P.E.R.C. NO. 2010-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MONMOUTH,

Petitioner,

-and- Docket No. SN-2010-020

MONMOUTH COUNTY CORRECTIONS
OFFICERS, PBA LOCAL 240,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals and language from an expired collective negotiations agreement between the County of Monmouth and Monmouth County Corrections Officers, PBA Local 240. The Commission holds that portions of the Discipline Article related to progressive discipline and discipline for sick leave are mandatorily negotiable. The Commission finds portions of the Discipline and Grievance Procedure Articles conflict with Civil Service law and are not mandatorily negotiable.

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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Respondent.

Appearances:

For the Petitioner, Parthenopy A. Bardis, Special County Counsel

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Genevieve Murphy-Bradacs, of counsel)

DECISION

On September 29, 2009, the County of Monmouth petitioned for a scope of negotiations determination. The County seeks a determination that certain proposals and language from an expired collective negotiations agreement that Monmouth County Corrections Officers, P.B.A. Local 240, seeks to include in a successor collective negotiations agreement are not mandatorily negotiable and may not be submitted to interest arbitration.

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

The PBA represents all County Corrections Officers.[1/] The parties' most recent agreement expired on December 31, 2008. On September 3, 2009, the PBA filed a petition to initiate compulsory interest arbitration. This petition ensued.

Our jurisdiction is narrow. We address only the abstract issue of whether the subject matter of the proposals or contract language are within the scope of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We do not consider the wisdom of any contract proposal. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). However, we will consider only whether the proposals are mandatorily negotiable. We do not decide whether contract proposals concerning police officers are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER

1/ The contract specifies that the employer is the County of Monmouth and the Monmouth County Sheriff.

594 (¶12265 1981). Paterson outlines the steps for determining whether a proposal is mandatorily negotiable:

> 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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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.
>
> [87 N.J. at 92-93; citations omitted]

Article 7, Section 5 Discipline

The employer asserts that the underlined portions of this article are not mandatorily negotiable.

> Section 1. Employees may be discharged or otherwise disciplined for just cause.
>
> * * *
>
> Section 5. An Officer's prior disciplinary record, other than major offenses, shall not be considered in imposing disciplinary penalties for subsequent offenses if the Officer's record has been free of disciplinary offenses for over one calendar year prior to the subsequent infraction. For purposes of this Section a major offense is defined as a non-attendance offense which results in a penalty suspension.

> Effective January 1, 2005, and for infractions occurring thereafter, any employee who maintains a record free of attendance-related infractions for a period of twelve (12) consecutive months from the date the infraction was committed will revert to two previous levels of discipline on the current progressive disciplinary guidelines and will continue to revert to previous levels of discipline for each additional year the employee goes free from discipline. Example: 1 year free from discipline the employee goes back two steps on the guideline; 2 years free, the employee goes back one additional step and so on.
>
> Discipline for pattern setting will not be brought unless an employee has used their allotted 15 days of sick leave in a given year.

The employer asserts that contract proposals that would set time limits on the use of past discipline in considering pending offenses are not mandatorily negotiable. It further argues that an arbitrator may not review the major discipline of a police officer. It cites City of Hoboken, P.E.R.C. No. 2005-70, 31 NJPER 139 (¶60 2005).

The PBA responds that the disputed contract language addresses only prior discipline based on sick leave abuse and excludes "major offenses," which the contract defines as "a non-attendance offense which results in a penalty of suspension." The PBA also responds that the second paragraph of Article 7, Section 5 is covered by our precedents recognizing that the amount of discipline to be imposed for violations of sick leave

policies is mandatorily negotiable. It cites City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999).

Hoboken precludes negotiations over a provision that would expunge disciplinary records. The language in this agreement applies to a limited class of prior disciplinary infractions -- those related to sick leave misuse and attendance issues -- and does not require expungement of such past disciplinary infractions. It more narrowly provides that after an officer has maintained a "clean" attendance record for a period of time, such past transgressions be given lesser weight as part of a progressive discipline system. In addition, unlike Hoboken, the language in this agreement does not require that past major disciplinary action not be considered. Hoboken ruled that such a provision would not be negotiable for police officers whose major disciplinary actions cannot be considered by an arbitrator.

