

I.R. NO. 2012-17

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.,  
Petitioner,

-and-

Docket No. SN-2012-048

ATU NEW JERSEY STATE COUNCIL,

-and-

ATU LOCAL 822,  
Respondents.

SYNOPSIS

A Commission Designee denies the request of the New Jersey Transit Bus Operations, Inc. ("NJTBO") for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission.

The grievance, filed by the Amalgamated Transit Union New Jersey State Council and Amalgamated Transit Union Local 822 ("ATU") asserts that NJTBO violated the parties' collective negotiations agreement when it refused to pay a 3.5% retroactive pay increase to an employee bus operator (and all similarly situated employees) who was injured in a work-related incident and was receiving workers' compensation pay.

NJTBO argued that the New Jersey State Workers' Compensation Statutes preempt ATU's grievance and, as a result, the grievance not subject to arbitration.

ATU argued that the employee is entitled to the 3.5% retroactive wage increase, the grievance is not preempted, it is a simple mathematical calculation that can be performed by the arbitrator, and the arbitration should not be restrained.

The designee found that NJTBO had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations due to the broader scope of negotiations for NJTBO employees; the difference between the scope of negotiation and the scope of grievability; and the fact that it was not clear if the grievance was preempted by the workers' compensation statutes as this was a matter of first impression and, as a result, required consideration by the full Commission.

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Appearances:

For the Petitioner, Jeffrey S. Chiesa, Attorney General of New Jersey, (Michael S. Rubin, Deputy Attorney General)

For the Respondents, Cohen, Leder, Montalbano & Grossman, LLC, attorneys (Paul A. Montalbano, of counsel)

INTERLOCUTORY DECISION

On March 5, 2012, the New Jersey Transit Bus Operations, Inc. ("NJTBO") petitioned for a scope of negotiations determination and filed an application for interim relief seeking a temporary restraint of binding arbitration pending a final determination by the Commission. NJTBO seeks a temporary restraint of binding arbitration of a grievance filed by the Amalgamated Transit Union New Jersey State Council and Amalgamated Transit Union Local 822 ("ATU"). The grievance asserts that NJTBO violated the parties' collective negotiations

agreement (CNA) when it refused to pay a 3.5% retroactive pay increase to an employee bus operator (and all similarly situated employees) who was injured in a work-related incident and was receiving workers' compensation pay. NJTBO asserts that the New Jersey State Workers' Compensation Statutes preempt ATU's grievance and, as a result, the grievance not subject to arbitration.

On May 7, 2012, an Order to Show Cause was issued specifying May 18 as the return date for oral argument via telephone conference call.

NJTBO filed briefs, certifications and exhibits in support of its application. ATU filed briefs, a certification and exhibits opposing the interim relief request. On May 18, 2012, the parties argued orally via telephone conference call. On May 23, I issued a written Order denying the NJTBO application for interim relief.

The following material facts are based on certifications and exhibits provided by the parties.

ATU and NJTBO are parties to a Collective Negotiations Agreement ("CNA") with a term of July 1, 2008 through June 30, 2010.<sup>1/</sup> The grievance procedures end in binding arbitration.

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<sup>1/</sup> In April 2009, a Memorandum of Agreement ("MOA") was entered into by the parties whereby a wage increase of 3.5% was to be paid to unit members retroactive to July 2008.

An employee bus operator was injured in a work-related incident and went out on Workers' Compensation in October of 2008.<sup>2/</sup> After the MOA was signed, NJTBO refused to pay the employee the retroactive 3.5% pay increase on the grounds that the amount of Workers' Compensation pay is based on the amount of pay the employee is receiving at the time of the accident. Additionally, the amount of pay is determined by and within the exclusive jurisdiction of the Workers' Compensation Court, and as a result, the grievance is preempted by State Statute and not legally arbitrable.

The ATU responds that the employee is entitled to the 3.5% retroactive wage increase, it is a simple mathematical calculation that can be performed by the arbitrator, the grievance is not preempted and the arbitration should not be restrained.

