

P.E.R.C. NO. 2021-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MILLBURN,

Petitioner,

-and-

Docket No. SN-2021-009

PBA LOCAL 34,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township of Millburn's (Township's) request for a restraint of binding arbitration of a grievance filed by PBA Local 34 (PBA). The PBA's grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it refused to reimburse the Grievant's sick leave used during a quarantine period for COVID-19 ordered by the Township. The Commission finds that the PBA's grievance seeks reimbursement of sick leave under the parties' CNA, and it does not raise the Families First Coronavirus Response Act (FFCRA) as requiring restoration of the Grievant's sick leave. The Commission concludes that even if the Township has found the Grievant ineligible for sick leave reimbursement under the FFCRA, it retains the discretion to reimburse the Grievant's sick leave, and the PBA may arbitrate potential violations of the CNA.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel and on the brief)

For the Respondent, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

DECISION

On September 10, 2020, the Township of Millburn (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 34 (PBA). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it refused to reimburse the grievant, a Millburn police officer, sick leave used from March 20, 2020 through March 31 because of Millburn's order for the officer to quarantine due to COVID-19.

The Township filed briefs, exhibits and the certification of its Business Administrator, Alexander McDonald. The PBA filed a

brief.^{1/} These facts appear.

The PBA represents all police officers employed by the Township. The Township and PBA are parties to a CNA with a term of January 1, 2017 through December 31, 2019. Article VII of the parties CNA sets forth the "Sick Leave" provisions. The grievance procedure ends in binding arbitration.

McDonald certifies that on March 9, 2020, New Jersey Governor Philip D. Murphy declared that a Public Health Emergency and State of Emergency exist within the State of New Jersey due to the ongoing COVID-19 pandemic. On March 18, the Families First Coronavirus Relief Act (FFCRA) was enacted. The Emergency Paid Sick Leave Act (EPSLA) of the FFCRA affords all full-time employees eighty (80) hours of paid sick leave to the extent that the employee is unable to work due to one of the FFCRA's qualifying reasons.

Section 5108 of EPSLA states that it "shall take effect no later than fifteen (15) days after the date of enactment of this Act," and "shall expire on December 31, 2020." According to the United States Department of Labor's "Questions and Answers" portal that addresses various questions regarding the FFCRA, the FFCRA's paid leave provisions became effective on April 1, 2020, and apply to leave taken between April 1, 2020 and December 31,

^{1/} PBA Local 34 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2020.

McDonald certifies that on June 11, 2020 he sent a memorandum to all department heads regarding COVID-19 related time off. The purpose of the memo was to "clarify the use of accumulated time since April 1, 2020 that may have been COVID-19 related under the [FFCRA]." The memo explained that "employees that may have used accumulated sick time for qualifying reasons (1), (2) or (3) will have up to 80 hours fully paid sick leave...returned to their time bank."^{2/} McDonald's June 11 memo, in accordance with the FFCRA, also exempted emergency responders from the FFCRA, which included law enforcement officers such as the grievant. Despite the Township's exemption of first responders from the FFCRA, McDonald's memo allowed reimbursement of sick leave for first responders if eligible under qualifying reasons (1), (2) or (3).^{3/}

By letter dated June 18, 2020, the PBA requested that the grievant's two weeks of sick leave taken due to the Township's

2/ The qualifying reasons are as follows: if the employee (1) is subject to a Federal, State or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine related to COVID-19; (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis. Due to the Grievant's ordered quarantine, qualifying reason (1) applied to the Grievant.

3/ Despite the June 11 memo's exemption of law enforcement officers from the FFCRA, the grievant would have still been eligible for FFCRA sick leave reimbursement per the memo's exception for emergency responders that met qualifying reason (1).

ordered quarantine, which concluded on March 31, be fully restored due to the close proximity of the leave to the memo's start date of April 1, 2020. On June 22, the Chief of Police responded to the PBA's grievance explaining that "[t]he time period of when the grievant was out sick does not fit the criteria that is in the memo and therefore is denied."

By letter dated July 6, 2020, the PBA filed a grievance with McDonald, stating in pertinent part:

We are in receipt of a copy of your memo dated June 11, 2020 to all Township Department heads regarding the return of up to a maximum of 80 hours paid sick leave utilized since April 1, 2020 as a result of various circumstances included [sic] a "local quarantine". You will recall that Officer Salemi was ordered to quarantine for 2 weeks concluding on March 31, 2020.

We realize that said memo expressly referenced the return of sick leave used since April 1, 2020. However, given the close proximity of the commencement of her 2-week quarantine, we believe a full restoration of her time is consistent with the intent and spirit of your instructions.

By letter dated July 20, McDonald responded to the grievance, denying same, and explaining that "[t]he timing of the grievant's use of accumulated sick time, falls outside of the effective dates of April 1, 2020 through December 31, 2020 as outlined in the federal [FFCRA]." That same day, the PBA filed a Request for a Submission of a Panel of Arbitrators. The PBA's request asserts that the Township's refusal to reimburse the

grievant's sick leave due to an ordered COVID-19 quarantine is "arbitrary and capricious and otherwise in violation the parties CNA including but not limited to, Article VII, and that [the grievant] must be reimbursed the sick leave." This petition ensued.

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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.]

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Township argues that arbitration of the PBA's grievance must be restrained because it is statutorily preempted by the express effective dates of the FFCRA. In response, the PBA argues that the Township's refusal to reimburse the Grievant's sick leave violated the CNA and the Township was not precluded from reimbursing the Grievant's sick leave because of the FFCRA's April 1 commencement date.

Sick leave benefits are mandatorily negotiable unless a statute or regulation preempts negotiations. Piscataway Tp. Bd. of Ed. v. Piscataway Maint. & Cust. Ass'n, 152 N.J. Super. 235 (App. Div. 1977). To be preemptive, a statute or regulation must set an employment condition expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees

Ass'n, 78 N.J. 54, 80-82 (1978).

Here, we find the Township's statutory preemption argument to be unavailing. Sick leave is generally mandatorily negotiable and legally arbitrable. Burlington Cty. Col. Fac. Assn. v. Bd of Trustees, 64 N.J. 10, 14 (1973), Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Assn., 152 N.J. Super. 235 (App. Div. 1977). The PBA's grievance, both in its July 6 letter and July 20 arbitration request, is seeking reimbursement of the grievant's sick leave under the parties' CNA. In neither articulation of the PBA's grievance does the PBA raise the FFCRA as requiring restoration of the Grievant's sick leave. While the FFCRA addresses restoration of sick leave for leave taken from April 1 to December 31, 2020, the parties may still negotiate over sick leave outside the framework of the FFCRA. Even if the Township has found the grievant ineligible for reimbursement under the FFCRA, it retains the discretion to reimburse the grievant's sick leave, and the PBA may arbitrate potential violations of the CNA. Any award that may be issued may not be inconsistent with the law. See Old Bridge Bd. of Education v. Old Bridge Education Ass'n., 98 N.J. 523, 527-528 (1985) (finding that grievances involving the application of controlling statutes or regulations may be subjected to resolution by binding arbitration as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent

with the law).

ORDER

The request of the Township of Millburn for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2021

Trenton, New Jersey