

P.E.R.C. NO. 2007-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERNARDSVILLE,

Respondent,

-and-

Docket No. CO-2006-217

BERNARDSVILLE PBA LOCAL 365,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by Bernardsville PBA Local No. 365 and grants a cross-motion filed by the Borough of Bernardsville. The PBA filed an unfair practice charge against the Borough alleging that the Borough violated the New Jersey Employer-Employee Relations Act when it repudiated the parties' contract by limiting PBA convention leave to two representatives rather than three as provided for by the agreement. The Borough argues that N.J.S.A. 40A:14-177 prohibits it from allowing more than 10% of a negotiations unit's membership to take paid convention leave. The Commission holds that the Legislature set minimums and maximums and specified one set of circumstances under which a collective negotiations agreement could exceed the maximum. That exception is limited and does not apply to this case, where the PBA seeks to have three representatives rather than the two representatives authorized and required by this preemptive statute. The Commission concludes that the Borough did not violate the Act when it limited the number of paid convention leaves to two in conformance with N.J.S.A. 40A:14-177.

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 Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Robert J. Merryman, on the brief)

For the Charging Party, Loccke, Correia, Schlager, Linsky & Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

This case comes to us by way of cross-motions for summary judgment. On February 27, 2006, Bernardsville PBA Local No. 365 filed an unfair practice charge against the Borough of Bernardsville. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4), (5), (6) and (7),^{1/}

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of (continued...)"

when it repudiated the parties' collective negotiations agreement by limiting PBA convention leave to two representatives rather than three as provided for by the agreement. The Borough responds that N.J.S.A. 40A:14-177 prohibits it from allowing more than 10% of a negotiations unit's membership to take paid convention leave. That statute provides, in relevant part:

The . . . head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization . . ., provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than two and no more than 10 authorized representatives shall be entitled to such leave, unless more than 10 authorized representatives are permitted such a leave of absence pursuant to a collective bargaining agreement negotiated by the employer and the representatives of the employee organization, and for employee organizations with more than 5,000 members, a maximum of 25 authorized

1/ (...continued)
employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

representatives shall be entitled to such leave.

The charge was accompanied by an application for interim relief. On March 14, 2006, Commission designee Arnold H. Zudick ordered the employer to permit a third representative to attend the convention, but did not require the employer to pay that representative. I.R. No. 2006-15, 32 NJPER 60 (¶31 2006). While he was not convinced that the Legislature intended to preempt the ability of public employers to negotiate over the paid release of more than 10% of a negotiations unit's membership, he believed that this Commission should speak first on that issue.

On March 21, 2006, a Complaint issued on the 5.4a(1) and (5) allegations only. On March 31, the Borough filed an Answer asserting that N.J.S.A. 40A:14-177 preempts the negotiated benefit.

On May 2, 2006, the PBA moved for summary judgment. On May 10, the Borough filed a brief opposing the PBA's motion and its own cross-motion.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). What follows are undisputed material facts.

The Borough and PBA are parties to a collective agreement that expired in 2004. Article IX provides, in pertinent part:

The Borough shall permit a delegate and two
(2) alternates to attend a State PBA
Convention without loss of regular pay
pursuant to State law.

That clause or a similar clause has existed for many years and until February 2006, the Borough has allowed three PBA representatives to attend the convention with pay. On or about February 6, 2006, the Borough notified the PBA that only two PBA representatives could be released for the convention because of the Borough's reading of N.J.S.A. 40A:14-177.^{2/}

By letter dated February 24, 2006, the PBA requested that the Borough cease and desist from changing the convention leave benefit and it demanded negotiations on all aspects of the issue.

We have long held that leaves of absence and release time for representational purposes are mandatorily negotiable in general. See, e.g., Town of Kearny, P.E.R.C. No. 2002-77, 28 NJPER 264 (¶33101 2002) and cases cited therein. However, "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

^{2/} The Borough has 18 police officers, including the chief.

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem, 91 N.J. at 44. State Supervisory explained that statutes that set minimum and maximum benefits can preempt negotiations below or above those limits:

It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum.

The predecessor to N.J.S.A. 40A:14-177 mandated paid convention leaves for various prescribed organizations. The statute then provided, in relevant part:

The heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to every person in the service of the county or municipality who is a duly authorized representative of the New Jersey State Patrolmen's Benevolent Association, Inc., Fraternal Order of Police, American Federation of Police Officers, Inc., Bronze Shields, Inc., Batons, Vulcan Pioneers, a member organization of the New Jersey Council of Charter Members of the National Black Police Association, Inc., Firemen's Mutual Benevolent Association, Inc., the Uniformed Firemen's Association, or the New Jersey State Association of Chiefs of Police, to attend any State or national convention of such organization.

