

P.E.R.C. NO. 2020-30

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(JUVENILE JUSTICE COMMISSION),

Petitioner,

-and-

Docket No. SN-2018-046

NEW JERSEY LAW ENFORCEMENT  
COMMANDING OFFICER'S ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the State of New Jersey (Juvenile Justice Commission) for a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Commanding Officer's Association, which demands the placement of the grievant in Employee Relations Group "4" or "4A," as defined by the New Jersey Civil Service Commission (CSC), and a corresponding salary increase, pursuant to a provision in the parties' CNA that guarantees such an increase to any employee who is promoted to any unit job title. The Commission finds that the applicable CSC rules do not expressly, specifically and comprehensively preempt negotiations over the grievant's compensation following the inclusion of his title in the negotiations unit by card check. Thus the issue of whether and to what extent, if any, the grievant is entitled to an increase in compensation is arbitrable. However, the Commission restrains arbitration to the extent the grievance seeks to compel the State, absent a determination by the CSC, to classify, assign or re-assign classification of the grievant's position.

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, Gurbir S. Grewal, Attorney General (Alexis F. Fedorchak, Deputy Attorney General, of counsel; Aimee Blenner, Deputy Attorney General, on the brief)

For the Respondent, Mets, Schiro & McGovern, LLP (James M. Mets, of counsel and on the brief; Julian N. Krol, on the brief)

DECISION

On May 18, 2018, the State of New Jersey, Juvenile Justice Commission (State or JJC), filed a scope of negotiations petition, seeking a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Commanding Officer's Association (NJLECOA). The grievance demands the placement of the grievant in Employee Relations Group (ERG)<sup>1/</sup> "4"

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<sup>1/</sup> The New Jersey Civil Service Commission (CSC) defines an ERG as a "category of titles that may or may not be represented by a majority representative (union)." <https://www.state.nj.us/csc/about/about/terminology/definiti>

or "4A" and a corresponding salary increase, pursuant to a provision in the parties' collective negotiations agreement (CNA) that guarantees such an increase to any employee who is promoted to any unit job title, at the lowest applicable step of ERG 4 or 4A above the salary that they were receiving at the time of the promotion.

The grievance was filed on January 30, 2017, and was denied following a step one hearing on May 3, 2017. Thereafter the NJLECOA waived a step two hearing and filed a request for submission of a panel of arbitrators, AR-2018-494, on April 11, 2018. The Commission appointed an arbitrator on May 1, 2018. This petition ensued.<sup>2/</sup> The State filed a brief, reply brief, exhibits, and the certification of Camille Warner, the State's Employee Relations Coordinator. The NJLECOA filed a brief. These facts appear.

Warner certifies that the grievant works at the JJC as an Assistant Chief Investigator, Secured Facilities, and has held that title since 2016. The grievant's employee history records show that he attained the title, which is in the career service,

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1/ (...continued)  
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2/ Briefing was completed on the scope petition by September 13, 2018, but at the parties' request it was held in abeyance through November 20, 2019, while they attempted, unsuccessfully, to resolve the issue in another forum.

by provisional appointment effective September 20, 2014, and by regular, permanent appointment effective April 21, 2016.

The NJLECOA and the State are parties to an expired CNA with a term from July 1, 2011 to June 20, 2015. Effective June 23, 2016, via Petition for Certification by card check, RO-2016-044, the grievant's title was added to the NJLECOA's existing unit.<sup>3/</sup> Thereafter, individuals with the grievant's job title became exclusively represented by NJLECOA and, Warner certifies, subject to the terms and conditions of the CNA.

Article XIII of the CNA, entitled "Salary Compensation Plan and Program," provides among other things (underlining in original):

A. Administration

1. The parties acknowledge the existence and continuation during the term of this Agreement of the State Compensation Plan which incorporates in particular, but without specific limit, the following basic concepts:

a. A system of position classification with appropriate position descriptions.

b. A salary range with specific minimum and maximum rates and intermediate incremental steps therein for each position or a single salary with an appropriate base salary.

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<sup>3/</sup> The existing unit included, among other titles, all regularly employed Assistant Chief Investigators, Secured Facilities, DOC (Department of Corrections), employed by the State.

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B. Compensation Adjustment

. . . the following salary improvements shall be provided to eligible employees in the unit within the applicable policies and practices of the State and in keeping with the conditions set forth herein.

1. Wage Increases: . . . the State agrees to provide the following benefits effective at the time stated herein or, if later, within a reasonable time after the enactment of the appropriation as follows.

\* \* \*

3. Salary Upon Promotion: Pursuant to the 2011 amendment to N.J.A.C. 4A:3-4.9, by the Civil Service Commission, which applies to every employee promoted into this unit, any employee who is promoted to any job title represented by NJLECOA, except for the title of Corrections Major, shall receive a salary increase by receiving the amount necessary to place them on the appropriate salary guide (Employee Relations Group "4" or "4A") on the lowest step that provides them with an increase in salary from the salary that they were receiving at the time of the promotion.

Warner certifies that the ERG for the grievant's title of "Assistant Chief Investigator, Secured Facilities, Juvenile Justice, . . . is M329," and that his salary was \$104,391.39 at the time of the step one grievance hearing, which is within the M329 salary range. A salary schedule effective July 12, 2014, attached to Warner's certification, covers ERG M3, which has three salary ranges, designated 29, 31, and 32, each comprised of nine steps. Warner also references a section of the CSC's State of New Jersey Job Descriptions, entitled "Job Specification

ASSISTANT CHIEF INVESTIGATOR, SECURED FACILITIES," including a chart indicating among other things that the salary range for the title is M329.

