

P.E.R.C. NO. 2019-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2018-033

PBA LOCAL 49,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Sheriff's Office's request for restraint of binding arbitration of a grievance filed by the PBA contesting the refusal to implement a compensation provision that was allegedly triggered by a merger/consolidation between the Sheriff's Office and the Bergen County Police Department. Finding that the disputed provision primarily concerns compensation, is not an illegal parity clause, and that the Sheriff's Office failed to demonstrate how the compensation clause would significantly interfere with its managerial prerogative to reorganize, the Commission declines to restrain 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, C. Elston & Associates, LLC,
attorneys (Catherine M. Elston, on the brief)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Michael A. Bukosky, on the brief)

DECISION

On February 21, 2018, the Bergen County Sheriff's Office (Sheriff's Office) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 49 (PBA). The grievance alleges that Bergen County (County) violated the parties' collective negotiations agreement (CNA) when the County refused to implement a compensation provision in the CNA after the Bergen County Police Department (County Police) was merged/consolidated with the Sheriff's Office.

The Sheriff's Office filed a brief, exhibits, and the certification of its attorney, Catherine M. Elston (Elston). The

PBA filed a brief, exhibits, the certifications of its President, Christopher Weston (Weston), and its attorney, Michael A. Bukosky (Bukosky). The Sheriff's Office also filed a reply brief. These facts appear.

The PBA represents County Police officers excluding the chief and deputy chief. The County and the PBA are parties to a CNA in effect from January 1, 2001 through December 31, 2004; the CNA has been extended and modified by a series of memoranda of agreement (MOA). In January 2014, the parties entered into their most recent MOA in effect from January 1, 2014 through January 1, 2017 (2014-2017 MOA). The grievance procedure ends in binding arbitration.

Article VIII of the parties' CNA sets out a detailed scheme for determining compensation. It provides in pertinent part:

1. The base annual salaries for the year 2001 for all Employees covered by this Agreement are set forth in Schedule A. This salary schedule reflects the parties' efforts to have placed the salaries for all Bergen County Police Officers at a representative position based upon the maximum Police Officer's salary (top step) being at the ninety-fifth (95%) percentile of those Bergen County law enforcement agencies listed in Appendix B.^{1/}

1/ Appendix B includes the following 30 law enforcement agencies: Fort Lee; Tenafly; Rochelle Park; Oradell; Hackensack; Wyckoff; Oakland; Rutherford; Bergen County Prosecutor; Mahwah; South Hackensack; Harrington Park; Woodcliff Lake; Englewood Cliffs; East Rutherford; Englewood; Waldwick; Montvale; Hillsdale; Ho-Ho-Kus; Saddle
(continued...)

2. Each year the annual salaries for all Employees covered by this Agreement shall be computed based upon the current year maximum base annual salary (top step) for Patrolmen or Prosecutor's Senior Investigators in the respective agencies listed in Appendix B. The maximum Bergen County Police Officers' base annual salary (top step) for each year shall be at the ninety-fifth (95%) percentile of the maximum base annual salaries for Patrolmen or Prosecutor's Senior Investigators in the respective agencies listed in Appendix B. Not less than ninety-five (95%) percent of those agencies shall have a maximum base annual salary for Patrolmen for said year which is below the maximum base annual salary of the Bergen County Police Officer. All computations shall be from the top of the list.

3. Computation shall be based upon the current year salaries for the said agencies and shall be settled as of September of each respective year at the then current wage rates. All computation shall be from the top of the list.

4. The PBA shall have the annual right to strike one Bergen County law enforcement agency from the attached list (Schedule B) and have said stricken agency replaced by any other Bergen County municipality of the PBA's choosing, provided that same is done by notice in writing to the County no later than September 1 of the respective year.

5. Those Employees covered by this Agreement above the rank of Police Officer shall receive salary increases for each year calculated as follows: The top step police officer's base wage shall be computed pursuant to the above paragraphs. The

1/ (...continued)
River; Ridgewood; Franklin Lakes; Glen Rock; Closter;
Ramsey; Old Tappan; Paramus; Allendale; and Upper Saddle
River.

