P.E.R.C. NO. 2016-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WOODBRIDGE,

Petitioner,

-and- Docket No. SN-2016-015

PBA LOCAL 38,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township for a restraint of binding arbitration of a grievance filed by the PBA challenging the Township's termination of leaves of absence with pay, and required use of accrued sick leave, before the one-year anniversary of two employees' job-related injuries. The Commission determined that N.J.S.A. 40A:14-137 and N.J.S.A. 40A:9-7 preempt arbitration of the grievance as the municipality's examining physician discontinued certification of an employee's injury, illness, or disability.

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, Genova Burns, LLC, attorneys (Brett M. Pugach, of counsel and on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Paul L. Kleinbaum, of counsel and on the brief; Genevieve Murphy-Bradacs, on the brief)

DECISION

On September 14, 2015, the Township of Woodbridge (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 38 (PBA). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it required two unit members to use accrued sick leave before the one-year anniversary of their respective job-related injuries. The Township maintains that arbitration is preempted by N.J.S.A. 40A:9-7 and N.J.S.A. 40A:14-137.

The Township filed a brief, exhibits, the certification of the Director of the Woodbridge Police Department, and the

certification of an Assistant Supervisor/Claims Adjuster from Qual-Lynx (QL Adjuster). The PBA filed a brief, exhibits, the certification of its State Delegate, and certifications of the two unit members. These facts appear.

The PBA represents all police officers in the Woodbridge Police Department, excluding those at the rank of Sergeant, Lieutenant, Captain, Deputy Chief, and Chief of Police. The Township and PBA are parties to a CNA in effect from January 1, 2015 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article XVII of the CNA, entitled "Sick Leave," provides in pertinent part:[1/]

> 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. . .

N.J.S.A. 40A:9-7, entitled "Leaves of absence with pay to certain officers and employees," 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.

1/ The same provision is contained in the prior CNA.

N.J.S.A. 40A:14-137, entitled "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.

Grievant #1

Grievant #1 (DB) was a Township police officer from December 16, 2005 to June 17, 2015. On May 10, 2014, DB injured his knee while on duty. The Township's examining physician certified DB's injury and put him out of work as of May 29, 2014. DB was paid his full salary without loss of sick days until December 24, 2014, when the Township's examining physician determined that DB had reached maximum medical improvement (MMI) and returned him to work.

The Police Director certifies that on or about December 24, 2014, DB was informed that additional absences stemming from his injury could only continue to be paid by charging his sick time unless he was able to have a workers' compensation doctor certify to his injury. The Director also certifies that as of that date, the Township began charging DB's sick time for subsequent absences. The Police Director and the QL Adjuster certify that DB has not had a workers' compensation doctor chosen by the

Township certify to his injury since the Township's examining physician returned him to work full duty as of December 24, 2014.

DB certifies that he asked to see another workers' compensation doctor after he was returned to work but was not permitted to do so. According to DB, the Police Director told him to see his own doctors until "the Township could work this out, including what [DB] thought was the temporary deduction of sick leave." DB certifies that he sought treatment from his own doctors in February and March of 2015 and was advised that he was not able to perform the full duties of a police officer. DB also certifies that the Director did not tell him until June 2015 that the Township would not give him back his sick days.

Grievant #2

Grievant #2 (AA) has been a Township police officer since January 17, 2005. On July 4, 2014, AA injured his arm while on duty. As of August 11, 2014, the Township's examining physician certified AA's injury and put him out of work. AA was paid his full salary without loss of sick days until December 2014, when the Township's workers' compensation doctors could no longer certify to his injury and returned him to work, full duty, for the respective injuries that each doctor had been treating.

The Police Director certifies that on or about December 12, 2014, AA was informed that additional absences stemming from his injury could only continue to be paid by charging his sick time

unless he was able to have a workers' compensation doctor certify to his injury. The Police Director also certifies that as of that date, the Township began charging AA's sick time for his subsequent absences. The Police Director and the QL Adjuster certify that AA has not had a workers' compensation doctor chosen by the Township certify to his injury since the Township's examining physicians returned him to work full duty in December 2014.

AA certifies that neither the Director nor anyone else from the Township told him on December 12, 2014 that he would have to use his sick time and that he "believed that it was temporary." According to AA, he sought treatment from his own doctors, and they placed him out of work during the following periods: December 17-22, 2014; December 29, 2014-January 12, 2015; January 5, April 12, 2015; and April 21, 2015. AA certifies that despite his continual complaints to the Township that he did not believe he could perform the full duties of a police officer during these periods of time, he was not sent to another examining physician selected by the Township.

