

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Petitioner,  
-and-

Docket Nos. SN-2003-40  
SN-2003-41

PASSAIC COUNTY SHERIFF'S  
OFFICERS PBA LOCAL 197,  
and PASSAIC COUNTY SHERIFF'S  
SUPERIOR OFFICERS PBA LOCAL 197

Respondents.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals which the Passaic County Sheriff's Officers PBA Local 197 and Passaic County Superior Officers PBA Local 197 have submitted to interest arbitration for inclusion in successor collective negotiations agreements with the County of Passaic. The Commission determines that a proposal that officers be considered on duty one hour prior to the start of each shift and one hour after the completion of each shift for insurance purposes is mandatorily negotiable to the extent the proposal seeks false arrest and indemnity insurance for off-duty employees, but not to the extent a change in "on duty" status contravenes State or federal law. The Commission determines that the proposal that holiday pay be paid along with regular payroll is mandatorily negotiable, so long as the proposal does not seek to have the arbitrator rule on pension creditability. Sections 1-6 of a proposal on departmental investigations are mandatorily negotiable as they expressly pertain to procedural aspects of departmental investigations; section 9 is not mandatorily negotiable since a union cannot require that an employer show a higher standard than "reasonable individualized suspicion" before subjecting an employee to urinalysis or blood screening; section 10 is mandatorily negotiable as it is part of a policy that applies to departmental, not criminal investigations, and it provides procedural protections during those investigations consistent with a State statute; Section 11 which requires that disciplinary charges against employees be brought within 45 days as that period is calculated by N.J.S.A. 40A:14-147; The Commission finds that Section 1 of a proposal concerning transfers and staffing vacancies which permits an employee to

notify an employer of his or her interest in filling a vacancy or lateral transfer is mandatorily negotiable. Sections 2 and 3 are not mandatorily negotiable because they do not accommodate the employer's prerogative to assign employees within a shift based on criteria other than seniority or service record.

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. 2003-96

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Petitioner,

-and-

Docket Nos. SN-2003-40  
SN-2003-41

PASSAIC COUNTY SHERIFF'S  
OFFICERS PBA LOCAL 197,  
and PASSAIC COUNTY SHERIFF'S  
SUPERIOR OFFICERS PBA LOCAL 197,

Respondents.

Appearances:

For the Petitioner, Genova, Burns & Vernoia, attorneys  
(Doug E. Solomon, on the brief)

For the Respondents, Loccke & Correia, P.A., attorneys  
(Richard D. Loccke, of counsel; Michael A. Bukosky, on  
the brief)

DECISION

On February 10, 2003, the County of Passaic filed two  
petition for scope of negotiations determination. The County  
seeks negotiability determinations concerning six proposals which  
Passaic County Sheriff's Officers PBA Local 197 and Passaic  
County Superior Officers PBA Local 197 have submitted to interest  
arbitration for inclusion in successor collective negotiations  
agreements with the County.

The parties have filed briefs and exhibits.<sup>1/</sup> The County has submitted the certification of its counsel, Doug Solomon. These facts appear.

The Passaic County Sheriff's Officers PBA Local 197 represents all Passaic County non-supervisory sheriff's and correctional officers. The Passaic County Sheriff's Superior Officers PBA Local 197 represents all sworn supervisory sheriff's officers. The parties' most recent collective negotiations agreements expired on December 31, 2002. On January 9, 2003, the unions petitioned for interest arbitration. These scope petitions 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

---

<sup>1/</sup> The County filed separate scope of negotiations petitions and separate initial briefs. The unions filed a single brief for both petitions, citing the identical issues in each case and seeking consolidation of the cases. The County filed a single reply brief for both cases. Due to the identical issues in dispute, we consolidate the cases. On April 29, 2003, the unions sought leave to file an additional brief in response to "additional factual and legal allegations raised by the County" in its reply brief. That request was granted.

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).<sup>2/</sup>

---

<sup>2/</sup> We reject the unions' assertion that the petitions are untimely. They were timely filed on the day the County's answers to the unions' interest arbitration petitions were due. See N.J.A.C. 19:16-5.5(c).

Wage Increase

The County and the unions met three times prior to the expiration of the agreements: October 30, November 22, and December 19, 2002. The unions provided the County with their written proposals at the October 30 negotiations session. The wage proposal stated that the unions seek across-the-board wage increases in each year of the contract and that details would be supplied. In his certification, the County's counsel states:

The Union proposed that members' salaries be tied to the salaries of police officers in Passaic County municipalities. Specifically, the Union sought to have members' salaries increased to the 90th percentile of the salaries of such municipal officers effective January 1, 2003, and to have future wage increases for members based on the wage increases received by these same municipal police officers, such that members would remain at the 90th percentile.

