

I.R. NO. 2021-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2021-001

EDISON IAFF LOCAL 1197,

Respondent.

SYNOPSIS

A Commission Designee grants Edison's request for an interim restraint of binding arbitration pending the outcome of its scope of negotiations petition before the Public Employment Relations Commission. Edison IAFF Local 1197's grievance alleges that Edison violated the parties' collective negotiations agreement when it unilaterally implemented the Travel Quarantine Policy (Policy), which requires employees returning from out-of-state travel to contact the Director of Health, who will determine whether they are required to undergo COVID-19 testing and self-quarantine, pending the results of testing, prior to returning to work. Additionally, the Policy requires firefighters to use accumulated paid leave while quarantined, if they wish to be paid during their absence. In the event the firefighters do not have any accumulated paid leave left, the leave will be unpaid. The Designee finds that the issue of compensation for sick leave to comply with the Policy is not severable from Edison's managerial prerogative to implement the Policy. The Designee finds that issue cannot be severed from the Policy, and challenged in arbitration, without substantially undermining the Policy's purpose of mitigating the spread of COVID-19 and ensuring Edison's ability to provide critical emergency response services to the public. The Designee concluded that Edison met the standards for granting interim relief; it established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations; it will suffer irreparable harm if arbitration is not stayed; that the public interest will not be injured by restraining arbitration; and that the relative hardship to the parties weighs in favor of Edison.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel and on the brief; Boris Shapiro, on the brief)

For the Respondent, Kroll Heineman Carton, LLC, attorneys (Raymond G. Heineman, of counsel and on the brief)

INTERLOCUTORY DECISION

On August 4, 2020, the Township of Edison (Edison) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Edison IAFF Local 1197 (Local 1197).^{1/} Local 1197 alleges that Edison violated the parties' collective negotiations agreement (CNA) when it unilaterally implemented the Travel Quarantine Policy (Policy), which requires employees returning from out-of-state travel to

^{1/} On July 22, 2020, Local 1197 filed a Request for Submission of a Panel of Arbitrators identifying the grievance to be arbitrated simply as "Travel Quarantine." Edison certifies that Local 1197 has not filed a formal grievance at any time after the Policy was implemented.

contact the Director of Health, who will determine whether they are required to undergo COVID-19 testing and self-quarantine, pending the results of testing, prior to returning to work. Additionally, the Policy requires firefighters to use accumulated paid leave while quarantined, if they wish to be paid during their absence. In the event the firefighters do not have any accumulated paid leave left, the leave will be unpaid.

Arbitration of the dispute is scheduled for December 15, 2020. Local 1197 did not consent to Edison's request to stay the arbitration pending resolution of its scope of negotiations petition. As a result, on November 2, 2020, Edison filed the instant application for interim relief, seeking a temporary stay of the arbitration pursuant to N.J.A.C. 19:13-3.11.

PROCEDURAL HISTORY

On November 4, 2020, I signed an Order to Show Cause directing Local 1197 to file any opposition by November 16 and setting November 23 as the return date for oral argument. On November 16, Local 1197 filed its opposition to the application for interim relief. On November 23, counsel for Edison and Local 1197 participated in oral argument during a telephone conference call with me. In support of Edison's application for interim relief, it filed briefs, exhibits and the certification of its Business Administrator, Maureen Ruane. In opposition, Local 1197 submitted a brief, exhibits, and the certification of its

counsel. The record also includes the briefs, exhibits, and certifications submitted by the parties in the underlying scope of negotiations petition. These facts appear.

FINDINGS OF FACT

Local 1197 represents all firefighters employed by Edison, excluding superior officers. Edison and Local 1197 are parties to a CNA in effect from January 1, 2019 through December 31, 2022. The grievance procedure ends in binding arbitration.

Ruane certifies that in March 2020, in order to protect the health, safety, and welfare of the residents of New Jersey, Governor Philip D. Murphy issued an Executive Order declaring a Public Health Emergency and State of Emergency in New Jersey related to COVID-19, which is still in effect. Therein, Governor Murphy declared that it is critical for all citizens and their employers to implement appropriate measures to mitigate the spread of COVID-19. Ruane further certifies that on June 24, 2020, in a concerted effort to implement measures to curtail the spread of COVID-19, Governor Murphy issued a travel advisory which called on all individuals traveling/returning to New Jersey from states with significant community spread of COVID-19 (i.e. "hotspots") to self-quarantine for a 14-day period from the date they leave the state on the travel advisory list. Edison asserts that the Governor's travel advisory currently applies to 39 of 50 states and that the Centers for Disease Control and Prevention

(CDC) recommends that individuals avoid all non-essential travel to most countries and to quarantine for 14 days upon returning to the United States.

