P.E.R.C. NO. 2021-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Petitioner,

-and- Docket No. SN-2021-036

UNION COUNCIL 8,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for restraint of binding arbitration of Council 8's grievance contesting the County's requirement that employees use paid sick leave time during NJFLA leave. Finding that N.J.A.C. 13:14-1.7 does not preempt arbitration because its language is discretionary and does not speak in the imperative regarding use of paid sick leave during NJFLA and that N.J.S.A. 34:11B-14 provides that the NJFLA's implementing regulations cannot be construed to reduce benefits or preclude negotiations over greater family leave benefits, the Commission declines to restrain 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.

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Appearances:

For the Petitioner, Hatfield Schwartz Law Group, attorneys (Kathryn V. Hatfield, of counsel and on the brief; Shannon M. Boyne, on the brief)

For the Respondent, Loccke, Correia, & Bukosky, attorneys (Corey M. Sargeant, of counsel and on the brief; Michael A. Bukosky, of counsel and on the brief)

DECISION

On March 25, 2021, the County of Union (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Union Council 8 (Council 8). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) and New Jersey Family Leave Act (NJFLA) statutes and regulations incorporated therein by forcing unit employees to use sick leave time for NJFLA leave.

The County filed briefs and exhibits.[1/] Council 8 filed a brief, exhibits, and the certification of its attorney, Corey M. Sergeant. These facts appear.

Council 8 represents all of the County's regularly employed blue collar and white collar employees. The County and Council 8 are parties to a CNA in effect from January 1, 2018 through December 31, 2020. The grievance procedure ends in binding arbitration.

Article 24 of the CNA, entitled "Leave of Absence," provides, in pertinent part:

> Employees serving on leave of absence without pay under circumstances that qualify under The Family and Medical Leave Act of 1993 (FMLA) and the New Jersey Family Leave Act (NJFLA) will have such leave considered to be taken under and in accordance with the applicable provisions of the FMLA or the NJFLA with all current amendments. The County's Policy governing Family and Medical Leaves shall be incorporated as if set forth fully herein, attached hereto as Exhibit C.

Exhibit C, Article IX of the CNA, entitled "Substitution of Paid Leave," provides, in pertinent part:

> Under the FMLA and the FLA, leaves of absence are unpaid. In order to assist employees and provide a level of financial security, the County will pay accrued, unused sick time to employees absent on a medical leave or a family leave to care for an immediate family member, starting from the first day of

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1/ The County 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.

> absence and continuing until either the employee returns or exhausts his/her sick leave benefits. In addition, employees may choose to be paid for their accrued vacation and personal/religious leave following exhaustion of sick leave benefits (or at the start of leave when sick leave benefits are exhausted or not available, such as family leave for birth or adoption). Once all time off benefits are exhausted, leave will be unpaid.

Article 2, Section 4 of the CNA provides that the County's "adoption of policies, rules, regulations and practices in furtherance [of the exercise of the County's powers, rights, authority, duties and responsibilities] and the use of judgment and discretion in connection therewith shall be limited only by the extent such specific and expressed terms of this Agreement are in conformance with the laws of the State of New Jersey" and state and federal constitutions.

On January 8, 2021, Council 8 filed a grievance alleging that the County has required unit employees to use their paid accrued sick leave time while out on NJFLA leave. The grievance asserts that the CNA is subject to state laws and regulations through which unit employees have the option of whether to use sick leave for NJFLA leave. The grievance asserts that the NJFLA statute (N.J.S.A. 34:11B-4(d)) and regulation (N.J.A.C. 4A:6-1.21A(j)) are implicated and are incorporated into the CNA by reference. As a remedy, Council 8 requests that any and all sick leave deducted from unit employees using NJFLA, NJ FLI, or

similar leave, be returned, unless the employee "opted" for its use, and for future compliance with the statute and regulation.

The County denied Council 8's grievance, asserting that N.J.A.C. 13:14-1.7 allows an employer to continue a past practice or policy of requiring its employees to exhaust accrued leave during a leave of absence under the NJFLA and that the CNA provides that the County will pay accrued sick leave time for employees out on NJFLA. On January 22, 2021, Council 8 filed a request for binding grievance 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.

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.
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> [Id. at 404-405.]

