P.E.R.C. NO. 85-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

P.B.A. LOCAL 138, SUSSEX COUNTY CORRECTION OFFICERS,

Petitioner,

-and-

Docket No. SN-84-99

COUNTY OF SUSSEX,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that a representation fee proposal may be submitted to compulsory interest arbitration.

P.E.R.C. NO. 85-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

P.B.A. LOCAL 138, SUSSEX COUNTY CORRECTION OFFICERS,

Petitioner,

-and-

Docket No. SN-84-99

COUNTY OF SUSSEX,

Respondent.

Appearances:
For the Petitioner, Loccke & Correia, Esqs.
(Manuel A. Correia, of Counsel)

For the Respondent, Yauch, Peterpaul & Clark, Esqs.
(Frank J. Peterpaul, of Counsel)

DECISION AND ORDER

On April 30, 1984, the PBA Local 138, Sussex County Correction Officers ("Local 138") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. Local 138 seeks a declaration that its proposal concerning the deduction of representation fees from the pay-checks of employees it represents may be submitted to compulsory interest arbitration. The County of Sussex ("County") contends that this proposal may not be submitted.

The parties have filed briefs and documents. The following facts appear.

The instant dispute concerns a representation fee proposal made during negotiations for a successor to the parties' contract which expired on December 31, 1983. By way of background, however, we will discuss what happened when a similar issue surfaced during the interest arbitration which followed the expiration of a previous contract on December 31, 1981 and led to

the parties' contract effective from January 1, 1982 through December 31, 1983.

Local 138 and the County were parties to a collective negotiations agreement which expired on December 31, 1981. The parties could not agree on various items in a successor contract and submitted their dispute to compulsory interest arbitration under N.J.S.A. 34:13A-16 et seq. One of the items in dispute was Local 138's proposal that representation fees be deducted from the paychecks of negotiations unit members who were not members of Local 138. The interest arbitrator included this proposal in his award establishing a contract from January 1, 1982 through December 31, 1983.

The County filed a motion in the Chancery Division of the Superior court to vacate the interest arbitration award. On July 21, 1982, Judge Stanton, while confirming the economic package awarded, vacated that award's grant of a representation fee provision. He did so for two reasons: (1) since there had been no concrete representation fee proposal on the table, the interest arbitrator erred in awarding a representation fee provision; and (2) since N.J.S.A. 34:13A-5.5a required a negotiated agreement before representation fees could be deducted, the interest arbitrator lacked authority to compel such an agreement. With respect to the second ground, Judge Stanton stated:

> The County of Sussex has argued that N.J.S.A. 34:13A-5.5a requires actual agreement between the employer and the employee representative (as opposed to an arbitrator's imposed solution) before an agency shop can be imposed on nonmember employees. The last sentence of the cited statutory section reads, 'Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.' I am satisfied that the language manifests a legislative intent that the employer and the employee representative must reach an actual agreement on an agency shop before it may be imposed on nonmember employees. Note, too, that N.J.S.A. 34:13A-5.6 starts with the phrase, 'Where a negotiated agreement is reached,....'

Local 138 appealed from that portion of Judge Stanton's order vacating the representation fee provision. The County cross-appealed from that portion of the award confirming the economic award. On March 26, 1984, the Appellate Division of the Superior Court affirmed the order in its entirety. It stated:

> We agree with so much of Judge Stanton's opinion as confirms the economic award and so much of his opinion as vacates the agency shop provision because 'the agency shop dispute was not properly submitted to the arbitrator', and affirm the judgment substantially for the reasons he expressed therein. We express no opinion, however, as to the arbitrability of an agency shop provision, a subject which should better be left to a determination by the Public Employment Relations Commission at an appropriate time. See Bd. Ed. W'dstn'n-Pilesgr. Sch. v. W'dstn-Pilesgr. Ed. Assn., 81 N.J. 582, 587-588 (1980).

On January 9, 1984, the PBA filed a Petition to Initiate Compulsory Interest Arbitration Proceeding with the Commission. The PBA again seeks to have the interest arbitrator grant its representation fee proposal. The instant scope petition ensued.

The parties agree that a proposal to deduct representation fees is a mandatorily negotiable subject. N.J.S.A. 34:13A-5.5(a) expressly says so.[1/] See In re Wayne Bd. of Ed., P.E.R.C.

