P.E.R.C. NO. 2016-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HELMETTA,

Petitioner,

-and-

Docket Nos. SN-2015-048
SN-2015-049

LOCAL 210, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of Helmetta's request for a restraint of binding arbitration of a grievance filed by Local 210, International Brotherhood of Teamsters. The grievance contests the Borough's termination of two Animal Shelter employees as being without just cause. Finding that Articles 10 and 29 of the parties' CNA are preempted by N.J.S.A. 40A:60-3(d) and N.J.S.A. 40A:60-5(c) because those statutes expressly define a quorum for purposes of conducting borough business and grant the mayor power to cast tiebreaking votes, the Commission restrains arbitration and holds that Articles 10 and 29 must be considered removed from the CNA. The Commission denies restraint of arbitration to the extent that the grievance challenges the Borough's termination as being without just cause.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Hoffmann & Associates, attorneys (Andrew S. Hoffmann, of counsel)

DECISION

On February 10, 2015, the Borough of Helmetta (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Local 210, International Brotherhood of Teamsters (Local 210). The grievance alleges that the Borough violated the parties' collective negotiations agreement (CNA) when two Borough Animal Shelter employees were terminated without just cause.[1/] The Borough seeks to restrain arbitration to the extent that Local 210 relies on contract language which the Borough asserts is

1/ On July 30, 2015, Local 210 withdrew the grievance and arbitration request of one of the employees (AR-2015-383).

statutorily preempted and should be removed from the CNA. The parties have filed briefs and exhibits. Neither party filed a certification.[2/] These facts appear.

Local 210 represents a negotiations unit of Public Works Department and Shelter employees. The Borough and Local 210 are parties to a CNA in effect from January 1, 2010 through December 31, 2014. The grievance procedure ends in binding arbitration.

Article 10 of the CNA is entitled "Separation from Service" and provides, in pertinent part:

> After the completion of the employee's probationary period, an employee can be terminated from service for cause only by the affirmative vote of four (4) Borough Council members with the full complement of Council members voting, the Mayor not being permitted to vote.

Article 29 of the CNA is entitled "Discharge" and provides, in pertinent part:

> No employee shall be discharged except for good and sufficient cause. The employer must give prompt written notice to the Union. The Union may question the discharge and submit the matter to arbitration if, in its opinion, such discharge is not justifiable. Discharge or termination of covered employees requires full City Council vote.

Local 210 maintains that in or about December 2014, the Borough terminated two Animal Shelter employees. Local 210 filed

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2/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

grievances challenging the terminations. On January 9, 2015, Local 210 requested binding arbitration. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of Local 210's claimed violation of the agreement, as well as the Borough's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [Id. at 404-405]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Borough seeks a ruling to eliminate certain provisions within Articles 10 and 29 of the CNA, and to have those provisions barred as part of the grievant's defense in the arbitration hearing. Specifically, the Borough argues that the following underlined provisions within Articles 10 and 29 requiring a specific number of Council members to vote on an employee's removal and prohibiting the Mayor from voting on an employee's removal are preempted by statute:

> **ARTICLE 10 - SEPARATION FROM SERVICE**
>
> After the completion of the employee's probationary period, an employee can be terminated from service for cause only by the affirmative vote of four (4) Borough Council members with the full complement of Council members voting, the Mayor not being permitted to vote.
>
> **ARTICLE 29 - DISCHARGE**
>
> No employee shall be discharged except for good and sufficient cause. The employer must give prompt written notice to the Union. The Union may question the discharge and submit the matter to arbitration if, in its opinion, such discharge is not justifiable. Discharge or termination of covered employees requires full City Council vote.

The Faulkner Act provides that a borough's elected officers shall be a mayor and six council members. See N.J.S.A. 40A:60-2. The Borough argues that the following statutes setting forth quorum requirements and mayoral powers in the borough form of government preempt negotiations over the number of voting council members needed to discharge an employee covered by the CNA:

> **40A:60-3. Organization, Officers; Meetings**
> * * *
> d. Three councilmen and the mayor or, in the absence of the mayor, four councilmen shall constitute a quorum for transacting business.
>
> **40A:60-5. Powers of the Mayor**
> * * *
> c. The mayor shall preside at meetings of the council and may vote to break a tie.

