

P.E.R.C. NO. 2023-8

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. SN-2022-035

FMBA LOCAL 25,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of the FMBA's grievance contesting the Township's placement of an employee on leave after rejecting his accommodation request for exemption from the Township's COVID-19 vaccination mandate. Applying the court's holding in City of Newark, 469 N.J. Super. 366 (App. Div. 2021), the Commission finds that the Township had a non-negotiable managerial prerogative to implement and enforce a COVID-19 vaccination mandate with no testing alternative. The Commission also finds that to the extent the FMBA's grievance challenges the denial of the employee's religious exemption request, it is not arbitrable because it concerns an alleged violation of anti-discrimination laws that must be considered in the appropriate forum such as the EEOC or DCR. Finally, to the extent that the FMBA alleged the suspension was disciplinary, the Commission finds that the FMBA may not challenge it in binding arbitration because the FMBA has an alternate statutory appeal procedure for major discipline.

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, Genova Burns, LLC, attorneys (Jared J. Monaco, of counsel)

For the Respondent, Law Offices of Craig S. Gumpel, LLC, attorneys (Craig S. Gumpel, of counsel)

DECISION

On March 21, 2022, the Township of Maplewood (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FMBA Local 25 (FMBA). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA) when it placed certain employees on leave after rejecting their accommodation requests for exemption from the Township's COVID-19 vaccine policy.

The Township filed briefs, exhibits, and the certifications of its Township Administrator, Jerry Giaimis, and its counsel, Jared J. Monaco. The FMBA filed a brief, exhibits, and the certification of its President, Kevin Herbert. These facts appear.

The FMBA represents all uniformed Firefighters, Firefighter-EMTs, Captains and Deputy Chiefs. The Township and FMBA are parties to a CNA in effect from January 1, 2020 through December 31, 2023. The grievance procedure ends in binding arbitration.

In or around August 2021, in response to the on-going global health crisis, the Township implemented a policy that required employees to show proof of COVID-19 vaccination or submit to weekly COVID-19 testing. Giamis certifies that during the pendency of this original COVID-19 vaccination policy, the Township reassessed its effectiveness and the administrative burden to allow weekly testing, which included scheduling release time for testing and collecting results for approximately 25% of the Township employees. In addition, the Township was concerned that the testing only reflected a moment in time assessment of risk and safety. Ultimately, the Township concluded, that like many other neighboring jurisdictions, a vaccine mandate eased the administrative burden while better ensuring safety among its employees and to its community.

On October 20, 2021, the Township issued a vaccination policy that mandated vaccinations for its employees. The stated purpose of the policy was "to provide a safe and healthy workplace that is free from recognized hazards that endangered the health, safety, and welfare of its employees." Further, the Township was required to "implement policies consistent with

current COVID-19 public health guidance and legal requirements to protect its employees and members of the public as it returns to in-person operations.” The policy decision was based on State and Federal public health guidance and was intended to protect against the continued and unnecessary spread of COVID-19.

The policy required all municipal employees to be fully vaccinated. All employees had until November 7, 2021 to prove they had been fully vaccinated or received, at a minimum, the first of two shots (or only one shot if J&J). In the event the employee was only able to demonstrate a first shot by November 7, the employee had 4 weeks to demonstrate proof that they had received the second dose. The policy provided the following process for exemptions:

If you seek an exception to this policy pursuant to our existing accommodation policy please contact HR for the accommodation request forms and submit them, fully completed, by November 1<sup>st</sup>. We will carefully review the request and respond accordingly consistent with applicable law.

Failure to provide proof of at least 1 dose of vaccination by November 7, 2021, without an approved reasonable accommodation, constituted non-compliance with the policy, which could subject the employee to discipline up to and including termination.

In October and November 2021, four FMBA members submitted requests for exemptions and accommodations from the Township's COVID-19 vaccination policy on the basis of their religious

beliefs. In their accommodation requests, the FMBA members sought, in lieu of vaccination, weekly COVID-19 testing and the wearing of face coverings when social distancing was not possible. The Township reviewed each accommodation request and determined that the accommodations sought by the FMBA members constituted an undue hardship on the Township. The Township's letters to the FMBA members seeking accommodations stated:

Upon careful review of your request, your position, your direct contact with members of the public in crisis and the nature of your job, we regret to inform you that your request constitutes an undue hardship. You are in a position in which you interact with the public directly, in emergent situations, and there may be instances of close contact in an emergent situation where someone in distress may not be masked and may be compromised/high risk. Accordingly, we are prepared to offer you a leave of absence through December 31, 2021, at which point we can re-evaluate your request. If you would like to remain in pay status, you may use any leave balances you have available.

