

P.E.R.C. NO. 2004-63

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WYCKOFF,

Petitioner,

-and-

Docket No. SN-2004-34

P.B.A. LOCAL 261,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses an untimely scope of negotiations petition filed by the Township of Wyckoff seeking a negotiability determination concerning a work schedule proposal made by P.B.A. Local 261 for inclusion in a successor collective negotiations agreement. The Commission concludes that the Township has not shown good cause or unusual circumstances to relax the timelines set by N.J.A.C. 19:17-5.5(c).

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, Wiss, Cooke & Santomauro, P.C.,  
attorneys, Raymond R. Wiss, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys  
(Michael A. Bukosky, on the brief)

DECISION

On January 8, 2004, the Township of Wyckoff petitioned for a scope of negotiations determination. The Township seeks a negotiability determination concerning a work schedule proposal made by P.B.A. Local 261 for inclusion in a successor collective negotiations agreement between the Township and P.B.A. Local 261.

The parties have filed briefs and exhibits. With its reply brief, the Township has submitted the certification of its business administrator. On March 2, 2004, the PBA filed a sur-

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reply brief. On March 12, the Township filed a response.<sup>1/</sup>

These facts appear.

The PBA represents patrol officers, sergeants, lieutenants and captains. The parties' most recent collective negotiations agreement expired on December 31, 2002. Section 8.00 of the agreement is entitled Work day, Work Week and Overtime. It provides at 8.02:

The basic work week and basic work day shall be prescribed by the Chief of Police or his designee, and shall conform to accepted principles of Police Scheduling. The work schedule shall conform to applicable Federal and State Laws.

On January 24, 2003, the PBA petitioned for interest arbitration. The PBA proposed to change the present 8-hour 6/2, 6/3 schedule to a 12-hour shift schedule.

This scope petition was filed nearly one year later. The PBA asserts that the petition should be dismissed as untimely under N.J.A.C. 19:16-5.5(c).<sup>2/</sup> The PBA argues that the parties

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<sup>1/</sup> The PBA requests leave to file this sur-reply brief to respond to the affidavit of the Township's business administrator that was not part of the original petition and to new issues it claims are raised in the Township's reply brief. We grant this request and will consider the sur-reply brief as well as the Township's response. The PBA contests all the factual allegations in the affidavit and requests a plenary evidentiary hearing on any conflicting facts. We deny this request. We also accept the Township's response to the sur-reply.

<sup>2/</sup> N.J.A.C. 19:16-5.5(c) provides that where a dispute exists as to whether an issue is within the required scope of

(continued...)

have completed interest arbitration hearings and that the arbitrator is now ready to render an award.

A chronology of the events leading up to the filing of the scope petition follows.

The parties began negotiations in September 2002. On October 8, the PBA's negotiating team forwarded its negotiations proposals, including the 12-hour work schedule proposal, to the Township's negotiating committee. The parties were unable to reach an agreement. On January 24, 2003, the PBA petitioned for interest arbitration. The petition listed seven economic issues and the 12-hour work schedule as a non-economic issue.

In January or February 2003, the mayor requested that the Township administrator follow up with the Township's labor counsel about the filing of a scope petition. The administrator spoke to the counsel who advised that he would file the petition.

On March 10, 2003, after receiving an extension of time, Township filed its response to the interest arbitration petition.

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2/ (...continued)  
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 N.J.A.C. 19:13. 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."

The response stated that the Township did not object to the filing of the petition, that the parties had mutually agreed to the selection of an arbitrator, and that the Township agreed to the list of issues in dispute, except that:

The Township does not agree that the issue of a change in the work schedule is non-economic in nature. The Township believes that the impact of a change in the police work schedule is economic in nature. . . . Furthermore, pursuant to N.J.A.C. 19:16-5.5(a)(3), the Township takes the position that the proposed work schedule is non-negotiable and is not within the required scope of negotiations."

The administrator states that when the March 10 response to the interest arbitration petition was sent, he believed that the labor counsel had filed or would be filing all the documents necessary to advance the Township's position that the work schedule proposal was not mandatorily negotiable. The administrator learned in February or March, that the attorney had been diagnosed with cancer. Shortly thereafter, he learned that the illness had progressed to the point that it interfered with the attorney's work. On August 12, 2003, the attorney passed away.

