

P.E.R.C. NO. 2013-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-2012-009

CAMDEN COUNTY PARK POLICE,
NEW JERSEY FRATERNAL ORDER
OF POLICE, LODGE #76,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of language in an expired collective negotiations agreement between the County of Camden and Camden County Park Police, New Jersey Fraternal Order of Police, Lodge #76. The contract article concerns separation pay based on service longevity. The Commission holds that the language is mandatorily negotiable and may remain in the agreement to the extent it applies to situations where unit employees are permanently separated from their job.

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, Sherri L. Schweitzer, Camden County
Counsel (Sherri L. Schweitzer, County Counsel, of
counsel)

For the Respondent, The Cushane Law Firm, LLC,
attorneys (Thomas A. Cushane, of counsel)

DECISION

On September 12, 2011, the County of Camden petitioned for a
scope of negotiations determination. The County asserts that
portions of Article XIX of its most recent agreement with the
Camden County Park Police, FOP Lodge No. 76, are not mandatorily
negotiable and may not be submitted to interest arbitration for
inclusion in a successor collective negotiations agreement
between the parties.

We hold that the language is mandatorily negotiable and may
remain in the agreement only to the extent it applies to

situations where unit employees are permanently separated from their jobs.

The parties have submitted briefs, certifications and exhibits. These facts appear.

The FOP represents the County's Park Police holding the ranks of Patrolman and Sergeant.^{1/} The County and the FOP are parties to a collective negotiations agreement effective from January 1, 2006 through December 31, 2009.^{2/}

During negotiations for a successor agreement, the County sought to eliminate Sections A.A.1 and A.B.1 of Article XIX.A "Separation Pay based on Service Longevity."^{3/} They provide:

- A. Should the County decide to exercise its managerial prerogatives in such fashion that the Park Police should be abolished, merged, absorbed within the agency or ceases to operate as a separate entity unto itself during the contract term, the following shall apply:
 - 1. Each employee covered under the terms of this agreement shall be entitled to one (1) month's longevity pay for each three (3) months of service. Employees shall be given credit for prior months

1/ The Captain and the Chief are excluded. The recognition clause of the 2006-2009 agreement indicates that the position "Lieutenant" did not then exist.

2/ On January 12, 2010, the FOP filed a petition to initiate compulsory interest arbitration.

3/ The article provides that one month of longevity pay is equal to 160 hours pay at an employee's base rate for the 8AM to 4PM shift. Employees disciplined for just cause are ineligible.

employed provided that such credit shall not exceed thirty-six (36) months longevity pay. Employees shall be allowed a maximum of thirty-six (36) months longevity credit. This benefit shall be paid in one (1) check on the employee's last day of service. The County agrees to maintain all medical benefits for a period of one (1) year from the employee's date of separation.

B. Should the County decide to exercise its lawful authority in such a fashion that the Park Police shall be reduced in force or have titles changed or modified, the following shall apply, at the discretion of the affected employee or employees:

1. Each employee covered under the terms of this agreement shall be entitled to one (1) months longevity pay for each three (3) months of service. Employees shall be given credit for prior months employed provided that such credit shall not exceed thirty-six (36) months longevity pay. Employees shall be allowed to earn a maximum of thirty-six (36) months longevity pay. This benefit shall be paid in one (1) check on the employee's last day of service. The County agrees to maintain all medical benefits for a period of one (1) year from the affected employee(s) date of separation. If the employee desires not to use the aforementioned benefit he can opt to assume the new job offer.

The FOP did not agree to the removal of the challenged provisions from the next agreement, and this petition ensued.

Our jurisdiction is narrow. Cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). Thus, we only determine whether the language is mandatorily negotiable and do not consider the wisdom of including the challenged terms in a

collective negotiations agreement. See In re Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977).^{4/}

We assess mandatory negotiability for law enforcement officers under the analysis set forth in Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981):

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

[Id. at 92-93; citations omitted]

^{4/} The parties' assertions as to how the language got into the agreement is irrelevant to our task in determining whether it is mandatorily negotiable. See Byram.

