

P.E.R.C. NO. 2023-27

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WALLINGTON,

Petitioner,

-and-

Docket No. SN-2022-038

PBA LOCAL 321,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, and grants, in part, the Borough's request for a restraint of binding arbitration of PBA's grievance. The grievance asserts that the Borough violated the parties' collective negotiations agreement when it denied officers the ability to utilize earned sick time for family leave. The Commission finds that to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an authorized use of sick leave as set forth in N.J.A.C. 4A:6-1.3(g), it is mandatorily negotiable and legally arbitrable. Conversely, to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an unauthorized use of sick leave, it is not mandatorily negotiable or legally arbitrable.

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. 2023-27

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WALLINGTON,

Petitioner,

-and-

Docket No. SN-2022-038

PBA LOCAL 321,

Respondent.

Appearances:

For the Petitioner, The Corrigan Law Firm, attorneys  
(David F. Corrigan, of counsel and on the brief)

For the Respondent, Loccke, Correia & Bukosky, LLC,  
attorneys (Michael A. Bukosky, of counsel and on the  
brief; Corey M. Sargeant, of counsel and on the brief)

DECISION

On April 14, 2022, the Borough of Wallington (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 321 (PBA). The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) when it denied officers the ability to utilize earned sick time for family leave.

The Borough filed briefs, exhibits, and the certification of Carmello Imbruglia, Chief of Police, which was appended to the Borough's reply brief. The PBA filed a brief and certification

of Victor Urgiles, the Local's President, along with a sur-reply letter.<sup>1/</sup> These facts appear.

The PBA represents all of the Borough's police employees except Captains and the Chief of Police. The Borough and the PBA are parties to a CNA with a term of January 1, 2018 through December 31, 2022. The grievance procedure ends in binding arbitration.

On May 11, 2021, the PBA filed the following grievance:

Recently, the Borough has denied officers the ability to utilize earned sick time for family leave. Pursuant to statute, Officers are permitted to utilize earned sick time for family leave.

The PBA hereby grieves this contract violation and requests that all affected unit members be made whole in every way. Please note that this grievance is an ongoing and continuous violation and that it is filed as a class grievance on behalf of all affected members.

On May 19, Imbruglia denied the PBA's grievance. On September 24, the PBA filed a Request for Submission of a Panel of Arbitrators with the Commission, and an arbitrator was appointed. The arbitration hearing has not been scheduled pending the outcome of the instant scope of negotiations petition.

---

<sup>1/</sup> We do not include the PBA's sur-reply letter in the record. In a scope of negotiations case, following the petitioner's filing of a reply brief, "no other briefs shall be served or filed without leave of the Chair or such other person designated by the Commission." N.J.A.C. 19:13-3.6(d).

Urgilies certifies that the parties' have a long-standing past practice and the contract has always been interpreted as entitling unit members to apply paid sick leave to family leave. Urgilies further certifies that the Borough has unilaterally changed this past practice and has declined to negotiate over this unilateral change.

In response, Imbruglia certifies that during his tenure as Chief of Police there have been no instances where police officers have been permitted to use paid sick leave while on family leave. Imbruglia further certifies that the CNA contains no provisions allowing for use of sick leave while on family leave. He also certifies that the PBA's grievance does not involve a disabled and/or pregnant mother; rather, it involves a spouse who is not disabled. Imbruglia certifies that the PBA has not demanded to negotiate this issue, and thus, the Borough has not declined to negotiate.

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 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, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance is mandatorily or 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. *Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 44 (1982); *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough argues that arbitration of the PBA's grievance should be restrained because it is statutorily preempted by the New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 et seq., and the federal Family Medical Leave Act (FMLA), 29 U.S.C.A. § 2601 et seq. The Borough asserts that both the FMLA and FLA preclude the use of paid sick leave for the birth of an employee's child and that the normal birth of a healthy child is not a serious health condition for which sick leave is available pursuant to Civil Service regulations, specifically N.J.A.C. 4A:6-1.3(g).

