

P.E.R.C. NO. 2007-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT
OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2007-041

P.B.A. Local 105,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (Department of Corrections) for a restraint of binding arbitration of a grievance filed by P.B.A. Local 105. The grievance seeks compensatory time off for essential employees who were required to work during the July 2006 State shutdown. The Commission restrains arbitration because Department of Personnel regulations limit the compensation for essential workers to regular pay.

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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P.B.A. LOCAL 105,

Respondent.

Appearances:

For the Petitioner, Fox Rothschild, LLP, attorneys
(Beth Hinsdale-Piller, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, P.C., attorneys
(Robert A. Fagella, on the brief)

DECISION

On January 23, 2007, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 105. The grievance seeks compensatory time off for essential employees who were required to work during the July 2006 State shutdown. We restrain arbitration because Department of Personnel regulations limit the compensation for essential workers to regular pay.

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

The PBA represents a law enforcement unit of approximately 6,950 employees, including 5,636 corrections officers. The parties' collective negotiations agreement is effective from July 1, 2003 through June 30, 2007. Article XIX is entitled Special Time Off. It provides:

A. Emergency or Special Observations

Whenever the Governor may declare a special emergency or observation of any event of State or national concern and authorizes time off to employees of the State for the observation of such event, those employees covered by this Agreement who are required to work during this period of the authorized time off shall be compensated for such hours worked as outlined in Article XXVIII, Hours of Work, and Article XXIX, Overtime.

B. Other

Whenever the Governor may declare time off for all employees (such as a day preceding or following an existing holiday) those who are required to work on that day shall be compensated for such hours worked by being granted equivalent time off at other times in accordance with the Governor's proclamation, or as provided by the appointing authority and, if operationally feasible, as requested by the employee. If the time off occurs on a seven (7) day operation employee's regular day off, he/she shall be granted equivalent time off in accordance with the above provision.

The grievance procedure ends in binding arbitration.

On July 1, 2006, Governor Jon Corzine issued Executive Order No. 17, ordering the shutdown of all non-essential State services because of the State's failure to enact a General Appropriations

Law before the start of the 2007 fiscal year. All non-essential State employees, approximately 45,000 in number, were furloughed.

The Order also declared a State of Emergency under N.J.S.A. App. A:9-33 et seq. This exercise of emergency powers allowed the Governor to ensure the continued provision of essential State services by requiring "essential employees" to continue to report for work. The Order provided, in relevant part:

9. All employees whose services are not deemed essential pursuant to this Order shall be deemed furloughed pursuant to N.J.S.A. 11A:6-1.1 and shall be governed by the rules implementing that program, except as may be prohibited by law. The provisions of this paragraph shall apply to any such employees who are necessary to implement the orderly shut down of programs and functions as provided in paragraph 16 of this Order upon the completion of such shut down, as determined and documented by the head of the department or agency.

10. The State Treasurer and the Director of the Office of Management and Budget are hereby authorized to obligate funds for the purpose of paying employees who have been designated as essential pursuant to this Order or who are necessary to implement the orderly shut down of programs and functions as provided in paragraph 16 of this Order. However, no such funds shall be disbursed except as provided by law.

On July 8, 2006, the Governor signed Executive Order No. 19 rescinding Executive Order No. 17 and ordering all departments to resume functions and services immediately. Paragraph 3 stated:

The State Treasurer and the Director of the Office of Management and Budget are hereby authorized to obligate funds for the purpose

of paying for the resumption of these functions and services, but in the absence of a signed General Appropriations Law for Fiscal Year 2007 in accordance with Article VIII, Section II, paragraph 2 of the New Jersey Constitution, no funds shall be disbursed except as provided by law.

Also on that date, the Fiscal Year 2007 Appropriations Law was signed. It gave the Department of the Treasury discretion over whether to compensate furloughed employees.

On July 10, 2006, the Governor announced that both furloughed and non-furloughed workers would receive full compensation for the time during the shutdown.

