

P.E.R.C. NO. 2019-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SUSSEX COUNTY,

Petitioner,

-and-

Docket No. SN-2019-020

CWA LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the County's request for a restraint of binding arbitration of the CWA's grievance contesting the County's requirement that employees either report to work or use their personal leave time during two days of inclement weather. The Commission holds that the County has a managerial prerogative to decide whether to open its facilities despite inclement weather, and that the CWA's alleged impact issue (being required to use leave time when deciding not to report to work during inclement weather) is not severable from the County's prerogative to keep its libraries open because it would significantly encroach upon its ability to provide those County services.

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, Trimboli & Prusinowski, LLC,
attorneys (James T. Prusinowski, on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys
(Annmarie Pinarski, of counsel; Charlette Matts-Brown,
on the brief)

DECISION

On September 13, 2018, Sussex County (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by CWA Local 1032 (Local 1032). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it required employees to report to work or use their personal time during inclement weather occurring on two separate days.

The County filed briefs, exhibits, and the certifications of William Porter, the Director of the Sussex County Library System, Gregory V. Poff, the Business Administrator for County, and the County's counsel, James T. Prusinowski. Local 1032 filed a brief

and the certification of the Branch Manager for the Dennis Memorial Library, Mary Martin. These pertinent facts appear.^{1/}

Local 1032 represents "all full-time and regularly employed part-time employees non-supervisor employed by the Sussex County Board of Freeholders," but excluding "all unclassified employees, managerial executives, confidential employees, police employees, division heads, supervisors and employees included in other collective negotiations units." The County and Local 1032 are parties to a CNA with a term of January 1, 2017 through December 31, 2017, which includes a grievance procedure that ends in binding arbitration.

Article 10, Section 4, entitled "Safety," provides in pertinent part:

Employees shall not be required to work under conditions of work which are unsafe or unhealthful. The County retains the right to make a determination of the safety or healthiness of the conditions of work and will be responsible for the development and enforcement of occupational safety and health standards to provide a safe and healthful environment in accordance with PEOSHA and any other applicable statutes, regulations, or guidelines.

Any employee whose work is temporarily eliminated as a result of the foregoing may be promptly assigned on an interim basis to other comparable work or work location. As

^{1/} The facts recited in this decision are generally not disputed by the parties. Facts that were certified to but not recited in this decision were either not found to be pertinent to our analysis and/or were in dispute.

soon as it is possible, management will notify the Union of any interim reassignments due to unsafe working conditions.

If other comparable work or work location is not available, employees shall be allowed to use vacation or personal leave. In no instance shall an employee be forced to take a vacation or personal leave in lieu of a temporary assignment.

Article 25, entitled "Emergency Days", provides in pertinent part:

Section 1: The County reserves the right to declare an emergency day, early closing, or late opening for all departments...

Section 2: Should non-essential employees report for work and subsequently the County decides to close County offices, such employees who reported to work shall be credited for the day's work. There shall be no charge against their benefit leave time...

Should the County close County offices before the start of a workday or declare a delayed opening, all non-essential employees scheduled to work that day will be credited with a day's work without charge to benefit leave time...

Section 3: If the County does not declare an emergency day or delayed opening, an employee who does not report to work will be charged with either a vacation or personal leave day.

Section 4: If an employee is reasonably late reporting to work due to traveling conditions caused by emergency and/or ice conditions, that employee shall be credited with a full working day.

Martin certifies that the Sussex County Library System consists of six branch locations. She further certifies that on Friday, March 2, 2018, a winter nor'easter brought heavy winds

and rain to Sussex County causing dozens of trees and power lines to be knocked down. Around 12:00 p.m., the Main Library lost power and closed for the day. Around 1:00 p.m., the Louise Childs Branch lost power and closed for the day. On March 3, 2018, some Sussex County roads were impassable due to fallen wires and trees. Also, on March 3, the Main Library and Louise Childs branches were closed due to a power outage. Martin certifies that at least fourteen employees were impacted by the inclement weather on March 2 and 3.