The County asserts that N.J.A.C. 13:14-1.7 requires that it continue its policy of requiring employees to exhaust accrued paid sick leave during NJFLA leave. It argues that arbitration should be restrained to the extent that Council 8 will attempt to argue that N.J.A.C. 4A:6-1.21A controls the issue. The County contends that N.J.A.C. 13:14-1.7 takes precedence over N.J.A.C. 4A:6-1.21A because N.J.A.C. 13:14-1.7 was promulgated by the Department of Law and Public Safety's Director of the Division on Civil Rights who is charged with implementing NJFLA, whereas N.J.A.C. 4A:6-1.21A is a Civil Service regulation.

Council 8 asserts that the grievance is arbitrable and is not preempted by N.J.A.C. 13:14-1.7. It argues that the issue is controlled by N.J.S.A. 34:11B-4(d), which states that NJFLA leave may be paid or unpaid, and N.J.A.C. 4A:6-1.21A(j), which states

that an employee has the option to use paid leave for family leave purposes. Council 8 contends that N.J.S.A. 34:11B-4(d) and N.J.A.C. 4A:6-1.21A(j) take precedence over N.J.A.C. 13:14-1.7. Citing N.J.S.A. 34:11B-14, it asserts that the NJFLA sets a minimum level of benefits, just like similar language in the federal Family Medical Leave Act (FMLA).

In general, paid and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. See, e.g., Burlington Cty. College Faculty Ass'n v. Board of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-44 (1977); Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd, NJPER Supp.2d 113 (¶95 App. Div. 1982). Negotiations will be preempted, however, if contract language conflicts with a statute or regulation that expressly, specifically, and comprehensively sets that term and condition of employment. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (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 (1978).

N.J.A.C. 13:14-1.7 provides, in pertinent part, that (emphasis added): "If an employer has had a past practice or

policy of requiring its employees to exhaust all accrued paid leave during a leave of absence, the employer may require employees to do so during a family leave." The courts and Commission have regularly found that statutes and regulations providing that a public employer "may" take a particular action are not imperative but confer discretion which may be exercised through collective negotiations. See, e.g., Local 195, supra, 88 N.J. at 406 (regulation providing an authority "may" lay off does not preempt because it "grants considerable discretion" and does not speak "in the imperative"); Hunterdon Cty., 116 N.J. 322, 331 (1989) (statutes providing employers "may" establish awards programs are not preemptive because they authorize employers "to exercise discretion in choosing to institute" them); Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006) (statute providing "employer may, in its discretion, assume the entire cost or a portion of the cost" of retiree health benefits is not preemptive); and Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-26, 17 NJPER 427 (¶22206 1991) (statute providing employer "may pay in his or its discretion the whole or a part of" salaries of employees on military leave is not preemptive).

In Lumberton Ed. Ass'n and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd, 28 NJPER 427 (¶33156 App. Div. 2002), the employer asserted that 29 U.S.C.A. § 2612(d) requires employees to use accrued paid leave

concurrently with FMLA unpaid leave and preempts negotiations over using accrued paid leave and FMLA leave consecutively. That statute provides, in pertinent part: "An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for [child-rearing] leave." (emphasis added). The Commission held that the statute did not preempt negotiations because it conferred discretion and did not mandate the use of accrued paid leave during FMLA leave. We held:

> Under the preemption standards, the issue is whether the statutes cited by the employer preempt its discretion to agree with the Association to have leave benefits run consecutively rather than concurrently. The answer is no. None of these statutes nor any implementing regulations comprehensively set whether leave allowances granted by any of these statutory schemes (FMLA, FLA, and Title 18A) are to run consecutively or concurrently. Nor do any of these statutes or regulations require that the decision to have leave run consecutively or concurrently be made by the employer unilaterally.
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> [Lumberton, 27 NJPER at 5.]

The court affirmed, holding:

> PERC properly recognized that the FMLA does not speak in the imperative and does not eliminate all employer discretion as to the stacking of an order in which FMLA and non-FMLA leaves may be taken.
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> [Lumberton [App. Div.], 28 NJPER at 428.]