AA certifies he believed that "this issue" would be resolved, that he would get back the sick leave he used, and that "it was temporary." AA certifies that as a result, he did not seek any additional relief through workers' compensation. According to AA, it was not until his meeting with the Director

on or around June 8, 2015 that he learned the Township would not credit him for the sick time he had been charged since December 12, 2014.

On June 15, 2015, DB and AA, through counsel, filed a grievance claiming that pursuant to Article XVII(B) of the CNA, they should be credited for all sick leave time used prior to the one-year anniversary of their respective work-related injuries. The Township denied the grievance at each step of the process. On July 14, 2015, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2016-025) which claims, in pertinent part:

> The Township violated Article XVII(B) of the Agreement, and any other relevant provisions, when it required [DB] and [AA] to use accumulated sick leave for an on the job injury and failed to extend up to one year's sick leave with pay to them.

This scope petition ensued.[2/]

The Township argues that the grievants may not be granted a leave of absence with pay without meeting the statutory preconditions set forth under N.J.S.A. 40A:9-7 and N.J.S.A. 40A:14-137, including the requirement that an examining physician appointed by the Township certifies to their injuries. The Township maintains that because both grievants were determined to

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2/ On October 13, 2015, a Commission Designee issued an Order granting the Township's application for interim relief to restrain arbitration. On January 7, 2016, a related Opinion was issued.

be fit and returned to work full duty by the Township's examining physician, N.J.S.A. 40A:9-7 and N.J.S.A. 40A:14-137 preempt any additional leave with pay.

The PBA argues that these statutes do not preempt arbitration of a dispute between the Township's doctors and the grievants' personal doctors regarding their fitness for duty. According to the PBA, N.J.S.A. 40A:14-137 permits the Township to negotiate paid injury leave provisions so long as those provisions do not strip the Township of its right to appoint an examining physician to certify the grievants' injuries. The PBA maintains that after such an examination has occurred, disputes regarding an officer's fitness for duty are arbitrable.

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 the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because

N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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

Arbitration is permitted if the subject of the grievance 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). Thus, if we conclude that the PBA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the

agreement alleged is preempted or would substantially limit government's policy-making powers.

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Id. "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Id. (citing Council of New Jersey State College Locals v. State Board 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." Id. (citations omitted).

In cases of statutory interpretation, we must "discern and give effect to the Legislature's intent. To begin, we look at the plain language of the statute. If the language is unclear, courts can turn to extrinsic evidence for guidance, including a law's legislative history. But a court may not rewrite a statute or add language that the Legislature omitted." State v. Munafo, 222 N.J. 480, 488 (2015)(citations omitted).

We have held that paid injury leave is a mandatorily negotiable subject absent a statute or regulation preempting negotiations. Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124

(¶29062 1998). We have also held that "workers' 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." County of Mercer, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015).

In Middlesex Cty. and PBA Local 152 Correction Officers of Middlesex Cty. Workhouse, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pt., rev'd in pt. 6 NJPER 338 (¶11169 App. Div. 1980), we held that N.J.S.A. 40A:9-7 expressly granted municipalities the authority to negotiate over leaves of absence with pay for work-related injuries but that "any negotiated provision may not contravene the specific limitations and qualifications placed on the [municipality's] authority. . . [including] provid[ing] for sick leave beyond the one year limitation or alter the requirement of certification of injury or disability by the [municipality's] appointed physician." The Appellate Division affirmed our determination, finding "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." Id.; see also, Morris Cty. and Morris Council 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); Stafford Tp., P.E.R.C. No. 97-103, 23 NJPER 176 (¶28088 1997); County of Mercer, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015).

In Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983), we reviewed a contract proposal entitled "Work Incurred Injury" that we described as follows:

> ...[E]mployees who suffer a work-related injury or disability shall receive full pay for a period of up to one year if unable to work as certified by a responsible physician. Disputes shall be resolved by the Division of Workers' Compensation. In addition, all temporary disability benefits accruing under the Workers' Compensation Act must be paid over to the County.

We held that the proposal was mandatorily negotiable because it "[did] not require the granting of paid leaves of absence beyond the first year of injury and hence [did] not run afoul of [N.J.S.A. 40A:14-137 and N.J.S.A. 40A:9-7]." Id.

