

P.E.R.C. NO. 2023-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROCKAWAY VALLEY REGIONAL SEWERAGE
AUTHORITY,

Petitioner,

-and-

Docket No. SN-2022-025

IBT LOCAL 125,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Rockaway Valley Regional Sewerage Authority for a restraint of binding arbitration of a grievance filed by IBT Local 125, which asserts that the Authority violated the parties' collective negotiations agreement (CNA) when the grievant was denied a religious exemption from the Authority's COVID-19 vaccine mandate. The Commission finds the grievant's claim that the denial was the result of religious discrimination challenges a personnel action involving a managerial prerogative, the vaccine mandate, that may not be submitted to binding arbitration. The Commission further finds that a more appropriate forum for enforcement of the public policy against discrimination is the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission, and/or the courts.

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, Trimboli & Prusinowski, LLC,
attorneys (Stephen E. Trimboli, of counsel and on the
brief)

For the Respondent, Cohen, Leder, Montalbano &
Connaughton, LLC, attorneys (Matthew G. Connaughton, of
counsel and on the brief)

DECISION

On January 27, 2022, the Rockaway Valley Regional Sewerage Authority (Authority or RVRSA) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the IBT Local 125 (Local 125). The grievance asserts that the Authority violated the parties' collective negotiations agreement (CNA) when the grievant was denied a religious exemption for the COVID-19 vaccine.

The Authority filed briefs, exhibits, and the certifications of its Executive Director, Joann Mondsini, and its Human

Resources/Safety Coordinator, Corinne Mosher. Local 125 filed a brief.^{1/} These facts appear.

Local 125 represents all hourly paid employees of the Authority, but excluding office and clerical employees, managerial executives, plant guards, salaried supervisors, professional employees, confidential employees, seasonal employees (as identified in Article V) and any other supervisory employees. The Authority and Local 125 were parties to a CNA in effect from January 1, 2018 through December 31, 2019. The Authority and Local 125 are also parties to a Memorandum of Agreement in effect from January 1, 2020 through December 31, 2023. The grievance procedure ends in binding arbitration.

Mondsini certifies that on October 4, 2021, the Authority issued a memo to all Local 125 employees detailing the specifics of the Authority's policy entitled Vaccination/Weekly COVID Testing Mandate. Among other things, according to the memo, effective October 22, 2021, the policy required employees who had not provided RVRSA with proof of full or initial vaccination by that date to be tested weekly on the employee's own time and expense.

The policy further specified that those employees who qualified for a medical or religious exemption to vaccination, by

^{1/} IBT Local 125 did not file a certification(s). N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

presenting "adequate documentation of medical or religious objections to vaccination," would also be required to submit to weekly testing, but would be allowed to use work time for testing purposes, and would be reimbursed by RVRSA for the cost. The policy also stated that those qualifying for medical or religious exemptions would receive full pay during any subsequent COVID-related quarantine period without charge against their accumulated paid time off, "the same as fully vaccinated employees." The policy further specified that such benefits would be unavailable to employees who either failed to comply with the vaccine mandate or who did not otherwise qualify for a medical or religious exemption.

Prior to issuing the memo, Mondsini certifies, she met and discussed the impact of choosing not to obtain vaccination or not qualifying for a religious or medical exemption with a representative of Local 125, and that the terms of that "agreement" are incorporated in the memo. Mondsini further certifies that all Local 125 unit members, including its shop steward and the grievant, signed an acknowledgment of receipt of the memo.

On October 18, 2021, the Authority issued a follow-up memo reminding employees of the vaccination policy requirements and deadlines. Among other things, the memo states, "RVRSA reserves the right to review and verify all purported religious and

medical objections to vaccination in accordance with applicable law."

On October 18, 2021, the grievant submitted to Mondsini a 5-page written request for a "religious exemption to these mandates." Among other things, the request stated: that the COVID-19 vaccine mandate violated the grievant's "sincerely held religious beliefs, practices and/or observances" under his Christian Faith; that vaccination should be voluntary because "all available" COVID-19 vaccines "are using aborted fetal cells" that "originated from healthy aborted children," which the grievant believes is a "moral sin"; that the vaccines are experimental, not "clinically safe," their "effect on humans is not yet known," and may "cause infertility and/or birth defects in future children"; that as a believer in Jesus Christ, the grievant has "the option to make a prudential decision whether to take part in the experiment"; and that the grievant's children "have been religiously exempt from required vaccinations at their schools since early age." The request also referenced various "studies on natural immunity" and the alleged efficacy of the drug Ivermectin against COVID, in support of the grievant's contention that RVRSR should acknowledge such "additional means by which to stop or prevent the pandemic"; and other "very clear" data in support of the grievant's belief that the vaccines are not safe.

