

P.E.R.C. NO. 2018-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLIAM TOOLEN, et al.,

Plaintiffs,

-and-

Docket No. MC-2017-001

STATE OF NEW JERSEY, et al.,

Defendants.

STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY, et al.,

Plaintiffs,

-and-

Docket No. MC-2017-002

STATE OF NEW JERSEY, et al.,

Defendants.

SYNOPSIS

The Public Employment Relations Commission dismisses complaints filed by various majority representatives of collective negotiations units of law enforcement personnel employed by the State and the State Police. The complaints were filed in the Superior Court of New Jersey, Law Division, and transferred to the Commission by court order. The plaintiffs argue that, separate from any obligation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to negotiate the payment of increments following the expiration of a collective negotiations agreement (CNA), there are state statutes contained in Titles 11A, 52, and 53 that mandate the payment of increments. The Commission finds that none of the cited statutes require the payment of salary increments during the hiatus between the expiration of one CNA and the commencement of a successor CNA.

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 Plaintiffs in MC-2017-001, Crivelli & Barbati,
attorneys (Frank M. Crivelli, of counsel)

For the Defendants in MC-2017-001 and MC-2017-002,
Montgomery, McCracken, Walker & Rhoads LLP, attorneys,
(William K. Kennedy, of counsel, Mr. Kennedy and Erin
K. Clarke on the brief)

For the Plaintiffs in MC-2017-002, Loccke, Correia &
Bukosky, attorneys (Michael Bukosky, of counsel)

DECISION

In 2015, various majority representatives of collective negotiations units of law enforcement personnel employed by the State of New Jersey and the New Jersey State Police, as well as two of the union presidents, filed lawsuits against their public

employers in the Superior Court of New Jersey, Law Division, Mercer County.^{1/} The lawsuits allege that the failure of the public employer defendants to pay employees salary increments following the expiration of collective negotiations agreements violated several state statutes.^{2/} Thus, they involve a similar

1/ Two lawsuits were filed. Docket No. MER-L-1566-15 is now before the Commission as Docket No. MC-2017-001. Plaintiffs in that case were:

NJ Law Enforcement Supervisors Ass'n (NJLESA) and
its President, William Toolen
PBA Local 105 and its President, Lance Lopez.

Defendants were the State of New Jersey and Christopher Christie in his capacity as Governor.

Intervening as party plaintiffs were:

Communications Workers of America (CWA); NJ
Superior Officers Law Enf't Ass'n (NJSOA);
NJ State PBA, State Law Enf't Unit (SLEU); and NJ
Investigator's Ass'n, FOP Lodge 174 (NJIA).

Docket No. MER-L-2285-15, is now before the Commission as Docket No. MC-2017-002. Plaintiffs were:

State Troopers Fraternal Association (STFA); State
Troopers Non-Commissioned Officers Ass'n (NCOA);
State Troopers Superior Officers Ass'n (STSOA);
and State Troopers Captains Association (STCA).

Defendants were the State of New Jersey, Christopher Christie in his capacity as Governor, John J. Hoffman, Acting Attorney General, and Joseph R. Fuentes, Superintendent of State Police.

2/ The statutes are: N.J.S.A. 11A:3-7, "Employee compensation"; N.J.S.A. 52:14-15.27, "Statutory maximum and minimum for salaries abolished[,] Civil Service Commission to establish salary ranges"; N.J.S.A. 52:14-15.28, "Statutory increases in salaries

(continued...)

kind of dispute as the one involved in Atlantic County, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013) and Township of Bridgewater, P.E.R.C. No. 2015-11, 41 NJPER 107 (¶38 2014), rev'd, 445 N.J. Super. 1 (App. Div. 2016), aff'd on other grounds, 230 N.J. 237, 44 NJPER 39 (¶12) (2017). However, the plaintiffs in the Superior Court lawsuits advanced a different theory of recovery (increments are mandated by statutes) than the issue litigated in Bridgewater (whether payment of increments after contract expiration is a mandatorily negotiable term and condition of employment under the New Jersey Employer-Employee Relations Act).