Porter certifies that on March 2 and March 3, 2018, the County Business Administrator did not declare an emergency or a snow day and did not authorize a delayed opening or an early closing to the County facilities due to the inclement weather. He further certifies that the County library system, which consists of six locations, was open and operational to the extent possible. However, Porter certifies that the County was unable to open or keep several libraries open on March 2 and 3 because it did not have minimum required staffing and due to electrical issues at certain locations. As a result, five (of the six) libraries were open on March 2 and three libraries remained open until regular closing time (thus, the County closed early two of the five libraries that were open at the beginning of the day). Porter certifies that any personnel who reported to work at a location that could not open or remain open were instructed to

work at a different branch or utilize their benefit leave time. On March 3, three (of the six) library branches were open and servicing customers. The library allowed the staff who chose not to report to work on March 2 or March 3, or left work early, to utilize their benefit leave time.

On March 23, 2018, Local 1032 filed a grievance asserting that the County violated Article 25 and Article 10, Section 4 of the parties' CNA by requiring employees to "travel to work in unsafe working conditions or use benefit time." The grievance seeks restoration of certain employees' leave time "where the conditions on March 2 and 3, 2018 were unsafe and unhealthful." On March 28, Porter denied the grievance. On April 4, Local 1032 filed a level 2 grievance, which was denied by the County on April 9. On April 23, Local 1032's level 3 grievance was denied. On May 10, Local 1032 demanded arbitration, and an arbitration hearing was scheduled for December 20, 2018. 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 Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

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 County argues that Local 1032's grievance must be restrained because the decision whether to open or close the County's libraries due to weather is its inherent managerial prerogative. Moreover, the County argues that arbitration over

any issue of compensation (i.e. whether employees who decided to not come to work or who left early on March 2 and/or 3 could recoup their used benefit time) is not severable and would substantially interfere with the County's managerial prerogative.

Local 1032 argues that its grievance is not challenging the County's managerial prerogative to open or close its libraries due to inclement weather. Rather, Local 1032 argues that "the weather conditions on March 2 and March 3, 2018 were unsafe, and thus the County's requirement that employees travel to work in unsafe working conditions or use their benefit time was a violation of the Safety provision in the parties' Agreement." Moreover, Local 1032 states that "grievance arbitration would require the arbitrator to determine whether certain negotiations unit members' benefit time should be restored where the conditions on March 2 and 3, 2018 were unsafe and unhealthful." Thus, the issue of employees' compensation for having to work under unsafe conditions is severable from the County's managerial prerogative to open facilities in spite of inclement weather.

The parties agree that the County has the managerial prerogative to decide whether to open its facilities despite inclement weather. This dispute concerns whether the impact of that decision on the employees (i.e. having to use leave time for not reporting to work during inclement weather) is mandatorily negotiable and legally arbitrable. To resolve this dispute a determination must be made whether negotiating the "impact issue"

would significantly or substantially encroach upon the management prerogative. See Woodstown-Pilesgrrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); see also Communications Workers of Am. v. State of New Jersey (Rowan Univ.), App. Div. Dkt. No. A-1500-98T5, 26 NJPER 30 (¶31009 1999), aff'g, State of New Jersey (Rowan Univ.), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998).

In Rowan, supra, the union sought to arbitrate the University's decision to require employees to work on certain holidays and the resulting impact (e.g. financial loss due to altered or canceled vacation plans) of that managerial decision. The Commission restrained arbitration of the grievance (and dismissed the union's unfair practice charge) finding that "the governmental policy decision to operate all university services on the four holidays cannot be separated from the decision to require some employees to work on those days." Ibid. In affirming the Commission's decision, the Appellate Division stated:

A managerial decision to "stay open" on a given day and provide services carries with it the fundamental understanding that staff will be available to provide those services. We conclude that the purported "impact" issue is not severable from the managerial prerogative and would significantly encroach upon the well-established managerial prerogative of establishing the academic calendar. To conclude otherwise would render this "managerial prerogative" a hollow shell without substance or meaning.