According to the certification of County Administrator Ross Angilella, a 2009 report commissioned by the County and issued by the International Association of Chiefs of Police, made several recommendations regarding the Park Police Force including downsizing. Angilella asserts that the size of the force has since been reduced only through attrition. He maintains that the challenged contract languages puts a large financial obstacle in front of the County if it seeks to make further workforce cuts or reorganizations by severance pay on employees even though they remain County workers after a reorganization or title change.^{5/}

While conceding that the provisions concern severance pay, normally a mandatorily negotiable term and condition of employment, the County argues that the language is non-negotiable because it would bestow that benefit on employees who do not actually lose their jobs. Making the contractual payments in those situations, the County argues, would cause it to incur financial obligations that would significantly interfere with its

^{5/} N.J.S.A. 40:37-11.6, allows a County to abolish both a park commission and the park police who will then become County Sheriff's Officers. N.J.S.A. 40:37-11.6(c) provides:

[T]hat a county park police officer shall be appointed as a sheriff's officer without any loss of seniority rights or impairment of tenure or retirement system rights.

The FOP says that in 1995 the County abolished the Park Commission. Neither party has explained why the Park Police Force has apparently remained a separate law enforcement entity rather than becoming County Sheriff's Officers.

ability to determine how to best provide police services. The County posits that the challenged language inhibits its prerogative to reduce the size of this law enforcement unit.^{6/}

The FOP responds that as long as this Article has been in the parties' agreement the language entitling employees to severance payments has never been triggered.

^{6/} In response to an FOP argument, the County compares the language of Article XIX.A.A.1 and A.B.1 to analogous provisions of its January 1, 2006 through December 31, 2012 agreement with PBA Local 351 and argues that the PBA contract makes the benefit is available only to PBA Local 351 unit members who lose their jobs. The provisions in the PBA Local 351 contract read:

A. Should the County decide to exercise its managerial prerogatives in such fashion that the Dept of Corrections be abolished or ceases to operate as a County agency (including privatization) causing an employee to lose their job and be forced from an active contributing membership in the Police and Fire Retirement System or the Public Employees Retirement System the following (severance pay-outs based on a longevity formula) shall apply:

* * *

B. Should the County decide to exercise its managerial prerogatives in such fashion that the Dept of Corrections shall be reduced in force causing an employee to lose their job for any reason or have titles changed or modified, the following (severance pay-outs based on a longevity formula) shall apply:

* * *

C. Should an employee be affected by this clause, the applicable current contractual provisions for medical benefits shall apply.

Severance pay is generally mandatorily negotiable. See Morris School District Bd. of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332, 345 (App. Div. 1998); certif. den. 156 N.J. 407 (1998) (severance pay is a form of deferred compensation for services rendered during periods covered by prior collective negotiations agreements); Cinnaminson Tp., P.E.R.C. NO. 79-5, 4 NJPER 310, 312 (¶4156 1978) (police union could not submit "no-layoff" clause as interest arbitration proposal; severance pay for laid off police officers was mandatorily negotiable).

However, in making negotiability determinations we issue rulings on a case-by-case basis. See Jersey City and POBA and PSOA, 154 N.J. 555, 574 (1998); Troy v. Rutgers, 168 N.J. 354, 383 (2001).

The term "severance pay" has an apparent and common sense meaning. See Robert's Dictionary of Industrial Relations (Bur. Nat. Aff.; 3d. Ed. 1986) listing "severance pay" as a synonym for "dismissal compensation,"

A payment to a worker upon permanent separation from the [employer], due to no fault of his own, either in a lump sum or in smaller amounts over a period of time.

[Id. at 154]

Both state and federal courts, ruling on New Jersey employer-employee relations controversies, have also construed severance pay to be receivable in cases where employment is lost.

