

P.E.R.C. NO. 2018-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTHAMPTON,

Petitioner,

-and-

Docket No. SN-2018-031

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 701,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract clauses in an expired collective negotiations agreement and contract proposals for a successor agreement between the Township and Local 701. The Commission finds that a sick leave buy-back provision is not mandatorily negotiable for employees hired on or after May 21, 2010 but is mandatorily negotiable for employees hired before May 21, 2010. The Commission finds not mandatorily negotiable provisions concerning: finite and/or inflexible limitations on the number of part-time or seasonal employees that can be employed; minimum staffing requirements that mandate a certain number of full-time employees; limitations on negotiations that guarantee future benefits; prohibitions against part-time employees being allocated overtime. The Commission finds mandatorily negotiable provisions concerning: preferences among employees based upon full-time or part-time status; recognition and elimination of certain persons or titles in a unit.

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, Parker McCay, attorneys (Elizabeth M. Garcia, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Connaughton, LLC, attorneys (Brady M. Connaughton, on the brief)

DECISION

On February 15, 2018, the Township of Southampton (Township) petitioned for a scope of negotiations determination. The Township asserts that certain existing language within an expired collective negotiations agreement (CNA) with the International Brotherhood of Teamsters, Local 701 (Local 701), as well as proposed new terms, are not mandatorily negotiable and cannot be included in a successor CNA.

The Township filed a brief, exhibits, and the certifications of its Administrator and its attorney. Local 701 filed a brief, exhibits, and the certifications of its Secretary/Treasurer/Business Agent Ron Lake (Lake) and Department of Public Works

(DPW) employee Robert Marcantonio (Marcantonio). The Township also filed a reply brief, exhibits, and the supplemental certification of its Administrator. These facts appear.

The Township and Local 701 are parties to an expired CNA in effect from January 1, 2013 through December 31, 2017. Article I of the expired CNA, entitled "Recognition," provides:

The Township recognizes the Union as the sole representative of all permanent employees of the Public Works Department employed by the Township. The Union recognizes the following:

Excluded: All managerial employees, confidential employees, supervisory employees within the meaning of the Act, professional employees, craft employees, police and fire employees, temporary employees, probationary employees, clerical employees, seasonal employees (those employees employed only between June 1 and August 31 each year) and all other employees employed by the Township. Seasonal employees shall become covered by this Agreement if employed beyond August 31.

On December 21, 2017, the Township received Local 701's proposal to negotiate a successor CNA. The Township's attorney certifies that on February 7 and 15, 2018, she spoke with Lake but they were unable to resolve the disputed contractual provisions and proposals set forth below.

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 wisdom of the clauses in question, only their negotiability. See Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J. Super. 12, 30 (App. Div. 1977).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

Sick Leave Buy-Back

Article VI of the parties' expired CNA, entitled "Sick Time," provides in pertinent part:

Section 4. In the event an employee has accumulated one hundred twenty (120) hours of sick time by November 30 in any given year, the Township shall, upon request, purchase up to forty (40) hours from such employee at said employee's then-current hourly rate of pay. The payment will be made together with the first paycheck in the month of December so long as the request is made at least ten (10) days prior to the date of the first paycheck in December. This agreement to purchase accumulated sick time hours is neither endorsed nor advised by the Township and each employee who qualifies must consider whether said purchase is in his/her best interest taking into account that such action will result in less paid sick time in the event of long term illness or injury.

The Township argues that "sick leave buy back provisions are preempted by [N.J.S.A. 40A:9-10.4]."^{1/} Local 701 concedes that

^{1/} N.J.S.A. 40A:9-10.4, entitled "Cap on compensation for unused sick leave not covered by Title 11A," provides:

Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has not adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of \$15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only

(continued...)

the "sick leave buy back provision is . . . partially preempted by [N.J.S.A. 40A:9-10.4]" but maintains that "payout of sick leave for any and all employees who were employed with [the Township] prior to [the statute's] effective date is mandatorily negotiable."

The Commission has held that vacation and sick leave, including compensation for unused leave allowances, are generally mandatorily negotiable. See, e.g., Howell Tp. Bd. of Ed., P.E.R.C. No. 2015-58, 41 NJPER 421 (¶131 2015); Hackensack Bd. of Ed., P.E.R.C. No. 2016-18, 42 NJPER 187 (¶49 2015). However, "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982).

In Little Falls Tp., P.E.R.C. No. 2016-42, 42 NJPER 303 (¶87 2015), the Commission held that "N.J.S.A. 40A:9-10.4 . . . applies sick leave limitations prospectively to new employees of non-civil service political subdivisions hired on or after May 21, 2010" and "mandates that supplemental compensation for

1/ (...continued)

to officers and employees who commence service with the political subdivision of the State, or the agency, authority or instrumentality thereof, on or after the effective date [May 21, 2010] of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.

accumulated sick leave shall be payable only at the time of retirement” Accordingly, Article VI, Section 4 of the parties’ expired CNA is not mandatorily negotiable for employees hired on or after May 21, 2010, but is mandatorily negotiable for employees hired before May 21, 2010.

2013 Addendum

On October 8, 2013, the parties entered into the following addendum (2013 Addendum) to the CNA:

This will confirm the parties understanding with respect to part-time employees:

a) The township may employ a maximum of (2) two part-time employees such employees shall be required to render initiation fees and periodic dues to the union. Also, the Township agrees not to propose to increase the number of part-time employees in any future contract negotiations.

b) The township shall no longer have the right to hire seasonal employees and the language in the collective bargaining agreement under Article I - Recognition pertaining to seasonal employees shall be null and void.

c) The township shall not employ part-time workers unless there is a minimum of eleven (11) full time employees on the seniority list.

d) No part-time employee shall work before a full-time seniority employee.

The language underlined above is language the Township is disputing as not mandatorily negotiable.

The Township Administrator certifies that the DPW currently employs ten employees but has had difficulty complying with storm water management regulations as well as keeping up with mowing, leaf and branch collection, and trail maintenance during the last four years, particularly during the summer and parts of the leaf season. According to the Administrator:

- generally four employees are assigned to residential trash pick-up duty and typically those assigned to trash duty are unable to assist with storm water maintenance;

- one employee is a mechanic and does not perform labor-related work; and

- when not otherwise assigned to trash pick-up duty, the five remaining employees are assigned various tasks including, but not limited to, mowing, maintenance of recreation fields, grooming of fields for various recreational programs, leaf and brush collection, and storm water management.

The Township Administrator certifies that there are times the DPW can be down four to five employees due to the use of vacation and sick time. According to the Administrator:

- in 2017, there were 135 days when the DPW was not fully staffed (the combined sick leave taken by the ten employees was 528 hours or 66 days; the combined vacation leave taken by the ten employees was 552 hours or 69 days) and as a result the Township was only able to clean 325 of 883 storm water catch basins and was only able to repair 17 of 225 storm water outfall pipes;

-similarly in 2016, the Township was only able to repair 16 catch basins and was unable to repair any outfall pipes; and

-currently there are 44 catch basins in need of repair and by the end of the year the Township may be unable to adequately service the catch basins and outfall pipes among other public works related tasks.

The Township argues that when considered in pari materia, Local 701's proposals remove or limit the Township's managerial prerogative to determine staffing levels. The Township maintains that Local 701 cannot demonstrate that hiring seasonal or part-time employees has in any way interfered with the terms and conditions of employment of full-time employees.

In response, Lake certifies that he negotiated the 2013 Addendum with the Township Administrator because seasonal employees were continuing their employment beyond the designated seasonal period. According to Lake, hiring more than two seasonal and/or part-time employees without negotiations would interfere with the terms and conditions of employment of full-time employees by reducing their salary, overtime, and hours of work. Lake certifies that negotiating aspects of the Township's leave policy would alleviate the need to hire seasonal and/or part-time employees.

According to Marcantonio, who has been employed by the Township for eighteen years, staffing issues have never been the reason that the Township has had difficulty complying with storm

water management regulations. Marcantonio certifies that proper scheduling of assignments and coordination of leave time would result in adequate DPW staffing throughout the year.

Local 701 argues that the instant dispute predominately involves full-time employees' interest in negotiating hours of work, overtime, and rates of pay and is mandatorily negotiable. Local 701 maintains that absent the Township's demonstration of a specific staffing shortage that cannot be alleviated by properly distributing assignments or modifying leave policy, the disputed provisions/proposals must be deemed mandatorily negotiable.

The Commission has consistently held that public employers have a managerial prerogative to determine staffing levels including "the type of employees who will be on duty to provide services or supervise others." Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016); accord Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 2005-8, 30 NJPER 335 (¶110 2004) (holding that the public employer's "governmental policy interest in setting the size of its workforce and determining how many employees it needs to perform required tasks" outweighs the union's "interest in preserving work and guaranteeing employment for employees it represents"). However, which employees will work extra work hours and what rate of pay those employees will be paid are mandatorily negotiable. See New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (holding that a public

employer's managerial prerogative to determine when services will be offered, what work must be done, how many employees are needed to staff operations, and what qualifications an employee must possess in order to work is separate from the mandatorily negotiable issues of which employees will work extra work hours and what rate of pay those employees will be paid).

The Commission has also held that "the scheduling of vacation or other time off is negotiable and arbitrable so long as the employer can meet its staffing needs" and that an employer "does not have a managerial prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements would be jeopardized." Watchung Bor. However, "if an agreed upon system for scheduling time off prevents an employer from meeting its staffing requirements, the system is no longer mandatorily negotiable." Id.; accord Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999).

The underlined portions of paragraphs (a), (b), and (c) of the 2013 Addendum are not mandatorily negotiable as written. Finite and/or inflexible limitations on the number of part-time or seasonal employees that can be employed may restrict the Township's ability to deliver services. Similarly, a minimum staffing provision that mandates a certain number of full-time

employees may restrict the Township's ability to staff its workforce with the type and number of employees it wants or needs. However, we note that clauses which establish preferences among employees based upon seniority or status are mandatorily negotiable in the abstract. See Woodbridge Tp. Bd. of Ed.; New Jersey Sports & Exposition Auth. With respect to any limitation on future negotiations, the Commission has held that contract clauses cannot guarantee that future benefits will be maintained in subsequent contracts. See Waldwick Bor., P.E.R.C. No. 2004-45, 30 NJPER 31 (¶9 2004) (holding that "contract clauses that provide for salaries or benefits for a contract term ordinarily 'guarantee' those benefits for the duration of the agreement and any post-contract status quo period . . . [b]ut by operation of law they cannot guarantee that the benefits will be maintained in subsequent contracts").

Paragraph (d) is mandatorily negotiable in the abstract. This provision establishes a preference among employees based upon full-time or part-time status. However, if in its application it is found to encroach upon the Township's managerial prerogatives, such as the Township's prerogative to assess the relative fitness of employees and match the best qualified employee to requisite work, it may not be enforced. See, e.g., Gloucester Tp. Fire District No. 2, P.E.R.C. No. 2016-89, 43 NJPER 55 (¶13 2016) (holding, in part, that two contract

proposals requiring the fire district to give certain employees preference to serve as acting supervisor on an equitable basis were mandatorily negotiable given that they provided for the assessment of qualifications).

Proposed Changes to the 2013 Addendum

Local 701 is proposing to replace the 2013 Addendum with the following provision:

New Article - Part-Time Employees

The Township may employ a maximum of two (2) part-time employees such employees shall be required to render initiation fees and periodic dues to the union.

Part-time Status:

Employees shall be deemed part-time if they regularly work twenty-five (25) hours or less per week. Part-time employees start times shall be consistent with Article IV - Hours and Management Rights Sections 3 and 4. Part-time employees are not eligible for the paid benefits provided in this Agreement, unless otherwise specified below.

