P.E.R.C. NO. 2023-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BRADLEY BEACH,

Petitioner,

-and- Docket No. SN-2022-031

UFCW LOCAL 152,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for restraint of binding arbitration of Local 152's grievance alleging that the Borough violated the collective negotiations agreement (CNA) by improperly calculating part-time vacation leave for multiple unit members. The Borough argues that because the CNA is silent on arbitrator selection, Local 152 should be restrained from utilizing the Commission's arbitration panel. The Borough also argues that Local 152 improperly converted its grievance from a single employee grievance to a class action grievance. The Commission finds that the Borough's objections to arbitration concern procedural arbitrability, which is outside of the Commission's scope jurisdiction and is for the arbitrator to determine. The Commission also finds that N.J.A.C. 19:12-5.1 does not preclude arbitration, as the record supports a prima facie showing of the parties' intent to use a Commission arbitrator based on their previous use of Commission arbitrators, the Borough's participation in the arbitrator selection process in this case with no objection, and no evidence of the parties' intent to use a different arbitration panel.

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, Eric M. Bernstein & Associates, LLC, attorneys (Eric M. Bernstein, of counsel)

For the Respondent, O'Brien, Belland & Bushinsky,, LLC, attorneys (Mark E. Belland, of counsel)

DECISION

On February 15, 2022, the Borough of Bradley Beach (Borough) filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by UFCW Local 152 (Local 152). The grievance alleges that the Borough violated Article VII, paragraph F of the parties' collective negotiation agreement (CNA) by not calculating part-time vacation properly for multiple unit employees. The Borough filed briefs and exhibits. Local 152 filed a brief and exhibits.[1/] These facts appear.

1/ Neither party filed a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

Local 152 represents a unit of the Borough's employees including positions such as code enforcement officer, violations clerk, dispatcher, bookkeeper, court administrator, senior mechanic, electrician, sanitation driver, senior landscaper, machine operator, deputy tax collector, various DPW positions, and all other positions listed in the CNA's Recognition Clause. The Borough and Local 152 are parties to a CNA in effect from January 1, 2020 through December 31, 2022.

The parties' grievance procedure is set forth in Article IV of the CNA. Article IV, paragraph C provides that the term grievance "means an appeal by an individual employee or group of employees, from the interpretation, application or violation of this Agreement." The grievance procedure ends in arbitration. Specifically, Article IV, paragraph G provides: "The Union has the right for arbitration for grievance if necessary." The record shows that the parties have previously utilized the Commission's arbitration panel in 2022 (Docket No. AR-2022-218) and in 2014 (Docket Nos. AR-2015-212 and AR-2015-151).

Article VII of the CNA is entitled "Vacations" and sets forth the numbers of vacation days for regular, full-time Local 152 employees as well as various vacation scheduling procedures. Article VII, paragraph F provides: "Part-time employees shall earn vacation on a pro-rata basis."

On December 6, 2021, Local 152 filed a grievance alleging that the Borough violated Article VII, paragraph F by not calculating part-time vacation properly for a particular unit employee. Local 152 subsequently filed an amended "Class Action" grievance alleging that the Borough violated Article VII, paragraph F by not calculating part-time vacation properly. The Borough claims that Local 152 improperly amended the grievance on February 3, 2022 to convert it to a class action grievance. Local 152 claims that there was nothing improper about amending the grievance or the request for arbitration to include all unit employees impacted by the alleged contractual violation.

On February 3, 2022, Local 152 filed an amended request for submission of a panel of arbitrators with the Commission's Director of Arbitration. (Docket No. AR-2022-325). On February 11, 2022, the Director sent the parties a letter confirming the request for arbitration and setting forth the arbitration selection process. Both the Borough and Local 152 participated in the arbitrator selection process. The Borough submitted its arbitrator preference sheets on March 1 and March 8, 2022. On March 8, 2022, the Director appointed a grievance arbitrator.

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 Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

> [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.

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 Borough asserts that Local 152 is not entitled to grievance arbitration using the Commission's panel of arbitrators because the CNA's arbitration provision, Article IV, paragraph G, does not specify what arbitration panel the parties are to use. It argues that there is no prima facie showing of the parties' intent to utilize the Commission's arbitration service as required by N.J.A.C. 19:12-5.1.[2/] The Borough contends that because the CNA does not provide a method for selecting an arbitrator, under N.J.S.A. 2A:24-5 of the Arbitration Act the Superior Court may appoint an arbitrator in a summary action. The Borough also asserts that even if the grievance may be submitted to a Commission arbitrator, arbitration must be restrained because Local 152 improperly converted the initial grievance into a class action grievance in violation of the CNA's grievance procedure.[3/] The Borough does not make any argument alleging that the grievance is not legally arbitrable under the applicable Local 195 negotiability test.