Accordingly, we hold that the first two paragraphs of Article 7, Section 5 are mandatorily negotiable. See also Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); Rutgers, The State Univ., P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991) (progressive discipline concepts are mandatorily negotiable).

We find that the third paragraph of Article 7, Section 5 is also mandatorily negotiable. The provision does not preclude sick leave verification or discipline for sick leave abuse. It

simply prohibits discipline for pattern setting when an employee's allotted sick leave days have not been exhausted. An employee can still be disciplined if he or she takes sick leave but is not verifiably sick or if the employee in some other manner abuses sick leave. N.J.A.C. 4A:2-2.3(a)4 permits Civil Service employees to be disciplined for "chronic or excessive absenteeism or lateness." It does not preclude an agreement not to discipline employees who have not yet exhausted their annual sick leave allotment for pattern setting. Contrast Montclair (grievance not legally arbitrable to the extent it sought to prevent employer from initiating discipline for sick leave abuse for employees who had not exhausted annual allotment of sick days).

Article 7, Section 7 Discipline

> All disciplinary charges shall be brought within forty-five (45) days of the date upon which the appointing authority or party bringing the charge has sufficient information to believe that an infraction has been committed. In the absence of the institution of the charge within the forty-five (45) day period the charge shall be dismissed.

The employer asserts that this language is preempted by N.J.S.A. 30-8-18.2, which contains a similar time limit but provides an exception for charges that are also the subject of a concurrent criminal investigation. In such cases the employer is not constrained by the 45-day limit.

The PBA responds that we rejected an analogous claim in Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993), where we permitted negotiations over a contractual provision setting time limits for disciplinary charges against municipal law enforcement officers governed by a similar 45-day time limit. See N.J.S.A. 40A:14-147.

The employer replies that the disputed clause in Cherry Hill specifically referenced N.J.S.A. 40A:14-147 and thereby incorporated its exception for criminal investigations, while Article 7, Section 7 does not similarly reference N.J.S.A. 30-8-18.2.

The PBA acknowledges the statutory exceptions to the 45-day time limit. It may seek to negotiate contract language that incorporates the statutory exception. However, the provision is not mandatorily negotiable as written because its does not include or reference the exception required by statute.

Article 8, Grievance Procedure, Section 3, Step 3, Paragraph 2

> In the event the grievance is not settled at Step 3 of this procedure, the Association may elect to proceed through the New Jersey Department of Personnel or through Step 4 [binding arbitration] of this grievance procedure. However, upon the election of either procedure, the choice of the Association becomes exclusive in nature and neither it nor the affected employee can later avail themselves of the procedure not used.

The employer argues that this language is not negotiable because it does not recognize that certain actions are reviewable only to the Civil Service Commission and not to binding arbitration.

The PBA responds that where arbitration is sought over a matter that is not legally arbitrable, the employer may petition us to restrain arbitration. It cites Northvale Bor. P.E.R.C. No. 2004-79, 30 NJPER 213 (¶80 2004).

The employer replies that Northvale did not specifically require binding arbitration and that this provision permits the PBA to invoke binding arbitration even when review is required to be to the Civil Service Commission.

We find this provision to be not mandatorily negotiable. It specifically permits the PBA to invoke binding arbitration for major discipline. Major discipline for Civil Service employees can only be appealed to the Civil Service Commission. Union City., P.E.R.C. No. 2004-78, 30 NJPER 210 (¶79 2004).

ORDER

The first three paragraphs of Article 7, Section 5 are mandatorily negotiable.

Article 7, Section 7 and Article 8, Section 3, Step 3, Paragraph 2 are not mandatorily negotiable.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself.

ISSUED: February 25, 2010

Trenton, New Jersey