

P.E.R.C. NO. 2012-73

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST CALDWELL,

Petitioner,

-and-

Docket No. SN-2012-052

WEST ESSEX PBA, LOCAL 81  
(WEST CALDWELL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines post-interest arbitration the negotiability of a contractual provision the West Essex PBA, Local 81 submitted to interest arbitration for a successor agreement with the Township of West Caldwell. The provision awarded by the interest arbitrator addresses eligibility for out-of-title pay. The Commission holds the provision is not mandatorily negotiable to the extent it significantly interferes with the Township's managerial prerogative to set staffing levels and determine the number and types of officers assigned on duty. The provision is mandatorily negotiable to the extent it provides officers contractual protection against assuming duties outside of their regular job titles.

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, Riker Danzig Scherer Hyland  
Perretti, LLP, attorneys (James J. Lott, Jr., of  
counsel)

For the Respondent, Loccke, Correia, Limsky & Bukosky  
(Merick H. Limsky, of counsel)

DECISION

On March 20, 2012, the Township of West Caldwell petitioned for a scope of negotiations determination.<sup>1/</sup> The Township seeks a negotiability determination regarding a contractual provision addressing eligibility for out-of-title pay contained in its collective negotiations agreement with West Essex PBA Local 81 (West Caldwell Unit). We find that the provision is not mandatorily negotiable to the extent it significantly interferes with the Township's managerial prerogative to set staffing levels and determine the number and types of officers assigned to be on

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<sup>1/</sup> As discussed more fully infra, this petition stems from interest arbitration proceedings.

duty, as well as when out-of-title work must be performed.

However, we find that the provision is mandatorily negotiable to the extent it provides employees contractual protection against assuming duties outside of their regular job title.

### I. Facts and Procedural History

The parties have filed briefs. The Township has filed a certification of its Chief of Police and exhibits.

The PBA represents the Township's police officers excluding the ranks of Captain and Chief of Police. The parties most recent collective negotiations agreement is effective from January 1, 2012 to December 31, 2014.<sup>2/</sup>

Article II, Section H of the Agreement addresses eligibility for out-of-title pay and provides as follows:

1. In the event a vacancy shall exist for any reason except as a result of a Department-assigned training or schooling and, as a result, an Officer or Superior is directed to assume, in an acting capacity, a higher rank and perform the duties and responsibilities of such higher rank for a period of at least ten (10) working days, then such Officer or Superior shall receive the salary or pay for the higher rank for any period so worked beginning with the first hour of the eleventh (11<sup>th</sup>) day.

2. Whenever an employee is assigned to work at a higher rank in a particular position and performs in that position for ten (10) working days either at one time or cumulatively during several assignments

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<sup>2/</sup> This Agreement is the result of an interest arbitration award issued on March 12, 2012 discussed more fully infra.

during a calendar year that Officer will be entitled to pay at the higher rank beginning on the eleventh (11<sup>th</sup>) day of such assignment(s). The provisions of this paragraph shall become effective April 10, 1997.

3. This section shall be interpreted and applied consistent with the Grievance Arbitration and Award of Grievance Arbitrator Joe Douglas (PERC Docket No.: AR-99-112/issued December 30, 1999, and affirmed by the New Jersey Superior Court, Chancery Division on July 11, 2000 (Docket No.: C-110-00)).

The history regarding the existence and interpretation of this contractual provision is lengthy and tortured. The provision was initially the subject of a grievance filed in 1998 that was resolved through an grievance arbitration award issued in 1999. Dkt. No. AR-99-122. The arbitrator found that the provision was ambiguous as to who is to direct an officer to assume work in a higher rank, and also found that the provision applied to vacancies involving both sergeants and lieutenants.

The Chief certified that the grievance arbitration award has been interpreted to require the Township to maintain both a sergeant and lieutenant on a shift and that it permits "double-bumping" -- i.e. where a lieutenant is absent on a shift, the sergeant or senior patrolman acts in the rank of lieutenant and the next senior officer then acts in the rank of sergeant, both in an out-of-title capacity. The Chief certifies that the out-of-title provision has had a significant impact on the operations, supervision and efficiency of the Department and his

authority as Chief. He further certified that there is an effective level of supervision with one superior officer, sergeant or lieutenant, on a shift and thus no need to assign an officer to work as a supervisory officer in an out-of-title capacity in the absence of a sergeant or lieutenant.