Ruane certifies that on July 16, 2020, she implemented and circulated to all Edison employees the "Amended Policy on Out of State Travel-Quarantine Requirements." Ruane further certifies that she implemented the Policy in order to effectuate the Governor's Executive Orders and travel advisory, to meet Edison's responsibility to mitigate the spread of COVID-19, and to safeguard the well-being of its employees and the public. The Policy provides:

AMENDED Policy on Out of State Travel -
Quarantine Requirements

Effective midnight, June 24, 2020, Governor Murphy issued a travel advisory for New Jersey residents related to the COVID-19 pandemic. In accordance with that advisory, any resident who travels out of the State of New Jersey to certain other states must quarantine for 14 days upon their return to New Jersey.

Consistent with the Governor's requirements and because COVID-19 is a direct threat to the workplace, the following policy and guidelines on out of state travel for Township employees are hereby implemented.

1. All employees taking vacation and traveling out of State or out of the Country must advise their Department Heads where they are traveling to and their return date to New Jersey. Department Heads shall advise the Administrator of employees traveling out of State or out of the Country and the date of their expected return to work.

2. All employees (or those with family members) returning from or planning to visit states listed in Governor Murphy's travel advisory are to contact the Director of Health for interview/contact tracing. The intention is to avoid exposure either directly or indirectly to the COVID-19 virus. Prior planning, to include consideration of visitation from out of state family and friends may prevent exposure and possible self-isolation.

3. As a result of the interview/contact trace a determination will be made regarding the date of last possible exposure followed by the need/duration for self-isolation, i.e. quarantine, prior to return to the workplace. Following vetting of travel by the Director of Health, he will determine whether testing will occur within 3 and up to 5 days of last possible exposure.

4. Testing. Consistent with paragraph 3, the affected employee be tested for COVID-19. Upon receipt and review of results by the Director of Health, the employee will be released to return to work so long as the results are negative.

5. Employees who had and can establish that they made travel plans and reservations prior to June 24, 2020 to travel to one of the states on the Governor's advisory list, shall review with their Department Head if working from home is available. If working from home is not available, the employee may use available sick, vacation, compensatory time or personal time for the quarantine period determined by the Director of Health per paragraph 3 and 4 above, which may be up to 14 days. Certain employees may be eligible to use paid sick leave under the FFCRA, if they have not exhausted that time, in lieu of their own sick time, except for emergency responders, i.e. police officers, firefighters, dispatchers, and DPW employees. In the absence of eligibility for paid sick leave under the FFCRA, employees may use

available sick, vacation, compensatory time, or personal time to remain in pay status during the period of quarantine provided herein. In the absence of available paid time off, the period of quarantine shall be unpaid.

6. Employees who made travel plans after June 24, 2020 and elect to travel to one of the states identified on the Governor's travel advisory list are required to use available vacation, compensatory time, or personal time to remain in a pay status during the period of quarantine provided herein. In the absence of available paid time off, the period of quarantine shall be unpaid.

7. Employees who elect to travel out of the Country are required to use available vacation or personal days to remain in a pay status during the period of quarantine. In the absence of available paid time off, the period of quarantine shall be unpaid.

Any employee who fails to adhere to the requirements of this Policy shall be subject to discipline, up to and include removal.

This Amended Policy shall take effect immediately.

Ruane certifies that on July 16, 2020, Local 1197's counsel objected, via e-mail, to Edison's unilateral implementation of the Policy because it prevents certain employees from immediately returning to work after returning from voluntary out-of-state travel and excludes firefighters from entitlement to emergency paid sick leave under the Family First Coronavirus Response Act (FFCRA) while they are under quarantine.

