P.E.R.C. NO. 2024-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LODI,

Petitioner,

-and- Docket No. SN-2023-039

PBA LOCAL 26,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of Lodi's request for a restraint of binding arbitration filed by PBA Local 26. The grievance contests whether the Borough violated the CNA by denying certain employees the opportunity to sell back sick leave for supplemental compensation. Specifically, the grievance contends that employees hired after the effective date of N.J.S.A. 11A:6-19.2 but before the expiration of the CNA in effect on that date are exempt from the statute's preemptive effect. The Commission, in reliance on Appellate Division precedent, finds that the statute does not preempt negotiations over supplemental compensation for accumulated unused sick leave prior to retirement for this narrow group of employees.

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. 2024-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LODI,

Petitioner,

-and- Docket No. SN-2023-039

PBA LOCAL 26,

Respondent.

Appearances:

For the Petitioner, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel; Anthony G. LoBrace, on the brief)

For the Respondent, Sciarra & Catrambone, LLC, attorneys (Christopher A. Gray, of counsel and on the brief; Frank C. Cioffi, on the brief)

DECISION

On April 21, 2023, the Borough of Lodi (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Policemen's Benevolent Association, Local 26 (Association). The grievance asserts that the Borough violated Article 51(c)(3) of the CNA, which affords certain employees the choice to receive cash payment for accumulated sick leave while actively employed.

The Borough filed briefs, exhibits and the certification of the Borough Manager, Marc Schrieks. The Association filed a brief, exhibits and the certification of its President, Nicholas Nobre. These facts appear.

The Association represents all employees of the Borough Police Department, except the Police Chief, Deputy Chief of Police and all non-police employees. The Borough and Association are parties to a CNA currently in effect from July 1, 2021 through December 31, 2025.[1/] The grievance procedure ends in binding arbitration.

Article 51(c)(3) of the CNA, which has remained unchanged since at least January of 2008, states:

> All persons with an effective hire date after January 1, 1992 or on or before July 1, 2013 shall receive no more than twenty-five (25%) percent of their then current annual salary as a cash payment upon retirement or death during employment as supplemental compensation for the full earned and unused accumulated sick leave days. Each employee hired after January 1, 1992 but before July 1, 2013 shall be permitted the option to sell back up to 120 hours of sick time per year to be paid in the first payroll following December 1st of said year. Where such option is to be exercised the Employer shall be advised by November 1st, of said same year.

It is undisputed that the Borough made payments pursuant to this article and generally followed its requirements through December 2021.

The Borough Manager certifies that in 2022, the Borough reviewed its leave policies for all negotiations units and determined that the above provision did not comply with N.J.S.A. 11A:6-19.2, which, in the Borough's view, places limits on the

1/ The Association maintains an option to extend the contract by an additional year, to December 31, 2026.

payment of supplemental compensation for unused sick leave for employees hired after May 21, 2010. The Borough then sought to modify Article 51(c)(3) to comply with the statute and notified the Association of its intent.

The Association President certifies that six of the Association's members were hired between May 21, 2010 and December 31, 2012, the last day the 2008-2012 CNA was in effect. The Association filed a grievance on behalf of this limited group, claiming that the preemptive effects mandated by N.J.S.A. 11A:6-19.2 were not applicable to them. Relying on In re Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2366 (App. Div. 2017),[2/] aff'g in pt., rev'g in pt., P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015), which was attached to the grievance, the Association contends that because the CNA in effect when the grievants were hired contained a provision on supplemental compensation for unused sick leave, that the statute did not apply. The Borough disagreed, and, at the conclusion of the grievance procedure, the Association filed a request for a panel of arbitrators on February 28, 2023. 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

2/ Published in NJPER at 44 NJPER 115 (¶136 App. Div. 2017).

> 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 merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [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.]

The Borough asserts that N.J.S.A. 11A:6-19.2 preempts negotiations over Article 51(c)(3) and therefore binding arbitration related to any employee hired after the effective

date of the law must be restrained. The Borough claims that the plain language of the statute and its legislative history, to the extent it is relevant, expressly, specifically and comprehensively sets the maximum supplemental compensation for accumulated unused sick leave for employees hired after May 21, 2010 at a single payment of $15,000 only at the time of retirement.

The Borough additionally attacks the precedential and persuasive value of Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2366, which it admits held that employees hired after May 21, 2010, but before the expiration of the then-active CNA, were exempt from N.J.S.A. 11A:6-19.2's limitations where otherwise preempted contractual provisions were already in effect. The Borough contends that since the Appellate Division declined publication of its decision, it should not be considered binding precedent pursuant to NJ Court Rules. Additionally, the Borough argues that Commission precedent, both before and after the Atlantic City opinion, supports its position that the grievance concerns a non-negotiable subject.

In response, the Association argues that Atlantic City should be applied to this case because it was decided correctly and, while unpublished, is exactly on point. Specifically, the Association relies on the Appellate Division's interpretation of the last sentence of N.J.S.A. 11A:6-19.2, which found that "the

statute is not to affect the terms of a CNA in force on [the statute's] effective date" and that "the exclusion of employees who commenced service during the interim period...was sanctioned" by the law. Ultimately, the Association argues that the Borough unilaterally changed the terms and conditions of employment for the affected employees in an area that is mandatorily negotiable.