The verified complaints commencing the Superior Court lawsuits were filed after the Commission had issued its Atlantic County and Bridgewater rulings and while the appeals from those decisions were pending before the Appellate Division of the Superior Court.

By orders of the Hon. Mary C. Jacobson, A.J.S.C., issued March 28, 2017, the lawsuits were transferred to the Public Employment Relations Commission. Both orders provided that the

2/ (...continued)
abolished[,] Civil Service Commission to establish automatic salary increases; N.J.S.A 53:1-6, "Salaries of officers and troopers[,] increase for detective work"; N.J.S.A 53:1-7, "Salary increases for personnel." The last two statutes were cited only in the case involving State Police, MER-L-1566-15, now before the Commission as Docket No. MC-2017-002.

Court would not retain jurisdiction, that any appeal from the Commission would be to the Appellate Division, and that all briefs, oral argument transcripts, and the transcript of the Court's decision would be submitted by the plaintiffs to the Commission. The remaining terms of Judge Jacobson's orders are summarized in Appendix A to this decision.

On August 2, 2017, the Supreme Court issued its decision in Atlantic County/Bridgewater. Following receipt of the transcripts of the oral argument before Judge Jacobson and her decision issued from the bench, the Commission invited the parties to submit argument on the impact of the Supreme Court's ruling on the matters transferred to the Commission by the Superior Court. Ten supplemental submissions were filed, the last of which was received on November 17, 2017.

Among the submissions was a motion by the CWA, supported by the plaintiffs and plaintiff-intervenors and opposed by the State, to consolidate the transferred lawsuits with seven cases pending before the Commission that had been held in abeyance awaiting the disposition of the Atlantic County/Bridgewater appeal.^{3/} As explained below, we decline to consolidate the

^{3/} The cases, filed between August and December 2015, and the parties are:

SN-2016-011, CWA and State;
CO-2016-106, PBA Local 105 and State;
CO-2016-107, NJLESA and State;
CO-2016-113, CWA and State;

(continued...)

cases transferred from the Superior Court with the scope of negotiations petition and unfair practice charges that have been held in abeyance pending the Atlantic County/Bridgewater litigation.

In the scope of negotiations proceeding that was being held in abeyance (SN-2016-011), the parties filed their submissions before the Commission's decisions in Atlantic County, P.E.R.C. No. 2014-040, and Bridgewater, P.E.R.C. No. 2015-011, were reversed on appeal. The State, relying on the Commission's decisions in the two cases, seeks a restraint of arbitration of two grievances filed by the CWA challenging the failure to pay salary increments following contract expiration. Our role in a scope of negotiations case is limited to deciding whether the issue sought to be negotiated or arbitrated is mandatorily negotiable. The Supreme Court's decision in Atlantic County/Bridgewater holds that payment of salary increments after contract expiration is mandatorily negotiable. 230 N.J. at 253. The remaining question in SN-2016-011, whether the expired agreement requires payment of increments, is a matter of contract interpretation, which will not be determined by the Commission in a scope of negotiations proceeding. Ridgefield Pk. Ed. Ass'n v.

3/ (...continued)

CO-2016-114, SLEU and State;

CO-2016-115, NJIA and State;

CO-2016-118, NJSOA and State (Dept. of Corrections).

Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 154 (1978) (quoting Hillsdale Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975)).

