

P.E.R.C. NO. 2004-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY PROSECUTOR,

Petitioner,

-and-

Docket No. SN-2003-52

ESSEX COUNTY PROSECUTOR'S
P.B.A. LOCAL 325,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of contract proposals which the Essex County Prosecutor's P.B.A. Local 325 has submitted to interest arbitration for inclusion in a successor collective negotiations agreement between the PBA and the Essex County Prosecutor. The Commission first finds that the scope of negotiations petition was untimely filed concerning some of the disputed proposals. The Commission finds no compelling reasons, except for one instance, for relaxing the time period set in N.J.A.C. 19:16-5.5(c) and considering negotiability challenges made almost one year after the filing of the interest arbitration petition. The Commission determines that a proposal to change the job title of Investigator to Prosecutor's Detective is preempted by statute and cannot be submitted to interest arbitration. The Commission also determines the negotiability of two proposals found to be timely. The Commission finds that a proposal concerning the eligibility for retiree health benefits is not mandatorily negotiable because it is preempted by the uniformity requirements of N.J.S.A. 40A:10-23. The Commission finds that a proposal that the employer pay health care benefits for dependents upon the death of a retiree is not mandatorily negotiable to the extent, if any, the proposal seeks to negotiate benefits for employees who have already retired.

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, Genova, Burns & Vernoia, attorneys
(Lynn S. Degen, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, P.C., attorneys
(Paul L. Kleinbaum, on the brief)

DECISION

On March 21, 2003, the Essex County Prosecutor petitioned for a scope of negotiations determination. The Prosecutor seeks a determination concerning the negotiability of eight proposals that Essex County Prosecutor's P.B.A. Local 325 has submitted to interest arbitration for inclusion in a successor collective negotiations agreement between the Prosecutor and the PBA.

The parties have filed briefs and exhibits. The Prosecutor has provided the certification of the County's Director of Labor Relations, Dolores Capetola. The PBA has submitted the certification of its president, Guy Casale. These facts appear.

The PBA represents detectives and investigators in the Prosecutor's office. The most recent collective negotiations agreement expired on December 31, 2001. On March 27, 2002, the PBA petitioned for interest arbitration.

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).

We first consider the PBA's argument that the scope petition is untimely with respect to six issues. The chronology of events leading to the scope petition follows.

The parties met on four occasions prior to the filing of the interest arbitration petition: December 5, 2001 and January 11, February 25, and March 11, 2002. At the February 25 session, the PBA provided the Prosecutor with these proposals:

1. 5 percent salary increase for each year of a 3-year contract. (County countered with 1% increase in July of each year beginning in July '02)
2. Provision that present retirement benefits cannot be retroactively withdrawn. Vesting language similar to IBEW.
3. \$3,400 for a degree and pro-rata share for others according to the educational allowance.
4. Automatic increment on the first of each year for those investigators not at top salary. Retroactive to January 1.
5. Provision for "JUST Cause" termination. (SEE ATTACHED).

6. Provision requiring Prosecutor to allow representation for arbitration of minor disciplinary disputes.
7. Arbitration for disciplinary disputes.
8. After first year of employment four (4) weeks (20 days) vacation. (Same as assistant prosecutors contract)
9. Increase in Development Fund of \$300/member.
10. Compensation of \$1,250.00 for Bi-lingual investigators. (Write, speak and understand)
11. Add to Article 7, Section 4: Creation of Senior Investigator status. This position shall begin with the 15th year of service in law enforcement with compensation of 3.75% above top salary.
12. Change of job title from Investigator to Prosecutor's Detective.
13. Memorialize current practice for outside employment.
14. Clause for Representative status allotting 20 hours/week.
15. In the event layoffs occur - Policy that Seniority will prevail, assuming that no special qualification[s] are required.

The PBA's interest arbitration petition, filed on March 27, 2002, listed the following economic and non-economic issues:

Economic Issues: salary, education allowance, automatic increments, vacation, development fund, compensation for bilingual investigators, Senior Investigator position, PBA leave, and leave policy for pregnant Investigators.

Non-Economic Issues: notification of Weingarten rights, provision permitting tape-recording of discipline meetings, provision for just cause discipline and disciplinary

procedures, change of job title from Investigator to Detective, Memorialize current practice for outside employment, seniority for layoffs, and vesting of health benefits for retirees.

On April 19, the Prosecutor responded to the interest arbitration petition; the response listed four additional economic issues and three additional non-economic issues.

On May 13, 2002, an arbitrator was appointed. The parties met with the arbitrator in a pre-arbitration mediation session on August 14, 2002. Two subsequent sessions were scheduled for September 30 and December 4, 2002. Neither session was held.

On March 10, 2003, the parties met with the arbitrator in a second pre-arbitration mediation session at which the PBA reviewed its February 25, 2002 proposals and orally submitted three additional proposals. The Prosecutor advised that its proposals were set forth in its April 19, 2002 response to the interest arbitration petition; that there would be no wage increase in any year of the successor contract; and that it intended to file a scope petition over several of the issues. On March 21, 2003, this scope petition was filed challenging the negotiability of eight PBA proposals.

The PBA asserts that under N.J.A.C. 19:16-5.5, the scope petition is untimely as to six of the proposals that were presented on February 25, 2002 (Proposal 2 - retiree health benefits - vesting and provision prohibiting retroactive

withdrawal of benefits; Proposal 5 - just cause for termination; Proposal 6 - representation for arbitration for minor disciplinary disputes; Proposal 7 - arbitration for disciplinary disputes; Proposal 12 - change of job title from investigator to detective, and Proposal 15 - seniority for layoffs). It argues that the Prosecutor never raised any negotiability question until the March 14, 2003 pre-arbitration mediation session.

The Prosecutor responds that its petition should be considered timely. It states that for approximately seven months the parties had not participated in any activity; that the issues remain far from settled; that as late as March 10, 2003 the PBA was still making new proposals, and that in that intervening time period a new administration was elected and new labor counsel appointed. The Prosecutor further states that it was not able to determine which issues remained unsettled until the March 10, 2003 session. It argues that under N.J.A.C. 19:10-3.1, the time frame set forth in N.J.A.C. 19:16-5.5 can be adjusted in appropriate circumstances and that there is no detriment to the PBA should the petition be heard since it was filed right after the March pre-arbitration mediation and the arbitration hearings are not scheduled until October 2003.

N.J.A.C. 19:16-5.5(c) provides:

Where a dispute exists with regard to whether an unresolved issue is within the required scope of negotiations, the party asserting that an issue is not within the required

scope of negotiations shall file with the Commission a petition for scope of negotiations determination pursuant to chapter 13 of these rules. This petition must be filed within 14 days of receipt of the notice of filing of the petition requesting the initiation of compulsory interest arbitration. The failure of a party to file a petition for scope of negotiations determination shall be deemed to constitute an agreement to submit all unresolved issues to compulsory interest arbitration.

N.J.A.C. 19:10-3.1 provides, in part:

(a) Except as stated in (c) below, whenever the commission or a designated officer finds that unusual circumstances or good cause exists and that strict compliance with the terms of these rules will work an injustice or unfairness, the commission or such officer shall construe these rules liberally to prevent injustices and to effectuate the purposes of the act (N.J.S.A. 34:13A-1 et seq.).

(b) When an act is required or allowed to be done at or within a specified time, the commission may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the act (N.J.S.A. 34:13A-1 et seq.).

In Borough of Roseland, P.E.R.C. No. 2000-46, 26 NJPER 56 (¶31019 1999), we cautioned parties to be attentive to the time period in N.J.A.C. 19:16-5.5(c) and to be aware that a scope petition is presumptively time-barred unless filed within the time specified by that rule or the time set by the Director of Arbitration for filing a response to the interest arbitration petition. See also City of Newark, P.E.R.C. No. 92-20, 17 NJPER

416 (¶22200 1991) (dismissing petition filed one month after arbitration record closed and where employer knew of negotiability issue for over two years); but see Roseland (relaxing rule where Commission had not yet clarified approach to applying N.J.A.C. 19:16-5.5(c)); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301, 303 n.1 (¶23129 1992) (declining to dismiss petition where union had revised proposal and new dispute arose over negotiability of revision); Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998) (declining to dismiss petition filed on due date set by Director of Arbitration for responding to an interest arbitration petition).

Here, unlike circumstances in prior cases where we have declined to dismiss a petition as untimely, the Prosecutor was aware of the PBA's proposals as early as February 2002; the proposals were included in the PBA's interest arbitration petition filed on March 27, 2002; it does not appear that the proposals have been modified; and, except for one proposal, it does not appear that the proposals contravene any statutes or regulations. The parties met at least three times after that date at which time the PBA did not withdraw any of the proposals. The Prosecutor did file a Petition for Issue Definition Determination together with its response.^{1/}

^{1/} N.J.A.C. 19:16-5.5(d) provides that where a dispute exists regarding the identification of an issue as economic or
(continued...)

Based on the above, and except for one instance, we find no compelling reasons or unusual circumstances for relaxing the time period in N.J.A.C. 19:16-5.5(c) and considering negotiability challenges made almost one year after the filing of the interest arbitration petition. See Delran Tp.; Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997).^{2/} We will, however, consider the petition with respect to the two proposals first presented at the March 10, 2003 session.

We begin with Proposal 12 to change the job title of Investigator to Prosecutor's Detective. We address this proposal despite the untimely scope petition because we believe it seeks to have the Prosecutor take an action that contravenes a statute.

N.J.S.A. 2A:157-2 is entitled "County detectives generally; appointment; salary; duties." It provides:

The prosecutor in each of the several counties of this State may appoint such

1/ (...continued)
noneconomic, the party contesting the identification of the issue shall file with the Commission a petition for issue definition determination. The employer's issue definition petition disputed the identification of the just cause and disciplinary proposals, the seniority for layoffs proposal, and the vesting of health benefits for retirees proposal. The petition was held in abeyance until the parties notified the Commission of the terminal procedure. When neither party responded to a status letter dated September 26, 2002, the issue definition file was closed on November 21, 2002.

2/ In light of the enactment of L. 2003, c. 173, the PBA has withdrawn Proposal 5 dealing with just cause for termination.

number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this chapter provided, to be known as county detectives, to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall be in the classified service of the civil service and shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs in criminal matters.

N.J.S.A. 2A:157-3 provides that in first-class counties such as Essex County, there may be a maximum of 50 county detectives.

N.J.S.A. 2A:157-10 is entitled "County investigators generally; appointment and removal; salary; duties." It provides:

In addition to the office of county detective, there is created in the office of the prosecutor, the office or position of county investigator which shall be in the unclassified service of the civil service. The prosecutor of each of the several counties of this state may appoint such number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this act provided, to be known as county investigators, to serve at his pleasure and subject to removal by him, and to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs, in criminal matters.

N.J.S.A. 2A:157-23 is entitled "Construction; "special officer" discontinued." It provides:

It is the intention that this chapter be so construed as to make consistent throughout the state the law as it applies to the office or position of county detective and county investigator, to provide that county detectives shall be in the classified service of the civil service, and county investigators in the unclassified service and to discontinue the term "special officer" as the title of any office in the offices of prosecutors.

The County argues that the union's proposal to change 140 County Investigators to Prosecutor's Detectives is prohibited by statute. We agree.

The statutory scheme creates County Detective and County Investigator titles. Their duties are defined by statute and their placement in and out of the classified civil service is set by statute. The maximum number of employees in these titles is set and, to ensure consistency throughout the State, "special officer" titles are prohibited.

The PBA argues that the purpose of the proposal is to enhance the image of Investigators in the eyes of the public and not to change their statutory duties and responsibilities. However, there is no provision in this statutory scheme for statutory County Investigators to be titled Prosecutor's Detectives. The statute establishes the titles and assigns the duties and civil service status. Contrast Rutgers, the State Univ., P.E.R.C. No. 91-81, 17 NJPER 212 (¶22091 1991) (change in name of title mandatorily negotiable where no new title or change

in duties). Accordingly, this proposal may not be submitted to interest arbitration.

One of the March 10, 2003 PBA proposals concerns eligibility for retiree health benefits. Article XI, Section 2(c) of the expired agreement requires that employees have ten years of service with the County prior to retirement. The PBA has proposed reducing the requirement to five years.

The Prosecutor argues that the proposal illegally seeks to affect employee pensions and violates the uniformity requirement of N.J.S.A. 40A:10-23. The Prosecutor contends that an arbitrator cannot award a benefit that would affect other employees over which the arbitrator has no jurisdiction.

The PBA responds that the Prosecutor's argument concerning uniform conditions is without merit because the Prosecutor, not the County, is the employer. It also argues that this language is not preemptive as long as employees meet the eligibility requirements of the statute.

The Prosecutor replies that it employs many other employees besides investigators and therefore other employees would be affected and uniformity would be compromised.

Health benefits for future retirees are mandatorily negotiable as long as the particular benefit at issue is not preempted by statute or regulation. Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (¶26079 1995). We have held, however, that

where an employer or a majority representative proposes to change or institute provisions concerning employer payment of retiree health benefits under N.J.S.A. 40A:10-23, such a proposal must be made contingent upon the uniformity requirements of N.J.S.A. 40A-10-23 being met. Borough of Matawan, P.E.R.C. No. 99-107, 25 NJPER 324 (¶30140 1999); Ocean Tp., P.E.R.C. No. 95-12, 20 NJPER 331 (¶25172 1994), aff'd 21 NJPER 324 (¶26208 App. Div. 1995).^{3/} The concern that an interest arbitrator not issue an award that would bind another unit is addressed if any change in employer payments takes effect only when uniformity requirements are met. Matawan. Accordingly, the PBA's proposal to reduce the number of years required to qualify for retiree health benefits is not mandatorily negotiable as written.

3/ In Matawan, we discussed two types of negotiability challenges based on the uniformity requirements associated with retiree health benefits. In one type of case, for example, Essex Cty. Sheriff, P.E.R.C. No. 97-26, 22 NJPER 362 (¶27190 1996), an employer sought to remove an existing provision on the ground that the same benefits were not being provided to other employees or negotiations units. In the other type of case, a union proposed new contract provisions concerning retiree health benefits. In the former, we have denied relief on the ground that the Superior Court, not this Commission, has jurisdiction to determine whether an employer's overall health benefits system complies with N.J.S.A. 40A:10-23. In the latter, we have held that an interest arbitrator may not rule on a proposal that, by virtue of N.J.S.A. 40A:10-23, would affect employees over whom the arbitrator had no jurisdiction. Matawan clarified that an arbitrator could, however, award a change in retiree health benefit coverage, contingent upon the same change being negotiated or awarded with respect to other unit. The present issue, unlike Essex Cty. Sheriff, involves the second type of case.

In its brief, the Prosecutor argued that N.J.S.A. 43:16A-10(6) preempts a PBA proposal that the Prosecutor pay health insurance benefits for the survivors of employees killed in the line of duty. The PBA responded that the Prosecutor misunderstood its proposal and that it seeks health insurance benefits for dependents upon the death of a retiree. The Prosecutor replied that it is well-settled that benefits for former employees who have already retired are not mandatorily negotiable and that receipt of benefits by survivors of a retired former employee is not a term and condition of employment.

We agree with the Prosecutor that the PBA may not negotiate benefits for employees who have already retired. Borough of Bradley Beach, P.E.R.C. No. 2000-17, 25 NJPER 412 (¶30179 1999). To the extent, if any, the PBA's proposal seeks to do so, it is not mandatorily negotiable.

ORDER

The proposal to require five years of service with the employer to be eligible for retiree health benefits; the proposal to change the job title of Investigator to Prosecutor's Detective; and the proposal for survivor health benefits to the extent, if any, it seeks to negotiate benefits for employees who have already retired are not mandatorily negotiable.

The remaining aspects of the petition are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell

Millicent A. Wasell
Chair

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

DATED: October 30, 2003
Trenton, New Jersey
ISSUED: October 30, 2003