In reply, the Borough reiterates its argument that it has no discretion to negotiate outside the limits of N.J.S.A. 11A:6-19.2 and that its prior adherence to the CNA violated state law. The Borough underscored its interpretation of the law by noting that the State Comptroller's report entitled "A Review of Sick and Vacation Leave Policies in New Jersey Municipalities" buttresses its position.

The question before us is whether the issue of supplemental compensation for accumulated unused sick leave in excess of the limits set forth in N.J.S.A. 11A:6-19.2 is preempted for employees hired between the statute's effective date and the expiration of a CNA when that CNA contains a relevant supplemental sick leave provision. Relying on Atlantic City, supra, we find that the statute does not preempt for this limited category of employees.

It is well settled that the issue of sick leave is generally legally arbitrable unless preempted by a statute or regulation.

See, e.g., Burlington Cty. College Faculty Asso. v. Bd. of Trustees, 64 N.J. 10, 14 (1973). 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 [May 21, 2010]. 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.]

The Commission Chair considered the identical issue before us in Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015) pursuant to our Pilot Program for expedited scope of negotiations rulings in interest arbitration proceedings. The Chair, in reliance on Howell Tp. Bd. of Ed., P.E.R.C. No. 2015-58, 41 NJPER 421 (¶131 2015), determined that N.J.S.A. 11A:6-19.2 was applicable to all public employees hired after the statute's effective date of May 21, 2010 and that the statute did not provide any extension of that date for employees hired between

the statute's effective date and the expiration of a CNA where that CNA contained a relevant supplemental sick leave provision.

On appeal, the Appellate Division reversed this aspect of the Chair's decision. The Appellate Division found that the Chair's reasoning "ignore[d] the proviso that the statute [was] not to affect the terms of a CNA in force of its effective date." Atlantic City 2017 N.J. Super. Unpub. LEXIS 2366 at *11. Because the CNA in force in Atlantic City on May 21, 2010 had not yet expired, the court found that the statute was not applicable to employees hired during the interim period between the statute's effective date and the expiration of the CNA. Ibid.

The Commission in numerous cases has interpreted this statute and has generally found that it is applicable to employees who commence public service after the statute's effective date, relying on the statutory language "[t]his 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 [May 21, 2010]." See Hoboken, P.E.R.C. No. 2023-051, 50 NJPER 7 (¶3 2023) (attendance bonuses not preempted); Little Egg Harbor Tp., P.E.R.C. No. 2023-046. 49 NJPER 535 (¶127 2023) (conversion of sick leave to another form of leave not preempted); Robbinsville Tp., P.E.R.C. 2023-10, 49 NJPER 244 (¶52 2022) (identical statute applicable to non-civil

service jurisdictions preempts negotiations for employees even when employed by a different public entity prior to statute's effective date); Little Falls Tp., P.E.R.C. No. 2016-42, 42 NJPER 303 (¶87 2015). However, Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015) was the only case in which this agency specifically considered whether the statute was applicable to employees hired between its effective date and the expiration of a CNA when that CNA contains a relevant supplemental sick leave provision.[1/]

While Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2366, is unpublished and does not bind the Commission the same way that a published decision commands, we reject the Borough's urging to disregard it. R. 1:36-3 states:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion

1/ Although the issue was not specifically before the Commission in Howell, supra, in Footnote 1 of that decision, the Commission stated that the CNA provision which permitted for supplemental sick leave compensation in excess of the statute's limits would continue to be in force for employees hired in the interim period. The Chair did not discuss Footnote 1 of the Howell decision in Atlantic City, P.E.R.C. No. 2015-63.

> and of all contrary unpublished opinions known to counsel.
>
> [Emphasis added.]

We grant authority to such an opinion because "[w]hile not generally precedential, an unpublished opinion is . . . binding on the court or agency whose opinion is being reviewed." Pressler & Verniero N.J. Court Rules (2023), Comment 2, R. 1:36-3. We also note that Atlantic City was published in the Commission-authorized New Jersey Public Employee Reporter at 44 NJPER 115 (¶136 App. Div. 2017). While this does not grant the opinion the precedential value of a published opinion, the Courts are permitted to cite to the opinion which indicates that it has more persuasive value. R. 1:36-3. There being no compelling reason to deviate from the Appellate Division's opinion in Atlantic City, we follow its holding.

For these reasons, we find legally arbitrable the issue of supplemental compensation for accumulated unused sick leave in excess of the limits set forth in N.J.S.A. 11A:6-19.2 for employees hired in the collective negotiations unit between May 21, 2010 and the expiration of the CNA with a relevant provision in force on the statute's effective date. Here, it is uncontested that the six grievants were hired between May 21, 2010 and the expiration of the CNA which contained a provision relevant to supplemental compensation for accumulated unused sick

leave. Thus, the issue is legally arbitrable for this limited class of grievants.

ORDER

The request of the Borough of Lodi for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 21, 2023

Trenton, New Jersey