P.E.R.C. NO. 2000-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,

Petitioner,

-and- Docket No. SN-2000-19

AFSCME, COUNCIL 52, LOCAL 2192,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Wayne for a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 2192. The grievance alleges that an employee was contractually entitled to receive annual increments which, over a five year period, would bring the employee to the maximum step on the salary guide. The Commission concludes that this grievance claiming a contractual right to salary increases in a five-year progression is not preempted and may be arbitrated.

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, John J. McKniff, Assistant Township Attorney, on the brief

For the Respondent, Carole Lanni, Staff Representative

DECISION

The Township of Wayne seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 2192. The grievance alleges that an employee was contractually entitled to receive annual increments which, over a five year period, would bring the employee to the maximum step on the salary guide.

Local 2192 represents white-collar employees employed by the Township. The Township and Local 2192 are parties to a collective negotiations agreement effective from January 1, 1997 through December 31, 2001. The grievance procedure ends in binding arbitration.

Thomas Cantisano is a full-time sanitarian for the Township. His date of appointment to this position is in dispute. AFSCME contends he was appointed in 1996; the Township contends he was appointed in 1997.

On March 12, 1999, Local 2192 filed a grievance alleging that the Township violated Article XXII and related articles of the parties' contract and portions of the Township Code by not paying annual increments to Cantisano. Such payments would advance him to the top of his pay grade after five years of employment.

Article XXII provides:

> The Township and the Union agree that there shall be no discrimination for reasons of sex, nationality, race, religion, age or marital status, political affiliation, or Union membership or non-membership or Union activity or non-activity.

Article XVII provides for binding arbitration of "any grievance or dispute that may arise between the parties, including the application, meaning or interpretation of the Agreement."

The Township denied the grievance. On July 7, 1999, AFSCME demanded arbitration. This petition ensued. The Township asserts that, under N.J.S.A. 26:3-25.1, Cantisano is not entitled to incremental pay increases to the maximum salary level because he has not completed five years of service with the Township.

N.J.S.A. 26:3-25.1, Receipt of maximum salary, provides:

> Every person holding a license issued under section 41 of P.L. 1947, c.177 (C.26:1A-41), who is employed in a position for which this license

> is required by any board of health, municipality or group of municipalities shall receive the maximum salary in the person's range, within five years from the date of appointment to this position if the majority of the person's job performance evaluations are satisfactory.

The Township also claims that the grievance is not contractually arbitrable because it does not involve the "application, meaning or interpretation of the CBA." The Township argues that any appeal of an action under this statute can be filed in the Superior Court.

AFSCME contends that another Township employee, serving in this same title, was issued annual increments starting in 1992, pursuant to N.J.S.A. 26:3-25.1, in addition to annual contract raises. The increments allegedly continued until she received the maximum salary in her range in 1997. AFSCME asserts that denying Cantisano the same treatment and applying the statute differently to him denies him equal treatment under Article XXII. It argues that whether the Township's prior method of payment to that previous employee constitutes a practice or policy for all employees is a question for the arbitrator.

The Township responds that the increments paid to the other Township employee were erroneously paid in violation of the statute. The Township argues that it has since become aware of this fact and refuses to make such payment to any other employees.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), 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 provided 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, we cannot consider the contractual merits of this grievance or any contractual defenses the parties may have. Our duty is simply to determine whether the subject matter in dispute is mandatorily negotiable and therefore legally arbitrable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates 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. [Id. at 404-405]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set

an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 26:3-25.1 provides that municipal health officers shall receive their maximum salary within five years from the date of their appointment if the majority of their job performance evaluations are satisfactory. Thus, municipal health officers with satisfactory performance evaluations and five years of service cannot be paid less than their maximum salary. The statute does not set the maximum salary or preclude elevation to the maximum salary before five years. Nor does the statute require or prohibit incremental salary increases before the maximum salary is reached after five years of service. The cases relied upon by the Township address an employee's entitlement under N.J.S.A. 26:3-25.1. See De Hay v. West New York, 189 N.J. Super. 340 (App. Div. 1983); Brown v. Jersey City, 289 N.J. Super. 374 (App. Div. 1996). They do not address what salary an employee is entitled to under a collective negotiations agreement.

Accordingly, AFSCME's grievance claiming a contractual right to salary increases in a five-year progression is not preempted and may be arbitrated. The dispute regarding Cantisano's years of service is outside our jurisdiction and may be presented to an arbitrator. Ridgefield Park.

ORDER

The request of the Township of Wayne for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999