

P.E.R.C. NO. 92-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLOSTER,

Petitioner,

-and-

Docket No. SN-91-99

PBA LOCAL 233 (CLOSTER UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines that a salary schedule in a collective negotiations agreement between the Borough of Closter and PBA Local 233 (Closter Unit) is preempted by the Fair Labor Standards Act to the extent it provides that employees assigned to the detective bureau shall receive a detective increment which is paid "in lieu of overtime pay."

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Appearances:

For the Petitioner, DeCotiis & Pinto, attorneys
(James A. Farber and Judy A. Verrone, on the brief)

For the Respondent, Loccke & Correia, attorneys
(Richard D. Loccke, of counsel)

DECISION AND ORDER

On June 25, 1991, the Borough of Closter petitioned for a scope of negotiations determination. It seeks a declaration that an overtime compensation provision in its collective negotiations agreement with PBA Local 233 (Closter Unit) is preempted by the Fair Labor Standards Act, 29 U.S.C. §201 et seq.

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

The PBA represents the Borough's police officers, except for the chief and deputy chief. The parties entered into a contract effective from January 1, 1990 to December 31, 1992. Appendix A sets forth the salary schedule for each rank. It then provides:

In addition to the above salary schedule, all employees assigned to the Detective Bureau shall

receive a detective increment which is paid in lieu of overtime pay. The detective's increment shall be five (5%) percent of that employee's base annual wage.

The detective's increment shall be paid as an addition to the employee's regular pay (folded in).

After this contract was executed, a complaint was filed with the Wage and Hour Division of the United State Department of Labor ("DOL"). On April 2, 1991, DOL's Director for the Northern New Jersey District wrote the Borough's attorney a letter confirming the findings of DOL's investigator. The letter stated, in part:

The investigation revealed overtime and recordkeeping violations. The Act requires that a daily and weekly accurate record of all hours worked be completed and that proper overtime be paid for hours worked over the maximum standards stipulated in 29 CFR Part 553. The investigation revealed the hours worked record for the Detective Bureau to be incomplete.

The investigation also revealed that a flat 5% of base salary is paid as overtime compensation in this department. This is not proper overtime compensation under the Act. Fixed amounts paid for varying hours do not satisfy the requirements of the Act. Accordingly, back wages due the employees have been computed as already explained to you and shown on the computations and summary sent to you by Mr. Braverman.

The investigator's back pay computations were based on the detective's base wage plus the 5% increment.^{1/} The Borough owed one detective \$4813.20 and another detective \$5866.40.

^{1/} For example, if a detective's base annual pay was \$40,000 and the 5% increment was therefore \$2,000, overtime calculations were based on an annual salary of \$42,000, which would then be broken down into a regular hourly rate.

On April 16, 1991, the Borough's attorney wrote a letter to the PBA and the two detectives. The letter stated that the Borough would pay the amounts DOL had directed it to pay. But the letter added that the detectives were unjustly enriched by being paid both the 5% increment in lieu of overtime and the overtime compensation required by the FLSA. The letter therefore requested, in part:

That the parties agree that the language... referring to the five (5%) percent in lieu of overtime pay be deleted.

That the subject officers or the PBA reimburse the Borough of Closter for the five (5%) payments paid over the last two years. It should be noted that the Borough believes it has the right to seek the repayment of the five (5%) payments....

On April 23, 1991, the PBA's attorney rejected these requests. His letter stated that the Borough should comply with federal law, not reduce the detectives' benefits. The letter specifically requested that the compensation program not be changed without prior negotiations with the PBA.

On April 23, 1991, DOL's Director wrote another letter to the Borough's attorney. That letter stated that the Borough could not require the detectives to reimburse the Borough for previous increment payments as a condition of receiving the back wages owed them under the FLSA.

On June 4, 1991, Borough and PBA representatives met to discuss modifying the compensation program for detectives. No agreement was reached.

This petition was then filed. The Borough seeks a declaration that the provision calling for a 5% increment in lieu of overtime is illegal and should be deleted from the contract prospectively.

The PBA has moved to dismiss this petition. It asserts that there is no current scope of negotiations dispute since the parties are not negotiating over a successor contract and no grievance is pending. We deny this motion.