The thrust of the Superior Court lawsuits is that, separate and apart from any obligation to negotiate pursuant to the New Jersey Employer-Employee Relations Act (EERA), the cited statutes in Titles 11A, 52, and 53, and related regulations, mandated the payment of step increases during the hiatus between the expiration of a CNA and the consummation of a new agreement through collective negotiations or interest arbitration.^{4/}

Except for N.J.S.A. 11A:3-7, none of the other four statutes was amended after L. 1968, c. 303, authorizing public sector collective negotiations, first took effect.^{5/}

In 2001, a paragraph (b) (underlined below) was added to N.J.S.A. 11A:3-7 to make it read:

^{4/} There have been interest arbitration awards setting the terms of successor agreements in the State Police NCOA unit and the State Police STFA unit. An appeal of the STFA interest arbitration award (IA 2016-003) is pending before the Appellate Division. The NCOA interest arbitration award was not appealed. Judge Jacobson dismissed the NCOA's complaint in Toolen, finding that it was moot as a result of the arbitration award. Accordingly, the complaint was not transferred to us, and the NCOA is not a party to this matter now.

^{5/} N.J.S.A. 52:14-15.27 and N.J.S.A. 52:14-15.28 were both enacted in 1945 and never amended. N.J.S.A. 53:1-6 and N.J.S.A. 53:1-7, applicable only to the State Police plaintiffs, were last amended in 1950 and 1945, respectively. Chapter 303's short title is the "New Jersey Employer-Employee Relations Act."

§ 11A:3-7. Employee compensation

a. The commission shall administer an equitable State employee compensation plan which shall include pay schedules and standards and procedures for salary adjustments other than as provided for in the State compensation plan for the career, senior executive and unclassified services.

b. Prior to adoption or implementation of an amendment, change or modification to the compensation plan for State employees which amendment, change or modification affects public employees represented by a majority representative selected or designated pursuant to section 7 of P.L.1968, c.303 (C.34:13A-5.3), the State shall negotiate with the majority representative for an agreement on the amendment, change or modification to the compensation plan. The State shall negotiate in good faith with the majority representative. A State employee compensation plan shall not be amended, changed or modified except pursuant to a written agreement entered into between the State and the majority representative following negotiations.

c. When an employee has erroneously received a salary overpayment, the commission may waive repayment based on a review of the case.

d. Employees of political subdivisions are to be paid in reasonable relationship to titles and shall not be paid a base salary below the minimum or above the maximum established salary for an employee's title.

The purpose of the change is reflected in the sponsor's statement to Senate Bill 1758, which upon enactment, amended the statute:

This bill modifies current law to only authorize the Commissioner of Personnel to administer, rather than establish and amend, an equitable State employee compensation plan

which includes pay schedules but not the assignment and reassignment of salaries for all State titles. Also, before the adoption or implementation of a change to the compensation plan for State employees, the State will be required to negotiate, in good faith, with the majority representative of employees affected for an agreement on the change. Under this bill, a change in the State employee compensation plan will not take effect unless there is a written agreement between the State and the majority representative.

[S1758, enacted as P.L. 2001, c. 240, emphasis added.]

Thus, the law memorialized what had been a longstanding fact of life in collective negotiations between the State and the representatives of its employees. The compensation plan was a product of the results of collective negotiations; it did not trump bargaining. Put another way, the compensation plan was the tail and could not wag, (i.e., change) the dog (i.e., compensation set by negotiated agreements).

Viewing N.J.S.A. 11A:3-7(b) in context, and in light of the Supreme Court's Atlantic County/Bridgewater decision, we hold that standing alone, it does not require the payment of salary increments during the hiatus between the expiration of one contract and the consummation of a successor. Nothing in the other four statutes warrants a different conclusion, nor have they ever been so construed.^{6/}

^{6/} In re Military Service Credit for State Teachers, 378 N.J. Super. 277, 282 (App. Div. 2005) held that teachers employed
(continued...)

Given that the statutes cited in the Superior Court cases have never been construed to mandate the payment of salary increments during the hiatus period, we need not seek the input of the Civil Service Commission, as Judge Jacobson had suggested. Moreover, at the time Judge Jacobson issued her orders, the Supreme Court had not yet issued its decision in Atlantic County/Bridgewater, which examines the obligation to pay increments in the context of the EERA and not by construing pre-EERA laws that are touted by the plaintiffs and intervenors to mandate such payments based on the terms of those statutes. In sum, the high court held:

1. That based on the three-part test established in Local 195, IFPTE v. State, 88 N.J. 393 (1982), and consistent with other Supreme Court public sector decisions, the payment of salary step increments is a mandatorily negotiable term and condition of employment. 230 N.J. 237 at 253.

