

P.E.R.C. NO. 2023-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY DEPARTMENT OF CORRECTIONS,

Petitioner,

-and-

Docket No. SN-2023-014

HUDSON COUNTY SUPERIOR OFFICERS
ASSOCIATION, PBA LOCAL 109A

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for restraint of binding arbitration of the PBA's grievance alleging that the County violated the parties' collective negotiations agreement (CNA) by unilaterally implementing a quarantine directive following a positive COVID-19 test result that required Officers to use their own accumulated leave time pending a review by Risk Management. Finding that paid leave is generally mandatorily negotiable and legally arbitrable, 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, Scarinci Hollenbeck, attorneys
(Sarah E. Tornetta, of counsel and on the brief)

For the Respondent, Alterman & Associates, LLC,
attorneys (Stuart J. Alterman, of counsel and on the
brief)

DECISION

On October 14, 2022, the Hudson County Department of Corrections (County) filed a scope of negotiations petition seeking a restraint of bidding arbitration of a grievance filed by the Hudson County Superior Officers Association, PBA Local 109A (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) by unilaterally implementing a quarantine directive following a positive COVID-19 test result that required Officers to use their own accumulated leave time pending a review by Risk Management.

The County filed a brief,^{1/} exhibits and the certification of its Acting Director, Oscar Aviles. The PBA filed a brief.^{2/} These facts appear.

The PBA represents all Superior Corrections Officers below the rank of Captain who are assigned to the Jail and/or penitentiary, but excluding managerial executives, professional employees, clerical employees, and other police employees and all other employees. The County and PBA were parties to a CNA in effect from January 1, 2013 through December 31, 2017. The County and PBA are also parties to a Memorandum of Agreement in effect from January 1, 2018 through December 31, 2022. The grievance procedure ends in binding arbitration.

Aviles certifies that the Corrections facility is open 365 days per year, 24 hours a day. The facility is staffed with two types of lieutenants - tour operations lieutenants and administrative lieutenants. Tour operations lieutenants are responsible for overseeing the daily functions of the entire facility, including custody staff, support staff, and inmates.

1/ On October 28, 2022, the County of Hudson filed a request for interim relief. On January 10, 2023, the Commission Case Administrator sought confirmation if the County was still seeking such relief. The County informed the Commission Case Administrator that the arbitrator agreed to hold the matter in abeyance pending disposition of the County's petition for a scope of negotiations determination.

2/ The PBA 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.

Administrative lieutenants are assigned specific tasks within the facility.

On January 3, 2022, the County implemented Personnel Policy C-2022-1 (the Policy). Aviles certifies that the County provided the unions with the opportunity to enter into discussions about the Policy prior to its implementation. The Policy implemented a COVID-19 vaccination mandate. The Policy also mandated that any partially or fully vaccinated employee, or any unvaccinated employee with an approved medical or religious exemption, who tests positive for COVID-19 can recover on County paid time for up to 80 hours without use of his or her own leave time. Conversely, the Policy provides that any unvaccinated employee without an approved medical or religious exemption, who tests positive for COVID-19, must use his or her own leave time while recovering.

On February 10, 2022, the PBA submitted a grievance contesting the County's unilateral implementation of the quarantine and leave time provisions of the Policy. The PBA requested relief in the form of "voiding/rescinding or redrafting the policy following appropriate, necessary negotiations..."

The grievance was subsequently denied in accordance with Steps One through Three of the CNA's grievance procedure. On February 25, the PBA filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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.

[Id. at 404-405.]

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County asserts that the COVID-19 vaccination mandate policy is non-negotiable prior to implementation given the particularized need to protect the health and safety of employees. IMO City of Newark, 469 N.J. Super. 366 (App. Div. 2021); see also N.J. State Policemen's Benev. Ass'n v. Murphy, 470 N.J. Super. 568 (App. Div. 2022).

The PBA asserts that arbitration should not be restrained because the grievances concern the mandatorily negotiable issue of allocation of quarantine and leave time rather than the managerial prerogative of whether a quarantine is allowed to be ordered by management. It argues that the Commission has found that while management has the prerogative to institute a quarantine policy, the question of how those quarantines are to be served, administered, and/or spent is a mandatorily negotiable term and condition of employment which is not preempted by State or Federal statute.

It is well-settled that, absent a preemptive statute or regulation, the issue of paid leave time is generally mandatorily

negotiable and legally arbitrable because it intimately and directly affects employee work and welfare and does not significantly interfere with the determination of governmental policy. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973).

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. City of East Orange and East Orange Fire Officer's Association, P.E.R.C. No. 2022-15, 48 NJPER 213 (¶47 2021) (finding that the issue of improperly deducting the grievant's sick leave and vacation leave while absent from work as a result of a positive COVID-19 diagnosis is mandatorily negotiable and legally arbitrable); see also Township of Millburn and PBA Local 34, P.E.R.C. No. 2021-30, 47 NJPER 373 (¶87 2021) (holding that the issue of reimbursement of sick leave for a COVID-19 quarantine period is mandatorily negotiable and legally arbitrable); Township of Edison and Edison IAFF Local 1197, P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021) (finding that the issue of compensation during a COVID-19 related quarantine is mandatorily negotiable and legally arbitrable).

Based on the foregoing established precedent, the issue in the instant grievance related to leave time for COVID-19 related

sickness or quarantine is mandatorily negotiable and legally arbitrable.

ORDER

The request of the Hudson County Department of Corrections 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: February 23, 2023

Trenton, New Jersey