P.E.R.C. NO. 2016-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LITTLE FALLS,

Petitioner,

-and- Docket No. SN-2015-069

TEAMSTERS LOCAL 97,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Township of Little Falls' request for a restraint of binding arbitration of a grievance filed by Teamsters Local 97. The grievance contests the Township's refusal to pay employees for unused, accumulated sick leave. The Commission holds that N.J.S.A. 40A:9-10.4 preempts arbitrability of an accumulated sick leave payment clause to the extent the clause applies to employees who commenced service with the Township on or after the effective date of the law.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Mets Schiro McGovern, LLP, attorneys (Kevin P. McGovern, of counsel)

DECISION

On April 24, 2015, the Township of Little Falls filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by Teamsters Local 97. The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it refused to pay employees for unused, accumulated sick leave.

The parties have filed briefs and exhibits. The Township submitted the certification of Charles Cuccia, Township Administrator. Local 97 submitted the certification of Patrick Guaschino, Business Representative for Local 97. These facts appear.

Local 97 represents a unit of all blue collar employees of the Township including all public works employees and excluding police department employees. The Township and Local 97 are parties to a CNA effective from January 1, 2013 through December 31, 2015.

Article XX, Section 3. of the CNA provides (emphasis added)[1/]:

> 3. After six (6) months of employment, an employee shall receive ten (10) sick leave days per year. The amount of such leave shall accumulate from year to year. Accumulated sick time shall be paid to the employee upon retirement at a maximum of $8,000. Employees shall have the option to sell back a maximum of 5 sick days per year.

Guaschino certifies that in January 2015 he was informed by Local 97 members that the Township was refusing to make the annual payment of accrued sick leave time from the previous year. On February 10, Local 97 filed a grievance alleging that the Township violated Article XX, Section 3. of the CNA by denying unit members their requested annual payment for unused, accumulated sick leave. The Township denied the grievance on March 6. On April 6, Local 97 filed a request for binding grievance arbitration. This petition ensued.

1/ The Township disputes the inclusion of the underlined sentence and submitted a different version of the CNA that does not include this language.

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).

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

> [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.
>
> [Id. at 404-405].

The Board asserts that Local 97's grievance regarding an alleged contractual benefit allowing for payment of some

accumulated sick leave prior to retirement is preempted by N.J.S.A. 40A:9-10.2 and N.J.S.A. 40A:9-10.4. The Association responds that N.J.S.A. 40A:9-10.2 is inapplicable and N.J.S.A. 40A:9-10.4 is applicable only to employees hired on or after May 21, 2010; therefore, it argues, the issue of payment for accumulated sick leave prior to retirement is mandatorily negotiable and arbitrable for employees hired prior to that date.

Vacation leave and sick leave are mandatorily negotiable subjects unless a statute or regulation preempts negotiations. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); State of New Jersey (Dept. of Corrections) and CWA, 240 N.J. Super. 26 (App. Div. 1990); Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Barnegat Tp. Bd. of Ed., P.E.R.C. NO. 84-123, 10 NJPER 269 (¶15133 1984). Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so 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); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (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 Commission recently decided a nearly identical issue in Howell Tp. Bd. of Ed., P.E.R.C. No. 2015-58, 41 NJPER 421 (¶131 2015). In Howell, we analyzed whether N.J.S.A. 18A:30-3.5 or N.J.S.A. 18A:30-3.6 preempt negotiability of an accumulated sick leave payment clause and held that N.J.S.A. 18A:30-3.6 preempts negotiability only for those employees who commenced service with the employer on or after the effective date of the law.

N.J.S.A. 18A:30-3.5 and N.J.S.A. 18A:30-3.6, which are applicable to board of education employees, are companion statutes to N.J.S.A. 40A:9-10.2 and N.J.S.A. 40A:9-10.4, which are applicable to non-civil service political subdivisions of the state.[2/] Like N.J.S.A. 18A:30-3.5, N.J.S.A. 40A:9-10.2 was passed as part of P.L. 2007, c. 92, and allows supplemental compensation for unused accumulated sick leave to be payable only at retirement. However, these 2007 statutes were only applicable to a subset of high-ranking officers and employees, as stated in the final paragraph of N.J.S.A. 40A:9-10.2 (emphasis added):

> As used in this section, "officer or employee" means an elected official; or a person appointed by the Governor with the advice and consent of the Senate, or appointed by the Governor to serve at the pleasure of the Governor only during his or her term of office; or a person appointed by an elected public official or elected governing body of a political subdivision of the State, with the

2/ The analogous statutes for civil service municipalities are N.J.S.A. 11A:6-19.1 and N.J.S.A. 11A:6-19.2

> specific consent or approval of the elected governing body of the political subdivision that is substantially similar in nature to the advice and consent of the Senate for appointments by the Governor of the State as that similarity is determined by the elected governing body and set forth in an adopted ordinance or resolution, pursuant to guidelines or policy that shall be established by the Local Finance Board in the Department of Community Affairs, but not including a person who is employed or appointed in the regular or normal course of employment or appointment procedures and consented to or approved in a general or routine manner appropriate for and followed by the political subdivision, or the agency, authority or instrumentality of a subdivision, or a person who holds a professional license or certificate to perform and is performing as a certified health officer, tax assessor, tax collector, municipal planner, chief financial officer, registered municipal clerk, construction code official, licensed uniform subcode inspector, qualified purchasing agent, or certified public works manager.

Therefore, as in Howell, we find that the sick leave limitations provided in P.L. 2007, c. 92 are inapplicable to the instant matter because Local 97's unit does not include any officers or employees covered by the allegedly preemptive statute (N.J.S.A. 40A:9-10.2).

In 2010, the State legislature made additional changes to the sick leave laws. P.L. 2010, c. 3. These changes expanded application of the sick leave limitations promulgated by P.L.

2007, c. 92 to all other school and municipal (civil service and non civil service) employees who were not among the high-level positions included in the 2007 law. In Howell, we noted that N.J.S.A. 18A:30-3.6 (P.L. 2010, c. 3, §3) applied prospectively to new school board employees and only upon expiration of any contracts in force on the effective date of the law - May 21, 2010. Similarly, in the instant case N.J.S.A. 40A:9-10.4 (P.L. 2010, c. 3, §2) applies sick leave limitations prospectively to new employees of non-civil service political subdivisions hired on or after May 21, 2010:

> 40A:9-10.4. Cap on compensation for unused sick leave not covered by Title 11A.
>
> Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has not adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the political subdivision of the State, or the agency, authority or instrumentality thereof, on or after the effective date of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a

> relevant provision in force on that effective date.

The disputed CNA clause at hand, Article XX, Section 3. provides employees "the option to sell back a maximum of 5 sick days per year." Because N.J.S.A. 40A:9-10.4 mandates that supplemental compensation for accumulated sick leave "shall be payable only at the time of retirement," the statute preempts Article XX, Section 3. for those unit members who fall within the statute's effective time frame. Accordingly, Article XX, Section 3. is not mandatorily negotiable or arbitrable for employees hired May 21, 2010 or later, but is mandatorily negotiable and arbitrable for employees hired prior to May 21, 2010.

ORDER

The request of the Township of Little Falls for a restraint of binding arbitration is granted as to any grievants/employees hired on or after May 21, 2010, but is otherwise denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: December 17, 2015

Trenton, New Jersey