2. That whether increments must be paid during the hiatus between contract expiration and the consummation of a new agreement is a matter of contract interpretation. Id. at 254-256.^{7/}

6/ (...continued)
at various State facilities were not entitled to military service credit under Title 18A. The court cited N.J.S.A. 11A:3-7 and N.J.S.A. 52:14-15.27 only in tandem with one another, observing: "[T]eachers employed by the State . . . are paid pursuant to the statutes governing the compensation of employees of the State government. N.J.S.A. 11A:3-7 and N.J.S.A. 52:14-15.27."

7/ Given the Court's holding, we need not reach the State's arguments regarding the issues left undecided by the Court in Atlantic County/Bridgewater.

The Toolen Complaint

All of the Toolen plaintiffs, including the intervenors, also filed unfair practice charges with the Commission. See n.4. As those cases have been held in abeyance, the record consists only of the allegations in the charges, all of which claim that the non-payment of increments violated various subsections of N.J.S.A. 34:13A-5.4a, proscribing public employer unfair practices. Some of the charges also refer to one or more of the statutes identified in the Toolen complaint; others focus solely on the employers' actions as violations of the unfair practice sections of the EERA.

In their supplemental submissions, the Toolen plaintiffs argue that the disposition of the dispute transferred to us by Judge Jacobson should be through the procedures used to resolve unfair practice charges, including settlement/exploratory conferences and hearings if necessary. We believe that activating the unfair practice charges will satisfy that procedural objective as it relates to the pending charges. At the same time, we see no benefit to the parties to allow our unfair practice proceedings to be used to further litigate the statutory claims asserted in the Toolen complaint.

Put another way, the plaintiffs in Toolen contend that three statutes mandate the payment of increments after contract expiration. Accepting that argument and applying the preemption

test would mean that a public employer has no discretion to negotiate, but instead must pay increments in every circumstance and, in the case of state troopers, in an amount set by the Superintendent. That premise conflicts with the Supreme Court's holding in Atlantic County/Bridgewater that the issue is mandatorily negotiable and that the parties are free to negotiate language requiring or barring the payment of increments during the hiatus between agreements. See Atlantic County/Bridgewater, 230 N.J. 237 at 256 (pointing out that a public employer, Ho-Ho-Kus Board of Education, and the majority representative of its teaching staff members had included in their collective negotiations agreement a provision stating that increments would not be paid after the contract expired). Accordingly, we will dismiss the Toolen complaint. Doing so will not prevent the Toolen plaintiffs from seeking a ruling, via their unfair practice charges or an arbitrator if the charges are deferred to grievance arbitration, that the increments should have been paid under the EERA or the CNA, as the case may be. Dismissing the Toolen complaint will only preclude the plaintiffs and intervenors from relitigating before this Agency their claims that Titles 11, 52, and 53 mandated the payment of increments and step movement during the hiatus period.

State Troopers Complaint

In their verified complaint, filed October 6, 2015, the four units of state troopers sought a declaratory judgment "finding the salaries of State Troopers must be advanced as a matter of law in accordance with . . . N.J.S.A. 53:1-6, N.J.S.A. 53:1-7." (Verified Complaint at 15, ¶B).

In its supplemental submission to the Commission dated November 2, 2017, the state troopers continue to rely on the argument that N.J.S.A. 53:1-6 and N.J.S.A. 53:1-7 are preemptive statutory mandates.^{8/} They argue that the laws require the payment of increments on trooper anniversary dates irrespective of the expiration of a collective negotiations agreement.^{9/} Although none of the four state troopers units have pending unfair practices involving the payment of increments post-contract, they support the consolidation of the dispute raised in the State Troopers complaint with the pending unfair practice charges filed by the plaintiffs in Toolen, arguing:

- The transferred cases should be processed in accordance with Commission

^{8/} The complaint also cites the three statutes referenced in the Toolen complaint: N.J.S.A. 11A:3-7, N.J.S.A. 52:14-15.27 and N.J.S.A. 52:14-15.28.

