P.E.R.C. NO. 2004-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and- Docket No. SN-2004-47

UNION CITY P.B.A. LOCAL NO. 8,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of certain contract articles and proposals presented during successor contract negotiations between the City of Union City and the Union City P.B.A. Local No. 8. The Commission holds that the City does not have a managerial prerogative to retain an article dealing with physical examinations in a successor agreement. To the extent the article addresses a managerial prerogative, it is not mandatorily negotiable and must be deleted at either party's request. To the extent the provision addresses mandatorily negotiable procedural protections, retention of those protections in a successor agreement is a matter for the parties to resolve through negotiations. The Commission holds that a sick leave clause does not, on its face, contravene the one-year limit in N.J.S.A. 40A:14-137 and may be retained in a successor agreement. The Commission holds that a portion of a health benefits provision that requires the union's consent to a change in carrier is not mandatorily negotiable. The Commission holds that a provision that provides for the appeal of disciplinary determinations to binding arbitration is not mandatorily negotiable to the extent it requires binding arbitration of major discipline. The Commission holds that portions of an article dealing with non-police duties are mandatorily negotiable. The Commission also holds that a portion of an article that requires employees to perform minor vehicle maintenance is mandatorily negotiable where, as here, there are public works employees available at all times to perform these tasks.

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, Martin R. Pachman, P.C., attorney
(Martin R. Pachman, on the brief)

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

DECISION

On March 2, 2004, the City of Union City petitioned for a scope of negotiations determination. The City seeks a negotiability determination concerning certain contract articles and contract proposals that Union City P.B.A. Local No. 8 has presented during successor contract negotiations.

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

The City is a Civil Service jurisdiction. The PBA represents all non-supervisory police officers. The parties' most recent collective negotiations agreement expired on December 31, 2003. On January 26, 2004, the PBA petitioned for interest arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states: "The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a 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 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 VII is entitled Physical Examinations. It provides:

> A. The City may require an employee to submit to an annual physical, neurological or psychiatric or other examination to be performed by a licensed physician selected by the City and at the City's expense.
>
> B. The employee, nevertheless, reserves unto himself the right to be examined by a physician of his own choice and at his own expense, in addition to any physical examination required by the City.
>
> C. The PBA agrees to the policy and procedures of the Drug Testing Ordinance attached hereto as Exhibit A and incorporated herein.

The PBA has proposed deletion of this article. The City argues that the article affirms its managerial prerogative to conduct medical examinations to ensure that officers are fit for duty, while also providing officers with the procedural

protection of being examined by their own physician.[1/] The PBA contends that the employer does not have a managerial prerogative to retain the article in a successor agreement.

To the extent the article addresses a managerial prerogative, it is not mandatorily negotiable and must be deleted at either party's request. To the extent the provision addresses mandatorily negotiable procedural protections, retention of those protections in a successor agreement is a matter for the parties to resolve through negotiations. Contrast N.J.S.A. 34:13A-5.3 (requiring parties to include grievance procedure in any collective agreement); cf. Camden Cty., P.E.R.C. No. 2004-7, 29 NJPER 385 (¶121 2003) (clause is negotiable so proposal to delete clause is negotiable).

The PBA submitted a Maternity Leave proposal that the employer argued created illegal disparities between male and female officers; treated pregnancy differently from other illnesses or disabilities; created unique leave rights applicable to only females; provided unique paid health insurance coverage available only to females, and modified the uniform requirements during pregnancy. The PBA then modified its proposal to ensure

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1/ The City asks us to declare that removal of the article would constitute a waiver of the PBA's right to negotiate these issues for the life of the contract. Such a declaration, however, is not within our scope of negotiations jurisdiction. Ridgefield Park.

gender neutrality. The employer has not addressed the modifications and therefore we do not address this issue any further.

The City argued that a portion of Article VIII, Promotions, violates Civil Service statutes and interferes with its employer's managerial prerogative to determine staffing levels. The PBA then proposed modified language. The City has not addressed the modification and therefore we do not address the issue any further.

Article XXI is entitled Sick Leave and Terminal Leave. Paragraph A provides, in part: "Sick leave policy for all members covered by this Agreement shall continue to be administered as in the past."

The City argues that the current policy permits unlimited use of sick leave and that therefore the contract contravenes the requirement in N.J.S.A. 40A:14-137 that paid sick leave not exceed one year from any one source, and then only if specifically adopted by City ordinance. It argues that this clause on its face provides no limits and is illegal.

The PBA responds that the parties' agreement does not have an unlimited sick leave clause, and that a clause does not become non-negotiable merely because it could be applied or construed to violate the statutory limit.

On its face, this provision does not contravene the one-year limit in N.J.S.A. 40A:14-137. The clause may be retained in a successor agreement. Should the PBA seek to arbitrate a claim for benefits that exceed the statutory limit, the employer may seek a restraint of arbitration.

Article XXVIII is entitled Medical Insurance, Hospitalization and Pensions. Section B covers Pensions and Insurance. Paragraph 4 provides:

> The employer, upon thirty (30) days written notice and mutual agreement of the employee organization, which agreement shall not be unreasonably withheld, may elect to change insurance carriers for the programs referenced herein provided equal or better benefits are provided thereby.

The City argues that this provision limits its prerogative to change carriers without PBA consent. The PBA responds that the clause merely memorializes the parties' duty to negotiate any changes in good faith and that the PBA may withhold agreement if the change in carrier results in a reduction in benefits.

Where changing the identity of the insurance carrier affects terms and conditions of employment, i.e., the level of insurance benefits and the administration of the plan, it is a mandatorily negotiable subject. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). This provision, however, requires union

consent to a change in carriers, even if the new carrier provides identical benefits. Requiring consent significantly interferes with the employer's prerogative to change carriers without affecting terms and conditions of employment. Accordingly, that portion of the provision is not mandatorily negotiable.

Article XXXVII contains Miscellaneous Provisions. Section A is entitled Appeal. It provides:

> 1. After disciplinary proceedings have been concluded, if the PBA concludes that an employee has been unjustly punished or dismissed, it may appeal such judgment to arbitration as provided below. The Board of Arbitrators shall review the justness of the punishment imposed, upon the record made before the Hearing Officer.
>
> 2. If the Board of Arbitrators decides that the punishment imposed was unduly harsh or severe under all the circumstances, it may modify the findings and punishment accordingly. Nothing herein shall be deemed to limit the right of the employee provided by Civil Service Law or other applicable laws.
>
> 3. The appeal provided by this Article is in addition to any appeal or other remedy provided by the Civil Service Act on any other statute, rule or regulation.

The City argues that this paragraph is not mandatorily negotiable because it provides for arbitration of major discipline in addition to the rights of appeal provided by Civil Service. The PBA argues that the clause is mandatorily negotiable in the abstract because it is applicable to minor

discipline. As for major discipline, the PBA argues that the clause is a mandatorily negotiable disciplinary procedure. It is prepared to clarify its proposal to address only the procedural aspects of discipline.

The clause does not apply to pre-disciplinary procedures. It specifically addresses appeals after punishment has been meted out. Appeals of major disciplinary determinations in local government Civil Service jurisdictions can be made only to the Merit System Board. City of Hackensack, P.E.R.C. No. 98-121, 24 NJPER 214 (¶29101 1998). This provision is not mandatorily negotiable to the extent it requires binding arbitration of major discipline.

Paragraph E is entitled Fireman and Other Non-Police Duties. It provides:

> 1. No employee shall be required to perform Fireman functions or duties.
>
> 2. No employee shall be required to assist in an attempt to control a fire, near fire or any other disorder by the use of hose streams or otherwise.
>
> 3. No employee shall be required to perform any mechanical or maintenance work (including but not limited to washing and cleaning motor vehicles) changing tires on any city owned or operated equipment, nor perform any maintenance work in the police station.

The City argues that this clause prevents it from ordering police officers to perform emergency maintenance duties on their vehicles when other regular maintenance personnel are not available and that it is a permissive subject of negotiations under Mercer Cty. Park Comm'n, P.E.R.C. No. 81-43, 6 NJPER 491 (¶11250 1980). The City further argues that the clause is not negotiable because it would preclude assignment of officers to emergency situations, including traditional components of police work such as traffic and crowd control at fire scenes. It maintains that municipalities have the right to enlist police and firefighters in civil emergencies.

The PBA asserts that the clause prevents the City from requiring police officers to fight fires. It further asserts that requiring police officers to perform out-of-title work is mandatorily negotiable. The PBA argues that maintenance duties have always been performed by public works department employees and are not incidental to or comprehended within a police officer's job description. The PBA requests an evidentiary hearing on the performance of non-police duties if we determine that such evidence affects this issue.

Sections 1 and 2 are mandatorily negotiable. Employees may seek to negotiate for contractual protections against being

required to assume duties outside their job titles and beyond their normal duties. New Jersey Hwy. Auth., P.E.R.C. No. 2002-76, 28 NJPER 261 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div. 2003). We read section 2 to refer to firefighting and not to interfere with the employer's prerogative to require police officers to perform crowd or traffic control or other police duties. We note that a public employer's inherent prerogative to deviate from a contract provision in the event of a civil emergency need not be spelled out in every applicable contract provision.

Section 3 is mandatorily negotiable. In Mercer Cty. Park Comm'n, P.E.R.C. No. 81-43, 6 NJPER 491 (¶11250 1980), the Chief of Park Police had issued a directive that patrolling officers would be expected to check the oil in their vehicles before going on patrol and that officers, except those on the day shift when maintenance employees were available, would be expected to change flat tires on their vehicles while patrolling. Against that backdrop, the union proposed a contract provision stating that patrol officers would not be required to make routine mechanical repairs to their vehicles while on duty, i.e. changing flat tires. Balancing the minor workload implications of the matters covered in the Chief's directive against the objective of

avoiding costly maintenance and keeping the cars available for duty, we held that the proposal was not mandatorily negotiable.

In this case, the employer has not challenged the PBA's assertion that Union City has a full-time public works department that has always been available to perform these functions. We note that in Mercer Cty., the contract proposal specifically sought to prevent employees from being required to change tires. Under the circumstances of that case, where public works employees were available only on the day shift, the proposal was not mandatorily negotiable. Here, the contract proposal specifically seeks to prevent employees from being required to wash and clean vehicles, change tires and perform maintenance work in the police station. Under the circumstances of this case, where public works employees are available to perform these tasks at all times, the proposal is mandatorily negotiable.

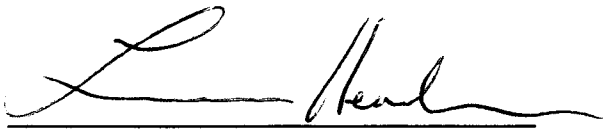
ORDER

The following are mandatorily negotiable: the disputed portion of Article XXI, Paragraph A; and Article XXXVII, Section E.

The proposal to delete Article VII, Physical Examinations, is mandatorily negotiable to the extent it sets negotiable terms and conditions of employment. To the extent the provision reaffirms a managerial prerogative, it may not be included in a successor agreement over either party's objection.

The following are not mandatorily negotiable: the disputed portion of Article XXVIII, Section B(4); and Article XXXVII, Section A, to the extent it requires binding arbitration of major discipline.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

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

DATED: May 27, 2004
Trenton, New Jersey
ISSUED: May 28, 2004