The administrator states that following the attorney's death, it began interviewing for a new attorney. In September 2003, a new attorney was appointed. All pending files were forwarded to him. After review of the files, the new attorney advised the Township that no scope petition had been filed. The

Township states that it was able to confirm at a December 4, 2003 mediation session with the arbitrator that the PBA continued to seek the 12-hour schedule. The Township filed its scope petition on January 8, 2004. The Township sought to adjourn the arbitration hearings pending our consideration of its scope petition. The PBA did not consent and the arbitrator declined to adjourn the hearings without such consent. Hearings were held on February 9 and 10.

The Township asserts that the illness and death of its labor counsel led to the late filing of this petition and constitutes the good cause or unusual circumstances referenced in N.J.A.C. 19:10-3.1<sup>3/</sup> to permit such late filing and that the late filing will not delay the arbitration hearing since the hearing has already taken place and it believes that a decision on the scope

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

(a) [W]henver 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. . . .

(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. . . .

petition would be issued before the arbitrator's award. It also argues that the proposal at issue, which it alleges sets staffing levels, is a managerial prerogative not subject to arbitration.

The PBA responds that the Township could have filed its scope petition at the same time it filed its response to the interest arbitration petition. The PBA also responds that even when a new attorney was retained, the scope petition was still not filed until months later and that even after a December 4, 2003 mediation session where the PBA once again set forth its schedule proposal, the Township still did not file a scope petition until over a month later. It points out that it has invested time and money in the interest arbitration process and that numerous witnesses and experts testified at the hearing. The PBA argues that allowing a scope petition to proceed at this late date would work a monumental prejudice to the PBA.

We dismiss the Township's scope petition. The timelines set forth in N.J.A.C. 19:16-5.5(b) and (c) 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 police. Borough of Roseland, P.E.R.C. No. 2000-46, 26 NJPER 56 (¶31019 1999). 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.

Roseland; N.J.A.C. 19:10-3.1; see also Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in pt., rev'd in pt. and rem'd, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003) (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 do not believe that the Township has shown good cause or unusual circumstances to relax N.J.A.C. 19:16-5.5(c). The Township's answer to the interest arbitration petition and any scope of negotiations petition were both due on the same date.<sup>4/</sup> The Township filed its answer on March 10, 2003, but not a scope petition. It has not explained why it was able to file one, but not the other. As the PBA has pointed out, even after the Township retained a new attorney, it did not file a scope petition for four months.

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<sup>4/</sup> In its sur-reply brief, the PBA questions the March 10, 2003 date asserted by the Township as the extended deadline for the filing of a scope petition. The PBA asserts that the petition should have been filed 14 days from the January 24 filing of the interest arbitration petition. We will, however, extend the time for filing a scope petition to coincide with the date set by the Director of Arbitration for responding to interest arbitration petitions. Therefore, the Township's extension of time to file its response to the interest arbitration petition also extended the time for filing a scope petition. See Roseland; Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998).



We also do not believe that strict 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). Instead, we believe 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 and the parties have presented two days of testimony and evidence on the subject of the petition.<sup>5/</sup> Contrast Roseland (scope petition filed one month after arbitrator was appointed would not appreciably delay, if at all, the interest arbitration); City of Clifton, P.E.R.C. No. 2003-59, 29 NJPER 100 (¶28 2003) (Commission declines to dismiss scope petition as untimely where petition was filed while the interest arbitration hearings were already in progress; supervision concerns raised in petition did not arise until after a memorandum of agreement was rejected by the PBA).

Finally, we cannot say at this juncture that any award that included or denied the PBA's proposal 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).

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<sup>5/</sup> The PBA was not obligated to delay arbitration hearings to allow us to consider the merits of an untimely scope petition.

For these reasons, we dismiss the petition as untimely. The arbitrator should consider the parties' evidence and arguments on the PBA's work schedule proposal, including the Township's staffing and supervision arguments. Should the arbitrator issue an award that the Township's believes would impermissibly compromise its ability to set staffing levels, the Township may appeal pursuant to N.J.S.A. 34:13A-16f(5) (a).

ORDER

The scope of negotiations petition is dismissed.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", written over a horizontal line.

Lawrence Henderson  
Chairman

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

DATED: March 25, 2004  
Trenton, New Jersey  
ISSUED: March 26, 2004