Local 152 asserts that the grievance is legally arbitrable before a Commission arbitrator because the parties have used Commission arbitrators for prior grievances pursuant to the same

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2/ In support of this argument, the Borough cites Ridgefield Bd. of Ed., P.E.R.C. No. 2000-58, 26 NJPER 92 (¶31037 2000).

3/ In support of this argument, the Borough cites Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd, 34 NJPER 228(¶79 2008).

contract language under which this arbitration request was brought. Citing three previous Commission arbitrations it submitted, including another class action grievance submitted on January 24, 2022, Local 152 argues that the parties have applied the CNA's arbitration provision as providing for a Commission arbitrator. Local 152 contends that the Borough's objection to the assignment of a Commission arbitrator is a matter of contractual arbitrability that is not properly raised before the Commission but is for the arbitrator to determine. Local 152 asserts that the Commission's scope jurisdiction does not include interpreting the parties' grievance procedure, so the Borough's procedural arbitrability arguments concerning Local 152's ability to amend its grievance and arbitration request to include additional employees is for the arbitrator.[4/]

The issues before us are whether Local 152 should be restrained from using the Commission's arbitration panel due to the CNA's silence on the method of selection of arbitrators, and whether arbitration should be restrained because Local 152 converted its initial grievance into a class action grievance. Both of these issues pertain to procedural arbitrability, on which the Supreme Court of New Jersey has held:

4/ In support of these arguments, Local 152 cites: Ridgefield Park, 78 N.J. 144, supra; City of Newark, P.E.R.C. No. 2018-9, 44 NJPER 91 (¶29 2017); University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016); and Linwood Bd. of Ed., P.E.R.C. No. 2004-26, 29 NJPER 492 (¶155 2003).

> Procedural arbitrability refers to whether a party has met the procedural conditions for arbitration. Matters of procedural arbitrability should be left to the arbitrator.
>
> [Bd. of Educ. of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34, 43 (2006); internal quotations and citation omitted.]

"The grievance process itself is used to decide matters of procedural arbitrability and, so, arbitrators are the decision-makers for those concerns." ATU, Local 880 v. New Jersey Transit Bus Operations, 200 N.J. 105, 116 (2009). The Commission has consistently held that issues of procedural arbitrability are outside of our scope of negotiations jurisdiction and are for the arbitrator to determine. See, e.g., Cape May M.U.A., P.E.R.C. No. 2019-3, 45 NJPER 80 (¶20 2018); Middlesex Bor. Bd. of Ed., P.E.R.C. 2017-67, 43 NJPER 448 (¶126 2017) (declining to restrain arbitration where the board asserted that the grievance was untimely and filed at the wrong step); and University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016) (issues of substantive, contractual, and procedural arbitrability are outside the purview of a negotiability determination).

We first address the Borough's claim that the Commission's arbitration panel is not the appropriate arbitration panel. In Standard Motor Freight, Inc. v. Local Union No. 560, Int'l Brotherhood of Teamsters, 49 N.J. 83 (1967), the Supreme Court of New Jersey held that the parties' dispute over which arbitration

forum their contract provided for challenging terminations was an issue of procedural arbitrability for the arbitrator to determine. The Court determined:

> While it can be said that which of two tribunals is to hear a grievance is a matter of greater importance to the contracting parties than adjective arbitration details, it is still in essence procedural.
>
> [Standard Motor Freight, 49 N.J. at 98.]

Applying Standard Motor Freight to this case, we find that the Borough's dispute over the arbitration panel is an issue of procedural arbitrability for the arbitrator to determine.

The Borough's contention that N.J.A.C. 19:12-5.1 precludes a Commission arbitrator from hearing the grievance is also unavailing. N.J.A.C. 19:12-5.1 provides, in pertinent part:

> The Commission deems it in the interests of the public to maintain an arbitration panel whose members are available to assist in the arbitration of unresolved labor relations grievances. . . . The availability of the Commission's arbitration service is intended to comply with the requirement of N.J.S.A. 2A:24-5 that the method for naming or appointing an arbitrator provided in the parties' agreement shall be followed. Accordingly, the release of a panel of arbitrators is predicated solely upon a prima facie showing of the parties' intention to utilize the Commission's arbitration service. Parties are referred to the judicial proceedings available under N.J.S.A. 2A:24-3 and N.J.S.A. 2A:24-5 in the event of a dispute regarding arbitrability or the method for naming or appointing an arbitrator.