Sergeants base pay shall be calculated at 9% above the base pay for police officers. The base pay of a Lieutenant shall be fixed at 9% over the Sergeants base as calculated in this paragraph. The base pay of a Captain shall be fixed at 9% over the Lieutenant's base as calculated in this paragraph. The base pay of an Inspector shall be fixed at 9% over the Captain's base rate as calculated in this paragraph. The base annual salaries for Sergeants, Lieutenants, Captains and Inspectors shall be payable to said Employees immediately on promotion to each of the said ranks.

6. The initial base annual salary for Police Officers hired during the term of this Agreement shall be Seventeen Thousand (\$17,000) Dollars. New Police Officers hired on or after January 1, 2001 shall be on a five (5) annual salary steps salary guide. Top step police officer pay for employees hired on or after January 1, 2001 only shall be attained upon completion of five (5) years of service.

There shall be five (5) equal annual salary step increments to maximum base annual salary (top step) for Police Officers. The effective date for the entitlement to such annual salary step increment shall be the anniversary date of the individual Employee's initial date of hiring. The pay rate for each annual salary step for those Police Officers below the maximum for their grade shall have their annual rates computed by subtracting the starting salary from the maximum annual salary rate for Police Officers in each of the said years and dividing the difference by five (5). The base annual salary of Police Officers having completed one (1) year of service shall be plus one-fifth (1/5) such difference. The base annual salary of Police Officers having completed two (2) years of service shall be the starting salary plus two-fifths (2/5) such difference. The base annual salary of Police Officers having completed three (3)

years of service, shall be the starting salary plus three-fifths (3/5) such difference. The base annual salary of Police Officers having completed four (4) years of service shall be the starting salary plus four-fifths (4/5) such difference. After five (5) years of service a Police Officer shall receive the maximum base annual salary for his grade.

7. Recognizing that some of the agencies listed in Appendix B may finalize their annual pay rates after January 1 of each of either of the said years, the parties to this contract agree that there shall be an advance payment across-the-board annually payable as soon as practicable after January 1 of each year for all Employees covered by this Agreement. Final pay rate adjustments as provided herein shall be made not later than September 1 of each year, respectively, for each of the years covered under this Agreement. The annual advance payment due on January 1 of each year, or as soon thereafter as it can be paid, shall be Two Thousand Two Hundred Fifty (\$2,250.00) Dollars.

The PBA President certifies that Article VIII has been in effect since 1976. He certifies that the parties agreed to hold Article VIII in abeyance for the term of the 2014-2017 MOA unless the County Police were merged/consolidated with the Sheriff's Office, in which case Article VIII would become operative again. That agreement was memorialized in the parties' 2014-2017 MOA, Section 1 as follows:

Article VIII, Salaries - Attached as Exhibit A is a new salary guide for all officers hired after January 1, 2014. Current officers who have not achieved top pay will progress under the existing salary guide until he/she achieves top pay. All officers will receive a 1.5% increase (applied to the

salary guides) for each year of the agreement (January 1, 2014 - January 1, 2017). Article VIII, Paragraphs 1-4, 6-7 and Exhibit B are no longer operative, unless the County Police are merged/consolidated into the Bergen County Sheriff's Office or disbanded, in which event, Paragraphs 1-4, 6-7 and Exhibit B become retroactively operative effective January 1, 2014.

The PBA President certifies that the agreement to reimplement Article VIII instead of paying compensation pursuant to the 2014-2017 MOA, Section 1 was intended to provide for the loss of compensation resulting from a merger/consolidation.

On January 1, 2015, the County, Sheriff's Office, and Bergen County Prosecutor's Office (Prosecutor's Office) entered into a MOA "For the Long Term Realignment of Police Services by and between the Bergen County Police Department and the Office of the Bergen County Sheriff" (Realignment MOA). On January 21, the Bergen County Board of Chosen Freeholders (Board of Freeholders) approved the Realignment MOA via Resolution No. 42-15.^{2/} Section 2 of the Realignment MOA, entitled "Transfer of Control and Responsibility," provides in pertinent part:

Effective upon final adoption and publication of an ordinance to be prepared and passed by the Board of Chosen Freeholders, the passage of which shall be an express condition of this Agreement, any and all ordinances

^{2/} On March 8, 2017, the County, Sheriff's Office, and Prosecutor's Office entered into a first amendment to the Realignment MOA (Amended Realignment MOA). On April 5, the Board of Freeholders approved the first amendment to the Realignment MOA via Resolution No. 274-17.

currently in effect within the County of Bergen in the administrative code, policy or otherwise, and which place operational and administrative authority over the Bergen County Police Department with the Bergen County Department of Law and Public Safety and/or County Executive shall be deemed as null and void and of no further effect. Simultaneously therein and included within the aforementioned ordinance, the Board shall further provide that all operational and administrative authority over the Bergen County Police Department shall be transferred and placed under the authority of the Bergen County Sheriff.

* * *

2.2 . . . All conditions, contracts and agreements in which the County of Bergen previously reached on behalf of the BCPD shall continue to exist without change, and full faith and credit shall be given to and by all governments and agencies established within the County, as it is the intent of this agreement to maintain, at this time, the entire BCPD and only to transfer the person or entity to which they are to be governed. That is, this Agreement does not abolish the Bergen County Police Department.

2.3 . . . The Bergen County Sheriff shall, by Freeholder Ordinance to be adopted, become the Appropriate Authority for all staff currently under the employ of the Bergen County Police Department, and as such shall have all authority to direct its day-to-day operations, including uniforms, assignments, hiring, retention, discipline and responsibilities, subject to existing law and statutes provided for that concern the governance of law enforcement agencies in New Jersey. . . .The Sheriff shall assume the responsibility for all of its day-to-day actions, effective upon the Ordinance transferring same, including the maintenance of all accounts, responsibilities and operations of the Department. . . .No changes shall be required of any labor contract in existence between the County and

the Sheriff PBA Local 134 and Bergen County Police Local 49, both of which were approved by the Freeholder Board, and both the Bergen County Police PBA staff and the Sheriff Department PBA staff remain unchanged and neither shall not, for purposes of salary, benefits and other terms and conditions of employment, be merged with each other.

[emphasis added.]

The PBA President certifies that when the County merged the operations of the County Police into the Sheriff's Office, the Sheriff's Office did not pay compensation pursuant to Article VIII as agreed to in the 2014-2017 MOA, Section 1. He further certifies that it is unknown whether compensation calculated under Article VIII would result in a significant increase in pay.^{3/4/5/}

3/ On March 23 and 31, 2017, the Sheriff's Office submitted a layoff plan to the Civil Service Commission (CSC) "targeting 26 County Police Officers . . . for layoff." The PBA filed a petition with the CSC seeking a stay of the layoff and requesting that the CSC disapprove the layoff plan or forward the matter to the Office of Administrative Law for a hearing as a contested matter. On June 7, the CSC issued a Final Administrative Action denying the petition. In re County Police Officers, Bergen County Sheriff's Office, CSC Docket No. 2017-3520, 2017 N.J. CSC LEXIS 414, at *3 (CSC June, 2017).

4/ The PBA President also certifies that many issues arose from the merger such as loss of unit work, diminished promotional opportunities, lost/diminished ability to work negotiated hours, and reduced/reallocated overtime opportunities, etc. Since December 2017, the PBA has filed four unfair practice charges (CO-2018-140; CO-2018-141; CO-2018-142; CO-2019-036) related to alleged employer violations of the New Jersey
(continued...)

On February 4, 2016, the PBA filed a grievance that provides in pertinent part:

Section of Collective Bargaining Agreement

Violated: Paragraph 1 of the Memorandum of Agreement dated January 17, 2014. The Bergen County Police officers are merged/consolidated into the Bergen County Sheriff's Office.

Resolution: Implementation of the specific provisions of paragraph 1 of the January 17, 2014 Memorandum of Agreement (activation of the salary provision of Article VIII and Appendix B of the Collective Bargaining agreement).

On February 29, 2016, the Sheriff's Office denied the grievance, asserting that there was not a merger, but a realignment of the Bergen County Police Department. The grievance was denied at every other step of the process. On April 18, the PBA filed a Request for Submission of a Panel of Arbitrators naming the County as the public employer (AR-2016-526). However, the Board of Freeholders and the attorney for the Sheriff's Office were named as employer representatives.^{6/}

4/ (...continued)
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), that were taken as a result of the Realignment MOA.

5/ On June 13, 2018, the PBA filed a request for special mediation (SM-2018-001) pursuant to N.J.S.A. 40A:65-12 based upon its assertion that "several employment issues" had arisen as a result of the Realignment MOA.

6/ On May 6, 2016, the County and the Sheriff's Office jointly filed a declaratory judgment action in Bergen County Superior Court (BER-L-3627-16) seeking a declaration that
(continued...)

On February 21, 2018, the Sheriff's Office filed the instant scope petition.^{7/}

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

6/ (...continued)
the County Police was not merged/consolidated with the Sheriff's Office and an injunction related to the PBA's demand for arbitration. The County/Sheriff's Office asserted that the parties' grievance procedure did not include the type of dispute underlying the PBA's grievance. On August 19, the trial court entered an Opinion and Order denying the County/Sheriff's Office's application for injunctive relief and granted the PBA's motion to dismiss the complaint. On September 20, the trial court entered an Order denying the County/Sheriff's Office's motion for reconsideration. On October 3, the County/Sheriff's Office filed separate appeals (A-0485-16T2; A-0486-16T2) related to the trial court's Orders; the Appellate Division consolidated the appeals. On November 7, the trial court entered an Order granting the County/Sheriff's Office's motion to stay arbitration pending disposition of the appeals. On October 31, 2017, the Appellate Division issued a per curiam decision affirming the trial court's determinations and vacating the stay of arbitration. Bergen Cty. Sheriff's Office v. Policemen's Benevolent Ass'n, Local 49, 2017 N.J. Super. Unpub. LEXIS 2787 (App. Div. 2017).

7/ On July 17, 2018, the Sheriff's Office filed an application for interim relief seeking a preliminary restraint of binding arbitration. On July 19, the application was dismissed by a Commission Designee.

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. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). 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 Sheriff's Office argues that compensating PBA members in accordance with Article VIII would interfere with the managerial prerogative to reorganize by imposing a significant financial burden on the County and its taxpayers. The Sheriff's Office also claims that Article VIII is an illegal parity clause that cannot be enforced.

The PBA responds that the Sheriff's Office had no standing to file the instant scope petition because it is not a party to the 2014-2017 MOA. The PBA also asserts that the County had no lawful ability to delegate its authority to the Sheriff's Office pursuant to N.J.S.A. 40A:9-108.^{8/} The PBA argues that employee

^{8/} N.J.S.A. 40A:9-108, entitled "Sheriff not to hold other civil office; exception," provides:

(continued...)

interests in enforcing Article VIII outweigh any employer concerns regarding interference with its managerial prerogative to reorganize. The PBA claims that Article VIII is not an illegal parity clause because it does not provide benefits to PBA members based upon future negotiations between the same employer and other units.

In reply, the Sheriff's Office asserts that the PBA's argument regarding standing is without merit given the Commission's prior determination that the Sheriff's Office was the correct employer to file for interest arbitration with respect to PBA members.^{9/}

8/ (...continued)

No person shall hold any other civil office during the time he holds and exercises the office of sheriff and by acceptance of the latter office his former office shall be deemed vacated, provided, however, that the governing body of any county may, by ordinance or resolution, as appropriate, provide that any person holding and exercising the office of sheriff may simultaneously hold and exercise the office of county emergency management coordinator but shall not receive any compensation or any other benefits otherwise attached to the office of county emergency management coordinator during such time as such person shall hold both such offices.

9/ On December 29, 2017, the Sheriff's Office filed a petition to initiate compulsory interest arbitration (IA-2018-012). The PBA objected to the petition based, in part, upon its assertion that the Sheriff's Office was not the employer; that the County and the Board of Freeholders were the employers. On January 12 and 17, 2018, the Director of
(continued...)

As a threshold issue, we find that the Sheriff's Office was authorized to file the instant scope petition. In Bergen Cty. PBA Local 134 v. Donovan, 436 N.J. Super. 187, 197 (App. Div. 2014), the Appellate Division held that pursuant to N.J.S.A. 40A:9-117,^{10/} "the sheriff, not the county executive, is the exclusive employer and hiring authority for the sheriff's office

9/ (...continued)
Conciliation and Arbitration (Director) issued letters indicating that the Sheriff's Office had made a prima facie showing that the matter could proceed and that the petition would be processed. On January 23, the PBA filed a request for special permission to appeal the Director's decision and a request to stay appointment of the interest arbitrator. On January 24, the Commission Chair issued a letter denying the PBA's requests based, in part, upon the finding that the Sheriff's Office was authorized to file for interest arbitration with respect to PBA members.

