

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2021-001

EDISON IAFF LOCAL 1197,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Edison for a restraint of binding arbitration of a grievance filed by the Edison IAFF Local 1197, asserting the Township violated the parties' collective negotiations agreement when it implemented a COVID-19 travel quarantine policy exempting firefighters from entitlement to emergency paid sick leave under the federal Families First Coronavirus Relief Act (FFCRA), during leave taken pursuant to the quarantine policy. The Commission finds the Township's managerial prerogative to implement the quarantine policy is severable from the mandatorily negotiable issue of whether firefighters are entitled to be compensated during periods of leave taken in compliance with that policy; and the FFCRA does not otherwise preempt 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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2021-001

EDISON IAFF LOCAL 1197,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel and on the brief; Boris Shapiro, on the brief)

For the Respondent, Kroll Heineman Carton, LLC, attorneys (Raymond G. Heineman, of counsel and on the brief)

DECISION

On August 4, 2020, the Township of Edison (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Edison IAFF Local 1197 (Local 1197). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it implemented an updated COVID-19 travel quarantine policy that, among other things, exempted firefighters from entitlement to emergency paid sick leave under the federal Families First Coronavirus Relief Act (FFCRA) and Emergency Paid Sick Leave Act (EPSLA), during periods of leave taken in compliance with the quarantine policy.

The Township filed briefs, exhibits and the certification of its Business Administrator, Maureen Ruane. Local 1197 filed a brief,

exhibits and the affidavit of its counsel, Raymond G. Heineman. These facts appear.

Local 1197 represents all firefighters employed by the Township, but excluding management executives as defined by the act and Superior officers. The Township and Local 1197 are parties to a CNA in effect from January 1, 2019 through December 31, 2022. The grievance procedure, at Article 46, ends in binding arbitration. It defines a "grievance," among other things, as a claim "that either the Employee, an individual employee, group of employees or the Union has been harmed by either the interpretation or application of the terms and conditions of this agreement and other conditions of employment."

The CNA provides for a 42-hour work week with various shifts for firefighters engaged in fire suppression duties and for those assigned to the Bureau of fire Prevention and Training. Firefighters may take paid leave, including vacation, personal days, and sick time, pursuant to the CNA at Articles 23, 26, and 45; and may request unpaid leave, subject to Township approval, pursuant to Article 14. Article 41 of the CNA provides that "all discipline shall be for just cause." The CNA at Article 8 among other things provides that the Township and Local 1197 "agree to cooperate to the fullest extent in the promotion of safety."

Ruane certifies that in March 2020, in order to protect the health, safety, and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued an Executive Order declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19. Therein, Governor Murphy declared that it is

critical for all citizens and their employers to implement appropriate measures to mitigate the spread of COVID-19. The State of Emergency is still in effect.

According to Ruane, on June 24, 2020, in a concerted effort to implement measures to curtail the spread of this virus, Governor Murphy issued a travel advisory which called on all individuals traveling/returning to New Jersey from states with significant community spread of COVID-19 to self-quarantine for a 14-day period from the date they leave the State on the travel advisory list. The Governor's Advisory does not apply to workers in critical infrastructure fields, as defined by the Cybersecurity and Infrastructure Security Agency, including firefighters.

Ruane also certifies that on July 1, 2020, she implemented and circulated to all Township employees the "Amended Policy on Out of State Travel-Quarantine Requirements." This policy was implemented in solidarity with Governor Murphy's travel advisory, and in furtherance of the Township's responsibility to mitigate the spread of COVID-19 and safeguard the well being of its citizens, employees, and the public at large. The policy states, in pertinent part:

In accordance with [the Governor's June 24, 2020 travel] advisory, any resident who travels out of the State of New Jersey to certain other states must quarantine for 14 days upon their return to New Jersey.

. . .

1. All employees taking vacation and traveling out of State or out of the Country must advise their Department Heads where they are traveling to and their return date to New Jersey. Department Heads shall advise the Administrator of employees traveling out of State or out of the

Country and the date of their expected return to work.

. . .

5. Employees who had and can establish that they made travel plans and reservations prior to June 24, 2020 to travel to one of the states on the Governor's advisory list, shall review with their Department Head if working from home is available. If working from home is not available, the employee may use available sick, vacation, compensatory time or personal time for the quarantine period determined by the Director of Health . . . , which may be up to 14 days. Certain employees may be eligible to use paid sick leave under the FFCRA, if they have not exhausted that time, in lieu of their own sick time, except for emergency responders, i.e. police officers, firefighters, dispatchers, and DPW employees. In the absence of eligibility for paid sick leave under the FFCRA, employees may use available sick, vacation, compensatory time, or personal time to remain in pay status during the period of quarantine provided herein. In the absence of available paid time off, the period of quarantine shall be unpaid.

6. Employees who made travel plans after June 24, 2020 and elect to travel to one of the states identified on the Governor's travel advisory list are required to use available vacation, compensatory time, or personal time to remain in a pay status during the period of quarantine provided herein. In the absence of available paid time off, the period of quarantine shall be unpaid.

