

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE,

Petitioner,

-and-

Docket No. SN-2003-37

P.B.A. LOCAL 89,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of proposals made by P.B.A. Local 89 for inclusion in a successor collective negotiations agreement with the City of Orange. The Commission finds that a proposal to delete the word "ordinance" from a miscellaneous provision is mandatorily negotiable; an employer cannot, by passage of a local ordinance, preempt a mandatorily negotiable term and condition of employment. The Commission finds that a proposal concerning promotional criteria is mandatorily negotiable to the extent it requires the employer to not change promotional criteria during a particular promotional process; the employer can change criteria subject to any negotiated notice requirements and, the employer has a prerogative not to fill a vacancy. The Commission finds that a proposal concerning the restoration of expended leave time in the event an injury is deemed covered by the Workers' Compensation Act to be mandatorily negotiable. The Commission concludes that worker's compensation laws do not address or foreclose a majority representative's efforts to negotiate contractual clauses providing leaves of absence and to enforce such clauses by seeking remedies limited to restoring sick leave days. The Commission concludes that a proposal concerning newly hired officers receiving credit and benefits for prior service is mandatorily negotiable.

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.

P.E.R.C. NO. 2003-91

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Respondent.

Appearances:

For the Petitioner, Lum, Danzis, Drasco & Positan, LLC,
attorneys (Domenick Carmagnola, of counsel; Ramon
Rivera, on the brief)

For the Respondent, Uffelman, Rodgers, Kleinle & Mets,
attorneys (James M. Mets, of counsel; Leonard C.
Schiro, on the brief)

DECISION

On January 3, 2003, the City of Orange petitioned for a
scope of negotiations determination. The City seeks a
determination that certain issues submitted by P.B.A. Local 89 to
interest arbitration for inclusion in a successor collective
negotiations agreement are not mandatorily negotiable.

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

The PBA represents all sworn police officers below the rank
of sergeant. The City and the PBA are parties to a collective
negotiations agreement that expired on December 31, 2001. The
parties are in negotiations for a successor agreement. On

December 27, 2002, the PBA petitioned for interest arbitration. This petition ensued.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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]

We consider only whether a contract proposal is mandatorily negotiable. It is our policy not to decide whether proposals, as opposed to grievances, concerning police and fire department

employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Article XXXIII is entitled Miscellaneous. Section 1 provides:

There should be no prohibition against any fundraising functions sponsored by the P.B.A., except as provided by State law or Ordinance. All fundraising activities shall be conducted outside the employee's normal work day.

The PBA proposes deleting the word "Ordinance" from this section. The City argues that deletion of the word ordinance would limit its policymaking power to control fund-raising activities. The City also argues that the proposal contravenes N.J.S.A. 40A:48-1 which allows a governing body to pass, amend, repeal and enforce ordinances to regulate the duties, terms and salaries of officers and employees. The PBA responds that an employer may obligate itself not to use ordinances to shield itself from contractual obligations.

An employer cannot, by passage of a local ordinance, preempt a mandatorily negotiable term and condition of employment; only a specific statute or regulation can do so. City of Paterson, NJPER Supp.2d 93 (¶76 1981) aff'g P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979). We have not been presented with any details of the PBA's fund-raising activities and to what extent they may

relate to negotiable terms and conditions of employment. If the section is amended as proposed and if a dispute arises over the arbitrability of a specific grievance, the employer may file a scope of negotiations petition focusing on the particular dispute.

Section 9 of Article XXXIII provides:

The City will maintain a current promotional list for the ranks of Sergeant, Lieutenant, and Captain throughout the duration of this Agreement.

The PBA proposes adding a sentence to this section stating: "The City agrees that it will not change promotional criteria during the promotional process."

The City argues that promotional criteria are not mandatorily negotiable. It asserts that restricting its ability to change promotional criteria during the promotional process would be detrimental since the promotional process could take several months to complete. The PBA responds that the proposal would not preclude the employer from changing promotional criteria, but would require it to adhere to an existing promotional list unless proper notice is given.

