

P.E.R.C. NO. 2019-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND
(DIVISION OF SOCIAL SERVICES),

Petitioner,

-and-

Docket No. SN-2018-041

UAW LOCAL 2327,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County of Cumberland's request for a restraint of binding arbitration of a grievance challenging unilaterally changed criteria in the "Attendance and Punctuality" section of an employee evaluation form. The "Attendance and Punctuality" section rated employees based on use of employee leave time, and the rating was used in determining eligibility for merit salary increments. Applying the Local 195 balancing test, the Commission finds that the criteria are mandatorily negotiable and legally arbitrable because they concern issues of employee leave time and eligibility for merit salary increments more than they concern the County's need to use them to evaluate employee performance. The Commission declines to restrain arbitration.

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, Theodore E. Baker, County Counsel

For the Respondent, Cleary, Josem & Trigiani, attorneys
(Ryan R. Sweeney, on the brief)

DECISION

On April 24, 2018, the County of Cumberland Division of Social Services (County) filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by UAW Local 2327 (UAW). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally changed provisions of a performance evaluation form concerning use of sick leave and other types of contractual leave time.

The parties have filed briefs and exhibits. The County did not file a certification, and the UAW's certification was

insufficient.^{1/2/} Based upon the exhibits, the following facts appear.

The UAW represents rank and file employees of the County's Division of Social Services. The County and UAW are parties to a CNA effective from January 1, 2016 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article 5.1(d) of the CNA provides:

The parties acknowledge the existence of a performance review system applicable to all employees within the Bargaining Unit, including provision for the denial or withholding of the incremental increase described in Article 5.1.c. herein based upon an unsatisfactory review as well as appropriate appeal/recourse by an affected employee. Increment withholding under this provision shall be enforced in the calendar year following the unsatisfactory review.

Article 7.1(a) of the CNA provides for four days of paid personal leave of absence annually, Article 7.3(a) provides for paid vacation leave of 12-25 days annually depending on the number of years of employment, and Article 7.4(a)(1) provides for 105 hours of paid sick leave annually. Articles 7.5, 7.6, 7.7, and 7.8 provide for additional paid leaves for work-related

1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

2/ The UAW submitted the certification of UAW President Sandra Urban; however, she did not certify to any specific facts and only provided a general certification of all of the facts contained in the UAW's brief.

disability, bereavement leave, jury duty/witness attendance leave, and military leave, respectively. Article 8 of the CNA provides for leave without pay including personal leave without pay, pregnancy/disability leave, and child care leave.^{3/}

Prior to 2017, the County's "Annual Employee Performance Evaluation" form applicable to UAW members contained a section entitled "Dependability" that provided the following:

Dependability

Objective:

Is consistently available to accept and perform assigned duties. Can be relied on to help maintain adequate work flow with minimal supervision or disruption to work schedule of co-workers.

Rating:

_ Unsatisfactory:

Is frequently unavailable to accept and/or complete assignments due to excessive absences. Work that is assigned must be completed by co-workers in order to maintain work flow of the unit. Has not met recommendations to improve to a satisfactory level.

_ Satisfactory, Needs To Improve:

Frequent absences contribute to work flow problems. Is marginally reliable.

^{3/} Article 12.1 of the CNA is a "Savings Clause" providing that "all terms and conditions of employment applicable on the effective date of this Agreement . . . shall continue to be so applicable during the term of the Agreement."

– Satisfactory:

Is usually available to accept and complete assignments. Can be depended on to help maintain work flow.

In February 2017, a new Annual Employee Performance Evaluation form replaced the Dependability section with a section entitled "Attendance and Punctuality." The Attendance and Punctuality section replaced the unsatisfactory, satisfactory/needs to improve, and satisfactory rating categories with numerical ratings from one through five.

Later in 2017, the County's supervisors began using a third version of the Annual Employee Performance Evaluation form that further modified the February 2017 "Attendance and Punctuality" section that had replaced the predecessor form's "Dependability" section. The new 2017 version of the Attendance and Punctuality section provided the following Definition and Rating categories:

Attendance and Punctuality

Definition: Is consistently available to accept and perform assigned duties. Can be relied on to help maintain adequate work flow with minimal supervision or disruption to work schedule of co-workers.

Rating: Circle appropriate number

- 1 Employee is excessively absent and/or late (10 or more instances in a calendar year)
- 2 Employee has been absent and/or late five to nine times in a calendar year

- 3 Employee meets County and Agency policies on time accountability and attendance
- 4 Employee occasionally comes to work early and takes nominal sick leave
- 5 Employee did not take any sick leave in the previous 12 months

The new Annual Employee Performance Evaluation form contains an initial "Instructions for Completing" page setting forth the purpose and goals of the evaluation to: 1) develop employee skills; 2) provide employees with feedback and assistance with improving job performance; 3) provide a means to recognize employee performance and assist employees with attaining future goals; and 4) provide a means of identifying and alleviating problems which prevent the employee from achieving goals. The instructions also explain how certain ratings will result in the issuance of a corrective action plan, and that "supervisors must recommend the issuance or denial of merit increments where applicable." The final page of the evaluation form, entitled "Supervisory Recommendation," sets forth a Yes/No option to the question: "If salary step permits, would you recommend granting a merit increment?"

