P.E.R.C. NO. 2002-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON STATE-OPERATED SCHOOL DISTRICT,

Petitioner,

-and- Docket No. SN-2002-25

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Paterson State-Operated School District for a restraint of binding arbitration of a grievance filed by the Paterson Education Association. The grievance alleges that the District improperly deducted sick days for a work-related injury. The Commission concludes that worker's compensation laws do not bar majority representatives either from seeking to enforce a safety clause on behalf of all employees or from pursuing a contract remedy such as restoration of sick leave days. The Commission also concludes that nothing in N.J.S.A. 18A:30-2.1 would preclude an agreement to restore sick leave days to an employee who was absent for a short period of time because of an allergic reaction to pesticides used in the workplace.

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.

P.E.R.C. NO. 2002-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON STATE-OPERATED SCHOOL DISTRICT,

Petitioner,

-and-

Docket No. SN-2002-25

PATERSON EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Murray & Murray, attorneys (Patricia Reddy-Parkinson, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Mary J. Hammer, on the brief)

DECISION

On January 9, 2002, the Paterson State-Operated School District petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the Paterson Education Association. The grievance alleges that the District improperly deducted sick days for a work-related injury.

The parties have filed briefs and exhibits. The District has submitted the certification of its risk management supervisor. These facts appear.

The Association represents certificated teaching personnel and certain other employees. The District and the

Association are parties to a collective negotiations agreement effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Article 25 of the agreement is entitled Protection of Employees, Students and Property. Article 25:1, entitled Unsafe and Hazardous Conditions, provides:

> Employees shall not be required to work under unsafe or hazardous conditions or to perform tasks which endanger their health, safety, or well-being.

Article 25:4, entitled Assault, provides, in part:

> 25:4-1 Legal Assistance
>
> The District shall give full support including legal and other assistance for any assault upon the employee while acting in the discharge of his/her duties, as provided in the statute.[1/]
>
> 25:4-2 Leave
>
> When absence arises out of or from such assault or injury, the employee shall be entitled to full salary and other benefits for the period of such absence but shall not forfeit any sick leave or personal leave.
>
> 25:4-3 Worker's Compensation
>
> Benefits derived under this or subsequent Agreements shall continue beyond the period of any Worker's Compensation until the complete recovery of any employee when absence arises out of or from assault or injury.

Beverly Gusler teaches art. On March 8, 2001, Gusler went to the nurse because of an allergic reaction. Gusler

---

1/ Article 25:3, Reasonable Force, refers to N.J.S.A. 18A:6-1, which prohibits corporal punishment.

described her symptoms as swollen eyes, closed throat and dry mouth. Gusler asked to be taken to the hospital for evaluation.

Gusler was examined at the hospital and the ultimate diagnosis was "allergic reaction." The emergency room physician advised her to see her regular doctor.

Before being taken to the hospital, Gusler completed a First Report for Workers Compensation Authorization form which she and the nurse signed. The District's risk management supervisor investigated and found that an exterminator had sprayed Perma-dust pesticide near Gusler's classroom ten days before her allergic reaction. He also reviewed the manufacturer's Material Safety Data Sheet on Perma-Dust, which indicated that inhalation of the pesticide was unlikely because the product was pressurized and the particles were not large enough to be respirable. The supervisor determined that Gusler's allergic reaction was not a work-related injury; he submitted a report to that effect to the District's Third Party Administrator.

On March 12, 2001, the supervisor recommended that Gusler see a doctor at Wayne Occupational Health Center and forwarded all of the reports there. On March 13, Gusler went to the health center. The doctor's report states the diagnosis as "possible allergic reaction - now resolved." She was told she could return to work that day. Gusler missed two and one-half days of work and was charged two and one-half sick days.

On March 15, 2001, Gusler filed a grievance alleging that the employer violated the worker's compensation article of the agreement. In a March 28 letter, the Association moved the grievance to level two, alleging that the docking of Gusler's sick leave bank violated Article 25:4, as well as articles on just cause; statutory rights; Association Rights and Privileges; and the savings clause. The Association states that Gusler's allergic reaction was caused by insecticide spray near her classroom and that the supervisor did not respond to Gusler's March 8 call about the incident until March 12. The grievance also states that, on March 22, Gusler had another allergic reaction to an insecticide sprayed by a custodian. A doctor at an Immedicenter advised her not to return to work until Monday, March 26. The grievance seeks restoration of the one-half day that had already been docked and restoration of any additional days that would be docked due to the allergic reaction.

