P.E.R.C. NO. 2022-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Petitioner,

-and- Docket No. SN-2022-003

EAST ORANGE FIRE OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City's request for restraint of binding arbitration of the FOA's grievance alleging that the City violated the parties' collective negotiations agreement (CNA) by improperly deducting the grievant's sick and vacation leave while he was absent from work due to a positive COVID-19 diagnosis. Finding that paid leave is generally mandatorily negotiable and that P.L. 2020, c. 84 does not specifically preempt arbitration over the issue of restoration of paid leave while absent for a work-related illness, 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, O'Toole Scrivo, LLC, attorneys (Marlin G. Townes, III, of counsel)

For the Respondent, Marc D. Abramson and Associates, Inc., labor relations consultants (Brian R. Furry, labor consultant)

DECISION

On August 10, 2021, the City of East Orange (City) filed a scope of negotiations petition seeking a restraint of binding arbitration filed by the East Orange Fire Officers' Association (FOA). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) by improperly deducting the grievant's sick and vacation leave while he was absent from work due to a positive COVID-19 diagnosis.

The City filed briefs, exhibits, and the certifications of its Fire Chief, Andre Williams, and its counsel, Marlin G. Townes III. The FOP filed a brief, exhibits, and the certification of FOA President William Kingston. These facts appear.

The FOA is the majority representative for all of the captains, the senior arson investigator, and the training officer employed by the City's fire department. The City and FOA are parties to a CNA in effect from July 1, 2013 through December 31, 2017. The grievance procedure ends in binding arbitration.

Article IX of the CNA is entitled "Sick Leave/Supplement Compensation." Article IX, paragraph 1.b. provides, in pertinent part:

> Absence from work as are [sic] result of work-related illness, sickness or disability shall not be deducted from accumulated sick leave but each employee shall receive time off for such work-related illness, sickness or disability as in the past.

Chief Williams certifies that in response to the COVID-19 pandemic, the City adopted a policy that afforded City employees 80 hours of paid leave as afforded by the Family First Coronavirus Response Act. Williams certifies that the City required employees needing additional COVID-19 leave beyond 80 hours to utilize their accrued leave time. He certifies that the City extended paid COVID-19 leave to rank-and-file and superior firefighters to a total of 120 hours and required that they utilize accrued paid leave after exhausting it.

The City's counsel certifies that the grievant is employed by the City as a Fire Captain. He certifies that the grievant has a pending workers' compensation case against the City related to his contracting COVID-19 in 2020.

On January 13, 2021, the FOA filed a grievance alleging that the City improperly deducted the grievant's sick and vacation leave while he was out after testing positive for COVID-19. The grievance alleges that the City's failure to restore the grievant's sick and vacation leave violates Article IX of the CNA and P.L. 2020, c. 84. President Kingston certifies that the FOA's grievance does not seek tort actions or damages on behalf of the grievant, but only seeks restoration of contractual sick leave that had been deducted while he was out with COVID-19.

On January 28, 2021, the FOA filed a request for binding arbitration describing the grievance to be arbitrated as: "Improper Deduction of Sick Day & Vacation Time." On August 10, 2021, the City filed this petition seeking to restrain binding arbitration. The arbitration hearing was conducted on August 13, 2021. Kingston certifies that he was present and testified at the grievance arbitration hearing and that the FOA's arguments at the hearing in no way sought a remedy exclusively based on violation of P.L. 2020, c. 84.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 we conclude that the 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.

The City asserts that the portion of the FOA's grievance concerning P.L. 2020, c. 84 should be restrained from arbitration because it is preempted by the New Jersey Workers' Compensation Act. It argues that P.L. 2020, c. 84, as codified in N.J.S.A. 34:15-31.12, creates a rebuttable presumption that COVID-19 contraction by essential workers is work-related, and that such work-related presumption applies only to workers' compensation claims. The City thus contends that the Division of Workers' Compensation has exclusive original jurisdiction over the issue of whether the City violated N.J.S.A. 34:15-31.12.

The FOA asserts that arbitration should not be restrained because the grievance concerns the negotiable issue of whether the City violated Article IX of the CNA concerning the use of sick leave. It argues that the Commission has found that the workers' compensation laws do not preempt grievances seeking recoupment of sick leave that was deducted during absences for work-related injuries. The FOA contends that N.J.S.A. 34:15-31.12 does not preempt arbitration because it was raised in the

grievance to buttress its contractual argument that COVID-19 should be considered a work-related illness under Article IX of the CNA and not require deduction of sick leave. It asserts that the statute was not raised in the grievance or arbitration to support an argument for tort actions or the seeking of damages.