N.J.S.A. 34:13A-5.4(d) provides, in part:

The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations.

N.J.A.C. 19:13-2.2(a)(4) requires a petitioner to state that a dispute has arisen:

i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter or matters which the other party contends is not a required subject for collective negotiations; or

ii. With respect to the negotiability of a matter or matters sought to be processed pursuant to a collectively negotiated grievance procedure; or

iii. Other than in subparagraphs i and ii above, with an explanation of the circumstances.

The first two subparagraphs do not apply. The question is whether special circumstances warrant our considering the Borough's contention that the overtime increment provision is illegal.

In Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), we explained that special circumstances permitting a scope determination absent negotiations or a grievance would exist:

Where a petitioner has made a prima facie showing that (1) a particular clause in a contract has been declared to be an illegal, as opposed to a mandatory or permissive, subject of collective negotiations by an intervening Commission or judicial decision or (2) specific legislation mandates the conclusion that a particular contractual provision is an illegal subject for collective negotiations....

We explained why:

If the Commission refuses to entertain scope applications of this type, the would-be petitioner in a scope proceeding may simply refuse to follow the contractual provisions at issue, often necessitating the filing of an unfair practice charge.... The Commission believes that to best effectuate the purposes of the Act it is preferable under the above circumstances to work within the non-adversarial scope of negotiations process, a procedure that is considerably more expeditious than unfair practice litigation and often not as provocative.

See also Livingston Tp. Bd. of Ed., P.E.R.C. No. 86-135, 12 NJPER 451 (¶17170 1986). This case meets Cinnaminson's requirements. The Borough contends that the overtime increment provision has been declared to be illegal by an intervening decision of the United States Department of Labor. We will consider that contention now rather than await an unfair practice charge.^{2/}

^{2/} We do not agree with the PBA that the employer's recourse is to file a grievance or to appeal the DOL determination. The employer is seeking relief from a contractual provision, not enforcement of that provision, and does not disagree with DOL's determination that the overtime increment does not satisfy the FLSA.

Under Local 195, IFPTE v. State, 88 N.J. 393, 403-04 (1982), a subject is not mandatorily negotiable if it is preempted by a statute or regulation. Preemption will be found if a statute or regulation specifically, expressly, and comprehensively sets a term and condition of employment, thereby eliminating the employer's discretion to negotiate over that subject. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330-31 (1989). DOL's District Director has already determined that paying a flat increment as overtime compensation violates the Fair Labor Standards Act. Neither party disagrees. We therefore hold that the portion of Appendix A calling for a detective increment "in lieu of overtime pay" is preempted by the FLSA.

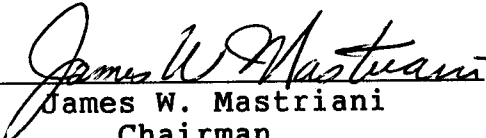
Our scope jurisdiction is narrow and limited to determining the abstract negotiability of the subject in dispute. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We have discharged that duty by holding that the provision calling for an increment in lieu of overtime is preempted. However, the payment of a detective stipend is not illegal by itself nor is basing overtime pay upon the annual salary and increment together. Indeed, the employer has not challenged the determinations of DOL's Director that the detectives' base pay must be calculated by using such an hourly rate retroactively and that the Borough cannot legally require the reimbursement of past increments. We express no opinion on whether the employees have any rights under the FLSA to have such an hourly rate continued prospectively until the contract

expires. The DOL must answer any such question. We also cannot interpret the labor agreement to decide whether the employees have any contractual rights to have the hourly rate continued prospectively or to receive the difference between the 5% increment and FLSA overtime payments if the increment is greater. An arbitrator must answer any such questions. Cf. State of New Jersey, P.E.R.C. No. 86-139, 12 NJPER 484 (¶17185 1986) (employer may agree to overtime compensation payments above those required by FLSA).

ORDER

Appendix A is preempted by the FLSA to the extent it provides that employees assigned to the detective bureau shall receive a detective increment which is paid "in lieu of overtime pay."

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: September 30, 1991
Trenton, New Jersey
ISSUED: October 1, 1991