Effective November 8, 2021, the four FMBA members whose accommodation requests were denied were involuntarily placed on an unpaid leave of absence through December 31, 2021 due to failure to provide proof of vaccination. The Township permitted them to use their leave balances to be paid during the leaves of absence. Herbert certifies that the leave of absence was a disciplinary suspension without pay. Giaimis certifies that the rejection of the employees' accommodation requests and placement on leaves of absence was not disciplinary.

After December 31, 2021, the Township reevaluated the requested accommodations. The Township again determined that the requested accommodations would constitute undue hardships on the Township. On January 3, 2022, the Township notified the four FMBA members of its intent to seek their removal based on their alleged failure to meet the job requirement of compliance with the Township's vaccination policy. The disciplinary hearing was held on January 19, 2022, prior to which two of the four FMBA members received their COVID-19 vaccinations. The two vaccinated FMBA members were returned to work effective March 15, 2022. The two unvaccinated FMBA members were terminated on March 19, 2022.

On November 9, 2021, the FMBA filed a grievance over the unilateral placement of the four FMBA members on an unpaid leave of absence effective November 8. The grievance alleges that the FMBA members were subject to major discipline in violation of the Township policy when they were placed on involuntary unpaid leaves of absence. On November 9, 2021, Deputy Chief Bret Derewsky denied the grievance at Step 1 and Acting Chief Christopher Ariemma denied the grievance at Step 2. On November 19, Giaimis denied the grievance at Step 3. On December 22, the Township's Public Safety Committee denied the grievance at Step 4, stating, in pertinent part:

Upon review of the documents submitted on behalf of the FMBA and your presentation to the Public Safety Committee, your grievance is hereby denied. First, no disciplinary

action has been taken against your members. The determination of an undue hardship in the context of a reasonable accommodation request is, in no way, punitive. Second, you have failed to demonstrate a violation of the collective bargaining agreement. Reasonable accommodations, determinations of undue hardship, and/or the resultant decision from that finding are not negotiable.

On December 31, 2021, the FMBA filed a request for submission of a panel of arbitrators with the Commission's Director of 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 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.

The Township asserts that arbitration must be restrained because the implementation and enforcement of a COVID-19 vaccination mandate is a non-negotiable managerial prerogative. It argues that even if its imposition of leaves of absence for violation of its COVID-19 vaccine policy is disciplinary, FMBA members are not entitled to arbitration of major discipline because they are non-Civil Service firefighters with an alternate statutory appeal procedure as set forth in N.J.S.A. 40A:14-19 through -22. The Township asserts that its determination that a requested accommodation constitutes an undue hardship is non-negotiable and is subject to the anti-discrimination laws.

The FMBA asserts that arbitration should not be restrained because the grievance does not contest the Township's managerial prerogative to implement and enforce its COVID-19 vaccine mandate policy. It argues that the grievance only challenges the Township's imposition of discipline by placing the grievants on involuntary leaves of absence following the denial of their requests for accommodations to exempt them from the COVID-19 vaccine mandate. The FMBA contends that such discipline is severable from the Township's prerogative to enforce its COVID-19 vaccination policy and reviewable in arbitration.

We first address the FMBA's request for arbitration to the extent that it challenges the Township's implementation and enforcement of its COVID-19 vaccination mandate policy. In City of Newark, 469 N.J. Super. 366 (App. Div. 2021), the Appellate Division found that negotiations over the implementation and enforcement of the City's COVID-19 vaccination mandate would significantly interfere with the City's policymaking powers aimed at protecting the health and safety of its employees and the public. The vaccination mandate in Newark, like the instant case, did not include an option for COVID-19 testing in lieu of vaccination, allowed for the possibility of medical or religious exemptions, and provided that failure to adhere to the vaccination policy could result in discipline including termination.<sup>1/</sup> 469 N.J. Super. at 374-375. The court held "that the City has a non-negotiable managerial prerogative to immediately implement its COVID-19 vaccination mandate." Id. at 377. In so holding, the court reasoned:

In the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative. COVID-19 has created an immediate and ongoing public health emergency that requires swift action to protect not only the City's employees, but the public they are hired to

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<sup>1/</sup> Weekly testing in Newark was only permitted in the 30-day interim period between providing proof of an initial vaccination and providing proof of full vaccination.

serve. . . . Similarly, requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate.

[Newark, 469 N.J. Super. at 385-386.]