The County argues that, under this system, annual increases would no longer be determined by negotiations or interest arbitration, but by the results of negotiations between Passaic County municipalities and their police unions. The County states that the unions' attorney indicated that this proposal, if implemented, would result in approximately a 36% increase in the top rate paid to correctional and sheriff's officers. The County recognizes that salary is ordinarily mandatorily negotiable, but argues that these wage proposals are illegal parity clauses. The County also argues that these proposals would contravene statutes

that require County officials to manage the County's finances. N.J.S.A. 40:20-1.

The unions argue that wage rates are one of the most fundamental terms and conditions of employment. They further argue that the County has misrepresented its wage proposal and denies that it seeks to tie its wage proposals to future increases in other municipalities. The unions state that they have proposed static numbers for wage increases that are readily identifiable by current salary numbers, but that due to the complex nature of applying such numbers to a complicated wage scale, it has not yet placed the actual numbers into a new salary guide.

The County replies that the unions have not provided any certification of facts to dispute the assertions made by the County's counsel in his certification concerning the wage proposal. The County states that the unions have put forth no description of their wage proposal and that the proposal as described by their attorney at the negotiations session would illegally tie member's salaries to the salaries negotiated by police officers in Passaic County municipal police departments.

In their sur-reply, the unions dispute the assertion that their wage proposal is an illegal parity clause. They state that 36% is a sum certain and that the failure to do the computations does not make the wage proposal an illegal parity clause.

The unions claim that their proposal is for finite salary increases that can be identified and placed into a salary guide. But because the union has not yet submitted such a finite proposal, we are not in a position to determine its negotiability at this juncture. Once such a proposal is presented to the arbitrator, the employer may refile its petition should the unions present a demand for wage increases pegged to future wage increases in surrounding municipalities. If necessary, we can address the parity and undue delegation arguments at that time.

Work Week - Hours of Work

Article V sets forth the work week and work hours for employees, provides that employees may be required to work any and all shifts as needed, and states that employees may be placed on staggered starts and finishes. The unions propose adding the following:

Officers will be considered "on duty" one (1) hour prior to shift start and one (1) hour after completion of shift worked for insurance purposes.

The County argues that this proposal is preempted by 29 C.F.R. §785.35, a regulation implementing federal wage and hour laws. That regulation declares that travel time to and from work is not considered to be work time. The County also contends that the proposal is preempted by State statutes concerning workers' compensation and pension coverage purposes. According to the employer, the Workers' Compensation Act, N.J.S.A. 34:15-1 et



seg., does not allow for compensation for employees who are injured going to and coming from work. See Zelasko v. Refrigerated Food Express, 128 N.J. 329 (1992). As for pensions, the employer argues that pension issues may not be submitted to interest arbitration. N.J.S.A. 34:13A-18.

The unions respond that their objective is to receive coverage for liability purposes when officers are forced to act as law enforcement personnel while off duty. It argues that false arrest and indemnity insurance are mandatorily negotiable. The unions also state that parties may negotiate insurance premiums that enhance statutorily mandated insurance coverage.

The County replies that it is undisputed that the unions' proposal to revise the definition of work week to include the hour before and after work as on duty time is not for indemnity insurance reasons, but rather to define them as on duty for pension and workers' compensation benefits.

Both parties are correct. To the extent the unions' proposals seek false arrest and indemnity insurance for off-duty employees, they are mandatorily negotiable. See State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985). To the extent the proposals seek to set the length of the workday for wage and hour or pension purposes, or contravene Workers' Compensation regulations, they are not mandatorily negotiable. The arbitrator should be guided by this determination and cannot

award a change in "on duty" status that contravenes State or federal law.

#### Holiday Compensation

The unions propose that holiday pay be paid along with the regular payroll and therefore used for all compensation purposes. The unions also propose a change in the method of payment of a uniform allowance.

The County argues that the unions cannot seek to have uniform and holiday pay included in base salary for pension purposes. The unions respond that including holiday pay in regular salary is a matter of compensation and is mandatorily negotiable. They acknowledge that whether such compensation is creditable for pension purposes is for the Division of Pensions. The unions do not address the uniform allowance proposal.

Once again, both parties are correct. We have previously held that proposals to include items such as terminal leave or holiday pay in base salary are mandatorily negotiable. But we have done so with the understanding that the Division of Pensions must decide whether those aspects of compensation are creditable for pension purposes. See, e.g., Delran Tp., P.E.R.C. No. 99-86, 25 NJPER 166 (¶30076 1999). So long as the unions are not seeking to have the arbitrator rule on pension creditability, the proposals are mandatorily negotiable.