The Borough further argues that the PBA's assertion that the parties' had an established past practice allowing for the substitution of sick leave for family leave is not accurate. It argues such a factual assertion is not relevant in a scope of negotiations petition. Lastly, the Borough asserts that the PBA's argument that the birth of a child renders the mother presumptively disabled thereby enabling a spouse to use sick leave for her care is not relevant to this case. The Borough asserts that the instant case does not involve a pregnant female nor the serious health condition of an employee's immediate family member.

The PBA argues that arbitration of its grievance should not be restrained because the use of sick leave is mandatorily negotiable, legally arbitrable, and not statutorily preempted by the FLA or FMLA. The PBA asserts that the FLA and its accompanying regulations expressly authorize employers to negotiate over leave benefits in excess of those required by the FLA. The PBA further argues that birth of a child renders the mother presumptively disabled for 30 days/four weeks before and after child birth, and thus, a grievant would be entitled to use sick leave to care for the mother. Lastly, the PBA argues that there is an established past practice between the parties allowing for the use of sick time for family leave.

Generally, unless preempted by statute or regulation, paid and unpaid leave benefits are mandatorily negotiable. In re City of E. Orange & E. Orange Superior Officers' Ass'n, No. A-2786-20, 2022 N.J. Super. Unpub. LEXIS 733, at 16-17 (App. Div. May 4, 2022). Whether an employee is required to use eligible paid leave concurrently or consecutively with FLA/FMLA leave is mandatorily negotiable and legally arbitrable. See ibid.; see also Madison Bd. of Educ. v. Madison Educ. Ass'n, 2016 N.J. Super. Unpub. LEXIS 1038 (2016).

The FMLA entitles an eligible employee to take up to twelve weeks of leave during a twelve month period for certain types of family and medical related events. 29 U.S.C.A. § 2612(a)(1); 29 C.F.R. § 825.112; N.J.A.C. 4A:6-1.21B(d). Specifically, FMLA leave may be used for: (A) birth of child (and to care for such child); (B) placement of child for adoption or foster care; (C) to care for a spouse, son, daughter, or parent with serious health condition; (D) because of the employee's own serious health condition; and (E) because of a qualifying exigency due to an immediate family member's active duty in the Armed Forces. 29 U.S.C.A. § 2612(a)(1)(A-E). New Jersey's regulation regarding FMLA recognizes an employee's use of paid leave as FMLA leave so long as entitlement to the leave is proven. N.J.A.C. 4A:6-1.21B(i). N.J.A.C. 4A:6-1.3(g) provides for the following four uses of sick leave by State employees: 1) personal illness



or injury; 2) exposure to contagious disease; 3) care of a seriously ill member of the employee's immediate family; or 4) death in the employee's immediate family. Therefore, "the Legislature established the maximum level of sick leave rights. [N.J.A.C. 4A:6-1.3(g)] lists four ways in which an employee may use sick leave, and that is the maximum level of the right to do so under the FLA." In Re State Police, No. A-4107-18T3, 2020 N.J. Super. Unpub. LEXIS 973 (App. Div. May 22, 2020) (restraining binding arbitration of a grievance challenging the State's decision to deny the substitution of paid sick leave for unpaid leave under the FLA and FMLA for childbirth/bonding and/or to care for the grievant's fiancée following childbirth).

Therefore, to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an authorized use of sick leave as set forth in N.J.A.C. 4A:6-1.3(g), it is mandatorily negotiable and legally arbitrable. However, to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an unauthorized use of sick leave, it is not mandatorily negotiable or legally arbitrable. Whether the parties had a past practice of allowing the use of paid sick leave for family leave is outside of our scope of negotiations jurisdiction. Ridgefield Park, supra.

ORDER

The Borough of Wallington's request for a restraint of binding arbitration is denied to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an authorized use of sick leave as set forth in N.J.A.C. 4A:6-1.3(g). The request is granted to the extent the PBA's grievance is challenging the use of paid sick leave in lieu of family leave for an unauthorized use of sick leave not set forth in N.J.A.C. 4A:6-1.3(g).

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 26, 2023

Trenton, New Jersey