

P.E.R.C. NO. 2014-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF GALLOWAY,

Petitioner,

-and-

Docket No. SN-2013-049

PBA LOCAL 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Galloway for a restraint of binding arbitration of a grievance filed by PBA Local 77. The grievance asserts that the Township violated the parties' past practice when it discontinued payment of employees' shares of pension contributions for employees out on workers' compensation leave. The Commission finds that the pension statutes preempt negotiations over employer payment of employee pension contributions for employees receiving compensation in excess of their Worker's Compensation benefits.

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, Blaney & Donohue, PA, attorneys
(William G. Blaney, of counsel)

For the Respondent, Plotkin Associates, LLC (Myron
Plotkin, consultant)

DECISION

On January 31, 2013, the Township of Galloway filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 77. The grievance asserts that the Township violated the parties' past practice when it discontinued payment of the employees' share of pension contributions for employees out on worker's compensation leave.

The Township filed briefs, exhibits, and the certification of Township Manager, Arch Liston. The PBA filed a brief, exhibits, and the certification of Officer and PBA Shop Steward Kevin Welsh. These facts appear.

The PBA represents all of the Township's regularly employed, full time police personnel below the rank of Corporal. The PBA

and Township are parties to a collective negotiations agreement (CNA) effective from January 1, 2011 through December 31, 2014. The grievance procedure ends in binding arbitration.

Liston certified that the Township has a practice of providing police personnel who are out due to a work-related injury with their full level of salary in lieu of workers' compensation benefits. Both parties certified that prior to September 2012, the Township had a practice of paying the injured employees' share of contributions to the pension system while those employees were out on injury leave.^{1/} The parties certified that this practice of making injured employees' pension contributions was discontinued in September 2012. Welsh certified that in September-December 2012, the Township made payroll deductions to recoup money from employees who received those full pension contributions while out on injury leave.

On October 5, 2012, the PBA filed a grievance asserting that the Township violated the CNA by discontinuing the practice of paying employee pension contributions while those employees are out on workers' compensation. Specifically, the PBA alleged that the Township violated contract articles guaranteeing continuation of past benefits (Articles XIX and XXII, Section B.) because discontinuation of the pension payments "is a violation of a

^{1/} There is no dispute concerning the amount of the employer's portion of pension contributions.

longstanding and consistent past practice and benefit." On October 8, Chief Patrick Moran denied the grievance. On November 13, the PBA demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the Township may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). For police officers and firefighters, binding arbitration is restrained only if the agreement alleged is preempted or would substantially limit government's policy-making powers. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981).

The Township acknowledges its past practice of paying the employee's share of pension contribution while that employee is out due to a work-related injury. It also notes that an employer is obligated under N.J.S.A. 43:16A-15.2a to make contributions to the pension system on behalf of employees receiving workers' compensation benefits. However, the Township argues that because (pursuant to Article XII, Section D.) it provides additional compensation in combination with workers' compensation benefits so that employees on injury leave receive their regular full pay, then N.J.S.A. 43:16A-15.2a does not apply because the total injury benefits package is not really "in lieu of his normal

compensation". Therefore, the Township asserts, it is not obligated to pay the employee's pension contribution while the employee is out on injury leave, but is required by N.J.S.A. 43:16A-15(7) to deduct contributions from the employee's salary.

The PBA responds that the Township's past practice of paying an employee's pension contributions while the employee is on injury leave is simply an additional economic benefit that is not specifically preempted by N.J.S.A. 43:16A-15.2a and 15(7). It argues that N.J.S.A. 43:16A-15.2a fails to state any prohibition or preemption of an employer paying an injured employee's pension contribution should that employee receive 100% (70% from workers' compensation, and 30% from the Township) of regular pay based on a negotiated contractual benefit.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). As noted in Paterson, supra, if a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). In addition, N.J.S.A. 34:13A-8.1, referring to the Act as a whole provides, "nor shall any provision hereof annul or modify any

pension statute or statutes of this state." The Supreme Court has held that this provision means that:

[T]he entire subject matter of public employee pensions is to be insulated from negotiated agreement which would contravene or supplement its comprehensive regulation of that area. Public employers and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pensions.

[State v. State Supervisory Employees Ass'n, 78 N.J. at 83]

N.J.S.A. 43:16A-15.2a, a pension statute, provides in pertinent part:

If any member of the retirement system receives periodic benefits payable under the Workers' Compensation Law during the course of his active service, in lieu of his normal compensation, his regular salary deductions shall be paid to the retirement system by his employer. . . The moneys paid by the employer shall be credited to the member's account . . . and shall be treated as employee contributions for all purposes. The employer will terminate the payment of these moneys when the periodic benefits payable under the Workers' Compensation Law are terminated or when the member retires.

The member for whom the employer is making such payments, will be considered as if he were in the active service.

Its terms are identical to those of N.J.S.A. 43:15A-25.1, applicable to the Public Employees Retirement System (PERS). The Supreme Court has construed the PERS law and held:

If the employee has returned to work and is receiving salary, even if the employee also is receiving a permanent partial disability

award at the same time, normal pension procedures would govern employee salary deductions and employer contributions to the pension system on account of that employee. If the employee is not receiving salary and is receiving only workers' compensation periodic benefits, then pursuant to N.J.S.A. 43:15A-25.1 the employer must pay both the employer's and the employee's pension contributions.

[James v. Bd. of Trs. of PERS., 164 N.J. 396, 411 (2000), emphasis added]

In sum:

- If the injured officer is receiving his normal compensation, than the employee's pension contribution is paid by the officer.
- If the injured officer is receiving only [the lower] workers' compensation benefits then the employer pays both its and the employee's share of the pension contribution.

It is undisputed that prior to September 2012, injured employees were paid full salary rather than worker's compensation benefits. Given both the language of the pension statute and the ruling in James, any attempt to enforce, through binding grievance arbitration, specific contract language or an existing practice that conflicts with the statute is preempted. We cannot ignore or neutralize the statute in this case because the parties have a past history of operating in a different manner.^{2/}

^{2/} We make no determination as to benefits received prior to September 2012. See County of Hudson, P.E.R.C. No. 90-6, 15 NJPER 495, 496 (¶20203 1989).

ORDER

The request of the Township of Galloway for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Wall recused himself. Commissioner Bonanni was not present.

ISSUED: October 31, 2013

Trenton, New Jersey