Article IV, paragraph G of the CNA provides that Local 152 has a right to arbitrate its grievances, but does not specify the arbitration forum. However, the undisputed record demonstrates that Local 152 and the Borough have utilized the Commission's arbitration services multiple times for other disputes in recent years. There is nothing in the record indicating that the parties have used or intended to use any other arbitration forum. Moreover, in this case, the Borough participated in the arbitrator selection process and raised no objections to the Director of Arbitration over Local 152's request for arbitration. Accordingly, on this record there is a prima facie showing of the parties' intention to use the Commission's arbitration panel and no contrary evidence submitted by the Borough to prevent this grievance from proceeding to arbitration.

The Ridgefield Bd. of Ed., P.E.R.C. No. 2000-58, case cited by the Borough is distinguishable. In Ridgefield, the Director of Arbitration did not provide the union with a Commission arbitrator because the collective negotiations agreement did not provide for arbitration at all. Unlike in this case, where the parties have agreed to arbitration as the final step in the grievance procedure, the last step in Ridgefield was the Board's decision. 26 NJPER at 92. Here, there is no contrary contractual provision to support a claim that the parties either should not go to arbitration or should go to a different

arbitration panel. There is an arbitration provision and a practice of submitting grievances to Commission arbitrators.

We next address the Borough's request to restrain arbitration based on its assertion that Local 152 violated the contractual grievance procedure by converting its initial grievance to a class action grievance. "Whether a grievance or demand for arbitration was properly raised in the early stages of the grievance procedure is a procedural arbitrability question to be decided by the arbitrator." Atlantic City Bd. of Ed., P.E.R.C. No. 2012-31, 38 NJPER 257 (¶87 2011), aff'd, 39 NJPER 431 (¶139 2013), certif. den., 215 N.J. 487 (2013). In Middlesex Bd. of Ed., P.E.R.C. No. 2020-7, 46 NJPER 109 (¶23 2019), the Commission held that the employer's assertion that multiple grievances should not be considered in a single arbitration was a procedural arbitrability issue for the arbitrator. We similarly find that the Borough's claim that Local 152 improperly amended its individual grievance to a class action grievance/arbitration is a procedural arbitrability issue that is outside of the Commission's scope of negotiations jurisdiction and appropriate for the arbitrator to determine. Ridgefield Park, 78 N.J. 144; Alpha, 194 N.J. 34; ATU, Local 880, 200 N.J. 105.

Middletown, P.E.R.C. No. 2007-8, cited by the Borough, is inapposite. Middletown was not a scope of negotiations case limited to the determination of legal arbitrability, but was an

unfair practice case in which the Commission's jurisdiction required us to determine, among other issues, whether the public employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act) by failing to implement the police chief's determination sustaining a PBA grievance. We concluded that the employer's failure to implement the chief's grievance determination did not repudiate the grievance procedure in violation of the Act because the union's circumvention of the first two steps of the grievance procedure likely prevented the employer from denying the grievance before the chief sustained it. That decision did not concern questions of procedural arbitrability raised in a scope of negotiations dispute.

Finally, although the Borough does not assert that underlying substantive issue of proper calculation of vacation leave is not mandatorily negotiable, we address it under the applicable Local 195 test. Paid and unpaid leaves of absence are generally 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. Burlington Cty. College Faculty Ass'n, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed., 152 N.J. Super. 235, 243-44 (1977); 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); City of E. Orange, P.E.R.C. No.

2021-50, 47 NJPER 530 (¶124 2021), aff'd, 48 NJPER 441 (¶100 App. Div. 2022); and 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). "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 Commission has thus held that, absent preemption, grievances concerning vacation leave and sick leave are legally arbitrable. See, e.g., City of E. Orange, P.E.R.C. No. 2022-15, 48 NJPER 213 (¶47 2021); Gloucester Cty. Sheriff's Office, P.E.R.C. No. 2021-33, 47 NJPER 382 (¶90 2021); Ocean Cty. Util. Auth., P.E.R.C. No. 2020-27, 46 NJPER 242 (¶57 2019); and State of N.J. Judiciary, P.E.R.C. No. 2013-70, 39 NJPER 472 (¶149 2013). Based on this precedent, we find that the issue of proper calculation of vacation leave is mandatorily negotiable and legally arbitrable.

ORDER

The request of the Borough of Bradley Beach for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: August 18, 2022

Trenton, New Jersey