

P.E.R.C. NO. 2023-39

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY AND  
UNION COUNTY SHERIFF,

Petitioner,

-and-

Docket No. SN-2022-043

PBA LOCAL NO. 108A  
SHERIFF SUPERIOR OFFICERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for restraint of binding arbitration of the PBA's grievance alleging that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally implemented a Special Order requiring employees to use their accrued sick leave when they were prohibited from reporting to work due to testing positive for COVID-19. Finding that paid leave is generally mandatorily negotiable and that P.L. 2020, c. 84 does not specifically preempt arbitration over the issue of restoration of paid leave while absent for a work-related illness, the Commission declines to restrain arbitration.

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, Hatfield Schwartz Law Group, LLC,  
attorneys (Lawrence S. Schwartz, of counsel)

For the Respondent, Marc D. Abramson & Associates,  
Inc., Labor Relations Consultants (Marc D. Abramson,  
on the brief)

DECISION

On June 24, 2022, Union County and the Union County Sheriff (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 108A Sheriff Superior Officers (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally implemented a Special Order that required employees to use their accrued sick leave and other benefit time when they were prohibited from reporting to work due to testing positive for COVID-19.

The County filed a brief and exhibits.<sup>1/</sup> The PBA filed a brief and the certification of its President, Frank Miller. These facts appear.<sup>2/</sup>

The PBA represents all of the County Sheriff's superior officers through the rank of captain at its location at the Courthouse, Elizabeth, New Jersey, and other locations within the County's jurisdiction. The County and PBA are parties to a CNA effective from January 1, 2018 through June 30, 2020. The grievance procedure ends in binding arbitration.

On January 7, 2022, the County issued Special Order No. 2022-003 updating its "Union County Return to Work & COVID-19 Prevention Policy." The policy provided, in pertinent part:

All Personnel: If you test positive for COVID-19, you will not be permitted to return to work and must use sick time or other benefit time.

On February 3, 2022, the PBA filed a grievance alleging that the Special Order's requirement that employees use their sick time and other benefit time when out of work due to testing positive for COVID-19 violates Articles 7, 23, and 24 of the CNA. As a

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1/ The County did not file a certification. N.J.A.C. 19:13-3.5(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2/ On October 11, 2022, the County filed an application for interim relief with the Commission requesting a restraint of binding arbitration pending the disposition of the County's scope petition. On November 9, a Commission Designee denied the County's request for interim relief. I.R. No. 2023-5.

remedy, the grievance seeks that the County "cease and desist from requiring employees to use their sick days when testing positive for COVID-19" and that unit members be "made financially whole by the reinstatement of sick days for any loss of sick days taken for COVID-19." The PBA requested binding arbitration of the grievance and this petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County asserts that arbitration should be restrained because the use of accrued sick leave days for COVID-19 is preempted by workers' compensation laws, specifically P.L. 2020, c. 84 as codified in N.J.S.A. 34:15-31.12. The County contends that negotiations over its Special Order requiring use of sick leave for COVID-19 exposure would significantly interfere with its policymaking powers. The County also asserts that the PBA's grievance fails to identify a contractual violation and that its sick leave policy does not violate the CNA or past practice.

The PBA asserts that the grievance is arbitrable because it concerns the mandatorily negotiable issue of sick leave. The PBA argues that workers' compensation laws do not specifically preempt arbitration over an employee's attempt to recoup sick leave used for work-related injury. It asserts that N.J.S.A. 34:15-31.12 supports that there is a rebuttable presumption that contraction of COVID-19 is work-related and compensable.

The courts and Commission have held that paid sick leave and other leaves of absence are generally mandatorily negotiable terms and conditions of employment because they intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. Burlington Cty. College Faculty Ass'n, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed., 152 N.J. Super. 235, 243-44 (1977); City of E. Orange, P.E.R.C. No. 2021-50, 47 NJPER 530 (¶124 2021), aff'd, 48 NJPER 441 (¶100 App. Div. 2022); and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd, 28 NJPER 427 (¶33156 App. Div. 2002). "Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012).

The Commission has also specifically addressed the issue of compensation and reimbursement of sick leave for an employee's

COVID-19 related absence and held that the issue is mandatorily negotiable and legally arbitrable. See City of East Orange, P.E.R.C. No. 2022-15, 48 NJPER 213 (¶47 2021) (restoration of paid sick leave deducted while absent due to COVID-19); Millburn Tp., P.E.R.C. No. 2021-30, 47 NJPER 373 (¶87 2021) (reimbursement of sick leave for COVID-19 quarantine period); and Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021) (compensation during absence due to COVID-19 travel quarantine policy).

The County asserts that the issue of employee use of sick leave for COVID-19 is preempted by workers' compensation laws generally and P.L. 2020, c. 84 specifically. Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so "expressly, specifically and comprehensively." Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

The Commission has consistently held that workers' compensation laws do not preclude arbitration over contractual claims concerning the restoration of paid sick leave. See, e.g., Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd, 24 NJPER 200 (¶29092 App. Div. 1998); State of New Jersey, P.E.R.C. No. 2020-28, 46 NJPER 244 (¶58 2019); and Paterson

State-Op. School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002). Moreover, in City of East Orange, P.E.R.C. No. 2022-15, supra, the Commission considered P.L. 2020, c. 84 in a nearly identical context and held that N.J.S.A. 34:15-31.12 is not restricted to workers' compensation claims and does not preempt a contractual claim that paid sick leave deducted while out with COVID-19 should be restored.<sup>3/</sup> We further noted that N.J.S.A. 34:15-31.14 explicitly states that P.L. 2020, c. 84 shall not be construed to reduce or limit other employee benefits provided by law. Here, the County has similarly not identified how P.L. 2020, c. 84 "expressly, specifically and comprehensively" preempts the PBA's grievance concerning the restoration of paid sick leave used during COVID-19 absences.

Furthermore, the County has not articulated how arbitration over how sick leave is utilized during COVID-19 would

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<sup>3/</sup> N.J.S.A. 34:15-31.12 provides: "If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence."



substantially limit its governmental policymaking powers to implement health and safety measures during the COVID-19 emergency. The PBA's grievance does not contest the portions of the County's policy addressing when, and under what conditions, employees may return to work following COVID-19 infections or exposures. The County has not submitted any certified facts as to how arbitration over whether the deduction of paid sick leave during COVID-19 absences violated the CNA would significantly interfere with its managerial prerogatives. Accordingly, consistent with the above-cited Commission precedent in City of East Orange, Millburn Tp., and Edison Tp., we find that the issue of reimbursement of sick leave used while out due to COVID-19 is mandatorily negotiable and legally arbitrable.

Finally, the County's assertion that the PBA's grievance did not properly claim a contract violation is a procedural arbitrability question for the arbitrator. See, e.g., Rutgers University, P.E.R.C. No. 2022-14, 48 NJPER 210 (¶46 2021); Atlantic City Bd. of Ed., P.E.R.C. No. 2012-31, 38 NJPER 257 (¶87 2011), aff'd, 39 NJPER 431 (¶139 2013), certif. den., 215 N.J. 487 (2013). The County's contractual and past practice defenses are likewise appropriate for the arbitrator, as they concern the merits of the grievance. Ridgefield Park.

ORDER

The request of Union County and the Union County Sheriff for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: March 30, 2023

Trenton, New Jersey