

P.E.R.C. NO. 2020-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE OCEAN COUNTY UTILITIES
AUTHORITY,

Petitioner,

-and-

Docket No. SN-2019-058

UNITED STEEL WORKERS, AFL-CIO,
PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL and SERVICE WORKERS
INTERNATIONAL UNION, LOCAL 4-406,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Authority's request for a restraint of binding arbitration of Local 4-406's grievance contesting the Authority's failure to credit a unit member with paid vacation/sick leave while he was out on a work related injury and receiving workers' compensation benefits. Finding that the issue of paid leave is generally mandatorily negotiable and that the Authority has cited no statute or regulation applicable to non-State employees that expressly, specifically, or comprehensively preempts negotiations over whether employees out on workers' compensation leave may accrue paid sick and vacation leave during such absence, the Commission holds the grievance legally arbitrable.

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.

P.E.R.C. NO. 2020-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE OCEAN COUNTY UTILITIES
AUTHORITY,

Petitioner,

-and-

Docket No. SN-2019-058

UNITED STEEL WORKERS, AFL-CIO,
PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL and SERVICE WORKERS
INTERNATIONAL UNION, LOCAL 4-406,

Respondent.

Appearances:

For the Petitioner, Haines & Yost, attorneys (Jerome C. Landers, of counsel and on the brief)

For the Respondent, David Tykulsker & Associates, attorneys (David Tykulsker, of counsel and on the brief)

DECISION

On April 3, 2019, the Ocean County Utilities Authority (Authority) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the United Steel Workers, AFL-CIO, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 4-406 (Local 4-406). The grievance asserts that the Authority violated the parties' collective negotiations agreement (CNA) when it failed to credit the

grievant vacation and sick leave while he was out on a work related injury and receiving workers' compensation benefits.

The Authority filed briefs, exhibits and the certification of its Director of Human Resources, Margaret Hansen. Local 4-406 filed a brief. These facts appear.

Local 4-406 represents all full-time and regular part-time (who work at least twenty (20) hours per week) craft employees and production and maintenance employees.^{1/} The Authority and Local 4-406 are parties to a CNA in effect from July 1, 2017 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article XII of the CNA, "Leave of Absence," provides in relevant part:

A. An official leave of absence may be granted by Resolution of the Authority.

* * *

C. An employee on leave of absence without pay, except military leave, does not accrue vacation, sick leave benefits, or any other benefit, with the exception of membership in the health benefits' plan, which shall continue, and membership in the retirement system, which may be continued by forwarding a copy of the Authority's Resolution authorizing the leave of absence.

Article XXIII of the parties' CNA, entitled "Injury on Other Employment," provides:

^{1/} The CNA has separate recognition clauses for the craft employees and the production/maintenance employees that list the titles within each employee category.

Any employee covered by this Agreement who is injured while working at another job, whether authorized or not by the Authority, and whether self-employed or not, shall not be entitled to collect any sick leave nor accrue any sick or vacation time, or any other time, with the Authority during his/her absence.

The grievant, an Electrician and craft employee, was injured on the job in November of 2017. He was out of work from November 3, 2017 through May 29, 2018. When the grievant returned to full time employment, the Human Resources Administrator manually calculated how many paid vacation and sick leave days the grievant was not eligible to receive based on his time on workers' compensation leave.

On June 15, 2018, the grievant filed a grievance after he was told he was not eligible to accrue vacation and sick leave during his injury leave. On June 18, Hansen denied the grievance. According to Hansen, the Authority treats a period of time out of the office for a work-related injury as a leave of absence. Local 4-406 and the grievant disagreed with the decision of the denial and sought a Step Two Hearing.

At the July 23, 2018 hearing, Local 4-406 asserted that Article XII of the parties CNA did not apply to workers' compensation leave. Hansen asserts she relied on the past practice of the Authority to disallow accrual of sick and vacation time for these absences. Specifically, she referred Local 4-406 to the Authority's HR Desk Guide of December 9, 1994

that outlined the reduction of sick and vacation time when an employee is out on a leave of absence, including the time that wages are replaced by Workers' Compensation Insurance.

Hansen certifies that the desk guide was the stated policy (or rule) for the Authority's automated pay process called MIS prior to the year 2000. MIS was replaced in the year 2000 by software which did not have an automated application of the desk guide. Since 2000, Human Resources had manually applied the Desk Guide and calculated any adjustment to be made to vacation and sick time accrual for an absence, for all of the Authority's employees. Human Resources maintains a binder for such calculations that is updated regularly by the HR Administrator.

Hansen further certifies that she has reviewed numerous employee records in this binder with Local 4-406 describing the application of the Desk Guide to accruals of vacation and sick leave for all absences. She asserts that the binder shows that the Authority had consistently rejected accruals for vacation and sick time while an employee was on workers' compensation leave. Hansen denied the relief sought at the Step Two on July 27, 2018.

On September 11, 2018, Local 4-406 filed a Request for Submission of a Panel of Arbitrators. On October 17, the Commission appointed Robert Simmelkjaer as arbitrator, and an arbitration hearing was held on March 28, 2019. The arbitration

was adjourned pending a ruling on the Authority's petition filed on April 3.^{2/}

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

^{2/} It is the Commission's policy, absent a court order, not to permit the filing of a scope of negotiations petition after arbitration is completed with the issuance of an award. See Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983). Here, arbitration was not complete when the petition was filed so we will decide the scope issue.

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.

