

P.E.R.C. NO. 2015-46

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Petitioner,

-and-

Docket No. SN-2014-068

PBA LOCAL 167 and  
PBA LOCAL 167, SOA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the County of Mercer for a restraint of binding arbitration of grievances filed by PBA Local 167 and PBA Local 167, SOA. The grievance asserts that the County violated the collective negotiations agreements when it withheld paid leave from unit members who were injured or became ill on the job. The Commission finds that paid injury leave in addition to worker's compensation is mandatorily negotiable where not specifically preempted by statute, and that N.J.S.A. 40A:14-113 allows counties to grant police paid sick/injury leave for up to one year whether or not the injury or illness is work-related.

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, Arthur E. Sypek, Jr., Mercer County Counsel (Kristina E. Chubenko, of counsel and on the brief)

For the Respondent, Detzky Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel)

DECISION

On February 28, 2014 the County of Mercer filed a scope of negotiations petition seeking restraint of binding arbitration of grievances filed by PBA Local 167 and PBA Local 167, SOA (collectively referred to as "Local 167"). The grievances allege that the County violated the parties' collective negotiations agreements when it withheld paid leave from employees who were injured or became ill on the job. The following facts appear.

The County has filed briefs, exhibits, and the certifications of Elizabeth Scannella, the County's Real Estate Manager/Risk Manager, and Francisco Javier Villota, M.D., Medical Director for the Department of Occupational Medicine and

Corporate Health at Robert Wood Johnson University Hospital Hamilton (RWJUHH).<sup>1/</sup> Local 167 has filed a brief and the certifications of Donald Ryland, a County Correction Officer and PBA Local 167 President, and Robert James, a County Correction Officer Lieutenant and PBA Local 167, SOA President.

PBA Local 167 represents the County's rank and file corrections officers, while PBA Local 167, SOA represents the County's supervisory corrections officers in the ranks of Sergeant and Lieutenant. Each unit is signatory to a collective negotiations agreement (CNA) with the County effective from January 1, 2009 through December 31, 2014.

Both CNA's include the following identically worded provision within the "Paid Leaves of Absence" section:

16.3 Occupational Injury Leave - Any employee who is disabled due to an occupational injury or illness shall be granted a leave of absence with full pay for the period of time the employee is disabled. Such disability is to be determined by the County physician. Said leave of absence shall be limited to a maximum of one year from the date of injury or until temporary disability payment would have terminated, whichever is sooner. New Jersey Workers Compensation Law shall apply if the disability continues beyond one year.

Employees returning from authorized leaves will be restored to their original classification and shift at the then

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<sup>1/</sup> Dr. Villota certifies that RWJUHH provides medical services to the County, including treatment for injuries alleged to have occurred during the course of employment.

appropriate rate of pay with no loss of seniority or other rights or benefits.

Scannella certifies that when an employee alleges a work-related injury, the employee is required to inform his/her supervisor, complete a Worker's Compensation Questionnaire, and report to Robert Wood Johnson Occupational Health for evaluation and/or treatment. She certifies that once the Worker's Compensation Questionnaire and other documentation are forwarded to the County's Insurance office, the information is reviewed and the claim is deemed either compensable or is placed under investigation. Employees are provided with medical treatment while their claim is under investigation. Once a claim is deemed compensable, employees who are out-of-work due to injury receive temporary total disability benefits retroactive to the first compensable day along with continuation of medical benefits.

Dr. Villota certifies that when County employees are referred to RWJUHH for treatment of alleged work-related injuries, the patient provides information about the injury, but RWJUHH does not otherwise investigate how the injury occurred unless specifically requested after a claim has been placed under investigation by the County.

