

P.E.R.C. NO. 99-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Petitioner,

-and-

Docket No. SN-99-14

FMBA LOCAL NO. 22,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Town of Harrison for a restraint of binding arbitration of a grievance filed by FMBA Local No. 22. The grievance asserts that the Town improperly calculated a retiring employee's terminal leave by failing to include holiday pay. The Commission finds that this dispute involves the calculation of terminal leave, not the calculation of the employee's pension. The dispute is mandatorily negotiable and is not preempted by statutes or regulations that deal solely with pension entitlements rather than terminal leave payments. The Division of Pensions has jurisdiction to decide whether holiday pay can be included in base pay for pension purposes.

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, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel; William R. Horwitz, on
the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Charles E. Schlager, Jr., on the brief)

DECISION

On September 25, 1998, the Town of Harrison petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by FMBA Local No. 22. The grievance asserts that the Town improperly calculated a retiring employee's terminal leave by failing to include holiday pay.

The FMBA represents all uniformed employees in the fire department below the rank of chief. The Town and the FMBA are parties to a collective negotiations agreement effective from January 1, 1996 through December 31, 1998. The grievance procedure ends in binding arbitration.

Article XIV(C) provides:

Effective December 31, 1993 and applicable in subsequent years, after twenty (20) years of service, effective in the first calendar year after first anniversary date is attained, holiday pay shall be included in the members base pay in lieu of a separate payment.

On March 17, 1998, the fire chief advised the Town that Deputy Fire Chief Michael DiSalvo would be retiring effective April 1, 1998.

On May 28, 1998, DiSalvo wrote to the Town's chief financial officer requesting a breakdown of the calculation of his terminal leave. DiSalvo stated that the Town's figure was \$1,789.60 short of his calculation, and the difference, over a three year payout, was \$5,368.80.

On May 29, 1998, the chief financial officer responded. She stated:

Enclosed please find a copy of what I believe to be the calculations for your lump sum payment.

I thought that at the council meeting I told you that you had made your calculation with the holiday pay included as your weekly pay.

On June 18, 1998, DiSalvo filed a grievance asserting that his terminal leave was calculated without the inclusion of holiday pay as provided in Article XIV(C) of the agreement. On June 19, 1998, the chief responded:

Since terminal leave is calculated on the basis of base pay, and base pay for 20 year members includes holiday pay; there appears to be merit to this grievance. However, it is not within the scope of my authority to remedy this grievance.

On July 9, 1998, the Town's attorney denied the grievance. That letter states:

After reviewing your grievance, the collective bargaining agreement, and consultation with appropriate municipal personnel, I must advise you that your grievance is denied.

The records of the Town of Harrison indicate a clear, uniform and consistent past practice that supports the methodology utilized by the Town in calculating your terminal leave payment. These records reveal that other members of the fire department retired and were paid terminal leave not including the holiday pay factor.

Further, we have recently been advised that a judicial determination was made in connection with an appeal involving a retired firefighter in Atlantic City where the pension board disallowed the inclusion of holiday type adjustments into base pay at a time close to retirement. Our firm was not involved in that case, however, it would appear to have some potential negative impact should litigation extend it to other communities; unless, it is reversed on appeal.

On July 30, 1998, the FMBA demanded arbitration. This petition ensued.

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 provides 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 do not consider the contractual arbitrability or merits of the grievance.

The Town asserts that the statute and a regulation governing the Police and Firemen's Retirement System prohibit an employer from including holiday pay in base pay when calculating terminal leave. The cited statute and regulation address calculations of employee pensions. N.J.S.A. 43:16A-1(26) provides:

"Compensation" shall mean the base salary, for services as a member as defined in this act, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary duties beyond the regular workday.

N.J.A.C. 17:4-4.1 provides:

(a) Only a member's base salary shall be subject to pension contributions and creditable for retirement and death benefits in the system.

(b) The board shall reserve the right to question any salary to determine its creditability where it is evident from the record that a salary reported for benefits includes extra compensation.

(c) Such extra compensation shall not be considered creditable for benefits and all contributions made thereon shall be returned.

(d) Some of the forms of compensation that have been defined as extra compensation include overtime; bonuses; longevity lump sum payments; individual retroactive salary adjustments or individual adjustments to place a member at the maximum of his or her salary range in the final year of service; increments granted for retirement credit or in recognition of the member's forthcoming retirement or in

recognition of the member's years of service in the community.

(e) All claims involving an increase in compensation of more than 15 percent over that of the previous year, as reported to the retirement system, shall be investigated. Those cases where a violation of the statute is suspect shall be referred to the board.

The FMBA submits a letter dated July 11, 1994 to the Division of Pensions from the Town's Treasurer. That letter requested that the PFRS approve the Town's inclusion of holiday pay in base salary at twenty years of service. On August 16, 1994, the PFRS approved the Township's request to allow the payment of holiday pay in base salary at the twentieth year of service.

The Town responds that the 1994 letter decision was effectively overruled by the Appellate Division in Wilson v. Board of Trustees of the Police and Firemen's Retirement System, App. Div. Dkt. No. A-2123-96T2 (2/20/98), affirming the decision of the Division of Pensions that longevity payments could not be included in base pay to calculate a member's pension payments. The FMBA asserts that Wilson is distinguishable.

The Town also relies on a May 26, 1998 letter decision of the Division of Pensions in Atlantic City (a decision currently on appeal) stating that holiday pay cannot be included in pension calculations if it is paid out in a lump sum, but can be included if it is paid out in routine paychecks.

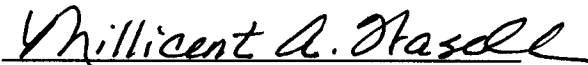
The FMBA argues that the Division of Pension's letter in Atlantic City is distinguishable and that the Division has advised the Town that it has approved the method of calculation advocated by the FMBA.

We recently ruled on an essentially identical issue. Galloway Tp., P.E.R.C. No. 98-132, 24 NJPER 260 (129124 1998). That dispute and this dispute both involve the calculation of terminal leave, not the calculation of the employee's pension, the issue in the unreported Appellate Division decision involving Atlantic City. Galloway concerned the treatment of longevity payments and tuition allowances for terminal leave purposes. This case involves holiday pay. This distinction is not significant. Based upon the analysis set forth in our Galloway opinion, we decline to restrain arbitration. We note that the Division of Pensions has jurisdiction to decide whether holiday pay can be included in base pay for pension purposes.

ORDER

The request of the Town of Harrison for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: December 17, 1998
Trenton, New Jersey
ISSUED: December 18, 1998