7. Employees who elect to travel out of the Country are required to use available vacation or personal days to remain in a pay status during the period of quarantine. In the absence of available paid time off, the period of quarantine shall be unpaid.

According to Ruane, a formal grievance was not filed by or on behalf of Local 1197 at any point after the Travel Quarantine Policy was implemented. However, in a July 16, 2020 email from its counsel

to the Township's counsel, Local 1197 articulated the nature of the dispute as follows:

The Town has implemented a unilateral change in the salary scheduling provisions of the contract, by refusing to allow firefighters to return to work [upon return from travel to a state listed in the Governor's Travel Advisory], while requiring them to use sick or vacation time to cover the period they are prevented from working by the Township's unilateral action.

On July 22, 2020, Local 1197 filed a Request for a Submission of a Panel of Arbitrators identifying the grievance to be arbitrated as "Travel Quarantine." This petition ensued.

On November 2, 2020, the Township filed an application for interim relief with the Commission requesting temporary restraints of binding arbitration pending the disposition of the Township's scope petition. On November 30, 2020, a Commission Designee issued an interim relief decision granting the Township's request for a restraint of binding arbitration pending a final Commission Decision. I.R. No. 2021-13.

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 (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). Thus, if a grievance is either mandatorily or

permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. 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 Township argues that arbitration must be restrained because it has a non-negotiable managerial prerogative to implement policies which protect the public welfare during a declared public health emergency; including policies requiring its emergency responders to think critically before traveling to areas of high COVID-19 transmission rates, with the understanding that if they do, pay during the period of quarantine will come from their accrued time.^{1/} Substantial interference with that prerogative would occur if the Township were required to negotiate the sick pay issue before implementing the travel quarantine policy, in the mean time unnecessarily exposing employees and the public to possible infection. The Township further argues that the FFCRA preempts negotiation over entitlement to emergency paid sick leave. The Township further notes that emergency paid leave, as permitted by the FFCRA and EPSLA, is not provided for in the CNA; and Local 1197 does not allege that the

^{1/} Rhetorically equating such a travel decision with the irresponsible act of attending a "COVID party," the Township asks, "should the taxpayers be responsible to pay him or her a salary while under quarantine?"

Township otherwise denied a firefighter's request to use contractually allotted leave to remain in pay status during quarantine.

Local 1197 counters that it does not oppose the Township's local quarantine order, but rather seeks to resolve the severable issue of scheduling and compensation of firefighters returning from a destination on the Travel Advisory list, who are required under the local quarantine order to use contractual vacation or sick leave, rather than being paid their salary or emergency paid sick leave. The grievance addresses mandatorily negotiable issues, including the amount of leave time to which employees are entitled, the scheduling of leave provided it does not infringe upon an employer's managerial prerogative to set staffing levels, and compensation issues resulting from an exercise of a management prerogative.

Local 1197 further argues that the FFCRA does not preempt arbitration because neither the FFCRA nor the Governor's Travel Advisory expressly, specifically and comprehensively fixes a term and condition of employment; and those statutes, and related interpretive guidance, do not bar the exercise of employer discretion consistent with a collective negotiations process or a labor agreement. The CNA provides for paid and unpaid leaves, but it does not mandate that firefighters take such leave, with the exception of discipline for "just cause." The Township's Policy is also not consistent with the Governor's Advisory or with State Department of Health and CDC guidance, which provides for the return to duty of asymptomatic firefighters, subject to specific safety measures. Finally, Local

1197 argues that matters predominately relating to employee safety are mandatorily negotiable.

Upon our review of the entire record, we agree with the Commission Designee's interim conclusion that the FFCRA, EPSLA, related regulations, and their interpretive guidance do not preempt arbitration because they do not specifically, expressly, or comprehensively mandate that the Township must exempt firefighters from the FFCRA's paid sick leave provisions, and they do not eliminate Edison's discretion to negotiate over that subject.

On March 18, 2020, President Trump signed into law the FFCRA,^{2/} which created new emergency paid leave requirements in response to the COVID-19 global pandemic, including the Emergency Paid Sick Leave Act (EPSLA). 85 FR 19326. EPSLA entitled certain employees to take up to two weeks of paid sick leave. Id. Under time-limited statutory authority established by the FFCRA, the Secretary of Labor promulgated temporary implementing regulations, effective April 2, 2020 through December 31, 2020, which are set forth in the Code of Federal Regulations at 29 CFR Part 826.

^{2/} 116 P.L. 127, 2020 Enacted H.R. 6201, 116 Enacted H.R. 6201, 134 Stat. 178, 116 P.L. 127, 2020 Enacted H.R. 6201, 116 Enacted H.R. 6201, 134 Stat. 178.

The Township cites 29 CFR 826.20(a)(2) and 29 CFR 826.30(c),^{3/} in support of its argument that the FFCRA expressly leaves to the Township's sole discretion the right to exclude "emergency responders" from entitlement to such emergency paid sick leave. 29 CFR 826.20 provides, in pertinent part, that an employer "shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to" the employee being "subject to a Federal, State, or local quarantine or isolation order related to COVID-19," only if, "but for being subject to the [quarantine] order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework." 29 CFR 826.20(a)(1)(i) and (a)(2).