The grievant, Mondsini certifies, did not "clearly" request a religious exemption and she denied his request in a memo dated October 20, 2021. The memo states, in pertinent part:

After careful research on the subject, RVRSA has found that there are no fetal tissues or fetal stem cells used in manufacturing or production of the Pfizer and Moderna vaccines. Therefore, your claim is factually incorrect.

The balance of your arguments are medical, not religious. The "concern that the ... vaccine may do more harm than good ... is a medical belief, not a religious belief." *Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487, 492 (3d Cir. 2017).

Your request for a religious exemption from the mandatory COVID-19 vaccination program is therefore denied. You are expected to either submit evidence of being fully vaccinated by October 22, 2021, or obtain and submit results of at least one COVID-19 PCR test each week effective October 22, 2021, on your own time and at your own expense.

The record does not indicate whether Mondsini or any other RVRSA representative met with the grievant to discuss his October 20 request for a religious exemption before denying it.

Mondsini certifies that on October 21, 2021, the grievant initiated Step 1 of the grievance procedure with a verbal grievance, as documented in a "Verbal Grievance Procedure Form" of the same date. The form includes a "Short Description" of the grievance, identifying "Religious discrimination," and further specifies that the grievant wants "[t]o not be discriminated against in any way because of my beliefs as provided by law."

Mondsini certifies that the grievant also submitted a second letter on October 21, 2021, intending to clarify his request. She certifies that the grievant's second request was denied on October 26, "as it was still unclear as to the sincerity of [the grievant's] religious belief," and the request was "therefore, beyond the authority of the Human Resources Manager." The record does not reflect whether Mondsini or any other RVRSA representative met with the grievant before denying his second request.

On October 28, 2021, the grievant filed a Step 2 grievance, Grievance #2021-4, as documented in a "Grievance Report" explaining the grievance as follows:

Being discriminated against because of documented religious beliefs by being forced to wear an EUA [sic] mask, being forced to take a weekly EUA [sic] COVID-19 PCR test while inoculated employees are not required to do the same. In addition[,] the above stated tests must be performed and paid for by me. I would like to be treated like many other employees who are not required to wear masks or take weekly inaccurate tests.

Mondsini certifies that after receiving the Step 2 grievance, on November 3, 2021, RVRSA asked the grievant "questions intended to verify the sincerity of his beliefs," including, among others: 1) What other vaccinations did he, either for himself or his children, decline to receive? 2) How long has he been opposed to abortion and what other anti-abortion activities he has engaged in? 3) What other medications does he

refuse to accept due to having been developed with cells or tissues from aborted fetuses? Mondsini certifies that the grievant refused to answer, refused to participate in the "verification process," and claimed RVRSA "had no right to ask him questions about his religious beliefs."

Mosher certifies that she was present on November 3, 2021, when Mondsini met with the grievant, and that she witnessed the questions asked of the grievant at that meeting. Mosher also certifies that the grievant refused to answer, and did not say he thought the questions were unreasonable and/or that he objected on that basis. Rather, Mosher certifies, the grievant refused to participate in the process, responding only, "I refuse to answer that question," or "you don't have the right to question my beliefs."

The record indicates that RVRSA posed those questions to the grievant, who assertedly refused to answer them, during a Step 2 grievance meeting to discuss Grievance #2021-4, as reflected in a document dated November 10, 2021, authored by Mondsini and denying the grievance, which states, in pertinent part (*italics in original*):

On the issue of a religious exception, contrary to what you asserted at our meeting, RVRSA has every right to make reasonable requests to verify whether an employee's professed beliefs are religious in nature and are *sincerely* held. The federal Equal Employment Opportunity Commission expressly warns: "*An employee who fails to cooperate*

with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation."

During our meeting, RVRSA attempted to verify the sincerity and religious nature of your objections to the COVID-19 vaccinations. You obstinately refused to answer any of the questions posed to you. Your failure to cooperate with RVRSA's reasonable request for verification of the sincerity or religious nature of your professed beliefs leaves RVRSA with no option but to deny your request for a religious exception. . . .