The gravamen of the Borough's case is that because Articles 10 and 29 require "the full complement of Council members voting" and "full City Council vote" for purposes of terminating a unit member, they conflict with the imperative language of N.J.S.A. 40A:60-3(d) that only four councilmen, or the mayor and three councilmen, "shall constitute a quorum for transacting business." The Borough also contends that Article 10's prohibition on the mayor voting on terminations conflicts with the language of N.J.S.A. 40A:60-5(c) requiring the mayor to preside over council meetings and granting the mayor the power to vote in order to break a tied council vote. It asserts that the Legislature did not intend for the number of voting council members in order to conduct certain aspects of Borough business to be negotiable.

Therefore, the Borough argues, Local 210 cannot demand the presence of the entire Borough council for termination where the law establishes the number required for a quorum, and the parties cannot negotiate away the mayor's voting power in the event only three council members could attend or in the event of a tie vote. It asserts that even if the statutes are not found preemptive for this dispute, the Borough has an overriding managerial prerogative in being able to meet quorum requirements to transact business and the relevant portions of Articles 10 and 29 interfere with its ability to function efficiently by preventing it from removing employees for cause without the full council.

Local 210 agrees with the Borough that N.J.S.A. 40A:60 provides for the minimum numbers of council members required to constitute a quorum for transacting municipal business, but argues that nothing in the statute or cases cited by the Borough specifically provides that the Borough is precluded from agreeing to provide additional protections to Local 210 employees by requiring the full council's presence as quorum for a termination decision. It asserts that the contractual provisions at issue were negotiated to effectively require a four-vote majority of council for terminations of unit members in order to provide additional job security and limit terminations sought by only factions of the council. Finally, Local 210 contends that the

Borough has waived its right to object to the disputed clauses now because they never objected to their inclusion in the CNA.

The Borough replies that it has not waived its right to seek a negotiability determination on the disputed clauses because they are at issue in the underlying grievance. Citing Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), the Borough asserts that the Commission will exercise its scope of negotiations jurisdiction relating to an existing contractual provision under "special circumstances" where specific legislation mandates that the provision is an illegal subject for collective negotiations.

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. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). 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. Id.

The Commission has not previously considered preemption arguments involving N.J.S.A. 40A:60-3(d) and N.J.S.A. 40A:60-5(c), but there is ample judicial authority on the relevant legal issues which directs our determination here. In Barnert v. Paterson, 48 N.J.L. 395, 400 (Sup.Ct. 1886), the Supreme Court of New Jersey found that the City of Paterson's adopted rule requiring two-thirds vote of the whole members of the board for issues involving the expenditure of money was invalid where not provided by state law or municipal charter. The Court held:

> When the charter of a municipal corporation or a general law of the state does not provide to the contrary, a majority of the board of aldermen constitute a quorum, and the vote of a majority of those present, there being a quorum, is all that is required for the adoption or passage of a motion or the doing of any other act the board has power to do.
>
> Under the twenty-third section of the charter, the board is given power "to establish its own rules of procedure." But I do not think that under this power it was designed to confer upon this board the adoption of a rule changing either the general law or any special provision in the charter. Power to make such rules and by-laws was inherent in the corporation without this provision. Such by-laws must be in accordance with the charter or the general rules of law. The charter is silent and the general law requires a majority vote.
>
> [Barnert at 400; citation omitted]

Similarly, in Outwater v. Carlstadt, 66 N.J.L. 510, 513-514 (Sup.Ct. 1901), a borough bylaw requiring a two-thirds vote of

all the members of the council for resolutions involving the expenditure of money was found invalid as preempted by the state Borough Act's quorum definition; therefore a 4-3 vote in which the six council members tied and the mayor cast the affirmative vote constituted a valid resolution for purchase of a new assessment map. The Supreme Court found:

> The Borough act of 1897 provides (section 23) that the mayor and councilmen, in number six (section 2), shall constitute the council; that three councilmen and the mayor shall constitute a quorum for the transaction of business. The mayor shall not vote except to give a casting vote in case of a tie. Section 26 of the same act provides that no ordinance shall be finally passed except by a vote of a majority of the whole council; the municipal action in this case was by resolution, which was adopted by a majority of the whole council.
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> [Outwater at 513]

In Florham Park v. Health Dep't, 7 N.J.Misc. 549, 550-551 (Sup.Ct. 1929), the state board of health consisted of eleven qualified members but had created a rule that only five members constituted a quorum for conducting business. Holding that the board's approval of a cemetery plan in Florham Park which occurred with only a five member quorum was invalid for violating the common law quorum requirement of a majority (6) of the total number of the board, the Supreme Court stated:

