

P.E.R.C. NO. 2023-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2022-041

UNION COUNCIL 8, NEW JERSEY CIVIL SERVICE
ASSOCIATION, (CITY HALL EMPLOYEES)

Respondent.

SYNOPSIS

The Commission grants the City of Elizabeth's scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Union Council 8, New Jersey Civil Service Association, City Hall Employees, asserting the City violated the parties' collective negotiations agreement by mandating that all employees seeking promotion must be vaccinated from the COVID-19 virus. The Commission finds the City's policy identifying the COVID vaccine as a promotional requirement concerns a change in the prerequisites for eligibility for promotion, a matter falling within the City's managerial prerogative that does not involve a negotiable promotional procedure. The Commission also notes the promotional requirement was in effect relatively briefly before it was supplanted by a policy requiring the vaccine as a condition of employment for all employees. The Commission further notes that there remains in effect a statewide State of Emergency under the Disaster Control Act and a nationwide public health emergency at the federal level due to the ongoing consequences of the COVID-19 pandemic.

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, Lum, Drasco & Positan, LLC,
attorneys (Wayne J. Positan, of counsel; Daniel M.
Santarsiero, of counsel)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Corey M. Sargent, of counsel)

DECISION

On April 22, 2022, the City of Elizabeth (City or Elizabeth) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Union Council 8, New Jersey Civil Service Association, City Hall Employees (Council 8). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) by mandating all employees seeking promotion to be vaccinated from the COVID-19 virus.

The City filed briefs, exhibits and the certification of its counsel, Daniel M. Santarsiero. Council 8 filed a brief,

exhibits and the certification of its President, Michael J. Breunig. These facts appear.

Council 8 represents all City Hall employees, but excluding all foremen and supervisors, managers and department heads. The City and Council 8 were parties to a CNA in effect from July 1, 2017 through June 30, 2021, with a Memorandum of Agreement (MOA) from July 1, 2021 through June 30, 2025 while a successor contract is drafted. The grievance procedure ends in binding arbitration. With the exception of a requirement that openings and promotional vacancies be posted, the CNA does not otherwise address promotional procedures. The MOA adds no new contractual terms in relation to promotional procedures. However, Breunig certifies, and the City does not dispute, that the parties have a prior practice of promoting pursuant to seniority.

On October 21, 2021, the City issued a memorandum to all employees entitled, "Updated Conditions Required for Promotion." It stated, in pertinent part:

[E]ffective immediately, the City of Elizabeth is requiring full COVID-19 vaccination status to be achieved and demonstrated, for current and future, eligible municipal employee promotional candidates. This condition of promotion will assist in overall municipal preparedness and supports our ongoing initiatives to stop the spread of COVID-19.^{1/}

1/ In its brief, the City stipulates that employees whose medical conditions or sincerely held religious beliefs
(continued...)

In the statement of facts in its brief in support of the scope petition, the City states that on or about January 3, 2022, it introduced a memorandum^{2/} broadening the class of employees subject to the COVID-19 vaccine mandate to include all City employees, not just those seeking promotions. The record does not disclose whether, prior to or after October 21, 2021, or before January 3, 2022, the City required vaccination of employees, if any, who were already in positions as to which the vaccine requirement (announced in the October 21 memorandum) would apply to those seeking promotions to such positions. Nor does the record reflect whether, during that same period, any Council 8 members were denied a promotion based on vaccination status, despite being otherwise equally qualified with a chosen but less-senior candidate.

On March 4, 2022, Governor Murphy issued Executive Order (EO) No. 292, 54 N.J.R. 511(a) (EO 292). EO 292 directs, in pertinent part, as follows:

1. The Public Health Emergency declared in Executive Order No. 280 (2022) pursuant to the EHPA, N.J.S.A. 26:13-1 et seq., is hereby terminated;

1/ (...continued)
prevent vaccination are not subject to the vaccine requirement.

2/ The record does not contain a copy of the January 3, 2022 memorandum, nor is it mentioned in the City's certifications.

2. The State of Emergency declared in Executive Order No. 103 (2020) and continued in Executive Order No. 280 (2022) pursuant to the Disaster Control Act, N.J.S.A. App. A:9-33 et seq., continues to exist in the State of New Jersey.

The federal government's Secretary of Health and Human Services renewed, effective April 16, 2022, prior federal determinations that a public health emergency exists nationwide as a result of the continued consequences of the COVID-19 pandemic. (Renewal of Determination That A Public Health Emergency Exists, April 12, 2022, available at <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-12Apr2022.aspx>. We also take administrative notice that this determination was again renewed effective January 11, 2023. (<https://aspr.hhs.gov/legal/PHE/Pages/covid19-11Jan23.aspx> (last visited 2/3/2023).)

On March 11, 2022, Council 8 filed an advanced-step grievance challenging an alleged unilateral change in promotional procedures as being in violation of contract and statute. Breunig certifies that the grievance concerns the employer's unilateral implementation of a change to the previous practice when it introduced, without prior negotiations, a new policy revising the promotional procedures to deny/eliminate anyone from eligibility who has not been vaccinated for COVID-19.^{3/} The

^{3/} On April 18, 2022, Council 8 filed a related unfair practice (continued...)

grievance does not challenge or mention the City's January 3, 2022 memorandum requiring vaccination of all City employees.

On March 17, 2022, through its counsel, the City denied the grievance, "on the grounds that it is untimely, vague and meritless." On March 23, Council 8 filed a request for submission of a panel of arbitrators for a grievance concerning a "unilateral change to promotional procedures." 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. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

3/ (...continued)
charge, Dkt. No. CO-2022-209, which is on hold pending the outcome of this scope petition.