1/ That section states: "Notwithstanding any other provision of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." We note that the Third Circuit Court of Appeals has recently upheld the federal constitutional validity of the New Jersey representation fee statute. See Robinson v. New Jersey, __ F.2d __ (3rd Cir, August 6, 1984), rev'g 565 F.Supp 743 (D.N.J. 1983), 547 F.Supp 129 (D.N.J. 1982) ("Robinson").

No. 81-106, 7 NJPER 151 (¶112067 1981). The only question in this case is whether an interest arbitrator is empowered to award a representation fee provision over the employer's objection.

Local 138 contends that all mandatorily negotiable subjects may be submitted to interest arbitration. The County, while accepting this general rule, contends that an exception is warranted because of the references to "agreement" in N.J.S.A. 34:13A-5.5(a) and to "negotiated agreement" in N.J.S.A. 34:13A-5.6. The County further argues that representation fees cannot be awarded through compulsory interest arbitration in the private sector, N.J. Bell Tel. Co. v. Communications Workers of America, 5 N.J. 354 (1950) ("Bell Telephone"), and that the statute should be construed narrowly to alleviate possible concerns about constitutionality and undue delegation of policy-making power.

In order to resolve the instant dispute, it is necessary to review the development and interrelationship of legislation concerning the obligation to negotiate over terms and conditions of employment, the use of interest arbitration as a means of resolving negotiations disputes, and the deduction of representation fees from the paychecks of non-members who are not members of the majority representative. We believe that this review demonstrates that when an impasse arises over a representation fee proposal, it may, like all other mandatorily negotiable proposals, be submitted to interest arbitration for resolution.

In 1968, the Legislature extended the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to cover public employees and specifically gave these employees the

right to select a majority representative for purposes of negotiating with their employer over their terms and conditions of employment. N.J.S.A. 34:13A-5.3 provides, in pertinent part:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

This section merely requires a public employer to negotiate in good faith over mandatorily negotiable subjects and does not compel public employers to agree to any particular proposal.

In 1977, the Legislature amended the New Jersey Employer-Employee Relations Act to specify procedures for resolving negotiations impasses between public fire or police departments and their employees. See N.J.S.A. 34:13A-14 et seq. These procedures include mediation, factfinding, and, if necessary, compulsory interest arbitration. N.J.S.A. 34:13A-14 articulates the public policy energizing this legislation:

> It is the public policy of the State that in public fire and police departments, where public employees do not enjoy the right to strike, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

In addition, our Supreme Court has recognized that this legislation, while authorizing compulsory interest arbitration as a last resort, was in fact intended to encourage the voluntary resolution of negotiations disputes. Thus, in New Jersey State PBA Local 29 v. Town of Irvington, 80 N.J. 271 (1979), the Court stated:

> Compulsory arbitration was thus intended to constitute a 'last resort' measure for the resolution of impasses involving public employers and their police or firefighting employees--deadlocks which, if not quickly settled, might cripple a municipality's ability to adequately protect its residents. Chapter 85 seeks to further, not to undermine, the basic policy upon which the entire Employer-Employee Relations Act is bottomed--i.e., that the 'voluntary [resolution] of ***disputes*** will [best] tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State.' Indeed, this is likely the reason why the study commission recommended that deadlocks be submitted to 'final offer' arbitration. Commentators have generally agreed that this particular form of arbitration encourages voluntary settlements by forcing the parties to tailor their proposals with an eye to the arbitrator's selection of the more reasonable submission.
> Id. at 286.

As a general rule, any subject that is mandatorily negotiable under section 5.3 may be submitted to mediation, fact-finding, and compulsory interest arbitration under N.J.S.A. 34:13A-14 et seq. Thus, these two statutory provisions must be read together to establish that, for police and fire employees, contractual agreement on mandatorily negotiable terms and conditions of employment may be reached either through negotiation or, if an impasse arises, through impasse resolution procedures including compulsory interest arbitration.[2/]

2/ We note that N.J.S.A. 34:13A-18 prohibits an interest arbitrator's consideration of proposals concerning a public employer's participation in the State Health Benefits Program or any governmental or statutory retirement system or pension fund.

