

P.E.R.C. NO. 2023-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. SN-2022-037

PBA LOCAL 44,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of the PBA's grievance contesting the Township's placement of an employee on unpaid leave after denying his request for religious 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 the grievance is not arbitrable to the extent it alleges religious discrimination, as such a claim must be considered in the appropriate forum such as the EEOC or DCR. Finally, the Commission finds that the PBA may not contest the Township's imposition of an unpaid suspension in binding arbitration because the PBA has an alternate statutory appeal procedure for challenging 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 (Jarad J. Monaco, of counsel and on the brief)

For the Respondent, Marc D. Abramson & Associates Inc.,
(Marc D. Abramson, on the brief)

DECISION

On April 4, 2022, the Township of Maplewood (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 44 (PBA). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA) when it placed the grievant on unpaid leave after denying his request for religious exemption from the Township's COVID-19 vaccination policy.

The Township filed briefs, exhibits, and the certifications of its Administrator, Jerry Giaimis, and its counsel, Jared J.

Monaco. The PBA filed a brief and exhibits.^{1/} These facts appear.

The PBA represents all of the Township's police officers, excluding sergeants, other superior officers, and the Chief of Police. The Township and PBA are parties to a CNA in effect from January 1, 2016 through December 31, 2019. The grievance procedure ends in binding arbitration.

Giaimis certifies that the Township initially implemented a COVID-19 policy that allowed for either testing or proof of vaccination. During the pendency of the original 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 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 endanger the health, safety, and welfare of its employees." Further, the

^{1/} PBA Local 44 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.

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. "Fully vaccinated" was defined as the following: 2 weeks after the second dose in a two-dose vaccine series (e.g. Pfizer or Moderna; or 2 weeks after a single-dose vaccine (e.g. Johnson & Johnson/Janssen). All employees who did not previously demonstrate full vaccination 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. Failure to provide proof of at least 1 dose of vaccination by November 7, without an approved reasonable accommodation, constituted non-compliance with the policy.

Giaimis certifies that once the November 7, 2021 deadline had passed, the policy was updated with a general compliance deadline (14 days) for new employees to adhere to moving forward. Employees seeking reasonable accommodations through the Township's existing accommodation policy were directed to Human

Resources and asked to submit a request for accommodation form for review by the Township. These forms were used to assist the Township in determining what, if any, accommodation was appropriate under the circumstances.

In November 2021, the grievant sought a religious accommodation, requesting testing in lieu of submitting proof of vaccination. His accommodation request was reviewed by the Township. The request was deemed an undue hardship. The Township considered "[his] position, [his] direct contact with members of the public in crisis, and the nature of [his jobs]." In addition, the Township noted that as a police officer, the grievant "interacts 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 [or] high risk."

On November 8, 2021, the Township placed the grievant on unpaid leave for failure to comply with the Township's vaccination policy. Giaimis certifies that the Township permitted the grievant to use his paid leave balance if he sought pay during the leave of absence. Giaimis certifies that the grievant was never subjected to discipline once his accommodation request was considered an undue hardship. The Township informed the grievant that his accommodation request would be reassessed on or around December 31, 2021. The Township subsequently

reevaluated the grievant's accommodation request and again determined it constituted an undue hardship.^{2/}

On November 19, 2021, the PBA filed a grievance challenging the placement of the grievant on a leave of absence after finding him noncompliant with the Township's COVID-19 vaccination policy. The grievance alleges that the Township did not address the grievant's religious exemption and accommodation request and that its actions were disciplinary and without just cause in violation of the CNA. On December 13, 2021, the Chief of Police denied the grievance, stating that the grievant was not disciplined, but was placed on leave for noncompliance with the Township's vaccination policy. On January 10, 2022, Giaimis denied the grievance, stating that the Township's vaccine mandate and its determination that the grievant's accommodation request constituted an undue hardship were not disciplinary and not negotiable. On January 11, 2022 the PBA filed a request for 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:

^{2/} Giaimis certifies that on November 19, 2021, the grievant notified the Township that he had been vaccinated. However, there is no clarification from either the Township or PBA regarding whether and when the grievant submitted proof of being fully vaccinated. Neither party certified as to the duration of the grievant's leave of absence for violation of the COVID-19 policy or whether and when he was reinstated following proof of full vaccination.

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 imposition of an unpaid leave of absence for violation of its COVID-19 vaccine policy is considered disciplinary, PBA members are not entitled to arbitration of major discipline because they are non-Civil Service police officers with alternate statutory appeal procedures as set forth in N.J.S.A. 40A:14-209 and N.J.S.A. 40A:14-147 through -151. The

Township also asserts that its determination that a requested accommodation constitutes an undue hardship is non-negotiable and only subject to challenge under the anti-discrimination laws.

The PBA 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 grievant on an unpaid leave of absence following the denial of his request for accommodation to exempt him from the COVID-19 vaccine mandate. The PBA contends that its grievance seeks only to enforce an alleged past practice of placing officers involved in disciplinary issues on paid leave, and therefore is severable from the Township's prerogative to enforce its COVID-19 vaccination policy and reviewable in arbitration.

We first address the PBA'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 in the face of a public health emergency. 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.^{3/} 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 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

^{3/} 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.

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 PBA’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 action in dispute is 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 grievant on a leave of absence after determining that his requested religious accommodation would create an undue hardship. Arbitration over whether the Township's denial of the grievant's 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 PBA's claim that the leave of absence was a disciplinary suspension and therefore whether it was paid or unpaid concerns a negotiable past practice of allegedly placing officers facing discipline on paid leave. Assuming, arguendo, that the leave of absence was disciplinary, then it was major discipline (suspension of more than five days, see N.J.S.A. 34:13A-5.3). Police officers may not appeal major discipline to binding arbitration. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993); Rutgers University, P.E.R.C. No. 2019-44, 45 NJPER 382 (¶100 2019), aff'd, 47 NJPER 53 (¶13 App. Div. 2020). Instead, non-Civil Service police officers have alternate statutory appeal procedures to challenge the imposition of major discipline pursuant to N.J.S.A. 40A:14-147 through -151 (internal hearing process followed by Superior Court review) or N.J.S.A. 40A:14-209 through -210 (special disciplinary arbitration). See Rutgers University, P.E.R.C. No. 2021-13, 47 NJPER 215 (¶48 2020). Accordingly, if the PBA sought

to challenge the imposition of the unpaid leave of absence as an alleged major disciplinary suspension, it would have needed to pursue its claim through one of its statutory review procedures.

Moreover, we reiterate that, under the Appellate Division's Newark opinion, the Township's decision to enforce its COVID-19 vaccination mandate by placing noncompliant employees on unpaid leaves of absence is a non-negotiable managerial prerogative. Newark, 469 N.J. Super. at 386 ("requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate"). The PBA's challenge to that COVID-19 policy enforcement action as allegedly violating a past practice of paid suspensions is not a severable negotiable issue, but would directly interfere with the Township's prerogative to enforce its COVID-19 vaccine mandate. The grievance is therefore not legally arbitrable.

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, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 27, 2022

Trenton, New Jersey