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by

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<sup>2/</sup> Workers' compensation payments are calculated by the Workers' Compensation Court at 70% of the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. N.J.S.A. 34:15-1, et seq.

an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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 Township may have.

The scope of negotiations is broader for New Jersey Transit bus employees than for any other employees in the New Jersey public sector because they are covered by the Public Transportation Act, N.J.S.A. 27:25-1 et seq. ("PTA"), instead of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The labor relations subchapter of the PTA requires this employer and this majority representative "to negotiate collectively with respect to mandatorily negotiable subjects which intimately and directly affect the work and welfare of employees." N.J.S.A. 27:25-14(d). Interpreting the labor relations subchapter as a whole and subsection 14(d) in particular, the Commission held in New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd 125 N.J. 41 (1991) that, as in private sector employment relationships generally, "issues that settle an aspect of the relationship between the employer and the employee" are mandatorily negotiable unless, unique to this particular employment situation, NJT would be prevented from fulfilling its statutory mission. The New Jersey Supreme Court approved this test and elaborated on it as follows:

[A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between government and its employees in mass transit. There must be more than some abstract

principle involved; the negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. All of the various rulings of PERC . . . have that theme. They look to the actual consequences of allowing negotiations on the ability of NJT to operate and manage mass transit efficiently and effectively in New Jersey. If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test, rather than someone's notion of what government generally should be allowed to unilaterally determine and what it should not.

[125 N.J. at 61]

Local 195, IFPTE v. State, 88 N.J. 393 (1982) articulated 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.

[88 N.J. at 404-405]

A statute or regulation will not preempt a negotiable term and condition of employment, unless it does so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982).

There is a difference, however, between the scope of negotiation and the scope of *grievability*. The Commission recently cited the New Jersey Supreme Court in a matter where preemption was argued by the employer:

Even where an otherwise negotiable term and condition of employment is set, and thereby preempted, by a statute or regulation, arbitration of a grievance asserting that the statute or rule is part of the parties' agreement and has been violated, may proceed, provided the result does not conflict with a pertinent law or rule or significantly interfere with non-negotiable managerial prerogatives. See W. Windsor Tp. and PERC, 78 N.J. 98, 116 (1978).

[County of Hudson P.E.R.C. No. 2012-46, \_\_\_\_ NJPER \_\_\_\_ (¶\_\_\_\_)]

The instant matter, regarding the payment of retroactive wage increases to workers' compensation pay, appears to be a matter of first impression before the Commission and the New Jersey Courts. NJTBO has not cited any authority that indicates that the subject has been fully or partially preempted by the workers' compensation statutes. NJTBO cited the Commission in City of Perth Amboy and PBA Local 13, P.E.R.C. No. 97-138, 23 NJPER 345 (¶28159 1997), aff'd 24 NJPER 531 (¶29247 App. Div. 1998) involving another area of the workers' compensation



statutes regarding the employer unilaterally changing the company it used to manage its workers' compensation plan, and in doing so, allegedly changing the established list of physicians, imposing pre-certification requirements, and increasing travel for unit members to receive treatment. The Commission held, however, "We need not decide whether the workers' compensation statute and regulations preempt negotiations over all aspects of an employer's workers' compensation scheme. The disputed aspects of the plan either were not changed or are preempted." Perth Amboy at 346.

Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000). Given the heavy burden required for interim relief and based on the facts of this case and the legal authority cited by NJTBO, I believe this is a matter of first impression that requires consideration by the full Commission.

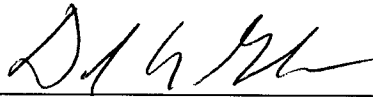
Thus, I find that NJTBO has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.<sup>3/</sup> The application for interim relief must be denied.

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<sup>3/</sup> As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

ORDER

The request of NJTBO for an interim restraint of binding arbitration is denied pending the final decision or further order of the Commission.



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David N. Gambert  
Commission Designee

DATED: June 12, 2012

Trenton, New Jersey