

P.E.R.C. NO. 2010-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLIFFSIDE PARK,

Petitioner,

-and-

Docket No. SN-2009-017

CLIFFSIDE PARK PBA LOCAL NO. 96,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of Cliffside Park's request for a restraint of binding arbitration of a grievance filed by the Cliffside Park PBA Local No. 96. The grievance asserts that the Borough violated the parties' collective negotiations agreement when it issued a new attendance policy and then refused to negotiate over issues arising from the adoption of the policy. Because some aspects of the policy either involve or trigger an obligation to negotiate over mandatorily negotiable subjects, the Commission permits the PBA to arbitrate its claim that the Borough was contractually obligated to negotiate.

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, Diktas Schandler Gillen, attorneys
(Christine Gillen, on the briefs)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Gregory G. Watts and Lauren P.
Sandy, on the briefs)

DECISION

On September 15, 2008, the Borough of Cliffside Park petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Cliffside Park PBA Local No. 96. The grievance asserts that the Borough violated the parties' collective negotiations agreement when it issued a new attendance policy and then refused to negotiate over issues arising from the adoption of the policy. The PBA also filed an unfair practice charge alleging that the adoption of the policy violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Dkt. No. CO-2009-44). Because at least some aspects of the policy either involve or

trigger an obligation to negotiate over mandatorily negotiable subjects, we will permit the PBA to arbitrate its claim that the Borough was contractually obligated to negotiate.

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

The Borough is not a Civil Service jurisdiction. The PBA represents the Borough's police except for the chief and deputy chief. The parties' collective negotiations agreement is effective from January 1, 2007 through December 31, 2010. The grievance procedure ends in binding arbitration. Section II of the agreement, "Prior Practices," provides:

Consistent with Chapter 303, Public Laws of New Jersey, 1968, the Borough shall not effect any change in policy concerning terms and conditions of employment as presently exist and they are included as part of this Agreement and contained herein.

This Agreement shall not be modified in whole or part by the parties except by an instrument duly executed by both parties.

Section XVII, "Preservation of Terms and Conditions of Employment," provides:

It is the intent of the Agreement to be supplemental to the terms and conditions of employment existing at the present time. All existing terms and conditions of employment shall continue except as modified by this Agreement. All existing rules and regulations governing the Police Department shall continue in full force and effect except as modified by this Agreement.

Sometime before July 21, 2008, the PBA and its attorney received a copy of a "Borough of Cliffside Park Police Department Attendance Policy (SOP)," scheduled to take effect on August 1, 2008. On July 21, the PBA president sent a memorandum to the Chief initiating a contract grievance concerning the adoption of the policy. The grievance asserts that the policy violates Sections II and XVII and that numerous points covered by the policy are mandatory subjects of negotiations under the Act.

On July 25, 2008, the Chief responded that he would be willing to discuss the policy after he returned from his vacation and would not make a final decision on the grievance until the meeting when he would have the opportunity to consider the PBA's position. He welcomed the PBA to contact his office to schedule a meeting after his return from vacation on August 4.

While the Chief was on vacation, the PBA was advised that the policy would take effect on August 1, 2008. On August 1, the PBA filed its unfair practice charge. On August 5, the Borough's attorney protested that the PBA had moved the grievance to step II before the Chief had been given an opportunity to respond to the grievance at step I. On August 6, the PBA's attorney wrote to the Borough's attorney suggesting the issues of concern to the PBA that should be the subject of negotiations.

When the Chief returned from vacation, he found out that the PBA had not made an appointment to meet, but had instead filed

its charge. On September 9, the PBA demanded binding arbitration. On September 10, the PBA wrote to the Borough stating that if it did not hear from the Borough concerning its intentions to negotiate the issues referenced in its August 6 letter, the PBA would contemplate filing an unfair practice charge.^{1/} This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed., 78 N.J. 144 (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.

[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. Accordingly, the Borough's contention that the grievance is untimely is outside our jurisdiction. See River Edge Bor., P.E.R.C. No. 2009-49, 35 NJPER 69, 70 (¶27 2009).

^{1/} The PBA's charge had already been filed on August 1, 2009.

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 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially

limit government's policymaking powers. No preemption issue is presented.

This case comes to us in an unusual posture. This is not a situation where the PBA has made specific contract proposals at the negotiations table which the Borough believes are not mandatorily negotiable, thus triggering its filing a scope of negotiations petition. Nor is it a situation where the contract has a specific provision on sick leave or a related topic that the PBA is seeking to enforce in binding arbitration and which the Borough believes is not legally arbitrable, thus triggering its filing a scope of negotiations petition. Instead, the PBA is claiming that the Borough has violated the contract by adopting its policy and by refusing to negotiate over mandatorily negotiable issues flowing from the adoption of the policy.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982), we held that the employer had a prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." However, disputes over whether a policy has been properly applied to deny sick leave benefits were found to be legally arbitrable. In addition, there are mandatorily negotiable issues that may flow from the adoption of an attendance policy. Such issues may include receipt of payment for accumulated, unused sick leave as a form of deferred compensation, see Morris School District Bd.

of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332 (App. Div. 1998); certif. den. 156 N.J. 407 (1998); a schedule of progressive penalties for sick leave abuse, see Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); see also Rutgers, The State Univ., P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991) (progressive discipline concepts are mandatorily negotiable); restrictions on using other forms of paid leave for sickness, see City of Paterson, P.E.R.C. No. 2005-33, 30 NJPER 463, 466 (¶154 2004); the cost of obtaining a doctor's note, Hudson Cty., P.E.R.C. No. 97-90, 23 NJPER 132 (¶28064 1997); and the circumstances under which an employee can be removed from an overtime list, see Borough of Park Ridge, P.E.R.C. No. 87-55, 12 NJPER 851 (¶17328 1986).

Under these circumstances, the grievance is legally arbitrable because the PBA may seek to arbitrate its claim that the Borough violated the contract by either changing or refusing to negotiate over mandatorily negotiable aspects of sick leave. The PBA may also seek an arbitral award ordering the Borough to negotiate over the mandatorily negotiable issues flowing from the adoption of the sick leave policy. Should the parties negotiate, either voluntarily or by order, and a dispute arise over a particular proposal that the PBA seeks to negotiate, one or both

parties may re-file a scope of negotiations petition and we will decide the negotiability of the specific proposal.

ORDER

The request of the Borough of Cliffside Park for a restraint of binding arbitration of a grievance seeking an arbitral order requiring negotiations over mandatorily negotiable issues arising from the adoption of the Borough's new attendance policy is denied.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey