

P.E.R.C. NO. 2017-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SUPERINTENDENT
OF ELECTIONS,

Public Employer,

-and-

Docket No. SN-2017-029

CWA LOCAL 1032,

Respondent,

-and-

COUNTY OF PASSAIC,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission denies the County of Passaic's motion to intervene, via a scope of negotiations petition, in grievance arbitration between the Superintendent of Elections and the CWA. Based upon the amendment of N.J.S.A. 19:32-27, the statute authorizing the Superintendent to appoint employees and to fix their salaries, the County argued that it and the Superintendent of Elections were joint employers of the election workers and that any salary increases for those employees had to be approved by the County. The Commission holds that the amendment may not be applied so as to require County approval of salary increases until the current negotiated agreement between the Superintendent and the CWA expires on December 31, 2107. The Commission also notes that the County may request the arbitrator to permit it to intervene in the 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 Public Employer, Kaufman Semeraro &
Leibman, LLP attorneys (Mark J. Semeraro, of
counsel and on the brief)

For the Respondent, Weissman & Mintz, LLC
attorneys (Annmarie Pinarski, of counsel and
on the brief)

For the Intervenor, Genova Burns, LLC attorneys (Brian
M. Kronick, of counsel and on the brief; Aaron C.
Carter, on the brief)

DECISION

On February 23, 2017, the County of Passaic (County) filed a
Notice of Motion to Intervene in a grievance arbitration,
accompanied by a brief, certification and exhibits, under docket
number AR-2017-291, between the Passaic County Superintendent of
Elections and CWA Local 1032 (CWA) along with the above-

referenced scope of negotiations petition.^{1/} The Commission's General Counsel responded in a letter, in pertinent part, on February 27, 2017, that under N.J.S.A. 2A:24-1 to -11, any issues concerning arbitrability must be presented to the arbitrator or the courts because "[I]n accordance with N.J.A.C. 19:12-5.1, the only function of the Commission in grievance arbitration is to maintain a panel of grievance arbitrators from which the parties to a collective negotiations agreement (CNA) may select." With respect to the scope of negotiations petition, the County was informed that:

[O]nly the public employer or majority representative that is a party to the collective negotiations relationship may file a petition to initiate such proceedings. See N.J.A.C. 19:13-2.1 and N.J.A.C. 19:13-2.2(a). According to the CNA that you provided, the only parties to that agreement are the CWA and Superintendent of Elections. In the event that one of them files a scope petition seeking to restrain binding arbitration of the matter in dispute in AR-2017-291 or a court refers the matter to the Commission for a negotiations determination, the County of

^{1/} The rule for intervention in a scope of negotiations matter is set forth in N.J.A.C. 19:13-3.3, "Intervention":

"A motion for leave to intervene in proceedings under this chapter shall be filed in writing with the Commission or its named designee, stating the grounds upon which an interest in the proceeding is claimed and stating the extent to which intervention is sought. An original and nine copies of such motion shall be filed, together with proof of service of a copy of such motion upon the parties. The Commission or its named designee may permit intervention to such extent and upon such terms as may be deemed just."

Passaic may move for intervention in accordance with N.J.A.C. 19:13-3.3.

On March 13 the County filed a "Motion for Reconsideration,"^{2/} along with a brief and exhibit, in response to the February 27 letter. On March 13 a letter was sent by the Commission to all the parties indicating that the motion would be referred to the full Commission and that the Superintendent and CWA had an opportunity to reply. The CWA filed a reply brief on April 7 and the Superintendent, after an extension, filed a brief, certification and exhibits on April 21.

Statement of Facts

By way of background, the Superintendent and the CWA are parties to a collective negotiations agreement (CNA) covering the period from January 1, 2015 through December 31, 2017. The Superintendent's office is a New Jersey State agency. See Meredith v. Mercer Cty. Bd. of Chosen Freeholders, 117 N.J. Super. 379, 385 (Law Div. 1970), aff'd 117 N.J. Super. 368 (App. Div. 1971), and the employees have been generally regarded as State employees. See Mercer Cty. and Mercer Cty. Superintendent of Elections and Mercer Cty. No. 4, NJCSA, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), aff'd 172 N.J. Super. 406, 409 (App. Div. 1980) citing MacPhail v. Hudson Cty. Bd. of Chosen Freeholders, 6 N.J. Super. 613 (Law Div. 1950). However, the County is required

^{2/} We are treating this matter as an initial decision before the Commission and not as a motion for reconsideration.

to pay the salaries of the employees in the office of the Superintendent of Elections. The County filed for a preliminary injunction in Superior Court attempting to enjoin the CNA on or about August 2015. On August 14, 2015, the judge denied the application primarily based on the language in N.J.S.A. 19:32-27 that at the time provided that the superintendent fixed the salaries of appointed staff and the superintendent's salary determinations were not subject to approval by the County. The County did not appeal the judge's decision.

The County argues that it is a joint employer with the Superintendent of Elections and, as a result, it is an indispensable party to the arbitration, and that the revised statute, N.J.S.A. 19:32-27b., which was amended after the Superior Court proceeding, preempts the arbitration of the grievance. CWA argues that the County cannot intervene in the arbitration as any concerns about arbitrability must be presented to the arbitrator or the courts and that the County is not authorized to file a scope of negotiations petition because it is not the public employer and has no standing to file the petition. The Superintendent contends that the County is not the public employer and, as a result, lacks standing for the purpose of filing a scope of negotiations petition. Additionally, the Superintendent argues that the County is not entitled to

intervene in the arbitration in this matter because it is not a party to the CNA.

In Mercer Cty., supra., we held and the Appellate Division affirmed that a superintendent of elections and the county were not joint employers. However, since that time, the relevant statute was amended. At the time Mercer Cty., supra., was decided, N.J.S.A. 19:32-27 provided in pertinent part (the statute was subsequently amended in 1992 but the pertinent language is identical):

Each superintendent shall fix the salaries of the persons so appointed and such salaries certified to and approved under his hand shall be paid semimonthly by the county treasurer of the county in which such persons are so engaged. All other necessary expenses incurred in carrying out the provisions of this Title when certified to and approved by the superintendent shall be paid by the county treasurer of the county in which the superintendent shall maintain his office.

However, as amended effective January 19, 2016, N.J.S.A. 19:32-27, "Appointment of deputy and assistants, salaries," now provides (emphasis added):

a. Except as provided in section 2 of P.L.1992, c.17 (C.19:32-26.2), each superintendent may appoint a chief deputy, a clerk, a secretary and any other assistants he considers necessary to carry out the provisions of this Title, and may remove the same whenever he deems it necessary. Those so appointed shall not be subject to any of the provisions of Title 11A, Civil Service, of the New Jersey Statutes but shall be in the unclassified service. Subject to the provisions of subsection b. of this section,

the salaries of the persons so appointed shall be fixed and such salaries certified to and approved under his hand shall be paid semimonthly by the county treasurer of the county in which such persons are so engaged. All other necessary expenses incurred in carrying out the provisions of this Title when certified to and approved by the superintendent shall be paid by the county treasurer of the county in which the superintendent shall maintain his office.

b. The superintendent shall determine the amount of the salary to be paid to each person appointed by the superintendent, and shall submit the proposed salaries to the governing body for review and approval. Following the review and approval of the governing body, the salaries shall be fixed and shall be paid to those persons pursuant to the provisions of subsection a. of this section.

In Salem Cty., P.E.R.C. No. 2014-87, 41 NJPER 54 (¶14 2014), a case involving the Salem County Surrogate, we considered a similar statute, governing employees of a county surrogate. N.J.S.A. 2B:14-13 provides (emphasis added): "The Surrogate shall select and appoint the Deputy Surrogate, any special Deputy Surrogate, Executive Secretary, Chief Clerk and engage all other employees, who shall receive such compensation as shall be recommended by the Surrogate and approved by the county governing body." In Salem Cty., supra., it was determined that the Surrogate and the County were joint employers.

In the instant matter, however, there is a current CNA between the Superintendent and the CWA (that the County is not a party to) that was entered into before N.J.S.A. 19:32-27 was amended.

Contract Bar

Both the federal and State constitutions generally prohibit the adoption of laws impairing the obligation of a contract. See Caponegro v. State Operated School Dist. of City of Newark, 330 N.J. Super. 148, 154-55 (App. Div. 2000). It also appears that N.J.S.A. 19:32-27, as amended, does not preempt arbitration of this matter^{3/} insofar as the statute does not indicate that the requirement for County approval of the salaries was intended to be retroactive.

It is not entirely clear whether the scope petition involves only a merit bonus for one employee or the merit bonus and step increases for two other employees.^{4/} Although the petition only

^{3/} Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively, thereby eliminating the employer's discretion to vary that condition. Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). If a subject is preempted, it cannot be the subject of a negotiated agreement or arbitrated.

^{4/} We have repeatedly held that disputes over receiving pay upgrades, including merit pay, are mandatorily negotiable and legally arbitrable. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 333 (1989); Camden Cty. Superintendent of Elections, P.E.R.C. No. 2003-97, 29

specifically mentions the merit bonus, we will address both situations. The Superintendent states in a January 23, 2017 email that her request for a step increase for two members of her staff and merit bonus for a third member of her staff had been denied by the Finance Committee of the Freeholders. If the arbitrator finds that the CNA entitled the two employees to step movement, then the contract bar precludes application of the statute, as amended, and the County would not be a joint employer of the Superintendent for purposes of the step movement pay increase. The statute may not apply to increments mandated by the CNA, if any, until the contract now in effect expires. The statute will first apply to any such increases to be made on or after January 1, 2018.^{5/}

We make no ruling as to whether or not the County should be allowed to intervene in the pending arbitration. The County may posit that question directly to the arbitrator.

4/ (...continued)
NJPER 293 (¶90 2003); Wall Tp., P.E.R.C. No. 92-95, 18 NJPER 165 (¶23079 1992); Essex Cty., P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986); Essex Cty. and AFSCME Council 52, Local 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) and Essex Cty. and Essex Cty. Local Unit of JNESO, P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986), aff'd NJPER Supp.2d 182 (¶158 App. Div. 1987). See also Essex Cty., P.E.R.C. No. 87-113, 13 NJPER 275 (¶18114 1987); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER 838 (¶17322 1986).

5/ All salaries and salary increases to be paid after December 31, 2017 must be approved by the governing body pursuant to N.J.S.A. 19:32-27.

ORDER

The County of Passaic's motion to intervene is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: May 25, 2017

Trenton, New Jersey