

P.E.R.C. NO. 2005-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2004-069

F.O.P. LODGE 200,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey (Department of Corrections) for a restraint of binding arbitration of a grievance filed by F.O.P. Lodge 200. The grievance asserts that the employer improperly denied paid military leave to a correction officer. The Commission concludes that leaves of absence are generally mandatorily negotiable and rejects the employer's argument that this grievance is preempted by a statute granting military leave for permanent employees or full-time employees. The parties' disagreement over whether the officer is a "permanent" employee cannot be resolved in a scope of negotiations proceeding.

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, Peter C. Harvey, Attorney General
(Karen M. Selby, Deputy Attorney General, on the brief)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman, on the brief)

DECISION

On May 7, 2004, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed on behalf of a correction officer now represented by F.O.P. Lodge 200.^{1/} The grievance asserts that the employer improperly denied paid military leave to a correction officer.

^{1/} At the time the grievance and this petition were filed, correction officers were represented by the State Law Enforcement Conference of the New Jersey State PBA (PBA Local 105).

The parties have filed briefs and exhibits. These facts appear.

The FOP represents a law enforcement unit including correction officers, senior correction officers, and correction officer recruits. The most recent contract covering these employees expired on June 30, 2003. Article XXVII of that contract is entitled Military Service Leave. It provides:

The existing State statutes concerning military service in their present state or as they may be amended will be observed by the parties hereto. The benefits under these applicable statutes shall be provided for any eligible employee in the bargaining unit.

The contractual grievance procedure ends in binding arbitration.

Piacenta Jackson was appointed to the position of Correction Officer Recruit effective July 26, 2002. She was classified as a permanent employee, subject to successful completion of the one-year working test period set by N.J.A.C. 4A:4-5.2(d). She successfully completed that period.

On August 20-23, August 26-30, and September 4-6, 2002, Jackson was ordered to attend annual national guard training. She did so, but the employer declined to pay her unless she used vacation days or other accumulated leave time.

Jackson filed a grievance alleging that she should have been paid for military leave and that the leave days she used for those absences should be restored to her. An employer-designated hearing officer denied the grievance, finding that Jackson was

not a permanent employee at the time of her military leave and therefore not entitled to the paid leave set forth in N.J.S.A. 38A:4-4 and incorporated in the parties' contract. Arbitration was then demanded and 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 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 this grievance or any contractual defenses the employer may have.

Paid and unpaid leaves of absence are, in general, mandatorily negotiable unless a statute or regulation preempts negotiations. Burlington Cty. College Faculty Ass'n v. Burlington Cty. College Bd. of Trustees, 64 N.J. 10, 14 (1973); State of New Jersey (DOC) v. CWA, 240 N.J. Super. 26 (App. Div. 1990). A statute or regulation will not preempt negotiations unless it speaks in the imperative and specifically sets an employment condition by eliminating any discretion to vary it.

State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 80-82 (1978).

The employer argues that N.J.S.A. 38A:4-4a preempts an agreement to pay Jackson because she was not yet a permanent employee at the time of her military leaves. N.J.S.A. 38A:4-4 provides:

a. A permanent or full-time temporary officer or employee of the State . . . who is a member of the organized militia shall be entitled, in addition to pay received, if any, as a member of the organized militia, to leave of absence from his or her respective duties without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year. . . .

b. Leave of absence for such military duty shall be in addition to the regular vacation or other accrued leave allowed such officers and employees by the State. . . .

c. Notwithstanding subsection a. of this section, a full-time temporary officer or employee who has served under such temporary appointment for less than one year shall receive for the service hereinabove described leave without pay but without loss of time.

See also N.J.A.C. 4A:6-1.11. The employer argues that Jackson was not a permanent employee under Civil Service law because N.J.A.C. 4A:1-1.3 defines a permanent employee as "an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of

the working test period" and N.J.A.C. 4A:14-5.2(d) requires correction officers to serve a 12-month working test period. The FOP responds that the definitions set forth in N.J.A.C. 4A:1-1.3 apply only in determining rights under Civil Service regulations, not in determining rights under N.J.S.A. 38A:4-4, and that N.J.S.A. 38A:4-4c implicitly allows permanent employees with less than one year of service to be paid for military leave.

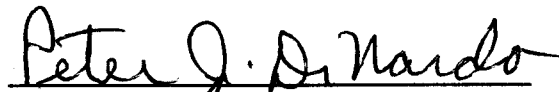
N.J.S.A. 38A:4-4a does not preempt arbitration of Jackson's claim for paid contractual leave. That statute guarantees paid military leave in certain instances, but does not prohibit a contractual benefit providing paid leave in other instances. Compare Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-26, 17 NJPER 427 (¶22206 1991) (N.J.S.A. 38:23-3 did not preempt arbitration of grievance seeking full pay for teacher called to duty in Persian Gulf war); West Orange Tp., P.E.R.C. No. 84-141, 10 NJPER 358 (¶15166 1984) (N.J.S.A. 38A:4-4 did not preempt arbitration of grievance seeking paid leave to attend National Guard drills and contesting decision to reschedule work days to eliminate conflict). Further, when the parties have expressly incorporated a statute setting an employment condition in their collective negotiations agreement, they may also generally empower an arbitrator to determine whether the incorporated statute or regulation has been violated. West Windsor Tp. v. PERC, 78 N.J. 98, 107 (1978); City of Newark, P.E.R.C. No. 89-33,

14 NJPER 648 (¶19271 1988) (arbitrator may determine whether employer violated N.J.S.A. 38A:4-4). The parties' disagreement over whether Jackson is a "permanent" employee for purposes of N.J.S.A. 38A:4-4 goes to the merits of this grievance and cannot be resolved by us in a scope of negotiations proceeding.

ORDER

The request of the State of New Jersey (Department of Corrections) for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Peter J. DiNardo
Acting Chairman

Acting Chairman DiNardo, Commissioners Buchanan, Katz, Sandman and Watkins voted in favor of this decision. Chairman Henderson abstained from consideration. None opposed. Commissioner Mastriani was not present.

DATED: October 28, 2004
Trenton, New Jersey
ISSUED: October 28, 2004