Additionally, the Chief certified that the out-of-title provision impedes his determination of the number and types of officers to be assigned to a shift and to set appropriate supervisory staffing levels. Moreover, the Chief certifies that his decision as to the staffing and level of supervision necessary is made to ensure the effective and efficient provision of police services to the public; involves a careful balancing of the appropriate supervisory staffing levels and the Township's economic interests to ensure the most effective use of police resources; made in accordance with recognized authorities on police management; made with consideration as to the quality and consistency of supervision on each shift and the individual qualifications and experience of officers to serve in a supervisory capacity; and requires a determination as to the proper allocation of work between direct patrol duties and supervisory responsibilities out-of-title.

After the issuance of the grievance arbitration award, the Township agreed to settle the grievance by side letter dated August 2000 which set forth that the out-of-title provision would be suspended in exchange for a fixed table of organization

including one chief, one captain, four lieutenants and five sergeants. It also required that in the event of a vacancy within the aforementioned positions, the Township must fill the vacancy within 60 days from a promotional list, and if no such list exists, then a promotional exam must be administered.<sup>3/</sup> The out of-title provision remained suspended by virtue of the 2000 Side Letter from 2000 through 2009.

In 2009, the Township declined to fill vacancies in the rank of captain and sergeant which triggered out-of-title pay requests dating back to 2008. The Township denied those requests and PBA grieved the matter. The Township filed a scope of negotiations petition seeking to restrain arbitration. We denied the Township's request for a restraint of arbitration and found that contract clauses requiring additional compensation for work performed in a higher title or different job category are generally mandatorily negotiable and legally arbitrable. However, we based our ruling on PBA's representation that the grievances addressed compensation for assignments already worked only and did not address staffing levels or assignments. We found that compensation claims do not significantly interfere with governmental policymaking. P.E.R.C. No. 2011-63, 37 NJPER 56 (¶22 2011).

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<sup>3/</sup> The Township was also required to pay 85% of all approved out-of-title requests, and any further requests were waived by the PBA.

After the issuance of P.E.R.C. No. 2011-63, the Township agreed to settle the grievance by side letter dated April 19, 2011. The 2011 Side Letter provided that the out-of-title provision was suspended in exchange for a fixed Table of Organization with a staff including one chief, one captain, four lieutenants, five Sergeants and four corporals. It further provided that if a vacancy occurs in any of the aforementioned positions, the Township must fill the vacancy within 60 days from a promotional list, and if no such list exists, then a promotional exam must be administered. Currently, the out-of-title provision remains suspended by virtue of the 2011 Side Letter.

On January 23, 2012, the Township filed a Petition to Initiate Compulsory Interest Arbitration, and it listed the out-of-title provision as a disputed issue. The Township argued that the provision interfered with its managerial authority to set appropriate supervisory staffing levels, to assign the number and types of officers to particular shifts, to make promotions, to determine when out-of-title work is performed and to establish and control the table of organization. On March 12, 2012, the interest arbitrator issued an Award and made no change to the out-of-title provision. He found that "[a]s to the Township's claim there has been an infringement upon its managerial authority, it is an issue the Township must address through a scope of negotiations proceeding before PERC."

The Township appealed the interest arbitration award only with regard to the arbitrator making no change to the out-of-title provision. On April 20, 2012, we issued a decision in which we found that the gravamen of the Township's argument on appeal was that the out-of-title provision infringes upon its managerial prerogative to set appropriate supervisory staffing levels and to assign the number and types of officers to a particular shift, and that its claim should be evaluated pursuant to the legal standards for a scope negotiations determination rather than the legal standards for appealing interest arbitration awards. P.E.R.C. 2012-54, \_\_\_ NJPER \_\_\_ (§ \_\_\_\_). Following the issuance of P.E.R.C. 2012-54, the Township filed its scope of negotiations petition and the parties filed briefs regarding the merits of their positions.

