

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF POINT PLEASANT BEACH,

Petitioner,

-and-

Docket No. SN-2016-082

PBA LOCAL 106,

Respondent.

SYNOPSIS

The Commission Chair issues an expedited scope of negotiations ruling on disputed proposals in a pending interest arbitration proceeding between the Borough and the PBA. The Borough filed a scope of negotiations petition and request for expedited resolution, asserting that the disputed proposals were not mandatorily negotiable and should not be submitted to the interest arbitrator. The PBA argued that the proposals were negotiable and should be submitted to the interest arbitrator.

The decision holds that the following proposals are not mandatorily negotiable: a 12-hour shift schedule is preempted by N.J.S.A. 40A:14-132 given the Borough's adoption of the necessary enabling ordinance; participation in the selection of a health insurance carrier absent a change in the level of benefits or administration of the plan; the payment schedule for health insurance premiums is preempted by N.J.S.A. 40A:10-21.2 to the extent the parties are negotiating a multi-year successor agreement that encompasses the period January 1, 2015 to August 1, 2015. The decision holds that the following proposals are mandatorily negotiable: a request for information in the Borough's possession regarding the benefits and administration of the insurance plan under consideration or selected by the Borough; to the extent the parties are negotiating a one-year successor agreement for 2015 and a subsequent multi-year successor agreement, the payment schedule for health insurance premiums is not preempted by N.J.S.A. 40A:10-21.2 for the successor agreement following the one-year agreement.

The order provides that the provisions that are mandatorily negotiable may be submitted to compulsory interest arbitration for inclusion in a successor collective negotiations agreement and those that are not mandatorily negotiable may not be submitted to compulsory interest arbitration.

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, Armando V. Riccio, LLC, attorneys
(Armando V. Riccio, on the brief)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Richard D. Loccke, of counsel; Cory M.
Sargeant, on the brief)

DECISION

This decision is issued under the Commission's Pilot Program to make expedited scope of negotiations rulings on disputed proposals in a pending interest arbitration proceeding.^{1/}

On June 21, 2016, PBA Local 106 (PBA) submitted a petition to initiate compulsory interest arbitration to resolve a negotiations impasse with the Borough of Point Pleasant Beach

^{1/} N.J.A.C. 19:16-5.7(I) gives interest arbitrators jurisdiction to make negotiability determination in their awards "[u]nless the Commission Chair directs otherwise." See State of New Jersey (New Jersey Law Enforcement Supervisors Ass'n), P.E.R.C. No. 2014-21, 40 NJPER 210 (¶81 2013). This exception allows expeditious resolution of negotiability disputes that are unresolved at the start of interest arbitration under a pilot program described at: http://www.state.nj.us/perc/Pilot_Program_Notice.pdf

(Borough) over the terms of a successor collective negotiations agreement (CNA) between the parties. On June 28, the Borough petitioned for a scope of negotiations determination and requested to have the issues decided on an expedited basis pursuant to the Pilot Program. The request was granted on June 28 and the PBA filed opposition on July 1.^{2/}

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

^{2/} The Borough filed a brief, exhibits, and the certification of its Business Administrator. The PBA filed a brief and the certification of its Attorney.

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.

In cases involving collective negotiations or interest arbitration, our policy has been not to decide whether contract language or proposals are permissively negotiable because an employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. City of Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015) (citing Town of West New York, P.E.R.C. 82-34, 7 NJPER 594 (¶12265 1981)). We consider only whether the proposals are mandatorily negotiable.

The parties' CNA expired on December 31, 2014. The Borough has identified specific PBA proposals that it asserts are not mandatorily negotiable. The proposed language or topic appears below and is underlined.

Article XVII - Overtime

The current schedule system shall continue.
The current twelve (12) hour shift schedule
(6 A.M. - 6 P.M., 6 P.M. - 6 A.M.) shall
continue. Shifts will continue to be chosen
by each Officer on a seniority basis for each
calendar year.

The Borough asserts that the above language is not mandatorily negotiable because the authority to establish a work

schedule for police officers has been granted to the governing body of a municipality pursuant to N.J.S.A. 40A:14-132. The Borough argues that this topic has been preempted given that it previously adopted an ordinance setting the maximum number of hours within a shift at eight hours consistent with the statutory requirement. The PBA responds that hours of work are, in general, mandatorily negotiable. The PBA maintains that the Borough's ordinance does not sufficiently fix a term and condition of employment with respect to the number of hours an employee must work. The PBA also argues that the ordinance is inoperable because the Borough has failed to demonstrate that there was approval by legal voters of the municipality and no related resolution has been adopted and filed.

N.J.S.A. 40A:14-132 provides in pertinent part:

The hours of employment of the uniformed members and officers of the police department and force in any municipality shall not exceed 8 continuous hours in any one day nor more than 40 hours in any one week. No such member or officer shall be required to perform any police duty which would involve more time than herein specified except in cases of emergency.

The provisions herein shall be inoperative unless and until adopted by ordinance of the governing body of the municipality. . . .

N.J.S.A. 40A:14-134 defines "emergency" to:

[I]nclude any unusual conditions caused by any circumstances or situation including shortages in the personnel of the police department or force caused by vacancies,

sickness or injury, or by the taking of accrued leave or both, whereby the safety of the public is endangered or imperiled, as shall be determined within the sole discretion of the officer, board or official having charge of the police department or force in any municipality.

The Borough has adopted Ordinance 2-10, entitled "Department of Police and Civil Defense," Section f., entitled "Hours of Employment," which provides:

The hours of employment of uniformed members of the police department shall not exceed eight consecutive hours in any one day nor 40 hours in any one week; provided, that in case of an emergency the chief of police or the director shall have full authority to summon and keep on duty any and all such members during the period of emergency. Although certain hours will be allotted for the performance of regular tours of duty, officers are considered at all times available for duty and must act promptly at any time that their services are required, except when on authorized leave or in the event of disability.

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation."

Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Educ. Ass'n, 91 N.J. 38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Id. "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Id. (citing Council of New Jersey State

College Locals v. State Board of Higher Educ., 91 N.J. 18, 30 (1982)). "The legislative provision must speak in the imperative and leave nothing to the discretion of the public employer." Id.

We find that the PBA's 12-hour shift proposal is preempted by N.J.S.A. 40A:14-132 given that the Borough has adopted the necessary enabling ordinance. The statute specifically fixes the maximum daily and weekly hours of employment for police officers, absent emergency, if a municipality adopts an enabling ordinance. Moreover, the Commission has held that "N.J.S.A. 40A:14-132 and N.J.S.A. 40A:14-134 . . . preempt[] negotiations over the managerial determination that overtime work is necessary." City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Unlike Long Branch, the issue of which employees will work overtime has not been raised by the parties in this petition.

Article XIX - Medical Coverage

B. The PBA proposes that PBA representatives be provided with active participation in the review, evaluation and ultimate selection of the health care provider.

The Borough asserts that its choice of health insurance carrier is not mandatorily negotiable so long as the negotiated level of benefits is not changed. The PBA argues that it is only seeking the ability to review and evaluate terms and conditions of employment relating to the level of insurance benefits provided by the potential health care provider and the administration of the plan in order to ensure that unit members

are receiving the contractually guaranteed "equivalent to or better than present coverage" level of benefits. The PBA also seeks the ability to provide information, opinions, and recommendations regarding the Borough's potential health care provider in order to avoid litigation between the parties.

The Commission has held that "[a]n employer's choice of health insurance carriers is not mandatorily negotiable so long as the negotiated level of benefits is not changed." Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009) (citing City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981)). "Once an employer and a union agree upon a level of benefits, the employer has discretion to choose a health insurance carrier, and the employer is not normally required to negotiate over which health insurance carrier it contracts with to provide those benefits." Id. "[P]arties can agree to permit an employer to change carriers consistent with the collective negotiations agreement." Id. (citing Camden Cty. College, P.E.R.C. No. 2008-67, 34 NJPER 254 (¶89 2008)). However, "[w]here changing the identity of the carrier changes terms and conditions of employment, i.e., the level of insurance benefits, and the administration of the plan, it becomes a mandatory subject for negotiations." Id. (citing Metuchen Bor., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984)).

Accordingly, to the extent that the PBA's proposal seeks to participate in the selection of a health insurance carrier, it is not mandatorily negotiable absent a change in the level of benefits or administration of the plan. Conversely, the proposal would be mandatorily negotiable to the extent it is construed to be a request for information in the Borough's possession regarding the benefits and administration of the insurance plan under consideration or selected by the Borough. See Lakewood Bd. of Educ., P.E.R.C. No. 97-44, 22 NJPER 397 (¶27215 1996).

C. The PBA wishes to negotiate the payment schedule with respect to health care premiums effective August 1, 2015.

The Borough argues that negotiations regarding health insurance premiums are preempted by N.J.S.A. 40A:10-21.2 until the next CNA after the one currently being negotiated given that full implementation of Chapter 78 did not occur until after the expiration of the most recent CNA. The PBA argues that Clementon Bd. of Educ., P.E.R.C. No. 2016-10, 42 NJPER 117 (¶34 2015), appeal docketed, A-0372-15T1 (App. Div. Sept. 22, 2016) is currently on appeal and only pertains to employee contributions and premiums for school districts under N.J.S.A. 18A:16-17.2. However, the PBA is willing to include the phrase "provided such premium contribution is lawfully consistent with the provisions of Chapter 78" in order to reserve its rights. Notwithstanding this concession, the PBA maintains that because Chapter 78 was

fully implemented as of August 1, 2015, its proposal to negotiate over the payment schedule for health insurance premiums is mandatorily negotiable.

The Commission has held that employee health benefits contributions become negotiable in the next collective negotiation agreement after full implementation of the four-tiered contribution levels and that Tier 4 levels of employee health benefits contributions constitute the status quo once employee contribution levels become negotiable pursuant to Chapter 78.^{3/} Clementon Bd. of Ed. In Clementon, an analogous case, the Commission stated:


Therefore, depending on the length of the successor agreement that the Board and the Association agree to, [the proposal] may be preempted by N.J.S.A. 18A:16-17.2. For example, if the parties agree to a contract with a one-year term, [the proposal] would be preempted by N.J.S.A. 18A:16-17.2 from July 1, 2014 to June 30, 2015, the final year of employee contributions at Tier 4 levels. However, it would not be preempted in the "next" agreement when employee contribution levels become negotiable. Alternatively, if the parties agree to a multi-year successor agreement, the express language of N.J.S.A. 18A:16-17.2 would preempt [the proposal] for the first year of the successor agreement as well as any additional years in the agreement until the "next" agreement when employee contribution levels would become negotiable.

^{3/} Chapter 78's enabling statutes include: N.J.S.A. 52:14-17.28d for State government employee contributions and premiums; N.J.S.A. 18A:16-17.2 for school district employee contributions and premiums; and N.J.S.A. 40A:10-21.2 for local government employee contributions and premiums.

The terms of N.J.S.A. 40A:10-21.2 are identical to N.J.S.A. 18A:16-17.2. Therefore we apply existing Commission case law correspondingly. The parties' CNA expired on December 31, 2014 and Tier 4 employee contribution levels were completed as of August 1, 2015. Accordingly, to the extent that the parties are negotiating a multi-year successor agreement that encompasses the period January 1, 2015 to August 1, 2015, the PBA's proposal to negotiate over the payment schedule for health insurance premiums is preempted by N.J.S.A. 40A:10-21.2 and is not mandatorily negotiable. To the extent that the parties are negotiating a one-year successor agreement for 2015 and a subsequent multi-year successor agreement, the PBA's proposal to negotiate health insurance premiums is preempted by N.J.S.A. 40A:10-21.2 for the one-year agreement but would not be preempted in the next agreement when employee contributions become negotiable.

ORDER^{4/}

- A. The PBA's proposal under Article XVII, Section C. is preempted by N.J.S.A. 40A:14-132 given the Borough's adoption of Ordinance 2-10(f) and is not mandatorily negotiable.
- B. The PBA's proposal under Article XIX, Section B. is not mandatorily negotiable to the extent the PBA seeks to participate in the selection of a health insurance carrier absent a change in the level of benefits or administration of the plan; the proposal would be mandatorily negotiable to the extent it is construed to be a request for information in the Borough's possession regarding the benefits and administration of the insurance plan under consideration or selected by the Borough.
- C. The PBA's proposal under Article XIX, Section C. is preempted by N.J.S.A. 40A:10-21.2 for year one of the successor agreement between the parties and, if applicable, any additional years for the successor agreement until the next agreement when employee contribution levels become negotiable.



P. Kelly Hatfield
Chair

ISSUED: July 14, 2016

Trenton, New Jersey

4/ Paragraphs G and H of the pilot program description read:

G. Any contract language or proposals that are determined to be not mandatorily negotiable shall not be considered by the interest arbitrator. If time permits, and in accordance with the rules governing interest arbitration proceedings, the interest arbitrator may allow the parties to amend their final offers to take into account the negotiability determination.

H. A decision issued by the Commission or Chair pursuant to this process shall be a final Agency decision. Any appeal must be made to the Superior Court, Appellate Division.