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L.D. NO. 92-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION  
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

ASBURY PARK HOUSING AUTHORITY

Public Employer,

-and-

Docket Nos. SN-91-95  
CO-92-4

LOCAL 196, INTERNATIONAL FEDERATION  
OF PROFESSIONAL AND TECHNICAL  
EMPLOYEES, CHAPTER 3, AFL-CIO,

Employee Representative.

Appearances:

For the Housing Authority:  
James Granello, Attorney

For Local 196, IFPTE  
Schneider, Cohen, Solomon, Leder & Montalbano  
(Reba Carmel, of Counsel)

DECISION

On June 24, 1991, the Asbury Park Housing Authority ("Authority") filed a Scope of Negotiations Petition requesting the Commission determine whether certain contractual items are mandatorily negotiable. On July 2, 1991, Local 196, International federation of Professional and Technical Employees (IFPTE) filed an unfair practice charge against the Authority alleging the Authority was refusing to negotiate certain contractual items in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The Authority and IFPTE jointly requested that the issue concerning the negotiability of the disputed subjects be submitted to the Commission's Litigation

Alternative Program. On August 27, 1991, I, as Commission designee, held an informal hearing to hear facts and arguments pertaining to the disputed contractual items. Both parties filed briefs. The parties have agreed that this decision is binding and resolves the Scope of Negotiations Petition and the Unfair Practice Charge.

The Housing Authority is a civil service employer. The Authority is funded and controlled by the federal Department of Housing and Urban Development ("HUD"). Local 196 represents a negotiations unit of the Authority's non-professional, non-supervisory employees. The most recent collective agreement covering this negotiations unit expired on March 31, 1991. The parties are in negotiations for a successor contract.

During negotiations, the HUD area office advised the Housing Authority in writing that,

[The 1989-91 contract with IFPTE] is more liberal in certain of its provisions than a local comparability determination would warrant....The following examples, which cannot be justified either by local comparability date or by the New Jersey Administrative Code, were cited:

1. Automobile insurance (undue risk and exposure to APHA).
2. Longevity pay (the City has frozen the pay levels for employees for purposes of the base salary on which longevity is calculated).
3. Supplemental compensation of sick leave (differs from New Jersey Administrative Code 4:2-26-9).
4. Vacation leave accumulation (differs from New Jersey Administrative Code 4:1-17.3)

5. Bonus vacation days for minimal use of sick leave.

6. Payment for unused sick leave prior to vacation or Christmas.

The result of the APHA's agreement is to create needlessly costly expenses for the low-income public housing program.

Corrective Action:

The present union contract is not in accordance with Sections 201 and 307 of the ACC.<sup>1/</sup> The current contract is in effect until March 31, 1991. The new contract must be in compliance with the ACC. Funding will be withheld for payments not in accordance with comparability and the ACC.

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As a result of HUD's communication, the Authority now seeks a determination whether the following clauses in the parties' contract are mandatorily negotiable under the New Jersey Employer-Employee Relations Act:

Article 12, Employee Facilities and Expenses, Section (D):

In the event any employee shall be sued, by reason of the use of his/her privately owned vehicle (as described in "B" above),<sup>2/</sup> the Authority shall provide such employee with

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<sup>1/</sup> The ACC refers to the Annual Contributions Contract between the Housing Authority of Public Housing Administration. Section 201 requires the Authority to operate the Projects with "efficiency, economy and stability." Section 307 requires the Authority to adopt and comply with a statement of personnel policies (including salary, wage rates, work hours, leave regulations, and travel expense reimbursements) comparable with "pertinent local public practice".

<sup>2/</sup> Article 12(B) provides for mileage reimbursement "Whenever an individual employee is authorized and required to use his or her privately owned vehicle or, as a condition of his or her employment uses such vehicle..."

all legal expenses and indemnify such employee from any verdict rendered against him/her.