The statute set neither a minimum nor a maximum number of convention representatives. On May 15, 2001, the Appellate Division declared the statute to be an unconstitutional delegation of legislative authority.^{3/} New Jersey FMBA v. North Hudson Reg. Fire & Rescue, 340 N.J. Super. 577 (App. Div. 2001).

The Court stated that:

the Legislature has failed to provide adequate standards and safeguards to guide the public employer and the FMBA and other organizations in the exercise of their discretion to determine the number of delegates to which the local fire departments must provide convention leave. [Id. at 594]

^{3/} The Court did not rely on the trial court's ground that the statute was unconstitutional special legislation.

_____On September 6, 2001, a bill was introduced amending the statute the Court had found unconstitutional (S2494). The bill limited convention leave to certain collective negotiations representatives and set limits on the number of representatives entitled to leave. The Sponsor's Statement provided, in part:

The bill also provides that no more than 10 percent of the employee organization's membership shall be permitted a leave of absence with pay, except that no less than two and no more than 10 authorized representatives are entitled to leave, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives are entitled to leave. The bill limits the leave of absence to no more than seven days.

The bill was signed into law on January 3, 2002. It provided, in relevant part:

The heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization as defined in subsection e. of section 3 of P.L. 1941, c. 100 (C.34:13A-3) and affiliated with the New Jersey State Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc. or Professional Fire Fighters Association of New Jersey to attend any State or national convention of such organization, provided, however, that no more than 10 percent of the employee organization's membership shall be permitted

such a leave of absence with pay, except that no less than two and no more than 10 authorized representatives shall be entitled to such leave, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave. [Emphasis supplied]

On March 4, 2002, a new bill was introduced to amend the revised legislation (A1980). The Sponsor's Statement for that bill provided:

This bill amends the statutes requiring State and local government agencies to grant convention leave to authorized representatives of certain police and firefighter professional associations. Current law provides that such leave may be granted to the lesser of 10 persons or 10 percent of the authorized representatives of an employee organization with less than 5,000 members. This bill establishes an exception to this limitation in cases where other terms have been negotiated by the employer and the employee organization.

The bill would have added the underlined language to the statute:

A leave of absence with pay shall be given to employees who are duly authorized representatives of an employee organization defined as a "representative" in subsection e. of section 3 of P.L. 1941, c. 100 (C.34:13A-3) and affiliated with the New Jersey Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc. or the Professional Fire Fighters Association of New Jersey to attend any State or national convention of the organization, provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than two and no more than

10 authorized representatives shall be entitled to such leave, unless negotiated otherwise by the employer and the representatives of the employee association, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave. . . .

On March 11, 2002, the Assembly State Government Committee reported the bill favorably with committee amendments. The committee amended the bill to clarify that the exception was to allow negotiations only for more than ten authorized representatives to have a leave of absence and not to allow negotiations to have fewer than ten. That bill was signed into law on July 12, 2002. N.J.S.A. 40A:14-177 now provides, in relevant part:

The heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization as defined in subsection e. of section 3 of P.L. 1941, c. 100 (C.34:13A-3) and affiliated with the New Jersey State Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc. or Professional Fire Fighters Association of New Jersey to attend any State or national convention of such organization, provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that

no less than two and no more than 10 authorized representatives shall be entitled to such leave, unless more than 10 authorized representatives are permitted such a leave of absence pursuant to a collective bargaining agreement negotiated by the employer and the representatives of the employee organization, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave. [Emphasis supplied]

Thus, the statute now provides that no more than ten percent of an organization's membership shall be permitted a leave with pay except that no less than two and no more than ten are permitted unless more than ten are authorized by a collective negotiations agreement. The Legislature set minimums and maximums and specified one set of circumstances under which a collective negotiations agreement could exceed the maximum. That exception is limited and does not apply to this case, where the PBA seeks to have three representatives rather than the two representatives authorized and required by this preemptive statute.

We accordingly deny the PBA's motion for summary judgment and grant the Borough's cross-motion. We conclude that the Borough did not violate the Act when it limited the number of paid convention leaves to two in conformance with N.J.S.A. 40A:14-177.

ORDER

The PBA's motion for summary judgment is denied. The Borough's cross-motion for summary judgment is granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller and Katz voted in favor of this decision. None opposed. Commissioner Watkins recused himself. Commissioner Buchanan was not present.

ISSUED: August 10, 2006

Trenton, New Jersey