In Saddler v. Elliott Co., 357 Fed. Appx. 416, 2009 U.S. App. LEXIS 27933 (3rd Cir.), the United States Court of Appeals upheld a lower court decision holding that a New Jersey private sector employee was not entitled to statutorily-based severance pay after he resigned five months following a job transfer prompted by a sale of part of the company where he had been employed for 32 years. In her opinion, Judge Delores Korman Sloviter determined whether the employee seeking severance pay had "lost" his job:

Elliott managers told Saddler that he was not being laid off before the transfer from Elliott to F.S. Elliott. Saddler missed no work after the transfer. On the contrary, he sat at the same desk with the same job responsibilities, telephone number, same or better salary, and became unemployed only when he voluntarily resigned from F.S. Elliott. In light of those stipulated facts, Elliott did not act in an arbitrary or capricious manner in concluding that Saddler did not suffer a job loss.

[357 Fed. Appx. At 417]^{7/}

Owens v. Press Publishing Co., 20 N.J. 537, 545-546 (1956) also views loss of employment as a characteristic of severance pay benefits:

Severance pay is terminal compensation measured by the service given during the subsistence of the contract, in this case the collective bargaining agreement, payable on discharge from the employment not induced by

^{7/} In Saddler, employees who were laid off as part of the sale did receive severance pay. 357 Fed. Appx. at 417, n. 2.

misconduct, according to the prescribed formula, a means of recompense for the economic exigencies and privations and detriments resulting from the permanent separation of the employee from service for no fault of his own. In a real sense it is remuneration for the service rendered during the period covered by the agreement.

More recently our Supreme Court, affirming the ruling of a pension board, held that a sum of higher rank compensation, paid to settle a police lieutenant's civil rights lawsuit, could not be included in the officer's base pay in calculating his retirement allowance, but could be retained by the retiring officer as "severance pay." In re Puglisi, 186 N.J. 529 (2006).

Our courts have also stressed that even where an economic payment or benefit is involved, if, in a given case, the enforcement of that contract term significantly interferes with the exercise of a managerial prerogative that provision may not be given its full effect. An example is Old Bridge Tp. Bd. of Ed. and Old Bridge Ed. Ass'n, 98 N.J. 523 (1985) where the Supreme Court ruled on consolidated appeals from this Commission's ruling that a deadline for notifying both full-time and part-time tenured teachers of their job assignments for the next year was mandatorily negotiable and from the resulting arbitration award that remedied a late notification of layoff by awarding a part-time teacher the salary she would have received during the next school year.

The Court held that although the clause was mandatorily negotiable, the remedy significantly interfered with the Board's ability to layoff the teacher for economic reasons. It reduced the award to 61 days of pay, equal to the lateness of the notice.^{8/} 98 N.J. at 533-534.

In this case the "severance pay" contract language can apply not only to cases where employees represented by the FOP completely separate from County employment, but also to employees who remain on the payroll. Providing that such employees could receive up to three years compensation for a title change or transfer, imposes a financial obligation on the employer that would inhibit the County from exercising its managerial prerogative to determine staffing levels and the manner and means by which it will provide law enforcement services.

Accordingly, we hold that the disputed language is mandatorily negotiable and may remain in the agreement only where the payments can legitimately be considered severance pay, i.e. the recipient must not continue as an active Camden County employee.

^{8/} There are economic benefits that can be negotiated for employees when they are transferred or reassigned even though they still perform the same duties for the same employer [See City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985) (shift differentials); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990) (premium pay to police officers required to patrol alone after midnight was negotiable)].

ORDER

Article XIX.A.A.1 and XIX.A.B.1 are mandatorily negotiable and may be included in a successor collective negotiations agreement between the parties only to the extent that the bonuses described therein are payable to employees who are leaving active employment with the County.^{9/}

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey

^{9/} We strongly suggest that the parties, with the assistance of the interest arbitrator, if necessary, redraft Article XIX to accord with our negotiability determination. If the issue is active in the interest arbitration proceeding, the arbitrator may redraft Article XIX.