

P.E.R.C. NO. 2003-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2003-11

PASSAIC FIREFIGHTERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses as untimely a scope of negotiations petition filed by the City of Passaic. The City seeks a negotiability determination concerning a contract clause which it wants to remove from a successor collective negotiations agreement with the Passaic Firefighters Association. The Commission concludes that this scope petition is not independent of the interest arbitration because the City also asked the arbitrator to delete the clause and the Association has proposed a modification to the clause.

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, Ruderman & Glickman, P.C., attorneys
(Mark S. Ruderman, of counsel; Ellen M. Horn, on the
brief)

For the Respondent, Fox & Fox, LLP, attorneys
(Gregory Busch, Craig S. Gumpel, and Kimberly A. Kopp, on
the brief)

DECISION

On August 23, 2002, the City of Passaic petitioned for a scope of negotiations determination. The City seeks a negotiability determination concerning a contract clause which it seeks to remove from a successor collective negotiations agreement. The Passaic Firefighters Association seeks to retain the clause, with a modification.

The parties have filed briefs and exhibits. The Association has filed certifications of its president, Lawrence

Dostanko. The parties have also filed supplemental briefs, certifications and replies.^{1/} These facts appear.

The Association represents all firefighters, including those in fire prevention and dispatcher positions. The parties' most recent agreement expired on June 30, 2001. On December 10, 2001, the parties jointly filed for interest arbitration. Instead of listing the issues to be submitted to interest arbitration on the petition form, each party attached its negotiations proposals, both of which referred to Article XXXIV, Miscellaneous, Section A. That section provides:

When the temperature goes below the number forty degrees Fahrenheit (40F) or above the number eighty degrees Fahrenheit (80F), there shall be no outside training except in emergency situations. In-service inspections may be held when the temperature is from the number 40 degrees Fahrenheit (40F) to the number eighty-five degrees Fahrenheit (85F).

^{1/} On November 13, 2002, the Association filed an additional supplemental letter brief. The City opposed the Commission's consideration of this submission. On November 18, the Chair advised the Association that it would not be considered. N.J.A.C. 19:13-3.5(c). On December 12, the Association asked us to reconsider that ruling. We deny that untimely request. See N.J.A.C. 19:13-3.11; N.J.A.C. 19:14-8.4 (motion for reconsideration must be filed within 15 days of receipt of decision).

The Association proposed deleting the phrase "in emergency situations" while the City proposed to "delete any limitations for training due to temperature and inspections."

Interest arbitration hearings were held on May 20 and 21, 2002 and July 2, 2002. On August 23, the City filed this petition seeking to remove Article XXXIV, Section A from a successor agreement.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the scope of negotiations analysis for police officers and firefighters:

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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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 firefighters, 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. [87 N.J. at 92-93; citations omitted]

We do not decide whether contract proposals concerning firefighters are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

The parties disagree on a threshold procedural issue. The Association contends that the petition should be dismissed as untimely, since it was filed almost nine months after the parties petitioned for interest arbitration, contrary to N.J.A.C. 19:16-5.5(c) and Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in part, rev'd and remanded in part on other grounds, 353 N.J. Super. 289 (App. Div. 2002), certif. granted, ___ N.J. ___ (2002). The City counters that its petition does not challenge the negotiability of any PBA proposals or contest the negotiability of any issues presented to the arbitrator, but instead asks the Commission to exclude existing contract language. It asserts that our case law holds that N.J.A.C. 19:16-5.5(c) does not pertain in such circumstances.

N.J.A.C. 19:16-5.5(b) and (c) set timelines for responding to interest arbitration petitions and for filing scope petitions concerning issues submitted for interest arbitration. These rules structure the interest arbitration process; ensure that the parties and the arbitrator know the nature and extent of the controversy at the outset; and foster the statutory goal of providing for an expeditious, effective and binding procedure for resolution of

disputes between employers and firefighters. Borough of Roseland, P.E.R.C No. 2000-46, 26 NJPER 56 (¶31019 1999).