In response to the factual assertions in Ruane's certification, Local 1197 responds that it is not opposing the

Policy because it prevents certain employees from immediately returning to work upon return from out-of-state travel. But rather, Local 1197 asserts that its grievance solely concerns the severable issues of scheduling and compensation of firefighters under the CNA. Local 1197 further asserts that by July 7, 2020 the Governor's travel advisory had exempted critical infrastructure workers, including firefighters; and thus, the Policy was not in accordance with the Governor's travel advisory. Additionally, Local 1197 asserts that New Jersey's current COVID-19 positivity rates exceed the positivity rates in the states that are of concern in the Governor's travel advisory, thus, undermining the Policy's purported goal of mitigating COVID-19 spread.

Local 1197 asserts that the Policy is not in accordance with national and state health experts who have stated that firefighters can work safely despite being exposed to COVID-19. Local 1197 asserts that the CDC does not recommend quarantining emergency responders, such as firefighters, following COVID-19 exposure. Local 1197 further asserts that the both the New Jersey Department of Health and federal Occupational Safety and Health Administration have issued guidance on safely returning firefighters to work following potential COVID-19 exposure. Thus, based on these authorities, Local 1197 asserts that firefighters can work safely following out-of-state travel,

thereby, questioning the appropriateness of the Policy.

Moreover, Local 1197 asserts that Edison is paying some employees under the FFCRA, while availing itself of the FFCRA's "emergency responder" exemption, to force firefighters to use benefit time during quarantine. Local 1197 reiterates that arbitration of this dispute is solely about compensation and the disparate treatment of similarly situated employees under the Policy.

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The first Crowe factor hinges on the substantial likelihood of Edison prevailing on a final Commission decision on its scope of negotiations petition. 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.

Where a restraint of binding arbitration is sought, a

showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park, 78 N.J. at 154; Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

LEGAL ARGUMENTS

Edison argues that it has a substantial likelihood of prevailing in its scope of negotiations petition because it has a non-negotiable managerial prerogative to implement the Policy, which increases employee safety and protects the public welfare during a historic public health emergency. Additionally, Edison argues that under the FFCRA it has sole discretion to exempt firefighters from the FFCRA's paid sick leave provisions, which it utilized; and thus, negotiations and arbitration over its decision to exempt the firefighters is statutorily preempted.

Edison further argues that negotiations over whether firefighters would be provided paid leave, in addition to their accrued benefit time, to comply with the Policy's return-to-work requirements would substantially interfere with its policy making powers. The intended purpose of the Policy is to inhibit out-of-state travel to COVID-19 "hotspots" and to ensure that firefighters do not contaminate the firehouse upon their return from one of these states, which could cripple Edison's ability to deliver essential emergency response services. Edison argues

that if it were required to provide additional paid sick leave to firefighters completing the Policy's return-to-work protocols it would incentivize firefighters to travel out-of-state, thereby, undermining the Policy's purpose. Additionally, Edison argues that negotiations over additional paid sick leave for firefighters completing the Policy's return-to-work protocols would delay implementation of the Policy, thereby, putting the firehouse at risk of possible contamination and endangering the public. Citing various Commission cases, Edison argues that even if some aspects of the Policy, such as compensation, are traditionally negotiable, in times of emergencies such as the current COVID-19 pandemic, public employers can deviate from traditionally negotiable terms and conditions of employment when public welfare and employee safety are implicated.

Local 1197 argues that it is not seeking to arbitrate whether employees who voluntarily elect to travel out-of-state to COVID-19 "hotspots" must be allowed to return to work without being tested or quarantined, but rather, the arbitration is solely over compensation. Local 1197 argues that Edison's decision to exempt its emergency responders, including firefighters, from the FFCRA's paid sick leave provisions has resulted in disparate treatment of employees regarding sick leave compensation that undercuts Edison's alleged goal of curtailing the spread of COVID-19. Local 1197 further argues that the FFCRA

does not preempt negotiations or arbitration over whether Edison must allow paid sick leave under the FFCRA because the "emergency responder" exemption is discretionary and not mandatory.

Likewise, Local 1197 argues that the Governor's Executive Order and travel advisory are not preemptive or mandatory, but rather, advisory. Local 1197 argues that, in fact, Edison's Policy is not in accord with the Governor's edicts, as they exempt emergency responders, or consistent with state and national public health experts, as those authorities have issued guidance on how essential emergency personnel can safely return to work even after potential COVID-19 exposure. Citing various Commission decisions, Local 1197 argues that issues concerning paid sick leave, central to its grievance, are traditionally mandatorily negotiable and legally arbitrable, and such issues of compensation are severable from any managerial prerogative to implement the Policy.

