

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WOODBRIDGE,

Petitioner,

-and-

Docket No. SN-2016-015

WOODBIDGE PBA LOCAL #38,

Respondent.

SYNOPSIS

A Commission Designee grants the request of the Township of Woodbridge ("Petitioner") for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the Woodbridge PBA Local #38, ("Respondent"). The grievance asserted that the Petitioner violated the parties' collective negotiations agreement when it required two police officers to use accumulated sick leave for on the job injuries and failed to extend up to one year's sick leave with pay to them.

The Petitioner argued that the Respondent's grievance is preempted by N.J.S.A. 40A:14-137 since the Petitioner's examining physicians did not certify to the two officers' injuries after they were seen in December 2014, and as a result, the arbitration must be restrained pending the Commission's decision in this matter.

The Designee found that N.J.S.A. 40A:14-137 was preemptive based on the language of the statute and prior Commission decisions and that the Petitioner had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that it had met the other elements necessary for a grant of interim relief.

I.R. NO. 2016-3

STATE OF NEW JERSEY
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In the Matter of

TOWNSHIP OF WOODBRIDGE,

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Docket No. SN-2016-015

WOODBIDGE PBA LOCAL #38,

Respondent.

Appearances:

For the Petitioner, Genova Burns LLP, attorneys (Brett M. Pugach, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman P.C., attorneys (Paul L. Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On September 14, 2015, the Township of Woodbridge (Township) petitioned for a scope of negotiations determination and on September 24, 2015, filed an application for interim relief requesting temporary restraints. The Township sought a temporary restraint of binding arbitration of a grievance filed by the Woodbridge PBA Local #38 (PBA) in July 2015. Acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d)3, I issued an Order to Show Cause without temporary restraints and after hearing oral argument from the parties subsequently issued an Order temporarily restraining the arbitration pending the Commission's decision in this matter.

FINDINGS OF FACT

The PBA is the exclusive representative for all the Police Officers in the Township's Police Department, excluding Sergeants, Lieutenants, Captains, the Deputy Chief of Police, the Chief of Police, and all other Employees not named. The parties have filed briefs, certifications and exhibits. The grievance asserts that the Township violated Article XVII(B) of parties' collective negotiations agreement (CNA),^{1/} and any other relevant provisions when it required two police officers to use accumulated sick leave for on the job injuries and failed to extend up to one year's sick leave with pay to them. The two officers were initially placed on paid injury leave but the Township required the two officers to use accumulated sick leave after their (the Township's) examining physicians found them fit for duty and able to return to work in December 2014 pursuant to N.J.S.A. 40A:14-137.^{2/} The two officers disputed the Township's examining physicians' findings and subsequently saw personal

1/ The parties current CNA is effective from January 1, 2015 to December 31, 2018; the previous CNA was in effect from January 1, 2012 to December 31, 2014. Article XVII is identical in both agreements.

2/ N.J.S.A. 40A:14-137 Leaves of absence with pay to certain members and officers provides:

"The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability."

physicians that found that they were not fit for duty.

Thereafter, the Township did not send the two officers for a second examination with the Township's examining physicians. The PBA filed a grievance in June 2015 and then filed for arbitration in July 2015 after the grievance was denied.

The Township argues that the PBA's grievance is preempted by N.J.S.A. 40A:14-137 since the Township's examining physicians did not certify to the two officers injuries after they were seen in December 2014, and as a result, the arbitration must be restrained pending the Commission's decision in this matter.

In response, the PBA argues that it is well established that paid sick/injury leave is a mandatorily negotiable term and condition of employment and that the Commission has never held that N.J.S.A. 40A:14-137 preempts arbitration of contractual disputes concerning the wrongful denial of paid injury leave.

The PBA has cited the following provisions from Article XVII from the CNA in its brief as relevant:

B. If an Employee sustains a major injury, sickness or disability which is related to his/her employment, then he/she shall be entitled to full salary during the period of one (1) year from the date of said disability or injury or sickness and there shall be no use of accumulated sick time. For all periods after one (1) year, accumulated sick time must be utilized. Furthermore, all compensation checks received for said major injury, sickness, or disability must be returned to the Township.

...

(C)2. Procedure

(a) The Township may, in its sole discretion, require an Employee requesting utilization of benefits under this Section to be examined by a doctor of the Township's choice. It is the Township's intention, where possible, to send the Employee to a doctor with expertise in the area. The Township will pay for the cost of the doctor's visit. The results of any examination shall be provided to the Employees and the Chief of Police.

CONCLUSIONS OF LAW

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. DeGioia, 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). Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

Where a restraint of binding grievance 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 Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975)^{3/} and City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the Township may have.

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

^{3/} In Englewood the court held:

"We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings." Id. at 125.

[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.

[88 N.J. at 404-405]

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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.

[Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute 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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982).

In Sayreville Bor. P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986), recon. den. P.E.R.C. No. 87-58, 12 NJPER 856 (17331 1986), (a matter where the employee refused to be examined by the Borough's examining physician) the Commission held that N.J.S.A. 40A:14-137 was preemptive:

[T]he PBA has grieved the removal from the payroll of an allegedly injured officer who refused to be examined by a Borough-designated physician. We agree with the Borough that N.J.S.A. 40A:14-137 gives it the right to insist that an officer applying for "injured on duty leave" be examined by a

physician appointed by the Borough. This statute is preemptive. See e.g. County of Middlesex and PBA Local 152 Correction Officers of Middlesex County Workhouse, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd App. Div. A-3564-78 (6/19/80).

