

P.E.R.C. NO. 2015-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PEMBERTON,

Petitioner,

-and-

Docket No. SN-2014-091

PEMBERTON PBA LOCAL NO. 260,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a scope of negotiations petition filed by the Township of Pemberton seeking to remove step three of the parties' grievance procedure from their successor collective negotiations agreement. The Commission finds that the Faulkner Act, N.J.S.A. 40:69A-31 et seq. does not specifically preempt the town council from reviewing a grievance at step three under a mayor-council form of government. The Commission holds that this dispute is one of separation of powers between the mayor and city council under the Faulkner Act, and is better adjudicated by a court than as a negotiability dispute under the Employer-Employee Relations Act.

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, Archer & Greiner, P.C., attorneys
(David A. Rapuano, of counsel)

For the Respondent, Sciarra & Catrambone, L.L.C.,
attorneys (Christopher A. Gray, of counsel)

DECISION

On April 23, 2014, the Township of Pemberton petitioned for a scope of negotiations determination concerning the grievance procedure article in its expired agreement with PBA Local 260. The Township seeks to remove step three of the grievance procedure and the PBA seeks to retain the process as written in a successor agreement.

The parties have filed briefs and exhibits. The Township has filed a certification of Township Business Administrator Dennis Gonzalez. These facts appear.

The PBA represents all patrol officers and sergeants employed by the Township's police department. The parties' most recent agreement has a duration from January 1, 2010 through

December 31, 2013. The parties have finalized a new agreement with a duration from January 1, 2014 through December 31, 2017 subject to this scope determination.

Article XIII is entitled Grievance Procedure and provides for the Chief of Police to hear a grievance at step one and the Mayor to hear the grievance at step two. Step three is the portion the Township seeks to remove and provides:

If the grievance is not resolved at Step Two, or if no answer has been received by the Association or the Aggrieved employee within the time set forth in Step Two, the grievance may be presented by the Association or the aggrieved employee in writing within ten (10) calendar days to the Township Council. The final decision of the Township Council shall be given to the Association or the aggrieved employee in writing within thirty (30) calendar days after the receipt of the grievance.

Step four provides for binding arbitration.

The City has adopted the mayor-council form of government pursuant to the Faulkner Act, N.J.S.A. 40:69A-31 et seq. In summary, the mayor-council form of government vests an elected mayor with the executive functions of the Township and the elected council with the legislative functions of running the Township.

Our jurisdiction 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).

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.^{1/} 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

^{1/} The scope of negotiations for police and fire employees 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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

As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. Of Higher Ed., 91 N.J. 18, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233. [Id. at 44].

The Township argues that step three must be removed from the grievance procedure because under the Faulkner mayor-council

plan, the mayor is responsible for executive functions that include matters of employment and negotiating contracts subject to council approval. By permitting the council to review and reverse the mayor's determination on a grievance, the council is usurping the power of the mayor in violation of the Faulkner Act.

The Township cites Hillside Firemen's Mutual Benevolent Ass'n v. Menza, 2013 N.J. Super. Unpub. LEXIS 506 (2013) (municipality operating under the mayor-council form of government pursuant to the Faulkner Act may not require by ordinance that its mayor obtain the council's approval for a layoff plan pertaining to all municipal employees); City of Atlantic City v. Gindhart, 2007 N.J. Super. Unpub. LEXIS 2321 (2007) (city council lacked authority initiate litigation which is an executive function under mayor-council form of government); and Torres v. Municipal Council of the City of Paterson, 2007 N.J. Super. Unpub. LEXIS 1482 (city council could not designate itself as the appropriate authority to bring disciplinary charges against police officers).

The PBA responds that the parties' CNAs have permitted grievances to be heard by the Township Council since the 1970s, including the past 23 years that the Township has operated under the mayor-council form of government. It further asserts the mayor is a former police officer who has held office since 2006 and never challenged the council's authority in the grievance

procedure prior to the council recently reversing his decision. It asserts that the grievance procedure is at least permissively negotiable and that this matter is not preempted by the Faulkner Act as no statute or regulation specifically prohibits the Township and PBA from agreeing to have the council participate in the grievance process. The PBA relies on various Township ordinances establishing the power of the council to conduct investigations and receive reports from the Chief of Police. It distinguishes the cases cited by the Township asserting that the council is not involved in collective negotiations; has not sought to institute a litigation; and has not sought to institute layoffs. Finally, the PBA argues that under the holding of Hillside, this dispute should be decided by the Superior Court as the matter is not an issue inherent under our Act.

The Township replies that PERC has primary and exclusive jurisdiction with respect to this scope of negotiations issue; the past practice of the parties is neither in dispute nor relevant; the council's ratification of the most recent CNA is not relevant to this dispute; the ordinances are not material to the dispute; and the Township Council does not have the statutory authority to overrule the mayor with respect to employee discipline and contractual interpretation.

As set forth above, our scope of negotiations jurisdiction requires us to determine whether the abstract issue - here the

grievance procedure - is mandatorily negotiable. Our Act specifically makes grievance review procedures mandatorily negotiable. N.J.S.A. 34:13A-5.3 provides, in part:

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization.

Where a statute or regulation is alleged to preempt an otherwise negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem. Nothing in the Faulkner Act specifically prohibits the council from participating as a step in the grievance procedure. The heart of this dispute therefore is not really a negotiability contest between the employer and PBA. It is really a political dispute between the mayor and city council. Our jurisdiction does not permit us to go outside the Employer-Employee Relations Act to find that a mandatorily negotiable issue violates the separation of powers in the Faulkner Act. Accordingly, this issue is better adjudicated by a court rather than a negotiability assessment within our expertise. See City of

Passaic, P.E.R.C. No. 2000-54, 26 NJPER 75 (¶31027 1999). We note the cases cited by the Township were initiated in the courts, except the Hillside case, where the court found the Civil Service Commission could not rule on a question of statutory law related to the separation of powers. We dismiss this Township's scope of negotiations petition.

ORDER

The scope of negotiations petition filed by the Township of Pemberton is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Voos voted in favor of this decision. None opposed. Commissioners Eskilson, Jones and Wall recused themselves.

ISSUED: March 26, 2015

Trenton, New Jersey