ANALYSIS

Having considered all the factual assertions and legal arguments presented by the parties, particularly those summarized above, my analysis begins with a determination of Edison's substantial likelihood of prevailing in its scope of negotiations petition. Under Paterson, supra, I must first determine whether the particular item in dispute is controlled by a specific statute or regulation (i.e. whether the dispute is statutorily

preempted). Edison cites 29 CFR 826.20(a)(2) and 29 CFR 826.30(c) of the FFCRA as providing it sole discretion to exempt its firefighters from the FFCRA's paid sick leave provisions, and thus, arbitration over its decision to exempt the firefighters is statutorily preempted. The above regulations provide, in pertinent part:

29 CFR 826.20 (Paid Leave Entitlements)

(a) Qualifying reasons for Paid Sick Leave.

(1) An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to any of the following reasons:

(i) The Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

* * *

(2) Subject to a Quarantine or Isolation Order. Any Employee Subject to a Quarantine or Isolation Order may take Paid Sick Leave for the reason described in paragraph (a)(1)(i) of this section only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework. An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer does not have work for the Employee as a result of the order or other circumstances.

29 CFR 826.30 (Employee eligibility for leave)

(c) Exclusion of Employees who are health care providers and emergency responders. An Employer whose Employee is a health care

provider or an emergency responder may exclude such Employee from the EPSLA's Paid Sick Leave requirements and/or the EFMLEA's Expanded Family and Medical Leave requirements.

* * *

(2) Emergency responders—

(i) For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Based on the plain language of the above-cited regulations, I find that Edison does not have a substantial likelihood of prevailing on a final decision in its scope petition on the claim that the FFCRA is statutorily preemptive. The above regulations

permit Edison to exempt firefighters from the FFCRA's paid sick leave provisions (e.g. "An Employer... may exclude [emergency responders] from the EPSLA's Paid Sick Leave requirements..." Emphasis added.) However, these regulations do not specifically, expressly, or comprehensively mandate that Edison must exempt the firefighters from the FFCRA's paid sick leave provisions, and they do not eliminate Edison's discretion to negotiate over that subject. See Bethlehem, supra.

The Commission has found when a statute uses permissive language (e.g. "may") regarding a condition of employment and does not expressly eliminate the parties' discretion to vary that condition in a negotiated agreement, then the subject is not statutorily preempted. See No. Hudson Regional Fire and Rescue and No. Hudson Firefighters Ass'n, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013), aff'd, 41 NJPER 353 (¶112 App. Div. 2015). That Commission case found N.J.S.A. 40A:53(h), which provides that "a local unit may adopt an ordinance authorizing special emergency appropriations..." did not preempt negotiations since the "local unit" was not mandated to adopt the ordinance, but rather had the option to do so.

Both parties claim that certain CDC guidelines support their respective positions. However, it does not appear that they are preemptive; rather, they appear to be health/safety recommendations pertaining to COVID-19 that do not place any

related limitation(s) on the negotiability of the underlying subject. Similarly, it does not appear that Governor Murphy's Executive Orders or travel advisory are preemptive as they declare a Public Health Emergency and State of Emergency in New Jersey related to COVID-19 and specify certain mitigation strategies, but do not appear to place any related limitation(s) on the negotiability of the underlying subject. See, e.g., State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2019-9, 45 NJPER 114 (¶30 2018) (denying the State's request for a restraint of arbitration; holding that although N.J.S.A. App. A:9-40 authorizes the Governor "to make, amend and rescind orders, rules and regulations as in this act provided" during a state of emergency, it "does not address" certain terms and conditions of employment such as "the treatment of leave time during a state of emergency"); Ocean Cty., I.R. No. 2020-24, 47 NJPER 1 (¶1 2020). Although not a final determination on Edison's statutory preemption argument, given the above principles, I find that Edison does not have a substantial likelihood of prevailing on this argument.

Next, under Paterson, I must determine whether arbitration over the Policy would significantly interfere with Edison's exercise of inherent or express managerial prerogatives or whether it would substantially limit Edison's policymaking powers. The Commission has "recogni[zed] . . . the difficulty of

squaring proper recognition of the exercise of managerial prerogatives by public employers with the duty of public employers under [the] Act to negotiate safety issues.” City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff’d, NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den., 88 N.J. 476 (1981); accord City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992) (the Commission “[is] charged with balancing the employer and employees’ respective interests . . . considering the facts of each case.”) However, “grievance[s] [that] seek[] to prevent [an] employer from implementing a decision to increase employee safety” are not mandatorily negotiable. City of Elizabeth (“Firefighters have an extraordinary interest in promoting safety and health issues. Their lives are on the line. Employers of firefighters have a responsibility to provide a safe and healthful work environment and an interest in keeping employee injuries to a minimum. Those interests should coincide.”)

Here, I find Edison has a substantial likelihood of prevailing on a final decision in its scope petition on the claim that arbitration over the Policy would significantly interfere with its managerial prerogative and substantially limit its policy making powers. Local 1197 asserts that it is not challenging in arbitration Edison’s “local quarantine order, the testing of employees, or the assignment of firefighters, who have

traveled out of state, to remain at home and self-isolate after consulting with the Health Department” and that “the parties’ dispute is not over safety, it is over compensation.” However, Local 1197’s arguments that the Policy is inconsistent with exemptions to the Governor’s COVID-19 edicts and state/national public health experts’ guidance directly attack the Policy’s necessity and efficacy in curbing COVID-19 spread, which Local 1197 reassures are not at issue in the arbitration. Put simply, Edison has the managerial prerogative to implement the Policy; however, Local 1197 argues that Edison must negotiate over whether the firefighters must be paid additional leave time to comply with the Policy. To resolve this dispute a determination must be made whether negotiating the “impact issue” would significantly or substantially encroach upon the management prerogative. See Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass’n, 81 N.J. 582 (1980); see also Communications Workers of Am. v. State of New Jersey (Rowan Univ.), App. Div. Dkt. No. A-1500-98T5, 26 NJPER 30 (¶31009 1999), aff’g, State of New Jersey (Rowan Univ.), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998).

Here, I find that the “impact” issue (e.g. whether the firefighters must be paid additional leave time to comply with the Policy) is not severable from Edison’s managerial prerogative to implement the Policy, which is designed to mitigate the spread

of a historic pandemic and ensure its ability to provide critical emergency response services to the public. A remedy sought by Local 197 through arbitration is the recoupment of a Local 1197 member's benefit time used to comply with the Policy. See Sussex Cty., P.E.R.C. No. 2019-52, 46 NJPER 4 (¶2 2019) (restraining arbitration of a grievance seeking the recoupment of sick days used by union members as the result of the employer's decision to not close its facilities during a snow storm); see also Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-30, 21 NJPER 392 (¶26241 1995) (restraining arbitration of a grievance seeking recoupment of used benefit time due to board's managerial decision to hold classes during spring vacation to make up for snow days).

If Edison were required to provide the firefighters additional benefit time, utilizing the FFCRA or other means, rather than requiring the firefighters to use their own accrued benefit time, while they cleared the Policy's return-to-work protocols, the firefighters would be encouraged to travel out-of-state; precisely what the Policy is attempting to inhibit. For example, the firefighters would be incentivized to take a vacation to an out-of-state "hotspot", knowing they could receive up to an additional 14 days of paid leave while they cleared the Policy's return-to-work protocols. The use of the firefighters' accrued benefit time while complying with the Policy is a

critical component of the Policy's efficacy. That component cannot be severed from the Policy without substantially undermining the Policy's purpose of discouraging travel to out-of-state "hotspots" and ensuring that, if such travel is voluntarily engaged in, the firefighters use their accrued benefit time to safely clear the Policy's return-to-work protocols and avoid potentially contaminating the firehouse.

Moreover, even if I were to find the issue of compensation, a traditionally negotiable subject, to be several from Edison's managerial prerogative to implement the Policy, arbitration over the Policy would still significantly interfere with and substantially limit Edison's policymaking powers. Public employers have been given some latitude in demonstrable emergencies to "deviate" from mandatorily negotiable terms and conditions of employment that normally prevailed. See Passaic Cty. I.R. No. 2020-20, 46 NJPER 533 (¶120 2020) (denying the union's interim relief request in an unfair practice charge challenging the employer's complete ban on outside employment to mitigate COVID-19 risk at its long term care facility); see also Colts Neck, P.E.R.C. No. 2014-59, 40 NJPER 423 (¶14036 2014) (arbitration restrained when emergency conditions after Hurricane Sandy required the Township to hire a temporary yard monitor to keep records of debris weight to ensure federal emergency funds); Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER

520 (¶169 2014); Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982); Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 163 (¶13 1982).

