P.E.R.C. NO. 2023-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and- Docket No. SN-2023-023

IAFF LOCAL 1078,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City of Hoboken's scope of negotiations petition requesting the restraint of binding arbitration of a grievance filed by IAFF 1078, which asserted that the City violated a "Sick Leave Incentive" contractual provision. That provision provides for a monetary bonus when employees use zero or very few sick days in a calendar year in a system where employees do not accumulate sick leave but are provided with unlimited sick leave. The Commission finds that since employees do not accumulate sick leave, N.J.S.A. 11A:6-19.2 does not preempt negotiations over the issue of an attendance bonus and, therefore, the issue is 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. 2023-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and- Docket No. SN-2023-023

IAFF LOCAL 1078,

Respondent.

Appearances:

For the Petitioner, Weiner Law Group, LLP, attorneys (Mark A. Tabakin, of counsel; Ryan P. Kelly, on the brief)

For the Respondent, Mets Schiro & McGovern, attorneys (James M. Mets, of counsel)

DECISION

On December 13, 2022, the City of Hoboken (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the IAFF Local 1078 (Local 1078). The grievance alleges that the City violated section 30.4 of the parties' collective negotiations agreement (CNA) when it impermissibly counted certain absences as occurrences of illness or injury leave for purposes of the perfect attendance incentive payment, which had the effect of reducing or eliminating the incentive payments to certain members. The City contends that the disputed provision is non-negotiable for employees hired on or after May 21, 2010, as it is both contrary to and preempted by

N.J.S.A. 11A:6-19.2.

The City filed briefs, exhibits and the certification of its Business Administrator, Jason Freeman. Local 1078 filed a brief, exhibits and the certification of its President, Thomas Worley. These facts appear.

Local 1078 represents all regular full-time non-supervisory firefighters employed by the City in its Fire Division. The City and Local 1078 were parties to a CNA in effect from January 1, 2007 through December 31, 2013, and two successor Memoranda of Agreement (MOA) for the periods of January 1, 2014 through December 31, 2017 and January 1, 2018 through December 31, 2023. The grievance procedure ends in binding arbitration.

Article 30 of the parties' MOA, entitled "Sick Leave and Incentive Clauses," provides as follows:

> Section 30.4 shall be amended and replaced to read as follows: A firefighter, having no days absent under sick leave/injury leave, work related (workers compensation) or otherwise, or any other paid or unpaid leave (family leave, FMLA, FLA, etc.), shall receive two thousand $2000 dollars for perfect attendance. Use of personal leave or bereavement leave shall not effect eligibility for perfect attendance.
>
> $2,000 No occurrence of illness/injury/leave
> $750 One (1) occurrence or any portion thereof of illness/injury/leave.
> $500 Greater than one (1) occurrence of illness/injury/leave but less than (3) occurrences
> No payment for three (3) or more occurrences of illness/injury/leave.

> Any "occurrence of illness/injury/leave" shall be defined as being absent from work for a twelve hour period due to illness, or leave, including injury on the job (workers compensation) leave under FMLA, FLA or any other paid or unpaid leave to which the employee may be entitled, from the time the employee reports the illness/injury/leave until he/she returns to work. The four (4) twelve hour blocks of personal leave under Article 3, TIME OFF, Section 3.1 and the use of bereavement leave under this Section shall not apply as an occurrence of illness/injury/leave.

Worley certifies to the following facts. Local 1078 unit members do not accumulate sick leave which can be carried year-to-year if unused or cashed-in. Rather, they have unlimited sick leave of up to one year of consecutive absence for each illness or injury that prevents them from performing their duties as a firefighter or prohibits them from engaging in light duty.[1/]

During the calendar year 2020, some Local 1078 unit members who were exposed to COVID-19 were ordered by the City to quarantine away from the workplace and, in other instances, were required by the City to be tested for COVID-19 and were not permitted to return to work until they tested negative for the coronavirus. For purposes of the sick leave incentive, the City counted both quarantine and exposure absences related to COVID-19 as an absence.

In January of 2021, Worley brought an oral Step One

---

1/ We note that the facts certified by Worley are uncontested.

grievance to the attention of then Chief Brian Crimmins. He advised Chief Crimmins that Local 1078 disagreed with the City's inclusion of the City-mandated COVID-19 quarantines and testing absences for purposes of calculating the sick incentive for Local 1078 negotiations unit members. Chief Crimmins denied the grievance, which ultimately proceeded to arbitration, docketed as AR-2021-361. This petition ensued.