The State asserts that arbitration must be restrained because the decision whether to adjust the grievant's ERG and compensation level is a matter for the CSC, and is preempted from negotiations by Civil Service statutes and regulations, including N.J.S.A. 11A:3-1, N.J.A.C. 4A:3-3.1 and 4A:3-4.1.

The NJLECOA responds that the CSC has "already decided" that titles represented by the NJLECOA "are to be placed at ERG 4 or 4A," and the matter is negotiable because otherwise the parties would not have provided for it in their CNA. The NJLECOA argues that the issue of the grievant's compensation, that is, whether he "should be paid consistent with ERG 4 or 4A above his current salary," is a mandatory subject for negotiations. The NJLECOA further argues that even if the grievant's title and ERG can only be changed by the CSC, the issue of whether the State breached a contractual duty to petition the CSC to do so is arbitrable.

The State, citing N.J.A.C. 4A:3-4.9, replies that the CSC provides for salary increases to employees who are appointed to a title with a higher class code, or whose title has been reevaluated to a higher class code; neither of which apply to the grievant, whose title was incorporated by card check into the NJLECOA unit. The State argues that "the movement of a title

into a negotiating unit does not automatically move employees of that title to a higher class code." The State further argues that the CNA states that only employees who are "promoted into the unit shall receive a pay raise," and that the grievant was "never promoted," in that "[b]oth before and after he became part of the NJLECOA negotiating unit, he retained the title of Assistant Chief Investigator, Secured Facilities, Juvenile Justice."

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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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.

[Id. at 404-405.]

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).

Here, we focus on the second prong of the Local 195 balancing test, i.e., whether the subject matter is fully or partially preempted by a statute or regulation. Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Ed. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 11A:3-1, "Classification," provides, among other things, that the CSC shall establish a State classification plan governing all positions in State service, assign and reassign titles to appropriate positions, and provide a specification for each title. N.J.A.C. 4A:3-3.1(b), "Classification of Positions," provides, among other things, that the CSC shall assign positions to titles in the career service on the basis of job analysis, and set the level of compensation for those titles. N.J.A.C. 4A:3-4.1(d) (2) provides that employees in the career services "shall be paid within the salary range or at the pay rate assigned to the employee's job title and pay shall be adjusted in accordance with this subchapter, except as otherwise provided by law, rule, or action of the Civil Service Commission." N.J.A.C. 4A:3-4.1(d) (2) (emphasis supplied).

N.J.A.C. 4A:4-4.9, "Advancement pay adjustments: State service," states in pertinent part as follows (emphasis supplied):

(a) Unless a different salary adjustment is established in a collective negotiations agreement, the following provisions shall be applied when employees are appointed to a title with a higher class code, except that in no event shall such adjustment result in a higher salary than that provided for in this section.

(b) Employees who are appointed to a title with a higher class code shall receive a salary increase equal to at least one increment in the salary range of the former title plus the amount necessary to place them

on the next higher step in the new range. . .  
. This subsection shall apply when the  
following conditions are met:

1. Employees are appointed from their permanent title to a title with a higher class code following or subject to a promotional examination;
2. Employees are serving in a title which is reevaluated to a higher class code;

\* \* \*

(e) Employees who do not meet the criteria set forth in (b) above shall be placed on a step in the salary range of the title with the higher class code that is the same or next higher than the salary paid in the title with the lower class code.

[N.J.A.C. 4A:4-4.9.]

Article XIII B.3 of the CNA references the CSC's 2011 amendment to N.J.A.C. 4A:4-4.9. The CSC's rule proposal for that amendment includes the following statement:

In subsection (a), new language is proposed that would permit an exception to the existing advancement pay adjustment formula in State service where a different salary adjustment is established in a collective negotiations agreement. However, no such adjustment would be permitted that resulted in a higher salary than that otherwise provided for in the subsection.

[43 N.J.R. 903(a).]

Based on its plain language and regulatory history, N.J.A.C. 4A:4-4.9(a) ties pay adjustments to appointment to or reevaluation of a title, N.J.A.C. 4A:4-4.9(b) (1 and 2), only in the absence of a "different" pay adjustment scheme established

through collective negotiations. N.J.A.C. 4A:4-4.9(e) further allows for pay adjustments even when an employee's situation is not the result of an appointment or reevaluation, by placing the affected employee's salary on a step within the salary range of the next higher class code.

We do not find that these provisions, taken together, expressly, specifically and comprehensively preempt negotiations over the grievant's compensation following the inclusion of his title in the negotiations unit. Article XIII B.3 of the CNA reflects that the parties, as expressly permitted by N.J.A.C. 4A:4-4.9(a), negotiated a pay adjustment scheme that differs from that set forth in N.J.A.C. 4A:4-4.9(b). As such, we will not restrain arbitration over whether and to what extent, if any, the grievant is entitled to an increase in compensation consistent with ERG 4 or 4A, pursuant to Article XIII B.3 of the CNA.

The State's argument that the grievant was not "promoted" within the meaning of Article XIII B.3 is a contractual defense that may be raised to the arbitrator. We find that the issue of whether the State was contractually obligated to petition the CSC to change the grievant's ERG to 4 or 4A is also arbitrable.

However, we agree with the State that N.J.S.A. 11A:3-1 and N.J.A.C. 4A:3-3.1 preempt arbitration to the extent the grievance seeks to compel the State, in the absence of a determination by

the CSC, to classify, assign or re-assign classification of the grievant's position.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is denied, except to the extent the grievance seeks to compel the State, absent a determination by the Civil Service Commission, to classify, assign or re-assign classification of the grievant's position.

BY ORDER OF THE COMMISSION

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

ISSUED: December 19, 2019

Trenton, New Jersey