#### Departmental Investigations

The unions have proposed a new article entitled Departmental Investigations. It provides:

In an effort to insure that departmental investigations are conducted in a manner which is conducive to good order and discipline, the following rules are hereby adopted:

1. The interrogation of a member of the department shall be at a reasonable hour, preferably when the member of the department is on duty, unless the exigencies of the investigation dictate otherwise.
2. The interrogations shall take place at a location designated by the Sheriff or designee. Usually it will be at the Sheriff's office or the location where the incident allegedly occurred.
3. The member of the department shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the members of the allegations should be provided. If it is known that the member of the department is being interrogated as a witness only, he should be so informed at the initial contact.
4. The questioning shall be reasonable in length. Fifteen (15) minutes time shall be provided for personal necessities, meals, telephone calls, and rest periods at the end of every two (2) hours.
5. The member of the department shall not be subject to any offensive language, nor shall he be threatened with transfer, dismissal or other disciplinary punishment. No promise of reward shall be made as an inducement to answering questions.
6. At every stage of the proceedings, the Department shall afford an opportunity for a member of the department, if he so requests, to consult with counsel and/or his Association

representative before being questioned concerning a violation of the rules and regulations during the interrogation of a member of the department, which shall not delay the interrogation beyond one (1) hour for consultation with this Association representative.

\* \* \*

9. No employee covered by this Agreement shall be subjected to any urinalysis or blood screening unless one of the two (2) circumstances exist: (1) Where the employer has probable cause to suspect that there is a job-related individualized impact with respect to the specific employee being tested. (2) Where the urinalysis or blood testing is done as part of a bona fide annual physical examination which is done for the Sheriff's Office.

10. Under no circumstance shall the employer offer or direct the taking of a polygraph or voice print examination for any employee covered by this Agreement.

11. Under no circumstance shall an employee be subject to any charge whatsoever after 45 days. The 45 day period shall be calculated consistent with N.J.S.A. 40A:14-147.

The County argues that: sections 1-6 of the proposal address non-mandatorily negotiable aspects of disciplinary investigations; section 9 impermissibly requires it to demonstrate a standard higher than "reasonable individualized suspicion" in order to require an employee to submit to a drug screening; section 10 has been found to be not mandatorily negotiable; and Section 11 is not mandatorily negotiable because it creates an absolute limit on an employer's ability to subject an employee to any disciplinary charge after 45 days.

The unions respond that its proposals contain procedural safeguards to be implemented during departmental hearings. They contend that these procedures are consistent with the Law Enforcement Officers' Protection Act, N.J.S.A. 40A:14-181, N.J.S.A. 40A:14-106a, and Attorney General Guidelines that provide procedural and substantive safeguards during departmental and criminal investigations. The unions assert that officers may seek additional procedural safeguards in addition to the Law Enforcement Officers' Protection Act.

The County replies that the fact that a proposal may be consistent with a statute or guideline does not make it mandatorily negotiable.

The unions respond that their proposals pertain to procedural aspects of discipline and that if the proposal touches on a managerial concern, the County can raise an objection at that time in a subsequent scope proceeding.

Sections 1-6 are mandatorily negotiable. The provisions expressly pertain to procedural aspects of departmental investigations. We have held similar provisions to be mandatorily negotiable. See, e.g., Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). Our caution in Franklin Tp. and this employer's concern about interference with criminal investigations do not apply to these proposals. Unlike Franklin

Tp., the preamble to these proposals limits the procedural safeguards to departmental, not criminal, investigations.

Section 9 is not mandatorily negotiable. As we stated in Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993), a union cannot require that an employer show a higher standard than "reasonable individualized suspicion" before subjecting an employee to urinalysis or blood screening.

Section 10 is mandatorily negotiable. It is part of a policy that applies to departmental, not criminal investigations, and it provides procedural protections during those investigations consistent with a State statute. N.J.S.A. 2C:40A-1 (employer who requests or requires employee to take lie detector test as condition of employment or continued employment commits a disorderly persons offense). Our early case law finding prohibitions on the use of polygraph clauses to be not mandatorily negotiable involved their use in criminal investigations. See South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986); State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985); see also Police Officers Local 346 v. Massachusetts Labor Relations Commission, 462 N.E.2d. 96 (Mass. Sup. Jud. Ct. 1984). A more recent case held that a clause was not mandatorily negotiable, not after application of the negotiability balancing test, but because it suggested that an employer could request consent for a polygraph test in violation

of N.J.S.A. 2C:40A-1. Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998). Applying the negotiability balancing test, we conclude that the employees' interest in prohibiting the use of polygraph tests in departmental (not criminal) investigations outweighs any employer interest in administering such a test in violation of State law.<sup>3/</sup>