Article 13, Rates of Pay for Employees, Section D:

Longevity Pay

Longevity pay shall be granted in accordance with the following schedule:

1. Beginning the 3rd year of seniority, from date of hire, 1% shall be added to base pay.
2. Beginning the 5th year of seniority, from date of hire, 2% shall be added to base pay.
3. Beginning the 7th year of seniority, from date of hire, 3% shall be added to base pay.
4. Beginning the 10th year of seniority, from date of hire, 5% shall be added to base pay.

Article 14, Fringe Benefits, Section C:

Retirement

All employees shall be entitled upon retirement under the PERS to receive a lump sum payment at retirement as supplemental compensation for earned and unused accumulated sick leave which is credited to him or her on the effective date or on retirement. The supplemental compensation payment shall be computed so that an employee can receive 50% of earned and unused accumulated sick leave, with no "cap" on either the number of days accumulated or the amount of supplemental compensation received.

Article 17, Vacations, Section 2:

After the initial month of employment and up to the end of the first calendar year, employees shall receive one working day for each month of service. Thereafter, employees shall receive paid vacation days as follows:

- (a) From the beginning of the first full calendar year of employment, but less than three (3) years of service, 12 working days.
- (b) Three years of service, but less than ten (10) years service, 15 working days.
- (c) Ten years of service, but less than fifteen (15) years of service, 20 working days.

- (d) Fifteen years of service, but less than twenty (20) years of service, 25 working days.
- (e) Twenty years of service or more, 1 additional working day per year of service beginning with year twenty.

Article 17, Section I:

Those employees who have worked the full preceding year, and who shall have taken no more than five (5) sick leave days in the preceding calendar year (January 1 to December 31st in preceding year), shall receive additional paid vacation days in the following year, as follows:

- 0 to 1 sick day taken - 3 additional vacation days
- 2 to 3 sick days taken - 2 additional vacation days
- 4 to 5 sick days taken - 1 additional vacation day.

Article 18, Sick Leave, Section F:

As an incentive for good attendance, employees having at least 20 paid sick days "banked" may cash-in up to five (5) days, either prior to going on vacation or prior to Christmas. The employee must notify the Authority of such cash-in election at least three (3) weeks prior to either vacation or Christmas, and the employee shall then be paid such cash-in days requested in the paycheck immediately preceding his/her vacation or Christmas (whichever is applicable.)

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ANALYSIS

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable if:

- (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]

This Commission has jurisdiction to decide the preemptive effect of statutes and regulations. State of New Jersey and NJ State College Locals, P.E.R.C. No. 89-129, 15 NJPER 343 (¶20152 1989); State of New Jersey (OER), P.E.R.C. No. 88-89, 14 NJPER 251 (¶19094 1988), recon. den. P.E.R.C. No. 89-96, 15 NJPER 255 (¶20104 1989). This jurisdiction is narrow. It does not extend to determining whether a regulation is statutorily authorized; whether it has been validly adopted; whether it is wise, or whether it should be voided.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978), the Supreme Court held that negotiations over otherwise mandatorily negotiable terms and conditions of employment are not preempted unless a statute or regulation specifically sets the terms and conditions of employment and "speaks in the imperative" leaving nothing to the public employer's discretion. See also Bethlehem Tp. Bd. of Ed. v. Bethlehem Ed. Ass'n, 91 N.J. 38 (1982).

Each of the disputed contract articles involve negotiable terms and conditions of employment. They are economic in nature and they directly and intimately affect the work and welfare of the employees. The disputed articles do not significantly interfere with any governmental policy determination. Disputed is whether negotiations on these contract articles are preempted by the HUD regulations.

The HUD Public Housing Handbook, (revised 10/23/87), Section 7401.7, provides at Chapter 4,

Section 4-1. POLICY.

HUD's policy is to afford maximum opportunity and responsibility for the establishment of employer-employee relationships (consistent with State or local law), including recognition of an employee organization formed or designated by the PHA's employees for negotiating the terms and conditions of their employment or other mutual aid or protection. The PHA shall determine what provisions may be necessary or desirable in such agreements and, if necessary, to obtain the advice of its Counsel or the Attorney General of the State or any other authorized legal officer with respect to its authority to act in this field. In general, HUD will not question such PHA determinations made after securing such advice. Such matters include the nature and scope of union recognition and bargaining, wages and fringe benefits, grievance procedures, check-off of union dues, seniority provisions, and other provisions commonly found in public employer-employee agreements.