Similarly, in New Jersey State PBA v. Murphy, 470 N.J. Super. 568 (App. Div. 2022), the Appellate Division upheld a COVID-19 vaccination mandate that did not permit a testing option in lieu of vaccination. Relying on Newark, the court held: "The imposition of a vaccination mandate in the face of a national public emergency constitutes the exertion of a non-negotiable governmental prerogative." 470 N.J. Super. at 592.

Here, the Township determined that its previous COVID-19 vaccination policy that permitted a testing alternative was both an administrative burden and less effective at ensuring the safety of employees and the public than a vaccination mandate. The Township therefore amended its COVID-19 vaccination policy to mandate vaccination with no weekly testing option. Applying the Appellate Division's published decisions in Newark, 469 N.J. Super. 366, supra and PBA v. Murphy, 470 N.J. Super. 568, supra, to the dispute in this case, we find that the Township had a non-negotiable managerial prerogative to implement and enforce a COVID-19 vaccination mandate with no testing alternative. As negotiation of these issues would substantially limit the Township's policymaking powers to effectively protect the health and safety of its employees and the public during the COVID-19

pandemic, they are not mandatorily or permissibly negotiable and arbitration must be restrained. Paterson.

We next address the FMBA's request for arbitration to the extent it challenges the denial of the grievants' religious exemption request for a weekly testing accommodation in lieu of vaccination. It is well-settled that a challenge to a managerial prerogative based upon an assertion that the employer's action is motivated by invidious discrimination may not be submitted to binding arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-18 (1983); Jersey City Educ. Assn v. Jersey City Bd. of Educ., 218 N.J. Super. 177, 187-188 (1987); City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd, 31 NJPER 287 (¶112 App. Div. 2005); and In re State Police, 2020 N.J. Super. Unpub. LEXIS 973, \*9-10 (App. Div. 2020). The Supreme Court in Teaneck held that such challenges must be made in the appropriate forum provided by anti-discrimination laws, such as the U.S. Equal Employment Opportunity Commission (EEOC), the New Jersey Division on Civil Rights (DCR), or the courts.

Here, the personnel actions in dispute are directly related to the Township's non-negotiable managerial prerogative to implement and enforce its COVID-19 vaccination policy that does not permit employees to substitute weekly testing for vaccination. The Township enforced its vaccine mandate by placing the unvaccinated grievants on leaves of absence after

determining that their requested religious accommodations would create an undue hardship. Arbitration over whether the Township's denial of the grievants' religious accommodation request was discriminatory would substantially limit its managerial prerogative to effectively implement its COVID-19 vaccine mandate policy. Accordingly, to the extent the grievance alleges religious discrimination for denying the requested accommodation, it concerns a discrimination claim that should be adjudicated in the proper forum such as the EEOC, DCR, and/or the courts. Teaneck; see also Neptune Tp., P.E.R.C. No. 2021-45, 47 NJPER 473 (¶112 2021) (denied training opportunities based on racial discrimination not arbitrable); Monroe Tp., P.E.R.C. No. 2021-24, 47 NJPER 321 (¶75 2021) (promotional decision based on religious discrimination not arbitrable); and Union Cty., P.E.R.C. No. 2002-5, 27 NJPER 325 (¶32116 2001) (denied accommodation for pregnancy-related disability not arbitrable).

Finally, we address the FMBA's claim that the leaves of absence were arbitrable disciplinary suspensions. Assuming, arguendo, that the leaves of absence were disciplinary, then they were major discipline (suspension of more than five days, see N.J.S.A. 34:13A-5.3). As firefighters in a non-Civil Service jurisdiction, the FMBA grievants may not have their major discipline reviewed in binding arbitration because it would be inconsistent with their "alternate statutory appeal procedure."

See N.J.S.A. 34:13A-5.3. Specifically, non-Civil Service firefighters may not submit major discipline to binding arbitration because they have a statutory appeal procedure pursuant to N.J.S.A. 40A:14-19 through -22 (internal hearing process followed by Superior Court review) and N.J.S.A. 40A:14-209 (special disciplinary arbitration). See Montclair Tp., P.E.R.C. No. 90-44, 16 NJPER 1 (¶2100 1989); Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); and Cherry Hill Fire Dist. No. 13, P.E.R.C. No. 2014-51, 40 NJPER 351 (¶127 2014). Accordingly, binding arbitration of the FMBA grievants' involuntary suspensions is statutorily preempted.

ORDER

The Township of Maplewood's request for a restraint of binding grievance arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: September 29, 2022

Trenton, New Jersey