Paragraph 11 requires that disciplinary charges against employees be brought within 45 days as that period is calculated by N.J.S.A. 40A:14-147. We have previously stated that a time period for bringing disciplinary charges can safeguard important employee interests in having charges speedily heard and determined. City of Newark, P.E.R.C. No. 86-79, 12 NJPER 91 (¶17033 1985). But we have held absolute prohibitions to be not mandatorily negotiable because they do not permit the employer to show good cause for a delay. For example, in Newark, we noted the city's concern about completing criminal investigations before filing disciplinary charges. Section 11 incorporates N.J.S.A. 40A:14-147. That statute sets a 45-day time limit on filing departmental charges, but has an exception that addresses the concern about interference with criminal investigations. It states:

---

<sup>3/</sup> Both parties treat voice print examinations as an issue of truth testing, or lie detection. Given that understanding, we assume that voice print examinations for that purpose are prohibited by N.J.S.A. 40A:14-147.

[t]he 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation.

We see no reason to find that the employer's prerogative extends beyond what the Legislature has permitted.

Transfer and Staffing Vacancies

The PBA has proposed the following new article entitled Transfer and Staffing Vacancies. It provides:

When a vacancy occurs in a specialized division of the Sheriff's Department, or when any lateral transfers are to be effectuated from the title of Correction Officer to the title of Sheriff's Officer, whether by resignation, retirement, promotion, death or transfer, the following procedure shall be followed:

1. Sheriff's Officers or Correction Officers, who have served three (3) years or more from the date of the permanent appointment and who are interested in vacancy or lateral transfer shall so signify to the Employer in writing.
2. If the Employer, at his sole option, determines to fill the vacancy or to implement the lateral transfers, the employer shall fill the position by the appointment of any one of those who have submitted their names in writing.
3. The employer will consider the length of service and the applicant's service



record as a factor in making the selection.

The County argues that transferring employees is a managerial prerogative and that a proposal which seeks to require that an employer apply seniority to transfer determinations is not mandatorily negotiable. The County concedes that procedural aspects of transfers and reassignments are mandatorily negotiable. The County also argues that these proposals are not mandatorily negotiable because they dictate criteria for making transfers and filling vacancies.

The unions argue that these proposals are standard seniority preference clauses affecting general assignments within a shift and are mandatorily negotiable. Noting Camden Cty Sheriff, P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd 27 NJPER 357 (¶32128 App. Div. 2001), the unions state that they would be willing to add statements to the proposals that the employer could override seniority preference when it can show that special training, skills or other qualifications are necessary.

The County replies that the unions are attempting to make their proposals mandatorily negotiable by amending them to provide that the County can override the clause if special skills are needed. It maintains that the proposal in Camden Cty. Sheriff, relied on by the unions, is distinguishable in that that proposal did not restrict the County's right to transfer

employees, nor provide criteria by which transfer determinations must be made.

Section 1 is mandatorily negotiable. It permits an employee to notify the employer of his or her interest in filling a vacancy or a lateral transfer.

Sections 2 and 3 set the criteria for lateral transfers, limit the pool of available transferees, and restrict the employer's prerogative to fill vacancies or laterally transfer employees based on its assessment of relative qualifications. The unions' reliance on Camden Cty. Sheriff is misplaced. That case recognized that public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). The disputed provision in Camden involved shift selection, where employees had a significant interest in having seniority considered. The provision did not involve filling vacancies or lateral transfers into different positions on the same shift. And even Camden required that in order for the shift assignment proposal to be mandatorily negotiable, the employer had to have the right to deviate from seniority when a position requires special skills, training or qualifications. Sections 2 and 3 do not accommodate


the employer's prerogative to assign employees within a shift based on criteria other than seniority or service record. Accordingly, they are not mandatorily negotiable.

ORDER

The following proposals of Passaic County Sheriff's Officers PBA Local 197 and Passaic County Superior Officers PBA Local 197 are mandatorily negotiable: Work Week - Hours of Work, to the extent the proposals seek false arrest and indemnity insurance for off-duty employees; Holiday Compensation; Departmental Investigations, Section 1-6, 10 and 11; Transfer and Staffing Vacancies, Section 1.

The following proposals are not mandatorily negotiable: Work Week - Hours of Work, to the extent the proposals seeks to set the length of the workday for wage and hour or pension purposes, or contravene Workers' Compensation regulations; Departmental Investigations, Section 9; Transfer and Staffing Vacancies, Sections 2 and 3.

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