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.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that arbitration of the grievance must be restrained insofar as the City's ability and duty to protect public safety are managerial prerogatives outside the scope of negotiations. It argues that those governmental policymaking abilities would be infringed if negotiations, including impact negotiations, are required over the policy mandating vaccination of promotional candidates, and would risk harm to public health during the continued pandemic.

The City contends the Appellate Division's decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), which held that a COVID-19 vaccine mandate affecting all city employees was non-negotiable, is controlling here. The City notes that Council 8 members work in City Hall, Municipal Court, and in various locations in the City where they are in contact with members of the public. The City argues its October 21 directive, as in City of Newark, was a measure designed to protect the public safety through the promotion of vaccine usage to curb the spread of COVID-19. The City argues its policy requiring vaccination of

promotional candidates was entirely proper given that the court upheld the non-negotiability of a complete vaccine mandate in City of Newark, and that the consequences of non-compliance for an employee under the City's policy (non-promotion) are nowhere near as drastic as in City of Newark (discipline up to termination). In a footnote, the City reiterates that the terms of the City's January 3, 2022 memorandum requiring all City employees to be vaccinated apply regardless of promotional status. The City reserves all arguments regarding the January 3 memorandum, including that it renders Council 8's grievance over the City's October 21 memorandum moot.

Council 8 argues, among other things, that the grievance concerns promotional procedures, a negotiable subject of bargaining. It argues that if two candidates for a promotion have substantially equal qualifications but differ in seniority and vaccination status, the City's unilateral change could cause the vaccinated candidate to be chosen as opposed to the more senior one, in violation of the negotiated promotional procedure concerning seniority. Council 8 disputes whether City of Newark controls, arguing that since the state-wide public health state of emergency concerning COVID-19 was lifted by EO 292, the employees' interests in enforcing the seniority provision now outweigh the employer's asserted public-safety interests. Council 8 further contends the employer's justification for a

prerogative (based on a need to contain COVID-19 transmission) is arbitrary and capricious, arguing that whether employees become supervisors (through promotion) does not change the workplace risk analysis, in that a non-vaccinated employee would arguably pose the same hypothetical risk as a non-vaccinated supervisor. Council 8 argues City of Newark also does not apply here because the vaccine mandate in that case involved the employer's non-negotiable managerial prerogative "to hire or direct the workforce"; while the City's mandate is not for newly hired employees and does not direct its entire workforce, but is solely for those seeking a promotion. Council 8 notes, as a further distinction, that hiring involves the addition of employees to the workforce, while promotions involve the advancement of existing employees in their careers.

The City replies that City of Newark was not abrogated by EO 292, while Governor Murphy has declared that the policy of the State of New Jersey is for all its employees to "be vaccinated or comply with testing requirements." The City further replies that the public policy arguments advanced by Council 8 ignore the managerial prerogative inherent in the vaccination mandate and promote a policy that disfavors public health and safety.

Generally, promotional criteria are not mandatorily negotiable while promotional procedures are. State v. State Supervisory Employees Assn., 78 N.J. 54 (1970); State v. State

Troopers NCO Assn, 179 N.J. Super. 80 (App. Div. 1981).

Nonnegotiable promotional criteria concern “the substantive question of the fitness of an employee for a given position,” as such criteria “deal with qualifications bearing on ability to do the job.” State Supervisory, 78 N.J. at 92. In other words, “[t]he measurement of an employee’s competence or satisfaction of the criteria is purely for management.” State v. State Troopers NCO Assn, 179 N.J. Super. at 91. “Qualities which are felt to be essential prerequisites to the performance of a particular job are not terms and conditions of employment but rather are within the employer’s prerogatives. As such[, a union’s] expectations developed with regard to these qualifications or any reliance placed on their not changing are not terms and conditions of employment.” See, City of Plainfield, P.E.R.C. No. 76-42, 2 NJPER 168, 170 (1976).

We find the City’s October 21, 2021 policy identifying the COVID-19 vaccine as a promotional requirement concerns a change in the prerequisites for eligibility for promotion, a matter falling within the City’s managerial prerogative. Ibid. The disputed issue does not involve a promotional procedure. As a practical matter, we also note that the promotional requirement was in effect for a relatively short period of time before it was supplanted by the January 3, 2022 memo requiring the COVID-19 vaccine as a condition of employment for all employees. In

response to the public health emergency created by COVID-19, City of Newark held that public employers have a non-negotiable managerial prerogative to implement a COVID-19 vaccination mandate. 469 N.J. Super. at 389. There is nothing in this record to support that an employer's managerial prerogative to impose a COVID-19 vaccine mandate is no longer applicable because the pandemic has been curtailed since the time that City of Newark was issued. Although the Governor terminated the public health emergency from COVID-19 in EO 292, he continued a State of Emergency under the Disaster Control Act. The central theme in EO 292 is that the management of the COVID-19 pandemic was achieved through the widespread administration of the vaccine. Moreover, determinations at the federal level, renewed as recently as January 11, 2023, continue to declare that a nationwide public health emergency exists as a result of the ongoing consequences of the COVID-19 pandemic. The City's request for a restraint of binding arbitration is granted.

ORDER

The City of Elizabeth's petition to restrain grievance arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioners Ford and Papero voted against this decision.

ISSUED: March 30, 2023

Trenton, New Jersey