

P.E.R.C. NO. 2008-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Petitioner,

-and-

Docket No. SN-2007-062

P.B.A. LOCAL 200,

Respondent.

SYNOPSIS

_____The Public Employment Relations Commission denies the request of the Borough of Hawthorne for a restraint of binding arbitration of grievances filed by P.B.A. Local 200. The grievances allege a unilateral change in a terminal leave policy. Because terminal leave is mandatorily negotiable, the Commission declines to restrain binding arbitration.

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, Laufer, Knapp, Torzewski, Dalena & Sposaro, attorneys (Fredric M. Knapp, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Leon B. Savetsky, on the brief)

DECISION

_____ On April 24, 2007, the Borough of Hawthorne petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of grievances filed by P.B.A. Local 200. The grievances allege a unilateral change in a terminal leave policy. Because terminal leave is mandatorily negotiable, we decline to restrain binding arbitration.

The parties have filed briefs, exhibits and certifications. These facts are undisputed.

The PBA represents police officers below the rank of sergeant. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. The

agreement does not address terminal leave. The grievance procedure ends in binding arbitration.

The Borough submitted the certification of Eric Maurer, who has been Borough Administrator for 14 months. Maurer's certification details four instances since 1999 where "unearned" terminal leave was granted to officers approaching retirement. The PBA submitted the certification of Joseph Carr, who has been employed by the Borough since 1993 and is the PBA president. Carr's certification asserts that there were also several other grants of terminal leave prior to 1999. Carr maintains that the terminal leave at issue is "earned" through 25 years of service and was granted on a case-by-case basis. All of the officers described in Maurer's certification had at least 25 years of service, but none received as much extra time as requested.

On January 26, 2007, Captain Peter Vander Pyl filed a grievance with Chief Martin H. Boyd. It states:

On December 18, 2006, in a letter addressed to Mayor Botbyl, I informed him of my desire to retire as of October 1, 2007. This would include vacation and personal days, accumulated overtime, and Garcia time, and additional days off that in the past have been granted to officers that have retired after 25 years of continuous service to the Borough of Hawthorne.

On January 19, 2007, I received a response to my request from Mayor Botbyl. In his letter, the Mayor approved the use of my "earned time," but after discussion with the Borough Administrator and the Borough's labor counsel, it was determined that there is no

basis to grant any additional "unearned terminal leave."

It is the opinion of this officer that the basis for granting additional time off has been established in past practice. By denying the request, the administration is denying me a benefit that previous retirees have enjoyed.

On January 29, 2007, Boyd notified Vander Pyl that he does not make decisions concerning time off on retirement. On February 6, the PBA demanded arbitration alleging a unilateral change in the terminal leave policy.

On March 8, 2007, Lieutenant Brian K. Carmen filed a grievance with Boyd. That grievance stated:

On February 2, 2007, in a letter addressed to Mayor Patrick Botbyl and Borough Administrator Eric Maurer, I informed them of my intention to retire April 1, 2008. In the letter, I requested to begin terminal leave on December 4, 2007. This request amounts to me seeking an additional 32 days off beside my regular days off, vacation days, personal days and Garcia days. This arrangement would allow the Police Chief to re-align the squads prior to the start of the new year.

Since the Mayor and Borough Administrator have chosen to not respond in any way to my request, I must interpret the lack of a response as a no. As a career law enforcement officer and a dedicated employee for almost 25 years I find it insulting to have my routine request completely disregarded.

It is the opinion of this officer that the basis for granting additional time off has been established in past practice. By denying this request, the administration is

denying me a benefit that previous police department employees have enjoyed.

On March 13, 2007, Boyd responded that he had not heard from the administration concerning the request. He stated he could not make a decision on the request and suggested moving the grievance to the next step.

On April 5, 2007, the PBA demanded arbitration on Carmen's behalf. This petition ensued.

The Borough contends that terminal leave is a managerial prerogative that was granted at the discretion of the former Mayor. It argues that this terminal leave was unearned, i.e. not relating back to some form of unused leave; is illegal because it involves a supplemental retirement benefit; and may be granted solely in the employer's discretion. The PBA responds that terminal leave is earned after 25 years of service and is mandatorily negotiable.

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.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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]

As this dispute arises in the context of a grievance alleging a violation of an existing agreement, 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 (¶111 App. Div. 1983). No statute or regulation is asserted to preempt the requested terminal leave.

Applying the negotiability balancing test, we have found terminal leave to be a mandatorily negotiable term and condition of employment. State of New Jersey (State Troopers), P.E.R.C. No. 92-3, 17 NJPER 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-5, 17 NJPER 409 (¶22195 1991), aff'd NJPER Supp.2d 278 (¶225 App. Div. 1992), certif. den. 130 N.J. 596 (1992); Middlesex Cty. Prosecutor, P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991), aff'd NJPER Supp.2d 280 (¶227 App. Div. 1992); Borough of Pompton Lakes, P.E.R.C. No. 95-103, 21 NJPER 223 (¶22164 1995). This is not an illegal pension supplement paid to retirees. It is a benefit paid to employees before they retire. Contrast Borough of Butler, P.E.R.C. No. 2000-69, 26 NJPER 119 (¶31051 2000) (payment of 20% of salary upon retirement was illegal supplemental retirement benefit).

All of the Borough's other arguments about why these officers are not entitled to this form of terminal leave must be made to the arbitrator. In an unfair practice case, these same arguments would be considered by the Commission. See, e.g., State of New Jersey (Commission rejected factual argument that

terminal leave was discretionary); Bridgewater Tp., P.E.R.C. No. 2006-62, 32 NJPER 46 (¶24 2006), rev'd 33 NJPER 155 (¶55 App. Div. 2007) (unfair practice charge dismissed where court found that mayor did not have the authority to disregard relevant contract terms and grant non-contractual terminal leave). Here, the arbitrator must determine whether the employer had a contractual obligation to grant the requested leave in these two instances given the history of the benefit and the terms of the parties' contract. We cannot conclude that, as a matter of law, the employer could not have agreed to grant these employees the same benefit the Borough claims that the mayor had the discretion to grant past employees.

ORDER

The Borough's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: February 28, 2008
Trenton, New Jersey