

P.E.R.C. NO. 2019-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2018-047

NEW JERSEY SUPERIOR OFFICERS
LAW ENFORCEMENT ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the States request for restraint of binding arbitration of a grievance filed by the SOA contesting the State's refusal to re-credit leave time utilized by essential personnel during the 2017 State government shutdown. Finding that the grievance concerns the mandatorily negotiable issue of leave time and is not statutorily preempted, 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, Gurbir S. Grewal, Attorney General
(Aaron J. Creuz, Deputy Attorney General, on the brief)

For the Respondent, O'Brien, Belland & Bushinksy, LLC,
attorneys (Kevin D. Jarvis, on the brief; David F.
Watkins, Jr., on the brief)

DECISION

On May 18, 2018, the State of New Jersey, Department of Corrections (State) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the New Jersey Superior Officers Law Enforcement Association (SOA). The grievance alleges that the State violated the parties' collective negotiations agreement (CNA) when it refused to re-credit leave time utilized by essential personnel during the 2017 State government shutdown.

The State filed a brief, exhibits, and the certification of Camille Warner (Warner), an Employee Relations Coordinator at the

Governor's Office of Employee Relations (OER). The Association filed a brief, exhibit, and the certification of its Vice President/Treasurer, Louis Hall (Hall). These facts appear.

The SOA represents correction officers, including lieutenants and other supervisory law enforcement officers, employed by the State as specified in the recognition clause (Article I) of the parties' CNA. The State and the SOA are parties to a CNA in effect July 1, 2011 through June 30, 2015 and a successor memorandum of agreement (MOA) in effect from July 1, 2015 through June 30, 2019. The grievance procedure ends in binding arbitration.

Article XVIII of the parties' expired CNA, entitled "Special Time Off," provides:

A. Emergency or Special Observations

Whenever the Governor may declare a special emergency or observation of any event of State or national concern and authorizes time off to employees of the State for the observation of such event, those employees covered by this Agreement who are required to work during the period of the authorized time off shall be compensated for such hours worked as outlined in Article XXVI, Hours of Work, and Article XXVII, Overtime.

B. Other

Whenever the Governor may declare time off for all employees (such as a day preceding or following an existing holiday) those who are required to work on that day shall be compensated for such hours worked by being granted equivalent time off at other times in accordance with the Governor's proclamation, or as provided by the appointing authority and, if operationally feasible, as requested

by the employee. If the time off occurs on a seven (7) day operation employee's regular day off, he/she shall be granted equivalent time off in accordance with the above provision.

On June 30, 2017, former Governor Chris Christie ordered a State shutdown, resulting in essential and non-essential employees being furloughed and put into non-pay status (Executive Order No. 228 (EO-228)).^{1/} The shutdown was due to the failure to enact a General Appropriations Law before the start of the 2018 fiscal year. EO-228 also declared a state of emergency

^{1/} EO-228 provides in pertinent part:

9. All employees whose services are not deemed essential pursuant to this Order shall be deemed furloughed pursuant to N.J.S.A. 11A:6-1.1 and shall be governed by the rule implementing that program, except as may be prohibited by law. The provisions of this paragraph shall apply to any such employees who are necessary to implement the orderly shut down of programs and functions as provided in paragraph 16 of this Order upon the completion of such shut down, as determined and documented by the head of the department or agency.

10. The State Treasurer and the Director of the Office of Management and Budget are hereby authorized to obligate funds for the purpose of paying employees who have been designated as essential pursuant to this Order or who are necessary to implement the orderly shut down of programs and functions as provided in paragraph 16 of this Order. However, no such funds shall be disbursed except as provided by law.

under N.J.S.A. App. A:9-33 et seq.,^{2/} thereby allowing the Governor to ensure the continued provision of essential State services by requiring essential personnel to continue to report to work.

According to the parties' briefs, SOA members are considered essential personnel and were ordered to report to work during the shutdown from July 1 - 3, 2017. However, certain SOA members were permitted to utilize leave time and did not report to work. All essential and non-essential employees who had scheduled leave time during the shutdown had that leave time rescinded.

On August 1, 2017, State employees who were furloughed pursuant to EO-228 were provided with their full salary

2/ N.J.S.A. App. A:9-33, entitled "Purpose of civilian defense act and disaster control act," provides:

The purpose of this act is to provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during any emergency as herein defined by prescribing a course of conduct for the civilian population of this State during such emergency and by centralizing control of all civilian activities having to do with such emergency under the Governor and for that purpose to give to the Governor control over such resources of the State Government and of each and every political subdivision thereof as may be necessary to cope with any condition that shall arise out of such emergency and to invest the Governor with all other power convenient or necessary to effectuate such purpose.

retroactive to July 1, 2017.^{3/} On or after August 1, 2017, the Civil Service Commission issued a memorandum setting out that previously scheduled leave time during the shutdown would not be deducted from non-essential personnel, but would be deducted from essential personnel.

On or about September 7, 2017, the SOA filed a grievance that provides in pertinent part:

EMPLOYEE STATEMENT OF GRIEVANCE:

From 7/1/17 to 7/3/17, the State Budget had not passed and all Essential Personnel were informed to report for work. Those Lieutenants that did not report to work and who utilized personal earned time such as Vacation, A/L, Compensatory Time or Sick Time, had this time deducted from their time balances. However, any Non-Essential Personnel who utilized time off as mentioned above, had their day(s) returned to them.