1. The Township shall not employ part-time workers unless there is a minimum of eleven (11) full time employees on the seniority list.
2. No part-time employee shall work before a full-time seniority employee.
3. No part-time employee shall be eligible to bid on a full time position or be eligible [for] premium overtime example: Saturday, Sunday, Holidays, Special Projects, etc.

The language underlined above is the language the Township is disputing as not mandatorily negotiable.

The underlined portion of the first body paragraph and paragraph (1) are not mandatorily negotiable as written for the reasons set forth above regarding paragraphs (a), (b), and (c) of the 2013 Addendum.

Paragraph (2) is mandatorily negotiable in the abstract as set forth above regarding paragraph (d) of the 2013 Addendum.

Paragraph (3) is not mandatorily negotiable as written. Although the Commission has held that "the allocation of overtime and procedures for selecting employees to work overtime are generally mandatorily negotiable and arbitrable," the instant clause establishes a bar against part-time employees rather than a preference for full-time employees. West Milford Tp., P.E.R.C. No. 2016-45, 42 NJPER 310 (¶90 2015) (granting a restraint of binding arbitration of a grievance contesting the temporary assignment of a patrol officer to the police department's communications center rather than assigning a civilian dispatcher on an overtime basis). See also New Jersey Sports & Exposition Auth. and Local 560 IBT, Laborers' Local 472 and Laborers Int'l Union Local 734.^{2/}

^{2/} We note that unit work considerations are not implicated in this matter given that Local 701 has proposed - and the Township has not objected to - including part-time employees in the negotiations unit.

Recognition Clause

Local 701 proposes to replace the existing Recognition Clause with the following Recognition Clause:

Article I - Recognition

The Township recognizes the Union as the sole and exclusive bargaining agent for all full-time and part-time employees of the Public Works Department employed by the Township, for all matters pertaining to wages, hours, working conditions and all other conditions of employment. The Union recognizes the following:

Excluded: All managerial employees, confidential employees, supervisory employees within the meaning of the Act, professional employees, craft employees, police and fire employees, probationary employees, clerical employees, and all other employees employed by the Township.

The proposed recognition clause specifies that all full-time and part-time employees (instead of using the term "permanent employees") are included in the unit. The proposed clause also eliminates seasonal employees from being excluded. The Township has not identified any specific language that it believes is not mandatorily negotiable. See State-Operated School Dist. of the City of Newark and City Ass'n of Supervisors and Administrators, AFSA/AFL-CIO, Loc. 20, P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999) and P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), aff'd in pt., rev'd in pt., 28 NJPER 154 (¶33054 App. Div. 2001)

(holding in part that the petitioner has the burden of identifying specific language that it believes is not mandatorily negotiable and in the absence of specific objection and input, the Commission will not issue a negotiability determination). Moreover, as a general proposition, the inclusion/exclusion of certain titles or types of employees within a recognition clause is mandatorily negotiable. See Clearview Regional High School Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) (“[i]f the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take”). Accordingly, Local 701’s proposed Recognition Clause is mandatorily negotiable.

ORDER

Sick Leave Buy Back

-Article VI, Section 4 is not mandatorily negotiable for employees hired on or after May 21, 2010, but is mandatorily negotiable for employees hired before May 21, 2010.

2013 Addendum

-The underlined portions of paragraphs (a), (b), and (c) are not mandatorily negotiable as written, and paragraph (d) is mandatorily negotiable in the abstract.

Proposed Changes to the 2013 Addendum

- The underlined portion of the first body paragraph and paragraph (1) are not mandatorily negotiable as written.
- Paragraph (2) is mandatorily negotiable in the abstract.
- Paragraph (3) is not mandatorily negotiable as written.

Recognition Clause

-The proposed recognition clause is mandatorily negotiable.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos
voted in favor of this decision. None opposed.

ISSUED: June 28, 2018

Trenton, New Jersey