensatory time, administrative leave, bereavement, jury duty, military leave and family leave. The six and one- half figure refers to absences, not sick days.
>
> Second, the Policy does not impose "discipline" automatically after the six and one-half absences. The Policy merely triggers a monitoring process to determine whether attendance problems requiring corrective action, or other appropriate response, are present. Monitoring does not constitute discipline. Disciplinary action will not be imposed on an officer unless a determination is made, based on all relevant evidence and circumstances, that disciplinary action is warranted. Neither myself, Chief McGrane, nor Warden Davis will discipline an officer merely on having six and one-half absences.
>
> Corporal Sklareski also states that the "Chronic and Excessive Absenteeism" Policy is inconsistent with Article 10, Section 4 of the PBA contract. That section requires the production of doctor's notes in specified circumstance as a contractual condition for the receipt of sick pay. The section does not address the issue of monitoring overall attendance. Further, as a matter of law, the County and the Sheriff have the legal right to require a doctor's note whenever they suspect possible sick leave abuse, regardless of any contractual limitation.

On March 28, 2001, the PBA demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield 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 or any contractual defenses the employer may have.

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. City of 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.... 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 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 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The employers assert that they have the non-negotiable, non-arbitrable right to establish sick leave verification and monitoring policies.

The PBA asserts that sick leave is mandatorily negotiable and that arbitration over changes in sick leave and absenteeism policies should not be restrained to the extent a grievance challenges changes in the contractual circumstances governing leaves or concerns economic or procedural matters. The PBA also notes that the agreement does not provide for arbitration of minor disciplinary disputes and argues that the employer is seeking to unilaterally establish minor disciplinary sanctions without any opportunity for impartial review. Finally, the PBA asserts that

as the policy also covers convention leave, discretionary leave and worker's compensation leave, employees legitimately using such leave risk disciplinary action.

The employers respond that the absenteeism monitoring and improvement policy is not negotiable and that the PBA has not demonstrated that the policy restricts the legitimate use of sick leave. They assert that the policy does not set a fixed schedule of penalties and the grievance does not seek review of any disciplinary sanctions.

Applying the negotiability balancing test, we have concluded that a public employer has a prerogative to verify that sick leave is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). That prerogative includes the right to determine how many absences trigger a verification requirement, State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995). The premise of Piscataway and related cases is that employers have a right to monitor whether sick leave is being used as intended, regardless of how much sick leave an employee might have earned in a year. See Piscataway, 8 NJPER at 96 (sick leave policy served "a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits"; compare Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984) (restraining arbitration of grievance challenging sick leave verification policy, despite Association's contention that the

policy infringed on employees' statutory entitlement to ten sick days per year).

The employer's right to verify illness may include the right to conduct a conference with the employee to find out why the employee was absent and to determine whether a disciplinary sanction is warranted. See, e.g., Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991). But once the employer invokes a disciplinary sanction, arbitration may be invoked. In Mainland, counseling was a sanction imposed after a conference to discuss the employee's absence record. We noted that disciplinary sanctions for absenteeism could include counseling, letters of reprimand, docking of pay, withholding of increments, tenure charges, and nonrenewal or termination of nontenured staff members. Similarly, in Rahway Valley Sewerage Auth., P.E.R.C. No. 83-80, 9 NJPER 52 (¶14026 1982), the employer had a prerogative to review an employee's attendance record after a certain number of absences to see if counseling or a warning was appropriate.

We agree with the employers that they had a non-arbitrable prerogative to adopt a sick leave verification policy that includes monitoring employees who are absent more than six and one-half days in a calendar year. However, once the employer determines that an employee has "chronic or excessive absenteeism" and decides that the employee must be "put on notice through a documented verbal discussion, to be confirmed in

writing, in an effort to correct the problem," the employer has in essence issued a verbal reprimand. Employees may then invoke a contractual right to contest that notice through binding arbitration. Contrast City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999) (counseling sessions were in the nature of the non-disciplinary conferences addressed in Mainland and Rahway). This "notice" aspect of the policy goes beyond monitoring and conferences to ascertain if the employee has a problem. The employer has identified that the employee has an excessive absenteeism problem and wants that fact documented, presumably in the employee's personnel file. This aspect of the policy sanctions an employee for excessive absenteeism and can legally be reviewed through binding arbitration. See UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992)

The employers also acknowledge that a fixed schedule of penalties would be negotiable, but note that the policy does not establish such a schedule. They further acknowledge that the application of the policy to withhold pay or impose discipline would be legally arbitrable, but that the grievance does not present an issue of application.

The PBA argues that unlike most of the agreements involved in our prior cases, the parties' current contract bars binding arbitration of grievances challenging minor disciplinary

sanctions. The PBA further argues that because disciplinary grievances cannot be arbitrated, adoption of the policy would allow the employer to impose discipline for acts which have not previously warranted discipline without meaningful review. While we understand the PBA's point, the restricted grievance arbitration clause in the current agreement does not render our precedents inapplicable.

Finally, we note the PBA's argument that the monitoring applies not only to sick leave, but appears to apply to convention leave, discretionary leave and workers' compensation. The PBA contends that this broadened application alters the circumstances under which employees can take leave. The employers have not specifically responded to the PBA's concern about the impact of the policy on leave other than sick leave.

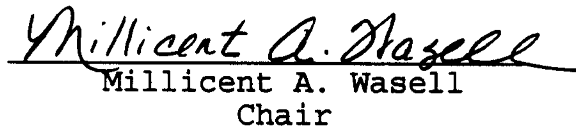
The rationale behind the non-negotiability of sick leave verification is that employers have a governmental policy interest in verifying that employees claiming sickness are, in fact, sick. Monitoring employee absences after a set number of sick days falls within that prerogative. The issue is different when dealing with leave that must be approved in advance, such as convention leave or discretionary leave. Verification that the leave is being used in accordance with negotiated restrictions may be a prerogative, see Barnegat Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984), but we perceive no employer interest in monitoring employees who take leave approved by the employer. Under these

circumstances, we will not restrain arbitration over the PBA's claims that the employer's policy interferes with these other pre-approved leaves.

ORDER

The request of the County of Morris and the Morris County Sheriff for a restraint of binding arbitration is granted to the extent the grievance challenges the employer's right to monitor sick leave after six and one half days per year. The restraint is otherwise denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: November 29, 2001
Trenton, New Jersey
ISSUED: November 30, 2001