And, *Bethlehem Township Bd. of Education v. Bethlehem Township Education Assoc.*, 91 N.J. 38, 44 (1982), emphasizes that preemption does not occur unless the statute or regulation, "expressly, specifically and comprehensively" sets the otherwise negotiable term and condition of employment.

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 Authority asserts that the grievance is non-arbitrable because the relief it seeks conflicts with its written policies and past practices regarding the non-accumulation of paid sick and vacation leave during the hiatus between an employee's ceasing work because of an injury and returning to active employment after he/she recuperates and is no longer on workers' compensation leave. The Authority argues that workers' compensation leave falls within the categories of unpaid leave covered by Article XII that provides that employees on unpaid

leaves, except for military leave, shall not accrue paid sick and vacation days.

The Authority further relies on civil service regulations N.J.A.C. 4A:6-1.2 and N.J.A.C. 4A:6-1.5 which were applied by the Commission in State of New Jersey and Law Enforcement Supervisors Association, P.E.R.C. No. 2016-81, 42 NJPER 561 (¶156 2016), aff'd, 43 NJPER 439 (¶123 2017), certif. den., 230 N.J. 618 (2017), to restrain arbitration of a grievance asserting the State should not have prorated paid leave for State employees on a leave of absence without pay including workers' compensation leaves.

Local 4-406 counters the Authority's reliance on Article XII by pointing out that Article XXIII "Injury on Other Employment," prohibiting the accumulation of sick and vacation days during an injury leave applies when the Authority employee is working an outside job, not his/her regular assignment. It notes that there is no dispute that the grievant's injury stemmed from his Authority duties.

Citing the language in Ridgefield Park delineating the borders of the Commission's scope of negotiations jurisdiction, Local 4-406 asserts that the arguments concerning past practice, Authority policy manuals, and the cited provisions of the CNA pertain to the merits of the grievance and not whether its subject is within the scope of mandatorily negotiable topics.

It maintains that arbitration is not preempted because the civil service enactments relied upon by the Authority explicitly pertain to State employees only.

Analysis

The parties' arguments concerning the impact of existing contract articles, written policies, and past practices may be relevant to the merits of the grievance but are outside our purview in this scope of negotiations proceeding.

Numerous Court and Commission decisions hold that absent a preemptive statute or regulation, the amount of paid leave, including vacation and sick leaves, is a mandatorily negotiable term and condition of employment. See Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Hoboken Bd. of Ed. and Hoboken Teachers Ass'n, P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd, 1982 N.J. Super. Unpub. LEXIS 8, NJPER Supp.2d 113 (¶95 App. Div. 1982), app. disp., 93 N.J. 263 (1983).^{3/}

Based on the following discussion, we conclude that no statute or regulation cited by the Authority, expressly, specifically, or comprehensively preempts negotiations over whether Authority employees on a workers' compensation leave from

^{3/} In its resolution of the case, the Appellate Division referred to partially preemptive sick leave laws applicable to school employees that: (1) set a minimum annual sick leave allowance of 10 days, N.J.S.A. 18A:30-2; and (2) limited the carryover to the following year of unused paid sick leave to 15 days, N.J.S.A. 18A:30-7.

an Authority job will not accrue paid sick and vacation leave days during the period they are absent from work as a result of a compensable injury.

We recognize and have held that specific civil service regulations direct that State employees on workers' compensation leaves do not accrue vacation and sick leave. See State of New Jersey and Law Enforcement Supervisors Association, P.E.R.C. No. 2016-81, 42 NJPER 561 (¶156 2016), aff'd, 43 NJPER 439 (¶123 2017), certif. den. 230 N.J. 618 (2017). But, non-State employees are not covered by those enactments as N.J.S.A. 11A:6-8 provides:

a. Leaves of absence for career, senior executive and unclassified employees in State service due to injury or illness directly caused by and arising from State employment shall be governed by rules of the Civil Service Commission. Leaves of absence for career and unclassified employees of a political subdivision directly caused by or arising from employment shall be governed by rules of the political subdivision. Any sick leave with pay shall be reduced by the amount of workers' compensation or disability benefits, if any, received for the same injury or illness.

[emphasis supplied]

In Headen, the Supreme Court, for reasons not pertinent to this case, modified the 2011 decision of the Appellate Division, reported at 420 N.J. Super. 105. That Court specifically cited and construed the above quoted statute:

Finally, N.J.S.A. 11A:6-8, which defines “[l]eaves of absence for career, senior executive and unclassified employees in State service due to injury or illness directly caused by and arising from State employment[,]” specifically provides such leave time applies to “career and unclassified employees of a political subdivision” as “governed by rules of the political subdivision,” again, granting the local government the autonomy to designate or negotiate appropriate leave.

[420 N.J. Super. at 117, emphasis added]

Based on the principles set by State Supervisory and Bethlehem, as well as the Appellate Division’s interpretation in Headen, because this statute leaves a non-State employer with discretion concerning paid leaves of absence, normally mandatorily negotiable subjects, the “rules,” or any changes to them, are to be set through collective negotiations.^{4/}

In its reply brief, the Authority acknowledges that neither N.J.A.C. 4A:6-1.2 nor N.J.A.C. 4A:6-1.5 is preemptive but urges that the policy barring State employees from accruing additional paid leave while on workers’ compensation should be strongly considered and applied to this dispute. The Authority may advance that argument, and its other contractual and policy defenses in the arbitration.

^{4/} N.J.S.A. 34:13A-5.3 provides in pertinent part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

ORDER

The request of the Ocean County Utilities Authority for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 26, 2019

Trenton, New Jersey