Section 4-2 HUD PREROGATIVES. PHA and employee organizations are free to bargain compensation issues except where prohibited by State law. HUD, however, retains its prerogatives to disallow certain PHA costs or to disapprove PHA operating budgets where the PHA has acted imprudently in light of the ACC requirement for an efficient and economic operation. See Section 201 of the ACC.

The question is, whether HUD's regulations preempt negotiations on the disputed subjects. I find that they do not. The HUD handbook makes it clear that HUD's intention is to vest the local public housing authority with the right to negotiate employees' terms and conditions of employment with the employee organization. However, regulation 4.2 (cited above) makes it clear that HUD retains the right, as part of the funding agreement, to "veto" the Authority's operating budget or certain costs.

Section 307 of the HUD Annual Contributions Contract requires the Authority to adequately justify the costs of its

negotiated agreement with "comparability data". Thus, HUD's regulations do not set the employee's terms and conditions of employment, leaving nothing to the employer's discretion. HUD merely retains its right to reject contractual provisions which result in excessive costs not justified by comparability data.<sup>3/</sup>

As to the specific contract articles in dispute, I observe the following:

Article 12, Employee Expenses, Section D

This article provides a standard indemnification policy for employees using their own vehicles while on authorized assignments. Indemnification policies are negotiable, economic issues which have a direct relation to employee income. Fort Lee Borough, P.E.R.C. 90-111, 16 NJPER 331 (¶21136 1990). I find this clause to be negotiable.

Article 17, Vacation

This article provides a schedule of vacation entitles for employees depending on length of service. Vacation entitlements for

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<sup>3/</sup> I note, parenthetically, that the Housing Authority cannot rely exclusively on contract provisions which the City negotiates with its employees to justify its contract provisions as "comparable". This parity situation puts an undue burden on the City's unions to negotiate, de facto, for Housing Authority employees not included in the City's bargaining units. Agreements which hinge the unit employees' salaries or benefits to negotiations with other units are illegal. See, City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978).



civil service employees are not fixed by the Administrative Code. The Code only establishes a minimum. N.J.A.C. 4A:6-1.2<sup>4/</sup> provides:

In local service, all permanent employees shall be entitled to a minimum of annual paid vacation leave...:

Article 13, Section D, Longevity

There is no comparable Civil Service statute or regulation dealing with longevity. Therefore, both longevity and vacation benefits are forms of compensation and are mandatory subjects of negotiation. Englewood Bd. of Ed. v. Englewood Teachers Ass'n., 64 N.J. 1 (1973).

Article 14, Section C, Retirement

This contract provision involves compensation for unused sick leave upon an employee's retirement. It is not preempted by statute or regulation. N.J.A.C. 4A:6-3<sup>5/</sup> does not control payment of unused sick leave upon retirement for local employees; it set eligibility and computation of payment for employees in State service. Thus, the issue is not preempted by statute or administrative regulation, and is negotiable.

Articles 17, Section 1 and Article 18, Section F

Both of these articles involve bonuses to employees for not using sick leave. Article 17(1) awards employees bonus vacation

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4/ N.J.A.C. 4:1-17.3(b), Vacation leave entitles, was recodified effective January 1, 1988.

5/ N.J.A.C. 4:2-26.9, lump sum sick leave payments, was recodified effective January 4, 1988.

days for not using sick leave. Article 18(F) permits employees to receive cash payments for unused sick leave. Employee bonuses are forms of compensation which are mandatorily negotiable. Hunterdon Cty. Freeholders Bd., P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986). Neither bonus plan is preempted by statute or regulation. Both are negotiable.

Based upon the foregoing, I find that all of the disputed articles are mandatorily negotiable. The Housing Authority is ordered to negotiate in good faith with IFPTE Local 196 concerning these terms and conditions of employment.

Susan W. Osborn

Susan Osborn, LAP Hearing Officer

Public Employment Relations Commission

DATED: October 9, 1991