> There is no provision in the statute with respect to the number of the board that shall constitute a quorum for the transaction of business, although the board is empowered to

> make rules. It has, by rule, provided that five members shall constitute a quorum.
>
> This it cannot do. The rule of law is succinctly stated in 43 Corp. Jur. 502 as follows: "A municipality may not fix its own quorum, either where there is a statute or charter provision fixing it, or in the absence thereof. If the charter is silent and there is no general law fixing a statutory quorum, then the common law rule of majority will govern, notwithstanding there may be a municipal by-law, rule or order prescribing a greater or less number for a quorum."
>
> The state board being composed of eleven members no less than a majority can constitute a quorum....It is argued that since the board has power to adopt rules it can change the rule with respect to a quorum. This, however, is not so.
>
> [Florham Park at 550-551; citations omitted]

In Matawan Regional Teachers Asso. v. Matawan-Aberdeen Regional School Dist. Bd. of Education, 223 N.J. Super. 504 (App.Div. 1988), the Appellate Division followed the Supreme Court's rulings in Barnert and Outwater to conclude that a local school board was not bound by a bylaw requiring two-thirds majority vote to sell a school building because the relevant statute defined a lesser majority threshold. The Appellate Division found:

> We reject the argument that the Legislature has merely established a minimum number of affirmative votes necessary for local board action, which the board may increase in its bylaws to assure a broader consensus. Depriving the majority of its authority and responsibility to govern in favor of a broader consensus carries the risk of inaction where action is warranted. There may

> be actions which should be taken with the affirmative votes of an enhanced majority because of their overwhelming importance or because they constitute a departure from the norm. The Legislature has provided for such particular instances by requiring the vote of an enhanced majority. A relevant example is the statute that prohibits a local board from selling school lands except 'by a recorded roll call majority vote of its full membership.' N.J.S.A. 18A:20-5. That requirement was met here.
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> [Matawan at 507-508]

Accord Traino v. McCoy, 187 N.J. Super. 638 (Law Div. 1982)(rule adopted by municipality's Board of Ethics requiring all three members to constitute a quorum for the conduct of business was found invalid in favor of common law majority quorum which can only be changed by general law or charter); Willingboro Tp. Bd. of Ed., I.R. No. 98-12, 24 NJPER 31 (¶29017 1997)(citing Matawan, supra, Commission Designee found the school board ratified a collective negotiations agreement because a majority of members constituting a common law quorum voted in favor of it and no law supported Board's asserted requirement that a majority of full membership of Board vote in the affirmative).

Based on the above-discussed precedent, it is apparent that the Borough here may not, whether through bylaw or collective negotiations, violate the terms of N.J.S.A. 40A:60-3(d) by creating either a higher or lower quorum or vote threshold for transacting certain types of municipal business. Furthermore, the Supreme Court in Outwater, supra, confirmed a mayor's right

under the Borough Act to cast a tie-breaking council vote. We therefore hold that the aforecited underlined portions of Articles 10 and 29 of the CNA are preempted by N.J.S.A. 40A:60-3(d) and N.J.S.A. 40A:60-5(c) because those statutes expressly define a quorum for purposes of conducting borough business and specifically grant the mayor's power to cast tiebreaking votes. We also hold that, beyond the confines of the instant arbitrability dispute, the preempted language must be removed from the CNA because the Borough's petition met the Commission's requirements for exercising our scope of negotiations jurisdiction in "special circumstances" including where a prima facie showing has been made that "specific legislation mandates the conclusion that a particular contractual provision is an illegal subject for collective negotiations." Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977).

The practical effect for purposes of the underlying grievance arbitration is that Local 210 may arbitrate its contractual just cause challenge to the termination, but arbitration is restrained with respect to the language of Articles 10 and 29 of the CNA regarding quorum requirements and mayoral powers.

ORDER

1. The request of the Borough of Helmetta for a restraint of binding arbitration is granted with respect to the disputed

quorum and mayoral powers provisions of Articles 10 and 29 of the collective negotiations agreement, and denied with respect to Local 210, International Brotherhood of Teamsters' just cause challenge to the termination.

2. The disputed provisions of Articles 10 and 29 are illegal subjects for negotiations because they are preempted by N.J.S.A. 40A:60-3(d) and N.J.S.A. 40A:60-5(c) and therefore must be considered removed from the collective negotiations agreement.

BY ORDER OF THE COMMISSION

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

ISSUED: October 29, 2015

Trenton, New Jersey