

P.E.R.C. NO. 2007-24

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2006-091

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 617,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 617. The grievance contests the City's decision to end a provisional employee's longevity payments and to recoup previous payments. The Commission holds that longevity payments are, in general, a mandatorily negotiable form of compensation. The Commission concludes that Department of Personnel statutes do not preempt arbitration over longevity payments nor an agreement over longevity for provisional employees.

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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UNION, LOCAL 617,

Respondent.

Appearances:

For the Petitioner, Aney K. Chandy, Corporation Counsel  
(Brendan E. Egan, Assistant Corporation Counsel, on the  
brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(Arnold Shep Cohen, on the brief)

DECISION

On June 5, 2006, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 617. The grievance contests the City's decisions to end a provisional employee's longevity payments and to seek to recoup previous payments.

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

Local 617 represents maintenance workers in the Water Department. The City is a merit system jurisdiction. The parties' collective negotiations agreement is effective from

January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.

Article XXV, Longevity, provides that "all eligible employees covered by this agreement in accordance with Ordinance 6S & FH adopted November 2, 1966" shall receive longevity payments following the tenth year of service. The ordinance provides, in part:

Every employee of the City of Newark, for long and faithful service, shall be paid longevity payments on a prorated basis with each earned salary check during the calendar year at a percentage of his permanent salary to be computed as follows:

\* \* \*

Longevity shall be based on service . . . from the date of original appointment, temporary or permanent. . . .

The City hired Ronald Johnson in 1984 as a "Senior Maintenance Repair Provisional." His title was changed to "Water Repairer" in 1992.

At the beginning of 2005, the City automatically issued longevity pay to employees based on their years of service.

On March 22, 2005, the City informed Johnson that he had received longevity and overtime longevity pay in 2005 to which he was not entitled. He was notified that \$711.70 would be recouped from his pay over the next six pay periods.

On August 26, 2005, Local 617 filed a grievance seeking a determination that Johnson was entitled to longevity pay. That same day, the supervising engineer responded:

I had spoken to you regarding this matter in March 1. I am perplexed as to why your office has submitted this grievance five months later. Nonetheless, Mr. Johnson does not have a permanent title. In 1992 his title was changed as a courtesy because he was not listed on the certification for his former title and he would have had to be demoted or terminated. He was fortunate the City retained him. Subsequently, he was never made permanent in his current title. There are no certifications that indicate Mr. Johnson passed the test for his title. Again he should be grateful that he has not been terminated. It is not the City's responsibility to ensure that an employee has a permanent title.

At the beginning of 2005, Peoplesoft automatically issued longevity to employees based on the number of years of service. Although Mr. Johnson has sufficient years for longevity he does not have a permanent title. As such he is not eligible for longevity. When we became aware of the problem, we stopped it and informed Mr. Johnson. This was money he did not earn and had to return back to the City.

Based on this, your grievance is without merit. Consequently, there is no need to meet to discuss this matter.

On September 16 and 23, 2005, Local 617 moved the grievance to steps two and three. On September 30, the City denied the grievance. The denial states, in part:

Be advised that Ronald Johnson does not have, nor has he ever had, a permanent title with the City of Newark and therefore does not

have a permanent salary, both of which are required and are the basis for eligibility of longevity payments pursuant to Union Contract Agreement and in accordance with the City of Newark's Revised General Ordinances, Title II, Administration; Chapter 24, Personnel Practices and Policies; Article 9, Longevity Pay Program - Computation of Payment (copy attached).

Our Supervising Engineer has explained the longevity process to Mr. Johnson and has also encouraged him to apply for exams when called for by the New Jersey Department of Personnel in order to obtain a permanent title with the City of Newark, which would then make him eligible to receive longevity.

On September 28, 2005, Local 617 amended its grievance to challenge the City's denial of longevity payments to all Local 617 unit members.<sup>1/</sup> On September 30, Local 617 advised its counsel to proceed to arbitration on the grievance. This petition ensued.