Ryland and James certify that the County began withholding the "full pay" guaranteed by section 16.3 of the CNA to certain employees injured on the job, even after their respective disability was confirmed by the "County Physician" while it

investigated the circumstances surrounding the injury and the injury itself. Therefore, the employees were forced to exhaust their own paid leave while other employees who were not subjected to County investigations were provided the contractual "full pay" for the duration of their convalescence. They contend that pursuant to 16.3, the CNA requires that an injured employee be provided "full pay" once that employee's work-related disability is confirmed by the County Physician, regardless of whether the County continues investigating the merits of the injury.

Local 167's grievances alleging violation of section 16.3 of the CNA were denied. On December 24, 2013 and January 9, 2014, PBA Local 167 and PBA Local 167, SOA, respectively, filed demands for binding grievance arbitration. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Absent a preempting statute or regulation, paid injury leave in addition to that provided by worker's compensation is

mandatorily negotiable. See, e.g., Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124 (¶29062 1998); Morris Cty. and Morris Coun. 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); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in part, 6 NJPER 338 (¶11169 App. Div. 1980). In affirming the part of the Commission's decision in Middlesex Cty., supra, declaring work injury leave to be mandatorily negotiable, the Court stated:

As to issue 2, PERC concluded that the matter of leave of absence with pay for work-incurred injuries was a mandatory subject of collective negotiations to the extent that the proposed contractual provision did not contravene the specific limitations and qualifications of N.J.S.A. 40A:9-7. We agree with this conclusion essentially for the reasons given by PERC.  
[6 NJPER 338]<sup>2/</sup>

The County asserts that the grievances are statutorily preempted from proceeding to arbitration by the Worker's Compensation statute and regulations. The County cites N.J.S.A. 34:15-1 and N.J.S.A. 34:15-49 in support of its preemption argument. Those statutes provide:

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<sup>2/</sup> N.J.S.A. 40A:9-7 provides: "The board of chosen freeholders of any county, by resolution, or the governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to any of its officers or employees who shall be injured or disabled resulting from or arising out of his employment, provided that the examining physician appointed by the county or the municipality shall certify to such injury or disability."

**34:15-1. Employees' right to recover for negligent injury; willful negligence as defense; jury question.**

When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, and the question of whether the employee was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

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**34:15-49. Original jurisdiction of claims; salaries of director and judges, qualifications of judges.**

a. The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits under this chapter....

The County asserts that these provisions indicate that the exclusive mechanism for deciding disputes between injured workers and employers/insurance companies over benefit entitlement is through the Division of Workers' Compensation. Citing New Jersey Turnpike Authority, P.E.R.C. No. 2012-6, 38 NJPER 136 (¶136 2011), the County argues that the Commission has previously restrained arbitration of a grievance alleging that an employee was entitled to supplemental workers' compensation benefits.

Local 167 asserts that the instant grievances are not specifically preempted by the workers' compensation statutes or regulations. It argues that the County's reliance on New Jersey Turnpike Authority is misplaced because the grievance in that case concerned the denial of the employee's workers' compensation benefits, not the delay of contractual injury benefits.

As a rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The workers' compensation laws rest on the premise that an employer receives insulation from an employee's tort actions in exchange for assuming strict liability for workplace injuries. We have held that worker's compensation laws do not foreclose a majority representative's efforts to enforce contractual clauses providing leaves of absence for injury or sickness by seeking remedies such as restoration of sick leave days. We have so held even where, as here, the employer contended that an injury was not work-related and argued that only a workers' compensation judge could resolve the issue. See Paterson State-Operated School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002); City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237



1998); Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); City of Camden, P.E.R.C. No. 96-33, 21 NJPER 399 (¶26244 1995).