A scope petition challenging the mandatory negotiability of an issue proposed for interest arbitration must be filed 14 days after a respondent receives the Director of Arbitration's Notice of Filing of the interest arbitration petition. N.J.A.C.

19:16-5.5(c). Scope petitions filed after the time period set in N.J.A.C. 19:16-5.5(c) are presumptively time-barred, but we will consider, on a case-by-case basis, arguments that N.J.A.C.

19:16-5.5(c) should be relaxed. Borough of Roseland; N.J.A.C.

19:10-3.1; see also Teaneck (N.J.A.C. 19:16-5.5(c) need not preclude a post-arbitration negotiability challenge when PERC decides to consider the issue).

We have held that N.J.A.C. 19:16-5.5(c) does not pertain to petitions that seek to remove provisions in an expired contract, unless those provisions have also been submitted to interest arbitration. See Edison Tp., P.E.R.C. No. 98-15, 23 NJPER 490 (¶28236 1997), recon. denied, P.E.R.C. No. 98-78, 24 NJPER 50 (¶29031 1997) and Town of West New York (declining to dismiss scope petitions filed after the time period in N.J.A.C. 19:16-5.5(c), where the clauses that the employers sought to remove had not been listed in the unions' interest arbitration petitions); Borough of Rutherford, P.E.R.C. No. 89-31, 14 NJPER 642 (¶19268 1988) (declining to dismiss scope petition seeking to removed expired contract clauses; although employer's response to petition had

sought to delete these clauses, the Director of Arbitration had found that the response was untimely and, therefore, the issues were not part of the interest arbitration). The rationale of these cases was that the scope petitions were independent of the interest arbitrations, and that there was no need to act promptly to divest the arbitrator of jurisdiction that he or she was not going to assert anyway.

Within this framework, we dismiss the petition as untimely. First, the circumstances here do not come within the ambit of Edison, Rutherford, and West New York. Unlike those cases, the scope petition is not independent of the interest arbitration because the City has also asked the arbitrator to delete Article XXXIV. If the City's primary position is that the article is not mandatorily negotiable, that position should have been promptly pursued within the timeframes of N.J.A.C. 19:16-5.5(c), in order to expeditiously establish the issues before the arbitrator. Further, the Association proposed a modification to Article XXXIV, and N.J.A.C. 19:16-5.5(c) obligated the City to promptly object to the consideration of that issue.

Second, while we will consider relaxing N.J.A.C. 19:16-5.5(c) on a case-by-case basis, the City has not explained why it waited over eight months after the interest arbitration petition was filed and three months after the first hearing to initiate scope proceedings. It thus has not shown good cause or unusual circumstances to relax N.J.A.C. 19:16-5.5(c).


Nor has it shown that adherence to N.J.A.C. 19:16-5.5(c) would "work surprise or injustice or interfere with the proper effectuation of the Act." N.J.A.C. 19:16-3.10(b). To the contrary. It would be disruptive to the interest arbitration process to entertain a scope petition at this juncture, when the interest arbitration has progressed so far; the parties presumably have presented evidence on the items that are the subject of the petition; and the Association has assumed, in formulating its final offer, that its Article XXXIV proposal would be considered by the arbitrator. Contrast Roseland (scope petition filed one month after arbitrator was appointed would not appreciably delay, if at all, the interest arbitration). Finally, we cannot say at this juncture that any award that either included the Association's proposal or denied the City's would have to be vacated. Compare Roseland (one factor weighing in favor of relaxing 5.5(c) is where it is clear that an award adverse to scope petitioner would have to be vacated on appeal, thereby making interest arbitration process futile).

For the foregoing reasons, we dismiss the petition as untimely. The arbitrator should consider the parties' evidence and arguments on their Article XXXIV proposals, including the City's contention that the clause interferes with its ability to conduct inspections and ensure that firefighters are able to perform in all weather conditions.

ORDER

The City of Passaic's scope of negotiations petition is dismissed as untimely.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Ricci and Sandman voted in favor of this decision. Commissioner Mastriani abstained from consideration. Commissioner Katz was not present.

DATED: January 30, 2003
Trenton, New Jersey
ISSUED: January 31, 2003