^{9/} Addressing this contention, the State argues that the Troopers position that the State Police Superintendent has sole authority over compensation, if accepted, would, contrary to practice and precedent, remove salary increments and all compensation from the scope of collective negotiations.

rules so that an evidentiary hearing will be held for the development of a factual record and the presentation of legal arguments;

- In accordance with the Supreme Court's holding in Atlantic County/Bridgewater the Commission must construe the pertinent language of the expired CNAs and hold that they require payment of salary increments during the hiatus period;
- The caps on tax levies and interest arbitration awards referenced in N.J.S.A. 34:13A-16.7 do not bar the payment of increments.

Before discussing the case as it relates to the units of state troopers, we point out that disputes over non-payment of increments following contract expiration normally become moot when the parties reach a successor agreement. See Rutgers, The State Univ. and AFSCME, Council 52, P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd, NJPER Supp.2d 197 (¶175 App. Div. 1988) [App. Div. Dkt. No. A-174-87T7 (11/23/88)].

Interest arbitration awards setting the terms of successor agreements between the State and the STFA and between the State and the NCOA have been issued. Both addressed the issue of increments. The NCOA award was not appealed, and Judge Jacobson's order dismissed the State Troopers complaint as moot "insofar as it set forth the claims of the NCOA."

The STFA appealed the award to which it was a party and argued before us that the arbitrator and the Commission were

“required to provide step movement to state troopers pursuant to” the same statutes in Titles 11A, 52, and 53 and that the last of these preempted “any law to the contrary.” We rejected those arguments as unpersuasive in State of New Jersey (Division of State Police), P.E.R.C. No. 2017-20, 43 NJPER 133, 139 (¶42 2016), appeal pending. Moreover, allowing those claims to be relitigated by the STFA in this matter is inconsistent, at least in spirit, with the New Jersey Court Rules, specifically, R. 2:9-1(a), which provides in pertinent part:

[T]he supervision and control of the proceedings on appeal . . . shall be in the appellate court from the time the appeal is taken”

That leaves the complaints of the State Troopers Superior Officers Association and the State Troopers Captains Association. If successor agreements have been reached with the State Police, the dispute over the increments will likely be moot. In either event, and for the reasons indicated in connection with the Toolen complaint, we find no basis for holding that the statutes cited in the verified complaint mandate the payment of salary increments. See discussion, supra, at 10-11. We also note that given that the claims in State Troopers, like Toolen, present questions of statutory interpretation and construction, their resolution would unlikely require an evidentiary hearing.

ORDER

The verified complaints transferred by court order are dismissed, and the motion for consolidation filed by intervenor CWA is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: January 25, 2018

Trenton, New Jersey

APPENDIX A

The Toolen Order also provides:

- i. that the complaint is transferred to PERC under the doctrine of primary jurisdiction;
- ii. the filing date of the lawsuit shall be the filing date for statute of limitations purposes;
- iii. PERC shall consider asking the Civil Service Commission for its views on the statutes cited to the Court and on what constitutes the "State employee compensation plan."

The Troopers Order also provides:

1. the Complaint as it relates to the NCO Association is dismissed as moot as the Troopers in that unit received increments pursuant to an interest arbitration award;
2. that the complaint as it relates to the claims of the remaining plaintiffs is transferred to PERC under the doctrine of primary jurisdiction;
3. PERC shall review the claims of the STFA to determine if those claims may proceed before PERC in light of the interest arbitration decision which addressed the issue of increments;
4. the filing date of the lawsuit shall be the filing date for statute of limitations purposes and;
5. PERC shall consider asking the Civil Service Commission for its views on the statutes cited to the Court and on what constitutes the "State Compensation Plan."