In Burlington Cty., P.E.R.C. No. 97-84, supra, we found, and the Appellate Division affirmed, that grievances seeking that medical expenses be paid and sick leave days be recredited for alleged work-related injuries are legally arbitrable and not preempted by workers' compensation laws. In Burlington Cty., P.E.R.C. No. 98-86, supra, the employer denied an employee's workers' compensation claim for an alleged work-related back injury because it believed he had a pre-existing back injury that was not aggravated by a workplace incident. We found that the employee's grievance seeking paid disability and restoration of sick days for his period of absence from work was not preempted by workers' compensation laws because it did not conflict with them by seeking tort-based damages. In City of East Orange, supra, an employee was denied continued placement on contractual line-of-duty injury leave and instead had to charge sick days and vacation time while his workers' compensation claim was pending. We disagreed with the employer that arbitration was preempted by the workers' compensation law, holding that the grievance was arbitrable because it did not seek tort-based damages, it was limited to a claim for restored leave, and any issue of

reimbursement to the employer should the employee ultimately be found eligible for workers' compensation was premature. In City of Camden, supra, a workers' compensation judge approved a settlement of an employee's workers' compensation claim, and a grievance was filed seeking supplementary temporary disability benefits according to a contractual clause providing for "full pay" not to be charged against sick or vacation days. We found that the workers' compensation statute only preempted the employee, after agreeing to a lump sum settlement under the statute, from seeking any other compensation or benefits arising from a claim under the workers' compensation statute, but did not expressly preclude an employee from pursuing a contractual claim for a paid leave of absence for an alleged work-related injury.

New Jersey Turnpike Authority, supra, cited by the County, is distinguishable because it was a limited holding applicable to the particular facts presented by the wording of the contractual clause at issue which predicated entitlement to workers' compensation supplemental benefits on first knowing what compensation level the employee would be awarded in a successful workers' compensation claim. We positively cited all of the aforementioned cases from the previous two paragraphs, agreeing with those holdings but ultimately restraining arbitration based on "the unique and confined circumstances presented by this case." 38 NJPER at 138.

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.<sup>3/</sup> 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.<sup>4/5/</sup> Contrast state employees, whose work-related sick and injury leave programs we recently found non-negotiable due to a 2010 amendment to N.J.S.A. 11A:6-8 which specifically preempted

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3/ N.J.S.A. 40A:14-113 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.

4/ N.J.S.A. 40A:9-7 allows counties/municipalities to provide leave with pay to any employees for work-related injuries only; and N.J.S.A. 40A:14-16 and 40A:14-137 allow municipalities to provide leave with pay to fire fighters and police, respectively, for injuries from any cause.

5/ See, e.g., Millburn Tp., P.E.R.C. No. 2012-8, 38 NJPER 140 (¶38 2011); City of Newark, P.E.R.C. No. 2012-7, 38 NJPER 139 (¶37 2011); N. Hudson Reg. Fire & Rescue Dist., P.E.R.C. No. 2004-18, 29 NJPER 453 (¶147 2003); Stafford Tp., P.E.R.C. No. 97-103, 23 NJPER 176 (¶28088 1997); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); Dover Tp., P.E.R.C. No. 85-44, 10 NJPER 629 (¶15302 1984); City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983); Morris Cty, supra; and Middlesex Cty, supra.

the continuation of such benefits for state employees.<sup>6/</sup> In the instant case, the contractual clause at issue appears to comply with N.J.S.A. 40A:14-113 by limiting the injury leave to one year and requiring the County physician's certification, and the parties do not dispute that the contractual benefit is further limited to work-related injuries rather than injuries from any cause. But the issue of whether the grievant's injury had to be work-related prior to receiving "Occupational Injury Leave" under article 16.3 of the CNA is not mandated by statute, and the parties' disputes over the timing and legitimacy of receiving such benefits (rather than applying other accumulated leave) following an initial report and physician's review while the employer conducts further investigation of the cause of the injury are issues of contract interpretation and fact reserved to an arbitrator.

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<sup>6/</sup> See State of New Jersey, P.E.R.C. No. 2014-21, 40 NJPER 210 (¶81 2013); and State of New Jersey, P.E.R.C. No. 2014-78, 40 NJPER 547 (¶177 2014).

ORDER

The request of the County of Mercer for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself. Commissioners Bonanni and Jones were not present.

ISSUED: January 29, 2015

Trenton, New Jersey