During this devastating global pandemic, New Jersey residents have suffered some of the highest COVID-19 infection and death rates in the country, economic lockdowns, isolation from friends and family, social distancing requirements, face covering mandates, among many other adverse consequences arising from the need to combat this ongoing public health crisis. Edison has determined, in its managerial prerogative, that the Policy is necessary to meet its responsibility to mitigate the spread of COVID-19 and protect the public, in furtherance of New Jersey's articulated public policy objectives. The severity and duration of this global emergency and the Policy's measures to address it weigh in favor of deviating from arbitration over the traditionally mandatorily negotiable subject of compensation for sick leave.

Having found that Edison has a substantial likelihood of prevailing in a final decision on its scope petition, I briefly turn to the remaining Crowe factors. First, I find that Edison may suffer irreparable harm if the arbitration is not stayed. While there exists a possibility of an outbreak of COVID-19 among Edison's firefighters given the high infection rate in New Jersey, the Policy's purpose is to lessen that probability by

curtailing out-of-state travel to additional COVID-19 "hotspots". An arbitral ruling that Edison cannot require the firefighters to use accrued benefit time while clearing the Policy's return-to-work protocols would create the perverse incentive to travel out-of-state that the Policy seeks to avoid, thus, increasing the probability of an outbreak. An outbreak among the firefighters would be absolutely devastating to Edison's ability to provide essential emergency response services and protect the public, during an ongoing crisis where those services are needed most, which constitutes irreparable harm.

Conversely, Local 1197 will not suffer irreparable harm from a stay of arbitration, as it maintains that the crux of the arbitration is about compensation. Irreparable harm is by definition harm that cannot be remedied at the conclusion of a final Commission determination. State of New Jersey (Kean University), I.R. No. 2019-2, 45 NJPER 61 (¶17 2018). Ordinarily, where the final remedy is primarily money, the Commission is reluctant to grant interim relief. Township of Maplewood, I.R. No. 2009-26, 35 NJPER 184 (¶70 2009); Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999). Money alone, without additional factors demonstrating particular hardship, does not support irreparable harm. See Sussex County Bd. of Freeholders & Sussex County Sheriff, I.R. No. 2003-13, 29 NJPER 274 (¶81 2003). Although I have found it unlikely, Local 1197 may still prevail

in a final decision in the underlying scope petition and, through arbitration, obtain its desired remedy of recoupment of used sick leave or lost pay resulting from the Policy. The loss of time and money that may still be remedied does not constitute irreparable harm.

Further, the public interest will not be injured by an interim relief order staying the arbitration. As stated above, Edison implemented the Policy to protect the public and the firefighters from COVID-19 and to ensure those firefighters are available to protect and serve the public. Conversely, the public interest may be injured if Edison, and its taxpayers, were required to pay for additional paid sick leave, on top of the firefighters accrued benefit time, to implement the Policy, and if Edison were required to pay the cost of litigating a dispute which may not be mandatorily negotiable or legally arbitrable. See Edison Twp. Bd. of Educ., I.R. No. 2015-2, 41 NJPER 349 (¶111 2015) (“...the public interest will not be injured by restraining arbitration since taxpayer funds will be preserved...”).

Lastly, the relative hardship to the parties in granting or denying relief weighs in favor of Edison. As stated above, a delay in the implementation or relaxation in the enforcement of the Policy brought about by negotiations or arbitration could increase the probability of an outbreak, thus, undermining the Policy's purpose. On the other hand, a temporary restraint of

arbitration pending a final Commission decision on the underlying scope petition may merely cost Local 1197 some delay in getting to arbitration, where it can potentially be made whole. Thus, Edison's hardship if the arbitration is not stayed outweighs Local 1197's hardship if it is temporarily restrained from arbitration.

CONCLUSION

Given the legal precepts and analysis set forth above, I find that the Commission's interim relief standards have been met. Accordingly, I grant the application for interim relief. This case will be referred to the Commission for final disposition.

ORDER

Edison's application for interim relief is granted. The arbitration is temporarily restrained pending the Commission's final determination of Edison's scope of negotiations petition.

/s/Ramiro A. Perez
Ramiro A. Perez
Commission Designee

DATED: November 30, 2020

Trenton, New Jersey