On July 12, 2006, the PBA's attorney wrote to the Director of the Governor's Office of Employee Relations. His letter stated that since non-essential employees were being paid for the time they did not work during the shutdown, essential employees should receive compensatory time off "both as a matter of basic fairness and as provided in Article XIX." His letter further stated that Article XIX (Special Time Off) specifically provides that when bargaining unit employees receive time off because of a "special emergency" declared by the Governor, the remaining employees who are required to work shall be compensated for such hours by being granted equivalent time off.

On July 13, 2006, the Director of the Governor's Office of Employee Relations denied the request. He wrote that N.J.A.C. 4A:6-2.5(d) governed emergency conditions and preempted any claim

to additional compensation beyond regular pay or, where appropriate, overtime compensation.

On August 9, 2006, the PBA demanded arbitration. This petition ensued.

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.

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]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.A.C. 4A:6-2.5(d) is a Merit System Board regulation entitled "Inclement weather or emergency conditions: State service." Before 1997, it provided:

(c) Employees who are required to work to maintain essential services while others are excused shall be given priority for release for the next emergency, where practicable.

The regulation did not specify the compensation for employees required to work during emergencies.

The regulation was amended after the blizzard of January 1996, in part because "questions arose about the pay to which essential employees were entitled while working during inclement weather or other emergencies." 29 N.J.R. 2733. The amended regulation now provides:

An essential attendance employee who is required to work in accordance with an Essential Employee Attendance Plan shall be compensated at the regular rate of pay for such work. See N.J.A.C. 4A:3-5 for overtime

compensation for work performed by non-exempt employees in excess of the regular workweek.

During the rulemaking process, a union representative commented that the then-proposed rule infringed on areas that should be reserved for collective negotiations and that it was not fair for employees not designated as essential to stay at home and get paid, while employees deemed essential report for work and receive only regular pay rather than overtime pay. The Merit System Board responded that the proposed rule, like the predecessor rule, would preempt any union contract provisions on emergency conditions. It stated that the new rule would continue the practice of paying essential employees overtime only if they have accumulated hours beyond the regular workweek and that the representative could make a proposal to amend the overtime rules if he wished.

The State argues that N.J.A.C. 4A:6-2.5(d) preempts a claim for additional compensation. The PBA responds that the regulation merely sets a minimum level of compensation and does not preclude a negotiated agreement granting additional compensatory time off.

N.J.A.C. 4A:6-2.5(d) preempts any negotiated agreement for compensatory time for essential employees who work during a State emergency. The plain language of the regulation requires regular

pay, not overtime compensation or compensatory time.^{1/} This interpretation of the regulation is supported by the Merit System Board's comments during the rulemaking process, which make clear that the regulation was intended to preempt all negotiations over compensation.

Even if the PBA's contractual interpretation is correct and Article XIX(B)'s provision for alternate time off could be read to apply to this type of emergency and not just to days before or after holidays, its application is preempted because the regulation specifically requires that essential workers be compensated at their regular rate of pay during emergencies.

The PBA's reliance on State of New Jersey, P.E.R.C. No. 2001-71, 27 NJPER 276 (¶32100 2001), is misplaced. That case held that a regulation setting a normal work week of 40 hours for purposes of determining when overtime compensation would be paid did not preempt negotiations over a contractual workweek of 42 hours and 30 minutes. We reasoned that the contractual agreement over the length of the workweek did not conflict with the regulation requiring that overtime compensation be paid after an employee works the number of hours in his or her regular workweek. Here, compensatory time is a form of compensation different from the only form specified and authorized by

^{1/} N.J.A.C. 4A:3-5.2 defines "overtime compensation" as cash overtime compensation or compensatory time off as permitted.

regulation and therefore arbitration seeking compensatory time off cannot be permitted.

ORDER

_____The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: April 26, 2007
Trenton, New Jersey