

P.E.R.C. NO. 2022-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY VOCATIONAL-TECHNICAL  
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-039

UNION COUNTY VOCATIONAL-TECHNICAL  
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Union County Vocational-Technical Board of Education's request for a restraint of binding arbitration of the Union County Vocational-Technical Education Association's grievance. The grievance asserts that the Board violated the parties' collective negotiations agreement when it improperly charged sick leave to members undergoing the American with Disabilities Act's interactive accommodations process. The Commission finds that the Association's grievance primarily concerns the restoration of sick leave and pay for two employees who were denied the ability to work remotely while the Board processed their ADA accommodation requests. The Commission concludes that such issues of wrongfully charged sick leave and withheld pay are generally mandatorily negotiable and legally arbitrable.

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, Florio Perrucci Steinhardt Cappelli  
Tipton & Taylor, LLC, attorneys (Afshan T. Ajmiri  
Giner, of counsel and on the brief; Lena K. Kim, on the  
brief)

For the Respondent, Caruso Smith Picini, attorneys  
(Nicholas Poberezhsky, of counsel)

DECISION

On April 28, 2021, the Union County Vocational-Technical Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Union County Vocational-Technical Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it improperly charged sick leave to members undergoing the Americans with Disabilities Act's (ADA) interactive accommodations process. The Association claims that the Board's disparate treatment of these members violated the parties' established past practice of

allowing members to work remotely pending the outcome of the ADA accommodations process, which was a benefit afforded to other similarly situated members.

The Board filed briefs, exhibits and the certification of its Superintendent of Schools, Gwendolyn Ryan. The Association filed a brief and the certification of its Grievance Chair, Colleen Prince. These facts appear.

The Association is the exclusive representative of the Board's employees, including the titles of Coordinators of Cooperative Education/Place/Apprenticeship, Counselors, Guidance Counselors/Recruiters, Nurses, School-to-Work Coordinator, Secretaries, Office Staff, Social Workers, and Teachers. The term of the parties' CNA is July 1, 2017 through June 30, 2020. The grievance procedure ends in binding arbitration.

Ryan certifies that, upon an employee's request for reasonable accommodations for a disability under the ADA, the Board has consistently initiated and engaged in an interactive process in order to determine appropriate accommodations in accordance with the ADA. She certifies that, as part of the ADA accommodations process, the Board has participated in interactive process meetings with employees to discuss accommodations that are reasonable given the employees' specific medical needs and/or disability and that allow the employees to continue performing their essential job functions. Ryan certifies that under the

ADA, the Board may use its discretion to offer interim solutions for an employee during the pendency of the ADA interactive process to enable that employee to continue working. She further certifies that the ADA interactive process does not automatically entitle an employee to be absent from duty due to their disability, and the Board is authorized to charge sick leave for an employee's absence.

Prince certifies that during the 2020-2021 school year, the Board shifted between in-person and remote teaching instruction in response to the COVID-19 pandemic. Prince certifies the several employees submitted ADA accommodation requests in order to work remotely on an extended or full-time basis due to increased vulnerability to COVID-19. She further certifies that, despite there being no formal written policy, the accepted practice during the school year was that employees who requested accommodations were permitted to work from home and not charged sick leave during the accommodations process.

Prince further certifies that the Board charged two employees, a guidance counselor and a shop teacher, sick leave while their accommodation requests were pending, which was a deviation from the parties established past practice during the COVID-19 pandemic. Prince certifies that, as result of the Board's disparate treatment of these two employees, the guidance counselor exhausted her accumulated sick leave and was removed

from the payroll during the accommodation process. She also certifies that the shop teacher lost all but one or two sick days before returning to work. Prince certifies that the guidance counselor has since resigned and the shop teacher notified the Board of his intent to resign effective at the end of the school year. Prince further certifies that these were the only employees that were not permitted to work remotely during the pendency of their ADA accommodations process during the COVID-19 pandemic. She certifies that the Board did not provide an explanation as to why these employees were disparately treated.

On March 18, 2021, the Association filed a grievance alleging:

Inequitable treatment of [Association] members during the interactive ADA accommodations review process. Members were told by Administration to use sick days and, where applicable, submit lesson plans even though the necessary documents requesting an ADA accommodation were submitted and the interactive process was initiated. Members were wrongfully charge[d] with sick time while the interactive process was and is still proceeding. In the past, while the interactive process was and is proceeding, members worked remotely pending a decision. This is in direct conflict with the treatment of many other staff members who are able to work from home during the process. By proceeding this way, Ms. Ryan is denying students their guidance counselor and/or classroom teacher. This practice is in opposition with providing a thorough and efficient education to all students.