After the above citation, the Commission added a footnote which stated, "Once that examination is made, a refusal to grant leave to the officer would present a different issue for arbitration." In the instant matter the two officers were examined by the Township's examining physicians but their personal physicians disputed the findings of the those physicians. As a result, the PBA asserts that there is a dispute between the physician's opinions as to the fitness for duty of the two officers, and, that the footnote above is evidence that under these facts the arbitration of the grievance is not preempted by N.J.S.A. 40A:14-137.

In City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992) where the Commission reviewed proposed language from the City's firefighter's union, the FMBA, and concluded that N.J.S.A. 40A:14-16,^{4/} (which is virtually identical to N.J.S.A.

4/ N.J.S.A. 40A:14-16. Leaves of absence with pay to certain members and officers provides:

"The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its paid or part-paid fire department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.

40A:14-137 except that it applies to members and officers of municipal paid or part-paid fire departments) was not mandatorily negotiable and also referenced the requirement for an examining physician's certification:

The City contends that N.J.S.A. 40A:14-16 prohibits injury leave payments beyond one year. The FMBA concedes that point. We therefore declare the underlined sentence to be not mandatorily negotiable.^{5/} City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). We also note that N.J.S.A. 40A:14-16 conditions paid leaves of absence upon an examining physician's certification of illness, injury or disability; a negotiated agreement may not negate that requirement.

Similarly, in Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015) (a case involving paid injury leave in addition to workers' compensation payments involving county correction officers), the Commission addressed N.J.S.A. 40A:14-113^{6/} (again which is virtually identical to N.J.S.A. 40A:14-137 except that

5/ The proposed language stated:

"Said payment shall not exceed one (1) calendar year unless an extension is approved by the City, which consent shall not be unreasonably withheld."

6/ N.J.S.A. 40A:14-113 Leaves of absence with pay to certain members and officers provides:

"The board of chosen freeholders of any county, by resolution, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured, ill or disabled from any cause, provided that the board appointed examining physician, shall certify to such injury, illness or disability."

it applies to members and officers of county police departments and correction officers):

Moreover, N.J.S.A. 40A:14-113 allows counties to grant police leaves of absence with pay for injury or illness from any cause, not just a work-related cause. The Commission has consistently upheld the mandatory negotiability of work/sick injury leave clauses in the grievance arbitration, collective negotiations, and interest arbitration contexts, so long as the provisions did not negate the examining physician certification requirement and did not provide for such leave in excess of the one year limit specified by N.J.S.A. 40A:14-113 and companion statutes. (Emphasis in the original; footnotes omitted).

See also Morris Cty. and Morris Cty. No. 6, NJCSA, P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp.2d 67 (¶49 App. Div. 1979) and Middlesex Cty., *supra*.

Regarding the footnote in Sayreville above, I can only conclude that the Commission was referring to a fact specific situation where an employer adopted the provisions of N.J.S.A. 40A:14-137 by ordinance (and it was a provision in the parties' CNA) and its examining physician certified to the injury and then the employer subsequently refused to grant the leave of absence with pay; or where the employer did not allow a potentially injured, ill, or disabled employee to see its examining physician and refused to grant the leave of absence with pay. Any other interpretation, based on the Commission's cases cited above is

misplaced.^{7/8/} Cf. Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124 (¶29062 1998) (The Commission addressed the one year limitation under N.J.S.A. 40A:14-137 and there was a factual dispute regarding whether a police officer had an existing injury or a separate injury entitling the officer to another year of paid injury leave under the parties' contract. Under those specific facts, the Commission did not restrain arbitration).

The PBA also argues that the City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) is controlling. In that decision, a police officer was denied continued placement on contractual line-of-duty injury leave and instead had to charge sick days and vacation time pending the outcome of his workers' compensation claim. The employee had been ordered back to work after an examination from an insurance company doctor. The Commission held that workers' compensation laws did not preempt arbitration under the facts of that case. However, the

7/ The preemptive effect of the statute would be eviscerated since any employee, after being examined the employer's examining physician and being found fit for duty, would be able to receive a differing opinion from a private physician and then be able to proceed to arbitration.

8/ The Commission denied reconsideration in Sayerville Bor. P.E.R.C. No. 87-58, 12 NJPER 856 (¶17331 1986), denying recon. P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986) and held:

"N.J.S.A. 40A:14-137 plainly conditions injury leave payment on the certification of the "examining physician appointed by said governing body" that the employee is disabled."

Commission's holding did not address the requirement for an examining physician to certify to an injury under N.J.S.A. 40A:14-137.^{9/} The grievance in the instant matter does not concern workers' compensation law.^{10/}

Based on the above, I find that the Township has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations since, under the facts of this matter, N.J.S.A. 40A:14-137 preempts arbitration of the PBA's grievance and the Township would suffer irreparable harm. See Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App. Div. 1994), quoting Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 514-15 (3d Cir. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result of a given scope proceeding

^{9/} Although the Commission cited the statute in a footnote, it was regarding the one year limitation and cited Woodbridge, supra as authority.

^{10/} One of the two officers in the instant matter certified that he had applied for a "Med & Temp" motion under workers' compensation but later withdrew his pending motion after the workers' compensation judge advised the officer's attorney that he was being permitted to use his health benefits to seek treatment.

would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.

The application for interim relief is granted. Accordingly, this case will be referred to the Commission for final disposition.

ORDER

The Townships's application for a restraint of binding arbitration is temporarily granted pending the final decision or further order of the Commission.



David N. Gambert
Commission Designee

DATED: January 7, 2016

Trenton, New Jersey