

P.E.R.C. NO. 2006-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LONGPORT,

Petitioner,

-and-

Docket No. SN-2006-027

P.B.A. LOCAL 363,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds the subject of a grievance arbitration award between the Borough of Longport and P.B.A. Local 383 to be legally arbitrable. The PBA filed a grievance alleging that the Borough had unilaterally adopted rules and regulations and personnel policies and procedures without negotiations. An arbitrator found that although the employer had a right to issue a policies manual, it did not have a right to abrogate the right of the PBA to negotiate terms and conditions of employment.

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, Louis P. McFadden, Jr., P.C.,
attorneys (Louis P. McFadden, Jr., on the brief)

For the Respondent, Alterman & Associates, attorneys,
(Stuart J. Alterman, on the brief)

DECISION

On September 8, 2005, the Borough of Longport petitioned for a scope of negotiations determination. The Borough seeks a declaration that a grievance arbitration award negating portions of a new personnel policies and procedures manual was not within the scope of negotiations. The grievance was filed by P.B.A. Local 363.

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

The PBA represents all full-time employees in the police department, except the chief. The parties' collective negotiations agreement is effective from January 1, 2003 through

December 31, 2006. Its grievance procedure ends in binding arbitration.

In 2004, the Borough's insurer notified it that in order to maintain coverage, it had to have an employee handbook setting forth standard policies and procedures. On October 6, 2004, the Borough adopted a Personnel Policies and Procedures Manual and Employee Handbook. The handbook covers employee rights and obligations and workplace, time off, compensation and benefits policies, as well as managerial/supervisory procedures. It specifically provides:

In the event there is a conflict between these rules and any collective bargaining agreement, personnel services contract, or Federal or State law including the Attorney General's guidelines with respect to Police Department personnel matters, the terms and conditions of that contract or law shall prevail.

On February 8, 2005, the PBA filed a demand for arbitration that identified the grievance as "Unilateral adoption of Rules and Regulations and adoption of personnel policies and procedures without negotiation."^{1/}

On July 13, 2005, the arbitrator conducted a hearing on this stipulated issue: "Has the Personnel Policies and Procedures

^{1/} On August 25, 2005, the parties arbitrated a separate grievance alleging that the handbook's method for valuing unused vacation time altered an established practice. This petition does not challenge the arbitrability of that grievance.

Manual been introduced unilaterally without negotiations, and, if so, what shall be the remedy”?

On September 20, 2005, the arbitrator issued a letter decision. He found that although the employer had a right to issue a policies manual, it did not have a right to abrogate the union’s right to negotiate terms and conditions of employment. He further found that the manual either created new terms and conditions of employment or changed existing terms and conditions of employment. He declared any changes in mandatorily negotiable terms and conditions of employment to be void and stated that the Borough had to negotiate such changes before they could be implemented.

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. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer’s alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the dispute or any contractual defenses the employer might have. We specifically decline to consider the merits of the arbitrator’s award, the

employer's contentions concerning whether unit members were aware of the handbook before it was implemented, and the impact, if any, of that alleged information.

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]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp.,

P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER

Supp.2d 130 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The Borough argues that it would be redundant and meaningless to require it to negotiate every term and provision in the handbook before adoption. It states that the handbook is not a contract, but only provides employees with notice of policies and procedures that will be followed. The Borough further argues that it has the right to establish reasonable work rules pursuant to law and to determine all managerial and administrative matters. It maintains that the handbook covers non-union as well as union employees and states that in the event of a conflict, the terms of any collective negotiations agreement prevail.

The PBA argues that certain provisions of the employee handbook involve mandatorily negotiable subjects not covered by the parties' contract. They include the policies on: drugs and alcohol, whistleblowers, employee complaints, access to personnel files, conflicts of interest, evaluation procedures, termination, resignation and work force reduction. The PBA further argues that there has been a 30-year past practice on leave time in the Borough, but that the handbook sets forth a vacation policy that was not negotiated.

The Borough responds that the PBA was aware of the employee handbook and that its president attended a handbook orientation session. The Borough notes that the handbook lists workplace laws to advise employees that the Borough will abide by those statutory directives.^{2/} It asserts that these state and federal mandates are nonnegotiable.

N.J.S.A. 34:13A-5.3 provides that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978), construes this language to prohibit unilateral changes in working conditions by a public employer during the life of a contract and during negotiations for a successor agreement.

A public employer's contractual relationships with outside vendors such as insurance companies do not supersede its collective negotiations obligations. See, e.g., City of Newark, P.E.R.C. No. 95-108, 21 NJPER 229 (¶26146 1995); Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div.

^{2/} The laws listed include: New Jersey Law Against Discrimination; Title VII of the 1964 Civil Rights Act; Americans with Disabilities Act; Public Employees' Occupational Safety and Health Act; Conscientious Employee Protection Act; the obligation to provide a smoke-free environment; Access to Public Records Act; Open Public Meetings Act; Family and Medical Leave Act; Military Leave Policy; Fair Labor Standards Act; COBRA; New Jersey Workers Compensation Act; and New Jersey Public Retirement Systems.

1986). A grievance arbitrator thus has the authority to determine whether an employment condition in a policy manual conflicts with an employment condition in the contract, and to enforce a contractual obligation to negotiate before establishing new mandatorily negotiable terms and conditions of employment.^{3/} The existence of a State or federal law regulating employee working conditions does not relieve a public employer of its statutory obligation to negotiate over terms and conditions of employment not specifically controlled by the pertinent law. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (mere existence of legislation relating to term and condition of employment does not automatically preclude negotiations). And because statutes are effectively incorporated by reference into collective negotiations agreements, parties may negotiate to resolve disputes over their application through the negotiated grievance procedure. See State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978); West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978). The grievance was therefore legally

^{3/} The Borough's reliance on Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004), is misplaced. There, the Court held that there was no presumption of contractual arbitrability in the New Jersey public sector. Camden did not hold that where a contract is silent, the employer has a managerial prerogative to act unilaterally. We also note that the Legislature has since amended N.J.S.A. 34:13A-5.3 to codify a presumption of arbitrability when interpreting a public sector grievance arbitration clause. L.2005, c.380.

arbitrable. The merits of the grievance were for the arbitrator to decide. Ridgefield Park.

ORDER

The subject matter of the arbitration award is mandatorily negotiable and the grievance was legally arbitrable.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: January 26, 2006

Trenton, New Jersey