In 1980, the Legislature amended the New Jersey Employer-Employee Relations Act to make mandatorily negotiable the deduction of representation fees from the paychecks of all employees in a negotiations unit who are not members of the majority representative. See N.J.S.A. 34:13A-5.5 et seq. The Sponsor's Statement to the bill leading to this legislation stated the legislation's purpose:

> For many years, the 'New Jersey Employer-Employee Relations Act' has required that a majority representative of public employees which has negotiated a labor agreement covering such employees to represent the interests of all employees in the bargaining unit, regardless of organizational membership, without discrimination. Non-members of the majority organization, therefore, enjoy virtually equal benefits and protections without sharing in the costs, incurred by collective negotiations, grievance representation, and other services. In the recent May, 1977 decision of the United States Supreme Court (Abood et al. v. Detroit Board of Education et al.) which upheld the constitutional validity of state 'agency shop' legislation, the Court pointed to the fact that the tasks of negotiating and administering an agreement are continuing and difficult ones and entail the expenditure of much time and money, often requiring the services of lawyers, expert negotiators, economists, research staff, as well as administrative personnel. In that decision, the Court went on to state that 'a union shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' - to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.' Many analysts feel that union security agreements such as the agency shop are vital to the stability and sense of responsibility of public sector unions.

The representation fee bill, as initially introduced, would have compelled the employer, upon demand, to incorporate a representation fee provision in a contract. It provided that public employee representatives (and public employers) could

"...not be denied from executing an agreement to require the payment by all employees in the unit to the majority representative of a fair share fee for services rendered by a majority representative, subject to the provisions hereinafter stated." The bill was later amended, and then enacted, to provide for mandatory negotiations over representation fee deductions and the entering of a signed agreement codifying representation fee provisions. The legislative history does not specifically explain this change, but it appears to us that the Legislature meant to make this issue, along with all other terms and conditions of employment, a matter to be resolved through the negotiations process.

The County contends that two phrases in the representation fee legislation evidence a legislative intent to preclude the submission of representation fee proposals to binding arbitration. First, N.J.S.A. 34:13A-5.5(a) states: "Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." (Emphasis supplied) Second, N.J.S.A. 34:13A-5.6 states: "Where a negotiated agreement is reached, pursuant to [section 5.5(a)] a majority representative shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in said unit who are not members of a majority representative...," subject to certain conditions not in dispute here. (Emphasis supplied) We disagree with the County's interpretation of the statute.

Section 5.5(a)'s reference to reaching and signing an agreement on representation fees merely replicates and particularizes section 5.3's general requirement that agreements

reached on terms and conditions of employment must be embodied in writing and signed. Thus, section 5.5(a)'s language is nearly identical to section 5.3's and manifests a legislative intent to treat negotiations over representation fee proposals in the same manner as negotiations over any other mandatorily negotiable subject.[3/] As previously mentioned, the negotiations process, at least for police and fire department employees, includes the possibility of mediation, factfinding, and compulsory interest arbitration.

Section 5.6 merely refers back to section 5.5(a)'s requirements and imposes no independent limitations on the negotiations process leading to representation fee provisions.[4/] The word "negotiated", used solely to refer to section 5.5(a)'s extension of 5.3's negotiations process to representation fees, cannot be interpreted to bar recourse to impasse procedures, including compulsory interest arbitration as a last resort, designed to induce voluntary agreement on all terms and conditions of employment. Accordingly, we conclude that the language of the representation fee statute is consistent with language in section 5.3 and the impasse resolution statute permitting the submission of disputes over all mandatorily negotiable subjects to compulsory

3/ It is a general rule of statutory construction that when a word or phrase is used more than once in a statute, it should be accorded the identical meaning throughout unless there is a clear indication to the contrary. Oldfield v. New Jersey Realty Co., 1 N.J. 63, 69 (1948).

4/ Section 5.6 does, however, impose certain conditions on the majority representative if it wishes to receive representation fees. For example, the majority representative must establish a demand and return system and must make membership available on an equal basis. Those conditions are not in issue here. For a discussion of them, see In re Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), appeal pending App. Div. Dkt. No. A-29-83T2 ("Boonton"); In re City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982).

interest arbitration.[5/] Accord Mass. Nurses Assn. v. Lynn Hosp., 85 LRRM 2330 (Mass. S.Ct. 1974).

We also note that when the Legislature enacted the representation fee statute, it did not amend the impasse resolution statute, N.J.S.A. 34:13A-18, to preclude an interest arbitrator's consideration of representation fee proposals as well as proposals concerning participation in the State Health Benefits Plan or any governmental or statutory retirement or pension plan. Had the Legislature intended such a result, it could have easily accomplished it. Its failure to use such a logical and readily available route indicates that it had no objection to submitting representation fee proposals to interest arbitration.