The Association sought arbitration. On November 7, 2001, the District responded:

> The District is not in agreement with your request to arbitrate the sick days/salary deduction in grievance (00-28). As we have maintained at our grievance hearings, the claimants [sic] position as to March 8, 2001 relies totally on her allegation that her illness arose out of her employment. The District's third party administrator has determined that her alleged illness is not work related; therefore, her redress lies with the Workman's Compensation Court under N.J.S.A. 34:15 et seq. I am advised the claimant has not as yet exercised her rights in this matter, although she is aware of rights in this matter.

> Therefore, please be advised this matter is governed by state laws and in the judgment of our attorney is not arbitrable.

This petition ensued.

Our 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 cannot consider the contractual merits of the grievances or any contractual defenses the parties may have.

The District asserts that arbitration of a grievance seeking restoration of sick days for an alleged work-related injury is preempted by N.J.S.A. 35:15-49, which gives the Division of Worker's Compensation exclusive jurisdiction over worker's compensation claims, and by N.J.S.A. 18A:30-2.1. That education law statute provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the

> accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

The District maintains that the Commissioner of Education must determine whether sick days must be restored, with the Commissioner usually deferring decision until the Division of Worker's Compensation determines whether the injury is work-related.

The Association counters that it is alleging a violation of Article 25:4, not N.J.S.A. 18A:30-2.1 -- and that an arbitrator may decide that claim. It also maintains that N.J.S.A. 18A:30-2.1 sets forth a minimum benefit and does not prohibit parties from negotiating restoration-of-sick leave benefits in excess of those mandated. It stresses that we have ruled that the worker's compensation statutes do not preempt the enforcement of workplace safety clauses or contractual sick leave remedies. Finally, the Association, in its brief, alleges a violation of Article 25:1 "Unsafe and Hazardous Conditions".

The District replies that, by mandating that a school district pay an employee full salary for "up to" one year, N.J.S.A. 18A:30-2.1 preempts Article 25:4, which purports to

confer benefits for a longer period. Finally, it contends that the Association's claim that the District violated Article 25:1 is untimely and should not be considered since the provision was not listed in the Association's grievance. On the merits, the District stresses that the only remedy sought for the Article 25:1 violation is restoration of sick days, which can only be restored by the Commissioner.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), contains the standards for determining mandatory negotiability:

> 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

Absent a preempting statute or regulation, paid injury leave in addition to that provided by worker's compensation is mandatorily negotiable. See, e.g., Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124 (¶29062 1998); Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978). We have held, and the Appellate Division has agreed, that worker's compensation laws do not bar a majority representative either from seeking to enforce a safety

clause on behalf of all employees or from pursuing a contract remedy such as restoration of sick leave days. Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); East Orange Bd. of Ed., P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998); New Brunswick Bd. of Ed., P.E.R.C. No. 86-8, 11 NJPER 453 (¶16159 1985). We have so ruled even where, as here, the employer contended that an injury was not work-related and argued that that issue should be resolved by a worker's compensation judge, not an arbitrator. Burlington, P.E.R.C. No. 97-84; East Orange. In Burlington, P.E.R.C. No. 97-84, we added that it was premature to consider whether an arbitration award would conflict with the worker's compensation laws, reasoning that post-arbitration review under N.J.S.A. 2A:24-8 was available to ensure that the award was consistent with statutory requirements. We follow those precedents in this case.

In addition, we note that the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., authorizes binding arbitration over terms and conditions of employment set by statute and incorporated in contracts. State v. State Supervisory Ass'n, 78 N.J. 54, 80 n.6; see also Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 21-23 (1983) (concurring opinion). Public policy favors arbitration as a means of settling disputes of terms and conditions of employment quickly, inexpensively and fairly. State v. IFPTE, Local 195, 169 N.J. 505, 513 (2001).

Nothing in N.J.S.A. 18A:30-2.1 would preclude an agreement to restore sick leave days to an employee who was absent for a short period of time because of an allergic reaction to pesticides used in the workplace.2/ Nor does anything in that statute preclude an arbitrator from considering whether such an agreement was actually made and then breached.

Finally, the issue of whether a claim has been properly presented during the grievance process goes to contractual, not legal, arbitrability. We do not consider that issue. City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326, 327 n.1 (¶25168 1994).

ORDER

The request of the Paterson State-Operated School District for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Muscato was not present. None opposed.

DATED: June 27, 2002
Trenton, New Jersey
ISSUED: June 28, 2002

2/ This case does not present any factual conflict with the statutory language concerning absences "for up to one calendar year" so we do not consider the parties' arguments concerning that language.