In a scope of negotiations determination, the Commission's 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 City contends that Local 1078's demand for arbitration should be restrained for members hired after May 21, 2010, because the Local's grievance requests enforcement of Article 30.4 which is preempted by N.J.S.A. 11A:6-19.2, which prohibits the payment of supplemental compensation for accumulated unused sick leave. Since Article 30.4 provides a cash incentive for perfect attendance, the City avers the payments are akin to supplemental compensation for accumulated unused sick leave during the employee's career.

In response, Local 1078 claims that the City mischaracterizes the nature of the compensation provided by Article 30.4. Local 1078 asserts that since firefighters employed by the City do not accrue any sick leave and never receive cash payment for accumulated sick leave, including at retirement, Article 30.4 is better described as an attendance bonus since there is no exchange of accrued sick leave for the cash incentive. Local 1078 further contends that the authority

cited by the City is not applicable because N.J.S.A. 11A:6-19.2 and related caselaw do not address attendance bonuses. Instead, that precedent involves the exchange of sick time for monetary benefit at a time other than at retirement, which have been determined to be preempted.

In reply, the City rejects Local 1078's arguments, maintaining that the sick leave incentives are a "back door" maneuver to receive payment for not using sick leave that subverts the intent of the Legislature. The City contends that even if the N.J.S.A. 11A:6-19.2 were ambiguous in its application to Article 30.4, Local 1078's interpretation of its effect is contrary to the intent of the Legislature. The City also counters Local 1078's contention that the payments are attendance bonuses, claiming that it merely rebrands what is supplemental compensation for unused sick leave. The City cites to the Office of the State Comptroller's ("OSC") interpretation of the statute, which determined that "bonuses and incentives used to compensate employees for unused sick leave...constitutes 'supplemental compensation' that is prohibited by law."[2/]

In this case, the question of whether N.J.S.A. 11A:6-19.2 preempts Local 1078's grievance turns on whether payment under

---

2/ The OSC acknowledged there was an "absence of definitive guidance regarding bonuses and incentives used to compensate employees for unused sick leave." Ex. A to Respondent's Brief at p. 15.

Article 30.4 is supplemental compensation for accumulated unused sick leave in an amount in excess of $15,000 at a time other than at retirement. Generally, "sick leave [is a] mandatorily negotiable subject[] unless a statute or regulation preempts negotiations." Howell Twp. Bd. of Ed., P.E.R.C. No. 2015-58, 41 NJPER 131 (2015). N.J.S.A. 11A:6:19.2 provides:

> Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the political subdivision of the State, or the agency, authority or instrumentality thereof, on or after the effective date of P.L.2010, c. 3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.

(emphasis added).

When interpreting a statute, "[o]ur duty is to determine what the Legislature intended. We must construe the [statute] as written and not according to some unexpressed intention." New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd and rem'd on other grounds, 233

N.J.Super. 173 (App. Div. 1989), rev'd and rem'd, 125 N.J. 41 (1991). In order to "give meaning to the Legislature's intent," we "first look at the plain language of the statute." State v. Thompson, 250 N.J. 556, 572 (2022). Moving beyond the statute to determine legislative intent is only necessary "when a statute contains ambiguous language that leads to more than one plausible interpretation." Ibid.

We find that N.J.S.A. 11A:6-19.2 does not expressly, specifically and comprehensively prohibit payment for perfect attendance under Article 30.4 where the sick leave policy does not provide for the accumulation of sick leave. Article 30.4 is not preempted by N.J.S.A. 11A:6-19.2 because the employees covered by the collective negotiations agreement do not accumulate sick leave, nor is there an exchange of sick leave for supplemental compensation. This is bolstered by the fact that negotiations unit members who retire do not receive any payment for sick leave upon retirement. N.J.S.A. 11A:6-19.2 preempts negotiations only for the payment for accumulated unused sick leave for employees hired after May 10, 2010 and limits it to a single payment not to exceed $15,000, paid only at the time of retirement.

Therefore, we find that the financial incentive provided by Article 30.4 is not preempted by N.J.S.A. 11A:6-19.2. For these reasons, we decline to restrain arbitration contesting the

alleged violation of Article 30.4.

ORDER

The City of Hoboken's request to restrain 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: May 25, 2023

Trenton, New Jersey