In addition to our reading, in pari materia, of section 5.3, the impasse resolution statute, and the representation fee statute, we believe that the public policy behind all three interlocking statutes is served by allowing the submission of representation fee proposals to interest arbitration. The purpose of the impasse resolution statute is to resolve all disagreements arising in negotiations over mandatorily negotiable subjects. It does not make labor relations sense to leave one area of disagreement out of the process for resolving all disputes together, especially since that process is intended to foster voluntary

5/ Compare also the 1982 amendment to N.J.S.A. 34:13A-5.3 which made disciplinary review procedures mandatorily negotiable. Section 5.3, as amended, provides that disciplinary review procedures "...shall be included in any agreement entered into between the public employer and the representative organization." (Emphasis supplied) That obligation is consistent with the submission to interest arbitration of a dispute over such procedures, regardless of the word "agreement." Impasse resolution procedures are merely one way of reaching such an "agreement."

agreements which may be reached after mediation and compromises. Similarly, it would be counterproductive to the representation fee statute's purpose and legislative history to give police and fire departments a right to exclude that term and condition of employment from the impasse resolution process that they do not possess over any other term and condition of employment.6/

The County suggests that submitting a representation fee proposal to interest arbitration implicates constitutional concerns of free association and undue delegation of the employer's policy-making power. Our job is to interpret the New Jersey Employer-Employee Relations Act, not to determine its constitutionality. Boonton. With respect to the alleged free association problems, however, we note Robinson and add that it does not appear that any employee free association issues are affected one way or the other by allowing interest arbitration as a terminal step for resolving an impasse over a representation fee proposal. With respect to the alleged undue delegation problem, we note that a representation fee proposal is a mandatorily negotiable term and condition of employment and is no less delegable than proposals over compensation or other terms and conditions of employment. Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer County Improvement Auth., 76 N.J. 245 (1978). Indeed, a representation fee provision has no relation to the substance of any governmental policy decisions.

6/ Compare In re Township of Hamilton, P.E.R.C. No. 82-121, 8 NJPER 370 (¶13169 1982) and In re Woodbridge Twp. Bd. of Ed., P.E.R.C. No. 81-131, 7 NJPER 330 (¶12147 1981) which held that an employer cannot insist to the point of impasse upon negotiating over the amount of a representation fee.

We also reject the County's reliance on private sector precedent. In the private sector, there is, as a general matter, no compulsory interest arbitration. Employers and employee representatives may consensually agree to use interest arbitration as a method to resolve a negotiations impasse, but generally interest arbitration is not a statutorily mandated procedure and is rather a permissive subject of negotiations. Thus, in the private sector (as in the New Jersey public sector for all employees besides police and fire officers), representation fees or any other terms and conditions of employment must generally be agreed upon by both the employer and employee representative. The statutory scheme under the New Jersey Employer-Employee Relations Act, however, is different with respect to police and fire officers and contemplates the submission of all disputes over terms and conditions of employment to interest arbitration. Bell Telephone is therefore distinguishable because, unlike the Act we are charged with interpreting, neither the federal Labor-Management Relations Act, 29 U.S.C. §151 et seq., nor the state statute dealing with labor disputes in public utilities, N.J.S.A. 34:13B-1 et seq., contemplated the submission of union security disputes to interest arbitration.7/

7/ To the extent that Bell Telephone reasoned that union security was not a "working condition" under the state statute dealing with labor disputes in public utilities, that reasoning is inapplicable here since N.J.S.A. 34:13A-5.5(a) makes it clear that a representation fee proposal is a mandatorily negotiable term and condition of employment. Similarly, to the extent that Bell Telephone rests on a federal preemption analysis, that analysis is inapplicable here since the ordering of New Jersey public sector employer-employee negotiations is a state, not federal, concern.

Finally, the College argues that Local 138's particular representation fee proposal is illegal. We have reviewed the particular terms of Local 138's proposal. It is consistent with the representation fee statute and may be submitted to interest arbitration.

ORDER

The representation fee proposal of PBA Local 138, Sussex County Correction Officers may be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Wenzler, Butch, Suskin, Newbaker and Hipp voted for this decision. None opposed.

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984