

P.E.R.C. NO. 2010-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and-

Docket No. SN-2010-012

HOBOKEN FIRE OFFICERS ASSOCIATION
LOCAL 1076 (SUPERIORS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals and language from an expired collective negotiations agreement between the City of Hoboken and Hoboken Fire Officers Association Local 1076 (Superiors). The Commission holds that a Civil Service statute preempts accrual of vacation beyond two years and that the issue of whether the parties' agreed to include a reopener clause in their last agreement is outside the Commission's scope of negotiations jurisdiction.

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, Scarinci Hollenbeck, attorneys
(Ramon E. Rivera, of counsel)

For the Respondent, Cohen, Leder, Montalbano &
Grossman, LLC, attorneys (Bruce D. Leder, of counsel)

DECISION

On August 10, 2009, the City of Hoboken petitioned for a scope of negotiations determination. The City seeks a determination that portions of existing contract articles and negotiations proposals made by Hoboken Fire Officers Association Local 1076 (Superiors) are not mandatorily negotiable. We find that a Civil Service statute preempts accrual of vacation beyond two years and that the issue of whether the parties' agreed to include a reopener clause in their last agreement is outside our scope of negotiations jurisdiction.

The parties have filed briefs and exhibits. The City has filed the certification of its corporation counsel. These facts appear.

The City is a Civil Service jurisdiction. The Association represents all superior fire officers in the City's uniformed firefighting force in the rank of Training Officer UFD Captain, Battalion Chief, and Deputy Chief. The parties' most recent Memorandum of Agreement expired on December 31, 2007.^{1/}

The City argues that two provisions are not mandatorily negotiable. It contends that an accumulated vacation leave provision is preempted by N.J.S.A. 11A:6-3 and that a reopener clause is not negotiable because it was not included in the 2005-2007 Memorandum of Agreement.

We begin with the reopener clause. Our jurisdiction in scope of negotiations cases is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states: "The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

^{1/} We take administrative notice of the fact that the Association filed for interest arbitration on January 15, 2010 and among the non-economic issues listed on the petition are unused vacation leave and the reopener clause (IA-2010-049).

The City is asking that we interpret the language of the parties' contract and rule that they did not agree to include a reopener clause in their most recent agreement. That is an issue of contract interpretation, not one of deciding whether a subject is within the scope of negotiations. Ridgefield Park. The cases cited by the City are unfair practice decisions where we must sometimes decide what the parties have agreed to in their contract. In a scope of negotiations case, we decide only whether a subject is negotiable in the abstract, and the employer does not argue that reopener clauses are not negotiable in the abstract.

We next consider the negotiability of the accumulated vacation provision. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police 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 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. In a case involving police and firefighters, 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.

[87 N.J. at 92-93; citations omitted]

We consider only whether a contract proposal is mandatorily negotiable. It is our policy not to decide whether proposals or language from an expired agreement, as opposed to grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

A statute or regulation will not preempt negotiations unless it expressly, specifically, and comprehensively fixes a term and condition of employment, thereby eliminating the employer's discretion to vary it. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State Supervisory.

The parties' 2000-2002 agreement contained this language in Article 29.4, Retirement:

A Fire Officer shall have the option to accumulate vacation periods prior to their retirement. He may accumulate a maximum of three (3) years of vacation period or less.

The accumulated vacation time shall be paid in a 100% lump sum payment on retirement or at the Fire Officer's request he shall receive this accumulated vacation time on consecutive days just prior to his retirement date. The maximum amount of lump sum payment for terminal leave and accumulated vacation time shall not amount to more than a year's salary at the time of the Fire Officer's retirement.

The parties' 2003-2004 Memorandum of Agreement did not change that language. Nor did their 2005-2007 Memorandum of Agreement.

The City argues that N.J.S.A. 11A:6-3(e) preempts the vacation accumulation language because the statute prohibits the accumulation of or use of vacation leave earned in one year beyond the next succeeding year.

N.J.S.A. 11A:6-3 grants vacation leave for full-time local government Civil Service employees. Section (e) provides:

e. Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the [Civil Service] commission, the leave is used or the employee is compensated for that leave, which shall not be subject to collective negotiation or collective bargaining.

The Association responds that vacation leave is mandatorily negotiable and the accrual of vacation leave can be addressed by the parties in negotiations.

We agree with the City that N.J.S.A. 11A:6-3(3) prohibits routinely permitting Civil Service employees from accruing vacation days not used during either the year they were earned or the next succeeding year. The statute recognizes that business demands may prevent vacation days from being used in the year they are earned, but states that such days shall accumulate and be granted during the next succeeding year only. Thus, Article 29 is not mandatorily negotiable to the extent it permits employees to accumulate vacation leave beyond the year after the vacation is earned. See State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 96-47, 22 NJPER 37 (¶27018 1995); Cf. Hazlet Tp., P.E.R.C. No. 96-56, 22 NJPER 73 (¶27033 1996) (regulation does not preempt negotiations of payment for vacation time not yet lost by virtue of the regulatory time frame).

ORDER

The disputed language in Article 29 regarding the accrual of vacation leave beyond the year it was earned or the next succeeding year is not mandatorily negotiable.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Kregel and Voos voted in favor of this decision. None opposed. Commissioner Fuller recused herself. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey