

P.E.R.C. NO. 2016-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LITTLE SILVER,

Petitioner,

-and-

Docket No. SN-2016-037

PBA LOCAL 359,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a contract clause establishing administrative fees for special duty assignments in an expired collective negotiations agreement between the Borough of Little Silver and PBA Local 359. The Commission holds that the disputed clause is permissively, but not mandatorily, negotiable. Given that the parties' collective negotiations agreement has expired, the disputed clause must be deleted from a successor agreement unless both parties choose to negotiate over it.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Bruce W. Padula, of counsel and on the brief; Bradley D. Tishman, on the brief)

For the Respondent, Detzky, Hunter & DeFillippo, attorneys (David J. DeFillippo, of counsel)

DECISION

On December 14, 2015, the Borough of Little Silver (Borough) petitioned for a scope of negotiations determination. The Borough asserts that Article XXVII, Section 3 of an expired collective negotiations agreement (CNA) with PBA Local 359 (PBA) is not mandatorily negotiable and therefore cannot be retained in a successor agreement.

The Borough filed a brief and one exhibit.^{1/} The PBA has not filed opposition. These facts appear.

^{1/} The Borough did not file a certification. Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

The PBA represents all full-time patrolmen, sergeants, lieutenants, and captains in the Borough's Police Department. The Borough and the PBA were parties to a CNA in effect from January 1, 2011 through December 31, 2014 and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article XXVII, entitled "Special Duty Assignments," Section 3 of the expired CNA provides in pertinent part:

It shall be the duty of the Chief of Police to provide a properly approved bill to the special duty assignment employer and to the Chief Financial Officer on a monthly basis or more frequently if required within his/her discretion. A properly authorized payroll record must also be provided to the Chief Financial Officer by the Chief of Police. Said billing shall be at the rate of sixty (\$60.00) dollars per hour, of which ten (\$10.00) dollars per hour shall be designated to the Borough to offset administrative and out of pocket expenses incurred by the Borough.

The Borough argues that the underlined portion of Article XXVII, Section 3 is not mandatorily negotiable and must be removed from the expired CNA because it limits the Borough's managerial prerogative to establish administrative fees for special duty assignments. Further, given that it does not wish to negotiate regarding this provision, the Borough maintains that the issue of permissive negotiability is moot.

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. 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.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters 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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See *Middletown Tp.*, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), *aff'd* NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

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 Commission has held that although the amount of an administrative fee may indirectly affect the likelihood that police officers will be employed by businesses to perform police services, it does not intimately and directly affect employee work and welfare and is therefore not a mandatorily negotiable term and condition of employment. *Paramus Bor.*, P.E.R.C. No. 2001-57, 27 NJPER 188 (¶32062 2001); see also *Parsippany-Troy Hills Tp.*, H.E. 2010-4, 36 NJPER 1 (¶1 2009), *aff'd* P.E.R.C. 2010-79, 36 NJPER 163 (¶60 2010). Further, although we have held that an administrative fee provision is permissively negotiable, "a permissive item remains in effect only during the term of the

agreement" and "[a] public employer is free to delete any permissive item from a successor agreement by refusing to negotiate with respect to that item." Paterson, 87 N.J. at 88; see also, Paramus Bor. "[T]he inclusion of a permissive subject in an agreement does not convert it into a mandatory subject of negotiations for those parties for negotiations on successor agreements. . .and either party may delete it. . .by simply refusing to negotiate over it during negotiations for those subsequent contracts." Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981); see also, Bedminster Tp., P.E.R.C. No. 2015-20, 41 NJPER 169 (¶60 2014).

Accordingly, we find that the underlined portion of the subject provision is not mandatorily negotiable and must be deleted from a successor agreement if either party refuses to negotiate over it.

ORDER

The underlined portion of Article XXVII, Section 3 is not mandatorily negotiable and must be deleted from a successor agreement unless both parties choose to negotiate over it.

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2016

Trenton, New Jersey