

P.E.R.C. NO. 2009-4

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2008-073

NEW JERSEY INVESTIGATORS  
ASSOCIATION, FRATERNAL ORDER  
OF POLICE LODGE 174,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a proposal made by the New Jersey Investigators Association, Fraternal Order of Police Lodge 174 during collective negotiations for a successor agreement with the State of New Jersey. The FOP proposes to have compensatory time or cash for overtime at the employee's option. The Commission holds that the proposal is mandatorily negotiable, subject to Department of Personnel approval, and may be submitted to interest arbitrator for inclusion in a successor agreement.

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, Genova, Burns & Vernoia, attorneys  
(Douglas E. Solomon, of counsel and on the reply brief;  
Carolyn Buccerone, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &  
Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

On April 24, 2008, the State of New Jersey petitioned for a scope of negotiations determination. The State seeks a determination that a compensatory time proposal made by the New Jersey Investigators Association, Fraternal Order of Police Lodge 174, is preempted by Civil Service regulations and may not be considered by an interest arbitrator for inclusion in a successor collective negotiations agreement. Consistent with prior case law, we hold mandatorily negotiable a proposal to have compensatory time or cash overtime be at the employee's option, subject to Commissioner of Personnel approval.

The parties have filed briefs and exhibits. These facts appear.

The FOP represents investigators, senior investigators and principal investigators in the Department of Corrections. The parties' collective negotiations agreement expired on June 30, 2007. The union has petitioned for interest arbitration. In its petition, the union has listed "comp-time" as an economic issue in dispute. In negotiations, the union sought to have compensatory time or cash for overtime be at the employee's option.

Our jurisdiction is narrow. We do not consider the wisdom of proposals, only the abstract issue of their negotiability. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

\_\_\_\_ Under Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), a subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with the determination of governmental policy. A statute or regulation will preempt negotiations over a mandatorily negotiable term and condition of employment only if it "expressly, specifically and comprehensively" establishes how that working condition is to be established. See Bethlehem Tp.

Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982)

(mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations).

\_\_\_\_\_The State argues that to the extent the FOP seeks to have employees decide whether they receive compensatory time or overtime pay for hours worked beyond their regular shift, the proposal is preempted by Civil Service regulations. N.J.A.C. 4A:3-5.5 provides, in relevant part:

(a) Employees in covered positions may be eligible for overtime compensation under this section as follows:

1. Employees in covered fixed workweek titles (NE), shall be eligible for either cash payment or compensatory time off at the discretion of the department head with the approval of the Commissioner or his or her representative for time worked in excess of 40 hours per week, provided that compensatory time off in lieu of cash overtime compensation is permitted by one of the following agreements:

I. Applicable provisions of a collective negotiations agreement, or any other agreement between the State and representatives of such employees.

\* \* \*

(b) Overtime compensation under this section shall be paid as follows:

1. Covered employees (35, 40 or NE titles) shall be compensated either in cash payment or compensatory time off at the discretion of the department head with the approval of the

Commissioner or his or her designee for time worked in excess of 40 hours per week as provided in (a)1 above. . . .

The State maintains that this regulation expressly provides that the department head, with approval of the Commissioner, has the authority to determine how overtime compensation will be paid. The FOP responds that we have already found this issue to be mandatorily negotiable.

We and the Appellate Division have previously held that the State may exercise its discretion to provide overtime pay or compensatory time through negotiations, subject to Commissioner of Personnel review. State of New Jersey, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd 11 NJPER 333 (¶16119 App. Div. 1985). In that case, a highway inspector filed a grievance contending that the State violated its contract with IFPTE, Local 195 when the Department of Transportation insisted that he accept compensatory time rather than cash for an overtime assignment. The State argued that Civil Service statutes and regulations preempted negotiations of any contractual provision that would divest the State Treasurer, the President of the Civil Service Commission, the Director of the Division of Budget and Accounting (known as the Overtime Committee), and the concerned department head (or any one of these individuals) of their discretion to determine the nature of overtime compensation and, specifically,

to require employees to take compensatory time off. The relevant regulation at that time provided:

Employees in fixed workweek titles shall be eligible for overtime compensation for time worked in excess of the regular workweek. Compensation shall either be cash payment or compensatory time off at the discretion of the department head with the approval of the Overtime Committee. [N.J.A.C. 4:6-3.1]

We held that no statute or regulation expressly, specifically, and comprehensively prohibited a contractual agreement to pay cash for overtime worked rather than require an employee to take compensatory time off. Instead, they vested the employer, through the department head, with initial discretion to determine whether an employee should receive compensation or compensatory time off for overtime worked. That discretion could be exercised through collective negotiations. The Appellate Division affirmed for the reasons stated in our decision. The Court noted that there was nothing in the record to demonstrate that the Overtime Committee had exercised its statutory power to reject the employer's contractual agreement to permit the employee to decide whether to take cash or compensatory time.

The regulations have been replaced since 1983, but the applicable new regulations contain similar language. N.J.A.C. 4A:3-5.5(b) permits either cash payment or compensatory time off at the discretion of the department head with the approval of the Commissioner or his or her representative for time worked in

excess of 40 hours per week. As in State of New Jersey, the department head's discretion may be exercised through the collective negotiations process, subject to Commissioner of Personnel approval. Also as in State of New Jersey, there is nothing in the record that suggests that the Commissioner of Personnel has taken any action to prohibit the employee discretion that the union seeks to achieve through interest arbitration.

The State argues that State of New Jersey is distinguishable because there the union did not seek to completely remove the department head's discretion, but instead challenged the manner in which the department head exercised this discretion. That is a distinction without a difference. In State of New Jersey, the contract provided that "compensatory credits shall be taken in compensatory time or in cash." The regulation gave the discretion to the department head to choose the form of compensation, subject to Overtime Committee approval. By permitting arbitration, this Commission and the Court held that the parties could have negotiated that the department head's discretion would be given to the employee. There was nothing in the statute or regulations to indicate that the department head had to exercise discretion anew every time an employee worked overtime. 10 NJPER 44 n. 3. That analysis applies here. The union may submit to interest arbitration its proposal that the

department head's discretion be given to the employee, subject to Commissioner of Personnel approval.<sup>1/</sup>

ORDER

The compensatory time proposal is mandatorily negotiable and may be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: August 7, 2008

Trenton, New Jersey

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<sup>1/</sup> We note that the Fair Labor Standards Act, 29 U.S.C. §201 et seq., limits the amount of compensatory time police officers may accrue. 29 U.S.C. §207(o)(3)(A).