29 CFR 826.30(c) provides, in pertinent part, that "[a]n Employer whose Employee is a health care provider or an emergency responder [defined to include firefighters] may exclude such Employee from the EPSLA's Paid Sick Leave requirements." (Emphasis added.)

As the Designee correctly noted, when, as here, a statute or regulation uses permissive language such as "may" regarding a

^{3/} The Commission takes administrative notice of the fact that, as of the time of this writing, 29 CFR 826.20 and 29 CFR 826.30 are not found within 29 CFR Part 826, either on Lexis or in the Electronic Code of Federal Regulations published at www.ecfr.gov/cgi-bin/ECFR. At the Commission's request, the Township provided supplemental exhibits, consisting of Westlaw printouts of 29 CFR 826.20 and 29 CFR 826.30. The Commission also takes administrative notice that the provisions of 29 CFR 826.20 are published in the Federal Register at 85 FR 19326, 19349-19350. The provisions of 29 CFR 826.30 are found at 85 FR 19326, 19351-19352, and are further discussed at 85 FR 19326, 19334-19335.

condition of employment, and does not expressly eliminate the parties' discretion to vary that condition in a negotiated agreement, the subject is not statutorily preempted. See No. Hudson Regional Fire and Rescue and No. Hudson Firefighters Ass'n, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013), aff'd, 41 NJPER 353 (¶112 App. Div. 2015) (statute providing that "a local unit may adopt an ordinance authorizing special emergency appropriations..." did not preempt negotiations because it did not mandate adoption of ordinance); I.R. 2021-13 at 16.^{4/}

The Township has a managerial prerogative to establish a quarantine policy during the ongoing COVID-19 pandemic. In barring potentially exposed firefighters from reporting to work during the quarantine period, the policy addresses a legitimate safety concern, that of shielding other employees and members of the public from potential exposure to the virus. This is similar to staffing decisions that meet an emergent need to ensure operational efficiency or public safety. See, e.g., Irvington Policemen's Benevolent Ass'n. v. Irvington, 170 N.J. Super. 539, (App. Div. 1979) (need for supervision and improved discipline on night shift made shift change

^{4/} The provisions of Title 29, Part 826, also expressly indicate that they are meant to provide rights in addition to, not override, rights and benefits set forth in a CNA. See 29 CFR 826.160(a)(ii). The legislative history also stresses the optional nature of an employer's decision to exclude emergency responders from entitlement to emergency paid sick leave. See 85 FR 19326, 19334 ("an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Acts . . . an employer is not required to exercise this option[.]") (Emphasis added.)

non-negotiable); City of Camden, P.E.R.C. No. 94-62, 20 NJPER 48 (¶25016 1993) (employer had prerogative to adjust staffing levels to meet emergency and correlative right to determine when staffing levels may be safely returned to normal levels); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981) (finding non-arbitrable borough's temporary assignment of personnel to meet emergent manpower needs).

However, we find that the Township's prerogative to require potentially exposed firefighters to comply with the quarantine order is severable from the issue of compensation during the period of quarantine. Camden, supra (related contractual compensation issue was severable from prerogative to adjust staffing levels during emergency); Pitman, supra (patrolman's claim of entitlement to additional compensation for performing out-of-title duties was severable from decision to assign such duties to meet emergent manpower needs). See also, City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985) (City had managerial prerogative to require sick leave verification at any time, but issue of who pays for required doctors' reports was severable and arbitrable.) Further, the courts and the Commission have held that the subject of paid sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment, and, as such, are ordinarily a subject of mandatory negotiation. Bd. of Educ. v. Piscataway Maint. & Custodial Ass'n., 152 N.J. Super. 235, 243-44 (App. Div. 1977), citing, Burlington Cty. Col. Fac. Ass'n. v. Bd. of Trustees, 64 N.J.

10, 14 (1973). See also, Ocean Cty. Utilities Authority, P.E.R.C. No. 2020-27, 46 NJPER 242 (¶57 2019).

We find no evidence in the record to support a conclusion that, from an operational standpoint, negotiations over the payment of compensation for leave taken in compliance with the policy would significantly interfere with the Township's ability to implement or enforce it. Local 1197 does not contest the Township's right to implement the local quarantine order. We are not persuaded by the Township's assertion that allowing the grievance to proceed to arbitration could result in an award barring the Township from implementing the travel quarantine policy until after it negotiates the emergency sick leave issue. We will not speculate about what remedies might or might not be lawful or appropriate if a grievance is sustained. Any challenges to a remedy awarded can be raised in post-arbitration proceedings, if necessary.^{5/}

Accordingly, we find that the Township's managerial prerogative to implement the disputed quarantine policy is severable from the mandatorily negotiable issue of whether firefighters are entitled to be compensated during periods of leave taken in compliance with that policy; and the FFCRA does not otherwise preempt arbitration.

ORDER

^{5/} For these reasons, we do not concur with the Designee's interim conclusion that arbitration would significantly interfere with the Township's managerial prerogative or substantially limit its policy making powers. I.R. 2021-13 at 18.

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

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2021

Trenton, New Jersey