Further, RVRSA has the managerial prerogative to require its unvaccinated employees to wear masks and undergo weekly testing. Your personal beliefs and "research" regarding the validity of these measures is not a valid basis for a grievance.

On November 12, Local 125 filed a request for a submission of a panel of arbitrators. 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 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).

In support of restraining arbitration, the Authority argues that establishing a COVID-19 mandatory vaccine and testing policy is not negotiable and is within RVRSA's inherent managerial prerogative. It further argues that it has a non-negotiable managerial prerogative to inquire into and verify the basis for an employee's request for an exemption to its policies; and to deny the exemption to anyone who, like the grievant, refuses to

cooperate with the verification process. The Authority also argues that whether the grievant was entitled to a religious exemption in accordance with Title VII or the NJLAD is outside the scope of arbitration, as it is not a negotiable issue.

In opposition, Local 125 concedes the Authority implemented its vaccination policy as a proper exercise of its managerial prerogative. But it asserts that the Authority lacked enough information to make an assessment as to the sincerity of the grievant's religious beliefs, based on RVRSA's statements that it was "unclear" whether the grievant expressed a sincerely held religious belief. Local 125 does not claim that a decision relied upon by the RVRSA, City of Newark v. Newark Police Superior Officers Ass'n, 469 N.J. Super. 366 (App. Div. 2021), is anything other than good law. But that case, Local 125 argues, does not stand for the proposition that the Authority's exercise of discretion to deny the grievant's religious exemption request is beyond review by an arbitrator. Local 125 also contends that the grievant did not refuse to cooperate with the verification process and, thus, the denial was not a managerial prerogative. Local 125 further argues that none of the questions posed to the grievant had anything to do with determining whether in fact he had a religion, and that the denial is akin to discipline and therefore within the scope of negotiations.

In reply, the Authority argues that it was within its right to inquire into the basis of the grievant's request for an exemption; that an employee may not simply refuse to cooperate and then seek arbitration; and that his refusal to answer any question related to his request frustrated the process of determining whether he was entitled to a religious exemption. The Authority further argues that the questions posed to the grievant were in direct response to the reasons he offered as a basis for exemption; and that the denial of a religious exemption is not discipline.

In City of Newark, supra, the New Jersey Superior Court, Appellate Division, ruled that "[i]n 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" to implement the vaccine mandate. Id. at 385. The court found the employer's authority to do so arose from the "well-recognized right to hire or direct its workforce[,] . . . coupled with the clear national and state public policy to combat the health threats posed by COVID-19." Id. at 382. Thus, the court in City of Newark tied the policy-based imperative to combat the public health threat of COVID-19 to the employer's right to hire employees, which has been held to be an "essential" managerial prerogative, a "governmental function" that "cannot be bargained

away." Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 15-17 (1983).

However, the New Jersey Supreme Court in Teaneck also recognized that "there is no managerial prerogative to discriminate" in an employment decision on the basis of the "age, sex, religion or background" of an employee, and that public policy dictates there must be an avenue to review employment decisions for such bias. Id. at 17-18. Considering the employer's inherent managerial prerogatives in conjunction with the strong public interest in enforcement of the Law Against Discrimination, the Court in Teaneck found that the Legislature "established the State Division on Civil Rights as generally the most appropriate forum for resolving" a claim of discrimination in a hiring decision. Id. at 17. In so holding, the Court affirmed a decision of the Appellate Division, which reversed a PERC opinion that "allegations of racial discrimination" in a hiring decision "were within the scope of collective negotiations and could be submitted to arbitration," and remanded to permit transfer of the claim to an appropriate forum such as "the Division on Civil Rights, the Superior Court, or the Law Division." Id. at 13.

Here, the Authority's vaccine mandate was undisputedly implemented pursuant to a non-negotiable managerial prerogative. The grievance challenges the Authority's denial of an employee's

request for an exemption to the vaccine mandate as being an act of discrimination against the employee for his documented religious beliefs. Applying Teaneck, in conjunction with City of Newark, to the circumstances presented here, we find the grievant's claim of discrimination challenges a personnel action involving a managerial prerogative that may not be submitted to binding arbitration. Consistent with Teaneck, a claim seeking enforcement of the public policy of preventing discrimination is more appropriately charged to a forum such as the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission, and/or the courts.

ORDER

The request of the Rockaway Valley Regional Sewerage Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: October 27, 2022

Trenton, New Jersey