TO CORRECT MY GRIEVANCE:

All Essential Personnel who utilized time such as Vacation, A/L, Compensatory Time or Sick, shall have their time returned to them the same way as all Non-Essential Personnel received. This is supported by the NJ Attorney General, who informed the State that all time balances were to be returned to every Employee.

On September 20, the State sent a letter to the SOA indicating that it wished to advance the grievance to arbitration. On September 22, the SOA consented. On January 2, 2018, the SOA

^{3/} P.L. 2017, c. 180; see also S3422/A18.

filed a Request for Submission of a Panel of Arbitrators.^{4/} This petition ensued.

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

^{4/} AR-2018-310.

(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. and Middletown PBA*, 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 policy-making powers.

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).

The State argues that this matter is preempted by N.J.A.C. 4A:6-2.5. The State maintains that essential personnel were compensated for pre-approved leave time utilized during the

shutdown and must have that time charged against their leave balances. The State also asserts that the decision to deduct leave time used by essential personnel during the shutdown was made pursuant to the Governor's emergency powers under N.J.S.A. App. A:9-40 and is therefore preempted from negotiations.

The SOA responds that vacation, sick and personal leave time are mandatorily negotiable subjects. The SOA argues that there is nothing within N.J.A.C. 4A:6-2.5(d) or N.J.S.A. App. A:9-33 et seq. which preempts negotiations regarding re-crediting leave time used by essential personnel during the shutdown. The SOA also asserts that should it be necessary, an arbitrator has the authority to interpret statutes and regulations applicable to the underlying grievance.

"[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). Notably, "the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (P107 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 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.'" Id. (citing Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982)); see also State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978) (holding that the "adoption of a statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing" the matter).

The Commission has held that vacation, sick, and other leave, including compensation for unused leave allowances, are generally mandatorily negotiable. See Southampton Tp., P.E.R.C. No. 2018-57, 45 NJPER 28 (¶8 2018); accord Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2003-10, 28 NJPER 345 (¶33121 2002) (holding that "[t]he number of personal leave days and the reasons for allowing personal leave are negotiable"). However, the State argues that N.J.A.C. 4A:6-2.5(d) preempts negotiation over the treatment of leave time for essential personnel during a state of emergency. The regulation states:

An essential attendance employee who is required to work in accordance with an Essential Employee Attendance Plan shall be compensated at the regular rate of pay for such work. See N.J.A.C. 4A:3-5 for overtime compensation for work performed by non-exempt employees in excess of the regular workweek.

The plain language of the regulation addresses compensation for essential personnel during a state of emergency and does not

expressly, specifically, or comprehensively address the treatment of utilized leave time. Bethlehem Tp. Bd. of Ed., 91 N.J. at 44.

The State also argues that N.J.S.A. App. A:9-40 is preemptive given that it provides the Governor with broad authority to "make, amend and rescind orders, rules and regulations" during a state of emergency. The statute states:

The Governor is authorized to make, amend and rescind orders, rules and regulations as in this act provided, and it shall be unlawful for any municipality or other subdivision or any other governmental agency of this State to adopt any rule or regulation or to enforce any such rule or regulation that may be at variance with any such order, rule or regulation established by the Governor. In the event of a dispute on the question of whether or not any such rule or regulation is at variance with an order, rule or regulation established by the Governor under this act, the determination of the Governor shall control.

The plain language of the statute does not address the treatment of leave time during a state of emergency.

The State also relies on State of New Jersey (DOC) and PBA Local 105, P.E.R.C. No. 2007-60, 33 NJPER 116 (¶41 2007), aff'd 34 NJPER 125 (¶54 App. Div. 2008), certif. den. 196 N.J. 595 (2008). In that case, the union filed a grievance seeking compensatory time for essential employees who were required to work during the 2006 shutdown. The Commission held, and the Appellate Division affirmed, that N.J.A.C. 4A:6-2.5(d) preempts any negotiated agreement for compensatory time for essential

employees who work during a State emergency. Unlike that case, in this case the SOA is seeking to have the leave time that was utilized by essential employees during the 2017 shutdown re-credited to their leave balances. Neither N.J.A.C. 4A:6-2.5(d) nor State of New Jersey (DOC) and PBA Local 105 address the issue of whether leave will be deducted if utilized by essential personnel during a state of emergency. To the extent the State is relying on the August 1, 2017 CSC memorandum, only statutes and administrative regulations can preempt otherwise negotiable terms and conditions of employment. Town of Morristown, P.E.R.C. No. 2013-11, 39 NJPER 149 (¶46 2012).

Under these circumstances, we decline to restrain arbitration. However, despite our finding that the issue of treatment of leave time for essential employees during a government shutdown is not preempted, an arbitrator may interpret, apply, or consider claimed violations of statutes and regulations applicable to this dispute. West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978). We also note that in making a scope of negotiations determination, we do not interpret the CNA. Our jurisdiction is limited to deciding whether an issue is mandatorily negotiable. Ridgefield Park.

ORDER

The request of the State of New Jersey, Department of
Corrections for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Voos voted in
favor of this decision. None opposed. Commissioner Boudreau was
not present.

ISSUED: September 27, 2018

Trenton, New Jersey