Promotional criteria are not mandatorily negotiable while promotional procedures are. State v. State Supervisory, 78 N.J. at 90. Absent preemption, an employer may normally agree to promote employees in the order they are listed on a promotional list developed by applying its own unilaterally-set criteria to

the eligible candidates. Id. at 92; see also Department of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981). Unless an employer has announced a change in its promotional criteria, it may remain obligated to fill positions from that list. Wall Tp., P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001), aff'd ___ NJPER ___ (¶_____ App. Div. 2003); Howell Tp., P.E.R.C. No. 95-59, 22 NJPER 101 (¶27052 1996).

The PBA's proposal is mandatorily negotiable to the extent it requires the employer to not change promotional criteria during a particular promotional process. The employer can change criteria subject to any negotiated notice requirements. And the employer can choose to exercise its prerogative not to fill a vacancy. Newark State-Operated School Dist., P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000).

The PBA has proposed adding the following new section to Article XXXIII:

Section 15: An employee who suffers an on-the-job injury or illness and has used accrued contractual leave time, as the result thereof, shall have all accrued time expended reinstated if said employee's injury or illness is deemed covered by the Workers' Compensation Act.

The City argues that reimbursement for leave time for a work-related injury is preempted by the workers' compensation statute. It argues that the statute was not intended to require

employers to reinstate sick or vacation time used by an injured employee who has applied for workers' compensation benefits. The PBA responds that paid leave for work-related injuries is mandatorily negotiable and that workers' compensation laws do not preempt contractual claims to restore lost leave.

The workers' compensation laws do not address or foreclose a majority representative's efforts to negotiate contractual clauses providing leaves of absence and to enforce such clauses by seeking remedies limited to restoring sick leave days.

Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997). The employer has not raised any preemption argument not already rejected by our case law. See also New Jersey State Judiciary, P.E.R.C. No. 2001-16, 26 NJPER 431 (¶31169 2000).

The PBA has proposed adding the following new section to Article XXXIII:

Section 17: If the Employer exercises its right under a Department of Personnel procedure or other procedure authorized by law to hire an officer with prior experience (including but not limited to the Inter-Governmental Transfer Program), the following shall apply:

- A. Such transferring officer shall be entitled to credit for prior service with regard to time-based benefits, including but not limited to steps on the salary guide and vacation schedule.

- B. Such transferring officer shall not receive credit and shall be considered a new hire for seniority based benefits, including but not limited to vacation selection, overtime selection, and seniority based bidding assignments.
- C. Such transferring officer shall be considered a new hire for the purposes of layoff and eligibility for promotion if the Department of Personnel rules and regulations do not preempt such designation.

The City argues that the criteria for hiring police officers is a managerial prerogative and not mandatorily negotiable. It further argues that the terms of the Intergovernmental Transfer Program are not mandatorily negotiable unless the City decides to negotiate such items. The PBA responds that this proposal concerns the mandatorily negotiable issues of initial salary guide placement, vacation selection, overtime selection, seniority-based shift selection, and layoff seniority.


The Intergovernmental Transfer Program was developed and is administered by the Department of Personnel. It provides the opportunity for New Jersey State and local government employees with permanent civil service status to transfer between State and local employment jurisdictions while maintaining their permanent status. N.J.A.C. 4A:4-7.1A. N.J.A.C. 4A:4-7.4 provides that employees transferred in accordance with the program shall retain accumulated seniority for purposes of promotional, layoff or demotional rights, and sick and vacation leave entitlements.

Those protections, however, do not apply to police officer and firefighter titles. N.J.A.C. 4A:4-7.4. Thus, for police officers, there do not appear to be any preemptive statutes or regulations. Therefore, issues of initial salary guide placement and seniority in vacation selection, overtime and bidding remain mandatorily negotiable. In addition, if permitted by Department of Personnel rules, a proposal to treat transferees as new hires for layoff and promotional purposes is mandatorily negotiable.

ORDER

The PBA's proposals to amend Article XXXIII are mandatorily negotiable.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. Commissioner Ricci was not present. None opposed.

DATED: June 26, 2003
Trenton, New Jersey
ISSUED: June 27, 2003