10/ N.J.S.A. 40A:9-117, entitled "Undersheriffs, chief clerks and other personnel; compensation," provides:

The sheriff shall select and employ the necessary deputies, chief clerks and other personnel. The sheriff shall fix the compensation they shall receive in accordance with the generally accepted county salary ranges and within the confines of the sheriff's budget allocation set by the governing body. The annual compensation of the undersheriff shall not exceed 90% of the annual compensation of the sheriff. The compensation of the personnel in the office of sheriff shall be paid at the same time and in the same manner as the county officers and employees are paid. The limitations on the salaries set herein shall not be construed to restrict any of said employees from participating in or benefitting from any cost of living bonus or longevity program provided for or established in the county.

and its employees, and can solely negotiate the collective negotiations agreement for those employees." Moreover, Section 2 of the Realignment MOA transfers "all operational and administrative authority over the Bergen County Police Department . . . [to] the Bergen County Sheriff." Further, in In re County Police Officers, 2017 N.J. CSC LEXIS 414, at *33, the CSC held that "the Bergen County Sheriff was the proper appointing authority to have submitted [a] layoff plan" pertaining to the County Police, "not Bergen County." Accordingly, and consistent with the agency's January 24, 2018 determination that the Sheriff's Office was authorized to file for interest arbitration with respect to PBA members, the Commission finds that the Sheriff's Office was authorized to file the instant scope petition.

Turning to the Sheriff's Office's contention that paying compensation pursuant to Article VIII would interfere with its managerial prerogative to reorganize, an employer may lawfully exercise its inherent managerial prerogative to reorganize the way it delivers governmental services. See, e.g., City of Jersey City, 154 N.J. at 570-575 (1998); Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985) (holding that a public employer has "managerial prerogatives to consolidate functions and reassign employees accordingly"). At the same time, it is well-settled that compensation is generally mandatorily negotiable.

See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973) (holding that "working hours and compensation are terms and conditions of employment within the contemplation of the Act"); Roselle Park Bd. of Ed., P.E.R.C. No. 2014-6, 40 NJPER 156 (¶59 2013).

Article VIII of the parties' CNA has existed since 1976. The Sheriff's Office has failed to provide any evidence demonstrating how compensating PBA members in accordance with Article VIII would constitute significant interference with its managerial prerogative to reorganize or would result in a significant financial burden. Absent a more particularized showing, we find that the Sheriff's Office has failed to demonstrate any limitation on the County's policymaking powers to reorganize. See, e.g., Monmouth Cty. Sheriff's Office, P.E.R.C. No. 2016-50, 42 NJPER 354 (¶100 2016) (declining to restrain arbitration where there was insufficient evidence to substantiate a broad assertion of the employer's managerial prerogative to determine qualifications required for a job).

The Sheriff's Office also asserts that Article VIII of the parties' CNA is an illegal parity clause. We disagree. Illegal parity clauses automatically bestow benefits to a unit of employees based upon future or as yet uncompleted negotiations between the same employer and other units. Marlboro Tp.,

P.E.R.C. No. 97-102, 23 NJPER 174 (¶28087 1997). Article VIII sets out a detailed scheme for determining compensation. The formula established by Article VIII uses a combination of salaries from agreements of other employers to determine salaries for PBA members. Article VIII does not automatically match salaries of PBA members to other Sheriff's Office employees, and therefore does not trigger the same concerns as an illegal parity clause. See, e.g., Edison Tp. Bd. of Ed., P.E.R.C. No. 92-61, 18 NJPER 44 (¶23017 1991) (holding that "[d]ifferentials and indices based on already negotiated salaries are a mandatorily negotiable aspect of [an] overall compensation system"); Westwood Reg. Bd. of Ed., P.E.R.C. No. 90-31, 15 NJPER 609 (¶20253 1989) (holding that an index system whereby "proposed salaries [were] pegged to the results of completed negotiations" did not present a parity clause problem).

The County has not made a particularized showing regarding how implementation of Article VIII would interfere with its managerial prerogative to reorganize. Moreover, Article VIII does not present a parity clause concern. Therefore, we decline to restrain arbitration.

ORDER

The request of the Bergen County Sheriff's Office for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Voos voted in favor of this decision. None opposed. Commissioner Boudreau was not present.

ISSUED: September 27, 2018

Trenton, New Jersey