In its reply brief, the City acknowledges that N.J.S.A. 34:15-31.12 applies the COVID-19 work-related rebuttable presumption to not just workers' compensation claims, but also disability retirements and "any other benefits provided by law." It argues that this should be interpreted to apply only to statutorily required benefits and not benefits provided pursuant to a collectively negotiated agreement.

The courts and Commission have held that paid sick leave and other leaves of absence are ordinarily mandatorily negotiable terms and conditions of employment because they 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. Bd. 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); 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 Commission has also specifically addressed the issue of compensation and reimbursement of sick leave for an employee's COVID-19 related absence and held that the issue is mandatorily negotiable and legally arbitrable. See Millburn Tp., P.E.R.C. No. 2021-30, 47 NJPER 373 (¶87 2021) (reimbursement of sick leave for COVID-19 quarantine period is negotiable); Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021) (issue of compensation during absence due to COVID-19 travel quarantine policy is negotiable).

The City asserts that arbitration of this issue is generally preempted by workers' compensation laws and is specifically preempted by P.L. 2020, c. 84. 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. 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). Moreover, grievances involving the interpretation, application, or claimed violation of statutes and regulations may be resolved 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. See Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523,

527-528 (1985); West Windsor Twp. v. PERC, 78 N.J. 98, 115-117 (1978).

The Commission has consistently held that workers' compensation laws do not foreclose a majority representative's efforts to enforce contractual clauses providing leaves of absence for injury or sickness by seeking remedies such as restoration of sick leave days. See Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd, 24 NJPER 200 (¶29092 App. Div. 1998) (restoration of paid sick leave); State of New Jersey, P.E.R.C. No. 2020-28, 46 NJPER 244 (¶58 2019) (restoration of paid sick leave); Paterson State-Operated School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002) (restoration of paid sick leave); see also Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015); City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) (restoration of paid sick leave); and Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997) (restoration of paid sick leave). Similar to the above-cited cases, here the grievance alleges a violation of the parties' CNA and seeks restoration of the grievant's sick leave used because of a work-related illness. As stated in those cases, such grievances are not preempted by workers' compensation laws and are legally arbitrable.

We next address the City's assertion that P.L. 2020, c. 84, specifically N.J.S.A. 34:15-31.12, either preempts arbitration or

may not be considered by an arbitrator. N.J.S.A. 34:15-31.12 provides:

> If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence.

On its face, the statute is not restricted to workers' compensation claims. In addition to applying the COVID-19 essential worker rebuttable presumption "for the purposes of benefits provided under R.S.34:15-1 et seq." (i.e., workers' compensation benefits), N.J.S.A. 34:15-31.12 explicitly applies to "ordinary and accidental disability retirement" as well as to: "any other benefits provided by law to individuals suffering injury or illness through the course of their employment." Furthermore, section four of the same law, P.L. 2020, c. 84, codified as N.J.S.A. 34:15-31.14, provides:

> This act [C.34:15-31.11 et seq.] is intended to affirm certain rights of essential employees under the circumstances specified in this act, and shall not be construed as reducing, limiting or curtailing any rights of any worker or employee to benefits provided by law.

The statute establishes a rebuttable presumption that COVID-19 is a work-related illness for essential workers and explicitly states that it shall not be construed to reduce or limit other employee benefits provided by law. The City has not identified how the statute preempts the grievance. We find that the statute does not "expressly, specifically and comprehensively" preempt the grievant's assertion that paid sick leave deducted while he recovered from COVID-19 should be restored.

The City also argues that the FOA's contractual work-related injury clause is not a benefit "provided by law" and therefore the FOA should be precluded from utilizing P.L. 2020, c. 84 to bolster its contractual arguments in arbitration. Regardless of the City's proffered statutory interpretation, we need not determine the applicability of P.L. 2020, c. 84 to the merits of the FOA's grievance arbitration. Ridgefield Park. As P.L. 2020, c. 84 presents no preemption concern regarding the disputed issue of the restoration of paid sick leave for absence from work due to COVID-19, we see no basis to bar the FOA from utilizing it in support of its case in arbitration. The arbitrator is empowered

to consider and apply any relevant statutes as necessary. See West Windsor Tp., 78 N.J. 98, supra; Old Bridge Bd. of Ed., 98 N.J. 523, supra; see also Union Cty., P.E.R.C. No. 2021-57, 48 NJPER 46 (¶12 2021) (where Civil Service regulation did not preempt paid leave issue, the union was not restrained from relying on it in arbitration); Ocean Cty. Util. Auth., P.E.R.C. No. 2021-56, 48 NJPER 43 (¶11 2021) (where union did not seek to arbitrate over issues that conflicted with federal regulations, the arbitrator could determine applicability of regulations).

ORDER

The request of the City of East Orange 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: October 28, 2021

Trenton, New Jersey