

P.E.R.C. NO. 2021-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2021-020

PBA LOCAL 122,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Gloucester County Sheriff's Office (GCSO) request for a restraint of binding arbitration of the PBA's grievance contesting the failure to reimburse a unit member for vacation time he utilized pending completion of a fitness-for-duty examination and weapons forfeiture application. The GCSO asserted that Attorney General Directive 2000-3 and N.J.S.A. 2C:25-21(d) preempt arbitration. Finding that nothing in the Directive or statute pertains to a law enforcement officer's leave status or use of personal leave time while awaiting the completion of the county prosecutor's conditions for return of the grievant's firearm, the Commission finds that the PBA's grievance is not expressly or specifically preempted and is 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.

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Appearances:

For the Petitioner, Brown & Connery, LLP, attorneys
(Michael J. DiPiero, of counsel and on the brief)

For the Respondent, Spear Wilderman, P.C., attorneys
(James Katz, of counsel and on the brief)

DECISION

On October 26, 2020, the Gloucester County Sheriff's Office (GCSO) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 122 (PBA). The grievance asserts that the GCSO violated the parties' collective negotiations agreement (CNA) when it failed to reimburse the grievant for 420 hours of vacation time he utilized when he returned from military leave pending the completion of a fitness-for-duty examination and weapons forfeiture application.

The GCSO filed a brief, exhibits, and the certification of its Undersheriff, August E. Knestaunt. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The PBA represents all full-time Sheriff's Officers and Sheriff's Sergeants employed by the GCSO. The GCSO and PBA are parties to a CNA in effect from January 1, 2014 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article IX of the CNA, entitled "Vacation," establishes provisions for the length of vacation time earned, accumulation, and selection of vacation. Article XIII, Section D of the CNA, entitled "Military Leave," states: "Military leave of absence will be granted as required by statute." The County's Human Resources Manual, Chapter 6, Section 7, provides, in pertinent part: "Upon returning from military leave, an employee shall be reinstated by the County without loss of benefits or seniority if he/she reports to work within 90 days of discharge from military service unless the separation was by a dishonorable discharge (N.J.S.A. 38:23-4)."

The grievant certifies that he was away on military leave from November 2018 until September 26, 2019. He certifies that due to an incident involving his former spouse which occurred at his residence on July 7, 2019, while he was on military leave, he voluntarily gave up his Firearms Purchase Identification Card. He certifies that he did not turn over any weapons because he had already turned them in before he left for military leave, as required by SOP 733, §XXIV. The grievant certifies that no

temporary restraining order, domestic violence, or criminal charges were filed in connection with the July 7, 2019 incident.

Knestaunt certifies that as a result of the July 7, 2019 incident, the Gloucester County Prosecutor's Office (GCPO) took possession of the grievant's duty weapon and prohibited him from carrying, possessing and/or using a firearm unless and until he successfully completed a fitness for duty evaluation (FFDE).

Knestaunt certifies that because the GCPO seized the grievant's firearm on July 8, he was therefore unfit for duty as of that date and incapable of performing his duties as a Sheriff's Officer. He certifies that the GCSO could not serve the grievant a Preliminary Notice of Disciplinary Action (PDNA) or set up a FFDE because the grievant was on military leave.

Knestaunt certifies that prior to the grievant's return from military leave, the Sheriff, through a designee, reached out to the grievant and provided him with two options for his scheduled return to duty on September 26, 2019: (1) he could be served with a Notice of Discipline placing him on an unpaid suspension pending his FFDE; or (2) he could voluntarily take accumulated leave time (vacation) in lieu of being served discipline, which would allow him to continue to be paid until completing and passing the FFDE ordered by the GCP. Knestaunt certifies that procedurally, if the grievant opted to be served discipline, he would have been entitled to a hearing within five (5) days to

contest the suspension without pay. He certifies that the grievant chose to use his vacation time. Knestaunt certifies that the grievant subsequently completed the FFDE and was cleared to return to duty as of December 19, 2019.

The grievant certifies that when he returned from military leave on September 26, 2019, the GCSO refused to reinstate him with pay because the GCPO's motion for weapons forfeiture was still pending. The grievant certifies that rather than reinstating him upon his return from military leave and then bringing disciplinary charges, he was advised that the Sheriff would either place the grievant on an unpaid status or he could utilize his accrued vacation time while the matter was being resolved. He certifies that he was not given any non-weapon light duty work options. He certifies that he felt coerced to use his available vacation time to cover his expenses.

The grievant certifies that on or about October 25, 2019, the Superior Court of New Jersey, Family Part, Chancery Division, dismissed the Weapons Forfeiture complaint, determining that the case had been filed in error. He certifies that the Sheriff refused to reinstate him with pay because the GCSO had not scheduled his FFDE. The grievant certifies that the FFDE occurred on November 18, 2019 and he was cleared to return to work with no restrictions on December 19, 2019. The grievant certifies that despite not being issued disciplinary charges or a

suspension and then being vindicated in the weapons forfeiture action and passing the FFDE, the GCSO refused to reimburse him for the 420 vacation hours he used for the time between his return from military leave on September 26, 2019 through December 19, 2019 when he was reinstated with pay. He certifies that ultimately he was issued an April 2, 2020 reprimand regarding the July 7, 2019 incident.