On November 17, 2017, the UAW filed a grievance challenging the County's changes to the employee performance evaluation form. The grievance alleged:

The new annual employee performance evaluation is in violation to several items

agreed upon in our contract. Specifically, time and leave regarding sick time, several changes in working conditions that are subjective, lack transparency and are arbitrary and capricious in practice. . . . The rank and file respectfully asks that the agency adhere to the terms and language of the contract and continue the usage of the previous performance evaluation.

The County denied the grievance at every step of the process. On March 5, 2018, the UAW filed a request for submission of a panel of arbitrators. This petition ensued.

The County asserts that arbitration should be restrained because the grievance concerns the standards or criteria for employee performance, which is non-negotiable per section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the Act). It also argues that negotiated employee evaluation requirements would hamper a public employer's ability to determine the significant governmental policy function of setting and measuring employee evaluation criteria. The County contends that it has a managerial prerogative to set and apply evaluation criteria because performance standards affect the level and quality of the delivery of governmental services. It further suggests that individual employees should independently grieve the application of performance criteria, but that the criteria and evaluation form itself may not be negotiated.

The UAW asserts that the new "Attendance and Punctuality" section of the employee performance evaluation form applies

ratings based on numbers of absences without recognizing the distinction between excused and unexcused absences. It states that the form is used for determining merit salary increments, promotions, and issuing corrective action plans. The UAW argues that the new rating system produces poor ratings for using sick leave and other contractual leave benefits far below what is permitted under the CNA. It contends that by requiring low ratings even for employees within their leave allotments, the new form "chills an employee's utilization of her collectively bargained term and condition of employment - sick leave - and threatens her eligibility for additional improved terms and conditions of employment - merit salary increases and promotion." The UAW asserts that the new form is not a traditional review of employee performance, but a way to discipline employees who exercise their contractual rights to paid time off.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. 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.]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

"[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." County of Mercer, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Bethlehem Tp. Bd. of Ed., 91 N.J. at 44(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. (citing Local 195, 88 N.J. at 403-404); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

We first address the County's argument that the criteria in the Attendance and Punctuality policy are criteria for employee performance and are preempted by N.J.S.A. 34:13A-5.3, triggering the second prong of the Local 195 test. N.J.S.A. 34:13A-5.3 prohibits negotiation over "the standards or criteria for employee performance." Criteria to evaluate employee performance are generally not mandatorily negotiable. Bethlehem, supra. However, the Commission looks beyond the labels used by parties to characterize an issue as being mandatorily negotiable or not mandatorily negotiable, and applies the third prong of the Local 195 balancing test to determine whether criteria primarily concern employee performance or primarily concern mandatorily negotiable terms and conditions of employment. The third prong of the Local 195 balancing test accomplishes this task by weighing employee and employer interests based on the individual facts of each case. Local 195 at 404; Jersey City, supra, at 575.

Criteria have been found to be mandatorily negotiable when they concern employee leave time, which is generally mandatorily

negotiable,^{4/} more than they concern an employer's need to use them to evaluate employee performance. In Montville Tp. Ed. Ass'n v. Montville Tp. Bd. of Ed., NJPER Supp.2d 159 (¶140 App. Div. 1985), the employer added an attendance component to the annual teacher evaluation that assigned ratings based on number of absences. The Association challenged the new evaluation system as violating sick leave provisions of the school laws as well as the collective negotiations agreement. The Commission found that the grievance concerned the establishment of evaluation criteria and restrained arbitration. Montville Tp. Bd. of Ed., P.E.R.C. No. 84-10, 9 NJPER 537 (¶14221 1983). That decision was not appealed. However, the Association appealed the State Board of Education's decision upholding the new evaluations. The Appellate Division reversed the Board and reinstated the Commissioner of Education's decision that had ordered the Board to revise the rating system. The court held:

We are satisfied that the record does not support the State Board's finding that the evaluation system as presently constructed does take legitimate illnesses into proper account. We so conclude because irrespective of the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence. A rating so assigned is, in our view, arbitrary. . . . The Commissioner was of the

4/ Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012).

view that there inhered in the rating system itself sufficient harm to require his remedial action irrespective of proof or lack thereof of any specific instances of application. The Commissioner thus recognized that an unsatisfactory rating under the system had a potentially adverse impact on staff members' employment possibilities, assignment or income. . . . An unsatisfactory rating adversely prejudices a staff member's legitimate interest in a satisfactory evaluation report. That prejudicial consequence contravenes the statutory allowance for sick leave in the event of illness or disability.