In City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992) we considered the negotiability of a contract proposal requiring the City to continue the salary of a firefighter injured while acting in that capacity for a period not to exceed one year unless the City approved an extension. We held that the portion of the proposal that would allow the City to extend payments beyond a year was not mandatorily negotiable because it conflicted with a limitation set forth in N.J.S.A. 40A:14-16, a statute identical to N.J.S.A. 40A:14-137 except

applicable to firefighters rather than police.[3/] We agreed with the City that the statute prohibited injury leave payments beyond a year. In addition, we said, "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."

By the plain and express terms of N.J.S.A. 40A:9-7 and N.J.S.A. 40A:14-137, it is an "examining physician appointed" by the municipality who must certify to the "injury, illness or disability" claimed by the employee in order for the municipality to grant a leave of absence with pay. It is clear from the statutes that the certification language is intended to limit leaves of absence with pay to cases in which the municipality's examining physician verifies the employee's claimed injury, illness, or disability. It would nullify the certification condition to permit a contrary opinion of the employee's personal physician as to the employee's ability to work to override that of the municipality's "examining physician," thereby requiring the municipality to grant or extend the leave with pay. Rather than permitting arbitration arising from such divergent medical

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3/ N.J.S.A. 40A:14-16 provides that a municipal governing body, by ordinance, "may provide for granting leaves of absence with pay not exceeding one year [to firefighters] 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."

views, the certification language of the statutes is preemptive. It leaves nothing to the discretion of the public employer as it makes the municipality's examining physician the controlling professional for purposes of the Township's authority to provide leaves with pay to officers under the statutory circumstances. Moreover, it would be illogical to construe these statutes so as to compel the municipality to continue an officer's paid leave even though its examining physician found the officer to be no longer disabled.

The PBA's reliance on our decisions in Sayreville Bor., P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986) and City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) is misplaced. In the former, we agreed with the employing borough that N.J.S.A. 40A:14-137 gave it the right to insist that an officer applying for 'injured on duty leave' be examined by a physician that it appointed, stating, "This statute is preemptive." In a footnote, we commented that "[o]nce an examination is made, a refusal to grant leave to the officer would present a different issue for arbitration." Presumably based on that comment, the PBA argues that N.J.S.A. 40A:14-137 only preempts arbitration when an officer is seeking leave in excess of a year or when he refuses to be examined by the municipality's examining physician.

The PBA reads too much into our footnote. As we clarified in our decision denying the PBA's motion for reconsideration in that same case, N.J.S.A. 40A:14-137 "plainly conditions injury leave payment on the certification of the 'examining physician appointed by [the] governing body' that the employee is disabled." Sayreville Bor., P.E.R.C. No. 87-58, 12 NJPER 856 (¶17331 1986). Nothing in Sayreville suggests that an arbitrable issue would have been presented had the officer's personal physician disputed the findings of the physician appointed by the municipality, either at the outset of the leave or its conclusion upon a subsequent finding that the officer was no longer disabled.

City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) is also distinguishable from this matter. There, an officer went out on line-of-duty injury leave for three months, returned to work, and then in order to have surgery allegedly related to the initial injury, went out on line-of-duty injury leave for six months, for a total of nine months. After an insurance company doctor returned the officer to work, the officer filed a grievance seeking to be placed back on line-of-duty injury leave and for restoration of sick and vacation time as well as a workers' compensation claim. In an ensuing scope petition, the City argued that arbitration was preempted by workers' compensation laws and that the grievance was premature

because the workers' compensation claim had not yet been resolved. We held that workers' compensation laws do not "foreclose a majority representative's efforts to negotiate contractual clauses providing leaves of absence and to enforce such clauses by seeking remedies limited to restoring sick leave days." In a footnote, we noted N.J.S.A. 40A:14-137 permits leaves of absence with pay not exceeding one year to police officers "injured, ill or disabled from any cause." However, we did not address whether the statute preempts arbitration once an examining physician appointed by the municipality finds the officer to be no longer disabled.

Here, unlike City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998), the Township is not arguing that workers' compensation laws preempt the subject grievance. Instead, the Township's argument is that arbitration is preempted by N.J.S.A. 40A:14-137 and N.J.S.A. 40A:9-7. Regardless, the certification requirement of the statutes would potentially be negated by allowing arbitral review of the finding of the examining physician appointed by the municipality as to whether or not the officer in question is disabled.

Accordingly, the Township's request to restrain arbitration is granted.

ORDER

The request of the Township of Woodbridge for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: March 31, 2016

Trenton, New Jersey