On May 21, 2020, the PBA filed a grievance seeking reimbursement of 420 vacation hours that the grievant used from September 26 through December 19, 2019 to cover the period he was awaiting results of the weapons forfeiture proceedings and his FFDE. The parties processed the grievance through all steps of the grievance procedure. On July 23, the PBA filed a request for binding arbitration. 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 merits of the grievance or any contractual defenses the employer may have.

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 GCSO asserts that arbitration should be restrained because Attorney General Directive 2000-3 and the Prevention of Domestic Violence Act of 1991, N.J.S.A. 2C:25-17 et seq., preempt the issue of how to deal with the grievant's July 7, 2019 domestic incident. It argues that when the GCPO prohibited the grievant from carrying, possessing, and/or using a firearm, he was unfit for duty until successful completion of a FFDE. The GCSO asserts that the grievant chose to use paid vacation time upon returning from military leave instead of being suspended without pay pending successful completion of a FFDE. Citing In re Cornish, 2010 N.J. Super. Unpub. LEXIS 1713 (App. Div. 2010), the GCSO argues that certain statutes and regulations permitting backpay for an unpaid suspension do not apply where the officer was not charged with a crime.

The PBA asserts that the grievance is arbitrable because it concerns the mandatorily negotiable issue of paid leave and is not preempted by statute. The PBA argues that the grievance does not challenge the GCSO's prerogative to refuse to reinstate the grievant while the GCPO's weapons forfeiture application was pending and/or while the grievant was waiting for his FFDE to be completed. It contends that the grievance challenges whether the

grievant was required to use his vacation leave while those processes were completed and whether he is entitled to reimbursement for that used vacation leave. The PBA asserts that Attorney General Directive 2000-3 does not address employee pay status or the use of leave time while awaiting the weapons forfeiture and FFDE processes. Finally, the PBA contends that In re Cornish is inapposite because it involved a statutory claim to backpay, not a contractual vacation leave claim.

The PBA is not challenging the GCSO's managerial prerogative to order the grievant to submit to a fitness for duty examination. See Bridgewater Tp. and PBA Local 174, P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd, 196 N.J. Super. 258 (App. Div. 1984) (a public employer has the right to determine if public safety personnel are fit to perform the duties of the positions to which they are assigned). The PBA's grievance also does not contest the seizure of the grievant's firearm by the GCPO. This case concerns whether the grievant is entitled to reimbursement for vacation leave he alleges he was coerced to use or risk being placed on an unpaid suspension after he returned from military leave and was awaiting the resolution of a weapons forfeiture application and a FFDE.

"Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey

City Bd. of Educ., 212 N.J. 437, 445 (2012). The GCSO asserts that Attorney General Directive 2000-3 and the Prevention of Domestic Violence Act of 1991 preempt arbitration. Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The language in Directive 2000-3 and N.J.S.A. 2C:25-21(d) quoted by the GCSO concerns the seizure of firearms and firearm purchaser identification cards from people involved in a domestic violence offense and the procedures for a county prosecutor to return such firearms to law enforcement officers. Nothing in the cited Directive or statute pertains to a law enforcement officer's leave status or use of personal leave time while awaiting the completion of the county prosecutor's conditions for return of the firearm (e.g., FFDE). We therefore find that neither Attorney General Directive 2000-3 nor the Prevention of Domestic Violence Act of 1991 expressly or specifically preempt arbitration of the PBA's grievance.

The GCSO has not asserted any claim that arbitration should be restrained based on the third prong of the Paterson

negotiability test, i.e., that the issue would significantly interfere with the exercise of inherent or express management prerogatives. We note that grievances seeking reimbursement for personal leave time used during a period of absence have been found legally arbitrable where not specifically preempted. State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2019-9, 45 NJPER 114 (§30 2018) (employees who utilized personal leave during government shutdown could arbitrate over State's refusal to re-credit leave time). Specifically, the Commission has held that the issue of reimbursement for the use of personal leave time while on a leave of absence pending the results of a fitness for duty examination is legally arbitrable. Rutgers University, P.E.R.C. No. 2020-52, 46 NJPER 522 (§116 2020); see also City of Atlantic City, P.E.R.C. No. 2001-44, 27 NJPER 122 (§32044 2001) (procedural issues related to fitness for duty exam, including compensation for time while awaiting the exam, were arbitrable).

Finally, we find that the GCSO's reliance on In re Cornish is misplaced because the officer here is not seeking backpay for an unpaid suspension pursuant to the specific statutes and regulations involved in that case, but is seeking reimbursement of contractual vacation leave.

ORDER

The request of the Gloucester County Sheriff's Office 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