## II. Legal Standards for Review

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 Township may have.

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

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 the proposal is mandatorily negotiable. It is our policy not to decide whether contract

proposals, as opposed to grievances, involving police officers and firefighters are permissively negotiable since the employer has no obligation to negotiate over such proposals. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶ 12265 1981).

### III. Parties' Arguments

The Township argues that the out-of-title provision is preempted by N.J.S.A. 40A:14-118<sup>4/</sup> and N.J.S.A. 40A:14-143<sup>5/</sup>. The Township further argues that the clause is not mandatorily negotiable because it limits its managerial prerogative to establish the table of organization, to decide when and whether to promote, to assign the number and types of officers to each shift, to set supervisory staffing, and to determine whether out-of-title work is necessary.

The PBA responds that this issue has been previously addressed in P.E.R.C. No. 2011-63, neither statute that the Township relies on preempt the out-of-title provision, and the provision does not interfere with the Township's managerial prerogatives.

The Township replies that this scope petition raises different issues than the petition addressed in P.E.R.C. 2011-63.

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4/ This statute sets forth the duties and responsibilities of a municipal chief of police.

5/ This statute sets forth that the governing body of any municipality, if it deems it necessary for reasons of economy, may decrease the number of members and officers of the police department or force or their grades or ranks.



IV. Analysis

We start with the Township's preemption argument, which we reject. A statute or regulation will not preempt a negotiable term and condition of employment, unless it does so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982). Both N.J.S.A. 40A:14-118 and N.J.S.A. 40A:14-143 are general statutes which do not expressly, specifically and comprehensively deal with the issue of out-of-title pay.

We next address the Township's argument that the out-of-title provision significantly interferes with its managerial prerogatives. Contract clauses requiring additional compensation for work performed in a higher title or different job category are generally mandatorily negotiable. East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992). In P.E.R.C. 2011-63, we found that PBA's grievance was legally arbitrable because it only sought compensation for out-of-title assignments already worked. Employees have a strong interest in receiving additional pay for performing work of a higher level than that on which their standard compensation is based.

However, the scope petition here does not stem from a grievance seeking compensation, but rather stems from interest arbitration proceedings wherein the Township was seeking to have

the provision removed from the contract because it asserts the provision interferes with managerial prerogatives. Article II, section H, paragraph 3 of the Agreement provides that the provision as written must be interpreted and applied consistent with the grievance arbitration award issued in 1999. That award set forth that the clause applied to vacancies involving both sergeants and lieutenants, and was ambiguous as to who is to direct an officer to assume work in a higher rank. Thus, the clause, as written, significantly infringes on the Township's managerial prerogative to set staffing levels and determine the number and types of officers assigned to be on duty to provide police services. Borough of North Caldwell, P.E.R.C. No. 2010-51, 36 NJPER 10 (¶ 4 2010); Sea Isle City, P.E.R.C. No. 96-83, 22 NJPER 240 (¶ 27125 1996). Flowing from this managerial prerogative is the Township's prerogative to determine when out-of-title work is necessary. However, employees may negotiate for contractual protection against being required to assume duties outside their job titles and beyond their normal duties. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977). Such protections maintain the integrity of the equation between negotiated salaries and required work. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed., 81 N.J. . 582, 591 (1980).

Within this framework, we conclude that to the extent the provision significantly interferes with the Township's managerial

prerogative to set staffing levels and determine the number and types of officers assigned to be on duty, as well as when out-of-title work is necessary, it is not mandatorily negotiable. However, to the extent the provision provides employees contractual protection against officers assuming duties outside of their regular job title, it is mandatorily negotiable. We direct the parties to interpret the provision in accordance with the findings established in this decision.

ORDER

The out-of-title provision is not mandatorily negotiable to the extent it significantly interferes with the Township's managerial prerogative to set staffing levels and determine the number and types of officers assigned to be on duty, as well as when out-of-title work must be performed. The out-of-title provision is mandatorily negotiable to the extent the provision provides employees contractual protection against assuming duties outside of their regular job title.

BY ORDER OF COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Jones recused himself. Commissioner Wall was not present.

ISSUED: June 28, 2012

Trenton, New Jersey