In its grievance, the Association sought the following remedy: "Remove all sick days charged to affected members and allow members participating in the interactive process to work remotely while the process is proceeding." On March 18, Ryan denied the grievance because it failed to allege any of the categories of violation enumerated in the parties' CNA, among other reasons. On April 14, 2021, the Association moved the grievance to 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 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 Board argues that arbitration of the Association's grievance is improper because the employees' entitlement to work remotely and not be charged sick leave during the ADA accommodations process is not mandatorily negotiable or legally arbitrable. The Board concedes that the first and second prong of the Local 195 test are not at issue here, but that the third prong is at issue in that arbitration of the Association's grievance would significantly interfere with the Board's determination of governmental policy. Citing several Commission cases regarding a public employer's non-negotiable managerial prerogative to determine minimum staffing levels, the Board argues that the Association's grievance is challenging its determination that certain employees report to on-site work during the pendency of their ADA accommodations process, which is a non-negotiable determination of policy concerning staffing

levels. Moreover, the Board argues that reasonable ADA accommodations are made on an individual basis based on the specific employee's medical needs, which allows the employee to continue to perform their essential job functions. Thus, the Board argues that enforcing an agreement that entitles all employees to the same accommodation is inconsistent with its discretion under the ADA and would substantially limit its policymaking powers. The Board further asserts that this matter is distinguishable from prior Commission cases where the Commission allowed arbitration of grievances seeking the restoration of sick leave due to the employees' work-related injuries. Lastly, the Board argues that the Association's grievance was not properly raised in accordance with the parties' contractual grievance procedure.

The Association argues that its grievance is mandatorily negotiable and legally arbitrable because it addresses the Board's disparate treatment of similarly situated employees during the ADA accommodations process, which resulted in their loss of accumulated sick leave and pay. The Association claims its grievance is seeking reimbursement of all improperly charged sick leave and withheld pay for the affected employees, and it is not seeking, as the Board contends, that employees be automatically entitled to work remotely without sick leave charged during the ADA accommodations process. The Association



asserts that it is not challenging the Board's managerial prerogative to determine minimum staffing levels, as in the cases cited by the Board, but rather, the Association's grievance is demanding that all employees be treated equally and fairly where the Board has established a practice of conferring a benefit to similarly situated employees. Lastly, the Association asserts that its grievance is appropriate under the CNA because the Board's deviation from the established practice of not charging sick leave during the pendency of the ADA accommodations practice affected the employees' terms and conditions of employment.

In its reply brief, the Board denies the Association's claim that there was an established practice of allowing employees to work remotely while their ADA accommodation requests were being processed. Rather, the Board claims it granted certain accommodations requests, including remote work, when it was reasonable and effective to do so in accordance with the ADA. The Board also denies that it denied the remote work accommodation to only the two employees identified in the Association's grievance, but rather denied such accommodations to other employees because it determined them to be unreasonable or ineffective pursuant to the Board's discretion under the ADA.

Sick leave benefits are mandatorily negotiable unless a statute or regulation preempts negotiations. Piscataway Tp. Bd. of Ed. v. Piscataway Maint. & Cust. Ass'n, 152 N.J. Super. 235

(App. Div. 1977). Here, we find that the Association's grievance primarily concerns the restoration of sick leave and pay for two employees who were denied the ability to work remotely while the Board processed their ADA accommodation requests. Specifically, the Association's grievance seeks to, "Remove all sick days charged to affected members..." Such issues of wrongfully charged sick leave and withheld pay are generally mandatorily negotiable and legally arbitrable.

We do not find that this is a matter primarily concerning minimum staffing levels. The Board has established no facts that the alleged practice of allowing employees to work remotely during the pendency of their ADA accommodations process interfered with its ability to maintain adequate staffing during the COVID-19 pandemic. Rather, the issue here, based on the certified facts presented, is whether the Board violated the CNA when it charged sick leave or withheld pay for two employees during the pendency of the interactive accommodations request process. This issue may include the factual question of whether the past practice alleged by the Association is established; such a question is for an arbitrator to decide. Applying the third prong of Local 195, we find the Association's grievance challenging the allegedly wrongful charging of sick leave and withheld pay of these two specific employees would not significantly interfere with the Board's discretion in processing

ADA accommodation requests. Lastly, the Board's contention that the Association's grievance does not comply with the parties' CNA is an issue of contractual interpretation to be determined by an arbitrator.

ORDER

Union County Vocational-Technical Board of Education's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: September 30, 2021

Trenton, New Jersey