[Montville, NJPER Supp.2d at 160; emphasis added.]

Compare City of Union City, P.E.R.C. No. 2006-77, 32 NJPER 116 (¶55 2006).^{5/}

In Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), the Appellate Division affirmed the Commission's holding that a principal's salary increment withholding for "intermittent and long-term absences" was not predominately based on an evaluation of performance and was therefore arbitrable. The court explained that the arbitrator could also review the employer's attendance policy in light of the parties' CNA provisions concerning leave:

We perceive that the Board's action reflects a policy determination that a staff member

^{5/} Though factually distinguishing it from the case before it, the Commission described the Appellate Division's Montville decision as "invalidating evaluation guidelines that mechanically assigned unsatisfactory attendance ratings based solely on number of absences."

who has not been able to perform the assigned duties at all, because of valid health reasons, is not entitled to an incremental advance in salary because the Board not only has not had the benefit of the staff member's performance, but has also suffered detriment. It is not for this court to determine the appropriateness of the Board's policy. It is for our purposes sufficient to recognize that establishment of such a policy is not based on evaluation of performance, and that it therefore is subject to arbitration. . . . The arbitrator's inquiry should focus on the intent of the parties as it pertains to authorized leave and its effect on increment entitlement when considering the appropriateness of the policy adopted by the Board in light of the "Agreement" negotiated by the parties and all other relevant factors.

[Edison, 304 N.J. Super. at 465, 467-468; emphasis added.]

Criteria have also been found to be mandatorily negotiable when they concern eligibility for economic benefits more than they concern the employer's need to use them to evaluate employee performance. In Township of Middletown, P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985), the employer unilaterally instituted an "Employee Performance Evaluation System" based on various police actions that compensated qualifying officers with cash awards, compensatory time off, and the personal use of police vehicles. The Commission held that the evaluation system was mandatorily negotiable because it was linked to economic benefits. Id. at 377. In Essex Cty. and AFSCME Council 52, Local 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) and Essex Cty. and Essex

Cty. Local Unit of JNESO, P.E.R.C. No. 87-48, 12 NJPER 835

(¶17321 1986), the Commission held that the union could arbitrate "alleged changes in and the arbitrary application of the evaluation criteria" used in an evaluation system for determining merit increments. 12 NJPER at 540. The Commission stated:

In sum, we recognize that public employers may have an interest in determining economic benefits unilaterally and in improving the quality of employee performance by the carrots and sticks of monetary incentives and withholdings. . . . But the Legislature has determined that the public interest requires collective negotiations over terms and conditions of employment such as compensation, and these employer interests have not prevailed in the balancing test for negotiability of these kinds of economic benefits. . . . The employees' interest in negotiating compensation as part of a viable negotiations process outweighs the employer's interest in deciding unilaterally who should receive merit/increments under the circumstances of this case.

[Id.]

The Appellate Division affirmed. Essex Cty., consol. and aff'd, NJPER Supp.2d 182 (¶158 App. Div. 1987). See also, Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER 838 (¶17321 1986) (substance of evaluation used to determine salary increases was arbitrable).

Given the individual facts of this case, consideration of the above precedents, and applying the Local 195 balancing test, we find the criteria in the Attendance and Punctuality section of the evaluation form to be mandatorily negotiable and legally

arbitrable. The criteria concern the mandatorily negotiable issues of employee leave time and eligibility for merit salary increments more than they concern the County's need to use them to evaluate employee performance. The Attendance and Punctuality policy uses a mechanical computation, assigning negative ratings for employees based solely on number of absences. The ratings are unaffected by the reasons for the absences and make no distinction between approved and unapproved absences. It is reasonable to conclude that this rating system might discourage employees from utilizing their negotiated and earned leave time. Additionally, the parties have negotiated a merit increment system, and the rating received on the Attendance and Punctuality policy is used toward determining eligibility for merit increments. Employees have a substantial interest in maintaining full use of their negotiated leave benefits without concern for financial and professional consequences.^{6/} The employees' interests enumerated above outweigh the County's interests in using the criteria to evaluate employee performance, making the criteria mandatorily negotiable and legally arbitrable. Whether application of the criteria in the Attendance and Punctuality

6/ Although not asserted by the County, to the extent it is using the rating system to control abusive use of leave time, Article 7.4(c) of the CNA appears to contain sick leave verification policies setting forth notification and medical documentation requirements based on specific amounts of sick leave used consecutively and annually.

Policy violates the parties' CNA and/or has been arbitrarily applied is beyond our scope of negotiations jurisdiction and is for the arbitrator to decide. Ridgefield Park.

ORDER

The request of the Cumberland County Division of Social Services for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed.

ISSUED: August 16, 2018

Trenton, New Jersey