Lumberton is analogous to the instant case, as both involve allegedly preemptive language stating that the "employer may

require" employees to use accrued paid leave during a family leave. Here, we find that the term "may" in N.J.A.C. 13:14-1.7 is discretionary; it does not specifically set an employment condition regarding the use of accrued paid sick leave during family leave. Rather, the regulation leaves the determination of whether to continue such a family leave policy to the discretion of the employer which, in a collective negotiations setting, means the employer may negotiate over the use of accrued paid leave during family leave with the majority representative so long as the issue is otherwise negotiable under the Local 195 test. As N.J.A.C. 13:14-1.7 does not "speak in the imperative" and does not "leave nothing to the discretion of the public employer," it is not preemptive. Bethlehem; State Supervisory.

Furthermore, the NJFLA statute at N.J.S.A. 34:11B-4(d) explicitly provides that: "Family leave required by this act may be paid, unpaid, or a combination of paid and unpaid leave." As in N.J.A.C. 13:14-1.7, the term "may" confers discretion for such NJFLA leave to be paid or unpaid; the issue has not been definitively set and is therefore not preempted. To the extent that N.J.A.C. 13:14-1.7 could be interpreted, as the County argues, to limit such open-ended discretion, it would conflict with N.J.S.A. 34:11B-4(d). In case of such a conflict, the statutory language supersedes. See, e.g., State v. Fajardo-Santos, 199 N.J. 520, 529 (2009) ("Regulations may not

trump the statutes that authorize them."); T.H. v. Division of Developmental Disabilities, 189 N.J. 478, 490-491 (2007) (agency regulations cannot "alter the terms of a legislative enactment or frustrate the policy embodied in the statute.")

Moreover, the NJFLA specifically provides that nothing in the statute or its implementing regulations can be construed to reduce employment benefits pursuant to a CNA or prohibit collective negotiations over more generous family leave benefits. N.J.S.A. 34:11B-14 provides (emphasis added):

> Benefits provided by collective bargaining agreement; reduction prohibited
>
> No provision of this act shall be deemed to justify an employer in reducing employment benefits provided by the employer or required by a collective bargaining agreement which are in excess of those required by this act. Nor shall any provision of this act, or any regulations promulgated to implement or enforce this act, be construed to prohibit the negotiation and provision through collective bargaining agreements of leave policies or benefit programs which provide benefits in excess of those required by this act. This provision shall apply irrespective of the date that a collective bargaining agreement takes effect.

In Madison Bd. of Ed., 2016 N.J. Super. Unpub. LEXIS 1038 (App. Div. 2016), the employer asserted that an NJFLA regulation requires NJFLA and FMLA leave to be used concurrently.[2/] The

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2/ N.J.A.C. 13:14-1.6(a) provides that "[w]here an employee requests leave for a reason covered by both the [NJFLA] and another law, the leave simultaneously counts against the (continued...)

court held that N.J.S.A. 34:11B-14 "expressly authorizes the Board to negotiate with the MEA over leave benefits in excess of those provided for in the NJFLA and its accompanying regulations" and therefore the regulation was not preemptive. Madison at *7-8. See also Lumberton, supra (the FMLA sets minimum family leave benefits and does not eliminate all employer discretion to negotiate with union for greater benefits). Consistent with Madison and Lumberton, we find that N.J.S.A. 34:11B-14 provides discretion for greater leave benefits and therefore N.J.A.C. 13:14-1.7 cannot be construed to limit Council 8's ability to enforce an alleged right for employees to choose whether to utilize paid sick leave during family leave.

We next address the County's request to restrain Council 8 from relying on N.J.A.C. 4A:6-1.21A(j), a Civil Service regulation, in arbitration. That regulation provides as follows:

> An employee may, at his or her option, use paid leave for family leave purposes. An employee who chooses to use paid leave (vacation, sick or administrative) must meet the requirements set forth in this subchapter for the type of leave requested.
>
> [Ibid.]

There is no language in N.J.A.C. 4A:6-1.21A(j) that preempts the disputed issue of whether paid leave must be used during the use of NJFLA. So long as there is no preemption concern, we see no

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2/ (...continued)
employee's entitlement under both laws."

basis to bar Council 8 from relying on N.J.A.C. 4A:6-1.21A(j) in arbitration. As the merits are not before us, the arbitrator may determine the relevance and applicability of N.J.A.C. 4A:6-1.21A(j) to this dispute. Ridgefield Park.

ORDER

The request of the County of Union 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: June 24, 2021

Trenton, New Jersey