The City argues that longevity pay for employees in provisional titles is not mandatorily negotiable under the Faulkner Act, N.J.S.A. 40:69A-43a; the grievance is preempted by a City ordinance that sets forth that longevity shall be based on "permanent" salary; and New Jersey Department of Personnel ("DOP") regulations exclude provisional employees from the emoluments of employment, including longevity, enjoyed by permanent employees.

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<sup>1/</sup> In its brief, the City views the amended grievance as not properly part of the written grievance material.

Local 617 argues that longevity payments are a mandatorily negotiable form of compensation; the City cannot avoid its contractual obligations by failing to comply with DOP statutes and regulations; and the City had an obligation to notify DOP of the provisional appointment so that appropriate steps could be taken to schedule and offer an examination and prepare an eligibility list. Local 617 argues that the City's failure to comply with DOP regulations cannot negate Johnson's eligibility for longevity payments.

The City replies that it is not responsible for enforcing DOP rules and, as a provisional employee, Johnson is not entitled to longevity payments.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. We specifically do

not decide the validity or timeliness of Local 617's September 28, 2005 grievance amendment.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Longevity payments are, in general, a mandatorily negotiable form of compensation. See Borough of Waldwick, P.E.R.C. No. 2004-45, 30 NJPER 31 (¶9 2004); Middlesex Cty. Pros., P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990), aff'd 255 N.J. Super. 333 (App. Div. 1992); City of Newark, P.E.R.C. No. 88-106, 14 NJPER 336 (¶19126 1988); cf. Buena Reg. Sch. Dist. Bd. of Ed. v. Buena Reg. Ed. Ass'n, 300 N.J. Super. 415 (App. Div. 1997), certif. den. 151 N.J. 466 (1997). We reject the City's arguments that arbitration over this longevity dispute is nonetheless preempted

by the Faulkner Act, DOP statutes or regulations, or the City's longevity ordinance.

A statute or regulation will preempt negotiations over a mandatorily negotiable term and condition of employment only if it "expressly, specifically and comprehensively" establishes how that working condition is to be established. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations); City of Paterson, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd NJPER Supp.2d 93 (¶76 App. Div. 1981) (general statutory grant of authority does not move a subject matter outside the scope of negotiations). The Faulkner Act provides a general grant of authority to a public employer to manage the affairs of government. That authority does not preempt the City's obligation to negotiate with Local 617 over mandatorily negotiable terms and conditions of employment.

Nor do DOP statutes or regulations preempt an agreement over longevity for provisional employees. N.J.S.A. 11A:4-13(b) provides that "[i]n no case shall any provisional appointment exceed a period of 12 months." While a provisional employee may not enjoy the same statutory rights as permanent employees, nothing in the civil service statute or DOP regulations divests provisional employees of their right under the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to be represented for purposes of collective negotiations and to be covered by a contract providing for wages, benefits and other terms and conditions of employment, including higher compensation for greater years of service. Compare O'Malley v. Dept. of Energy, 109 N.J. 309 (1987) (provisional employees do not enjoy the same job protection as permanent employees) with Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984) (employer's discretion to terminate provisional employee does not fully preempt binding arbitration over termination).

Finally, we reject the City's argument that arbitration should be restrained because the contract provides that longevity shall be granted to all eligible employees in accordance with a City ordinance and that ordinance requires that eligible employees be permanent. To the extent, if any, the contract defines those eligible for longevity by reference to a City ordinance, an arbitrator must consider that ordinance in determining the grievant's entitlement to longevity. The ordinance, however, does not preempt arbitration. Instead it helps to define the contractual benefit.<sup>2/</sup>

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<sup>2/</sup> City of Newark v. PBA Local 3, 272 N.J. Super. 31 (App. Div. 1994), certif. den. 137 N.J. 315 (1994), cited by the City, involved its right to adopt a residency ordinance pursuant to a specific statutory grant of authority. There is no comparable longevity statute and salary ordinances do not preempt negotiations over salary. City of Orange, P.E.R.C. (continued...)

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: October 26, 2006

Trenton, New Jersey

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2/ (...continued)  
No. 2003-91, 29 NJPER 283 (¶85 2003) (employer cannot, by its own passage of a local ordinance, preempt a mandatorily negotiable term and condition of employment).