[Ibid.]

Here, similarly to Rowan, we find that the "impact" issue (e.g. use of leave time when deciding not to report to work during inclement weather) is not severable from the County's managerial prerogative to open its libraries despite inclement weather and would significantly encroach upon its ability to provide County services. See also Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-30, 21 NJPER 392 (¶26241 1995) (restraining arbitration of a grievance seeking recoupment of used benefit time due to board's managerial decision to hold classes during spring vacation to make up for snow days), compare with Greater Egg Harbor Reg. Bd. of Ed., P.E.R.C. No. 2016-43, 42 NJPER 305, 308 (¶88 2015) (declining to restrain arbitration of a grievance challenging the Board's decision to prohibit the use of personal leave for the make-up days).

The remedy sought by Local 1032 through arbitration, the recoupment of Local 1032 members' benefit time used to avoid the hazard of commuting in the storm, is not severable from the County's managerial prerogative to open its facilities. If the employees could refuse to go to work during inclement weather without having to take any benefit time, it would incentivize the employees to be absent, and thus, the County would not have the staff to provide its services. The employees would be determining whether the libraries would be open rather than the County. As articulated by the Appellate Division in Rowan,

supra, such a resolution would eviscerate the managerial prerogative to open the County's facilities and provide services.

Local 1032's reliance on New Brunswick Bd. of Ed., P.E.R.C. No. 86-8, 11 NJPER 453 (¶16159 1985) is distinguishable from the instant matter. In New Brunswick, the Commission declined to restrain arbitration of a grievance seeking additional sick leave for a teacher who had gotten ill due to the school holding classes in frigid temperatures resulting from an inoperative heating system. Unlike Local 1032's concern with an unsafe commute, New Brunswick dealt with unsafe working conditions (i.e. inadequate heat) on the employer's premises. After balancing the employees' interests against the employer's interests, the Commission concluded that "an employee has an important interest in receiving compensation for work-incurred illnesses and in encouraging the employer to provide a healthy working environment." Here, Local 1032 does not allege any work-incurred illnesses or injuries that necessitated the use of personal time by its members or any unsafe working conditions at the employer's premises. Rather, Local 1032's main concern is that its employees had to use benefit time to avoid having to travel to and from work in inclement weather.

Likewise, Local 1032's reliance on Rutgers, the State Univ., I.R. No. 2011-39, 41 NJPER 82 (¶27 2011) is distinguishable from

the instant matter.^{2/} In Rutgers, the University decided to close its Camden and Newark campuses due to a snow storm, but did not close its New Brunswick/Piscataway campus. Thus, employees of the New Brunswick/Piscataway campus had to either report for work in the snow storm or use their benefit time while the Camden and Newark employees did not. Significantly, all classes throughout the University system were cancelled and students were excused. Thus, in Rutgers, the crux of the dispute was over the disparate treatment of the similarly situated employees. The Commission allowed the arbitration to proceed reasoning that the New Brunswick/Piscataway campus employees' pursuit of compensation (commensurate with that afforded to the Camden and Newark employees) would not significantly interfere with Rutgers' educational mission, particularly in light of all educational classes having been cancelled due to the snow storm.

Here, unlike the employees in Rutgers, all County employees were treated the same. All library employees were required to report to work or use benefit time if they did not want to travel in the inclement weather or if they wanted to leave early. Even

^{2/} Significantly, this is a decision for interim relief to restrain binding arbitration of a grievance during the pendency of a scope of negotiations petition. It is not a final determination on the merits of the underlying scope petition. The standard for interim relief to restrain arbitration is different than that under a scope petition. The Commission allowed the arbitration to proceed while it determined the scope of negotiations petition, which subsequently was rendered moot when the arbitrator did not sustain the grievance.

the employees assigned to libraries that were subsequently closed due to power outages or lack of staffing were not excused with paid time off. These employees were required to assist at the other open libraries, or again, use benefit time if they wanted to stay home or leave early.

ORDER

The request of Sussex County for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: June 27, 2019

Trenton, New Jersey