

P.E.R.C. NO. 2022-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN,

Petitioner,

-and-

Docket No. SN-2022-004

PBA LOCAL 49,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the County of Bergen for a restraint of binding arbitration of a grievance filed by the Policemen's Benevolent Association, Local 49, seeking to enforce a contractual provision by which, the PBA asserts, the County agreed to bear the cost of certain members' health benefits upon retirement. Given its narrow scope jurisdiction, the Commission declines to address the County's assertion that Local 49 lacks standing because it no longer has members as the result of a departmental merger of the County's police and sheriff's departments. The Commission highlights that the grievance arose in 2017 at a time when, it is undisputed, Local 49 represented all County police officers and sought to avoid layoffs resulting from the merger; and Local 49 continued to represent officers and retirees in the unit after the merger. The Commission finds the County may raise its standing argument to the grievance arbitrator. The Commission further finds that Local 49 has a cognizable interest in ensuring the receipt of retirement benefits that were contracted for at the time the employees identified in its grievance retired; and the County did not assert preemption or demonstrate that arbitration over the grievance would significantly interfere with the exercise of managerial prerogatives.

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, Eric M. Bernstein & Associates,
LLC, attorneys (Eric M. Bernstein, of counsel and on
the brief)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Michael A. Bukosky, of counsel and on the
brief; Corey M. Sargent, on the brief)

DECISION

On August 16, 2021, the County of Bergen (County) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Policemen's Benevolent Association, Local 49 (PBA or Local 49). The grievance seeks to enforce the parties' collective negotiations agreement (CNA) by which, the PBA asserts, the County agreed to bear the cost of certain members' health benefits upon retirement.

The County filed briefs and exhibits. The PBA filed a brief. No supporting certifications were filed by either party.^{1/} These facts appear.

The record includes a CNA between the parties that was in effect from January 1, 2001 through December 31, 2004. The term of that CNA, as modified by four subsequent memorandums of agreement (MOAs)^{2/}, was thereafter extended through January 1, 2017. The CNA provides that all of its provisions shall remain in full force and effect until a new contract is executed. The CNA's grievance procedure ends in binding arbitration.

The CNA's recognition clause states that the PBA is the exclusive representative of all County police officers, excluding only the titles of Chief of Police and Deputy Chief. Article X of the CNA states, among other things, "premiums for benefits in the State Health Benefits Program shall be paid by the County" for unit employees who retire with a minimum of 25 years of service. Subsequent MOAs further specified, respectively: effective January 1, 2010, employees would contribute 1.5% of their base pay toward their health benefits (December 29, 2010

1/ N.J.A.C. 19:13-3.6(f)¹ requires that all briefs filed in scope of negotiations matters be "supported by certification(s) based upon personal knowledge."

2/ The four MOAs were respectively executed on: May 17, 2002; December 29, 2010; March 11, 2011; and January 17, 2014.

MOA); and employees would contribute to their health benefits in accordance with Chapter 78, P.L. 2011 (January 17, 2014 MOA).

On January 1, 2015, as the result of an agreement between the County Sheriff's Office, the County, and the County Prosecutor's Office, operational and administrative authority over the County Police Department was transferred from the County to the Sheriff. Under this "realignment" agreement, as the County calls it, the Bergen County Police Department became known as the Bergen County Sheriff's Office, Bureau of Police Services.

On March 23, 2017, the Sheriff's Office submitted a layoff plan, effective June 12, 2017, to the New Jersey Civil Service Commission (CSC), seeking to layoff from the Bureau of Police Services officers who were former members of the County Police Department. The PBA challenged the layoff, including by filing a good faith appeal and a layoff rights appeal with the CSC, and an unfair practice charge with the Commission.

On December 19, 2017, the PBA, through its counsel, filed the grievance that is the subject of the instant scope petition. Filed on behalf of "Officer [T.M.], retirees, current officers, and other similarly situated Officers," the grievance stated, in pertinent part:

PBA Local 49 understands the denial of health benefits to be a contractual violation. Additionally, the PBA seeks to enforce the contractually agreed upon health benefit wherein the County agreed to bear the cost of benefits upon retirement for retirees. The

PBA demands that Officer [T.M.] and all similarly situated members be provided their contractual health benefits.

The PBA understands this to be an ongoing and continuous violation and requests that Officer [T.M.] and all similarly situated members be made whole in every way. The PBA requests contract compliance, [and] compliance with the laws of New Jersey

The County denied the grievance on December 21, 2017. The PBA submitted a request for arbitration on January 12, 2018. An arbitrator was initially appointed on March 29, 2018 (Docket No. AR-2018-307).

Through an MOA dated August 14, 2020 (the Settlement Agreement), the Sheriff's Office and the PBA eventually agreed to settle the "various litigations between them," as the County puts it, or "a majority of the numerous litigation filings by" Local 49, as the PBA puts it, in connection with the 2017 layoffs. Among other things, the Settlement Agreement provided each Local 49 member the opportunity, subject to CSC approval, to accept a lateral title change (from the CSC title of County Police Officer to that of County Sheriff's Officer). The Settlement Agreement further provided that any Local 49 member who had been demoted as part of the 2017 layoff, upon accepting a lateral title change, would be repromoted to the rank he or she held prior to the 2017 layoff; and further that all employees accepting a lateral title change would become members of PBA Local 134 and be subject to the terms and conditions of a CNA between the County Sheriff's

Office and Local 134. The latter was also a party to the Settlement Agreement.

But the Settlement Agreement did not resolve every pending dispute between Local 49 and the County, an exception being the instant grievance arbitration. The Settlement Agreement states at Paragraph 13, Retiree Health Benefits, in pertinent part (emphases added):

It is the Parties' intent to assure currently retired County Police Officers who currently receive paid medical benefits from the County that the County and the Sheriff agree to continue those benefits on the same terms and conditions as those benefits are provided to current and future active employees notwithstanding the dissolution of PBA 49 as the exclusive representative of County Police Officers. The Parties acknowledge that the issue of one or more retirees' obligation to contribute toward the cost of their medical benefits is currently the subject of a grievance arbitration under Docket No. AR-2018-307. Absent a decision in [that] grievance arbitration . . . that the PBA 49 CBA exempts all retired County Police Officers from . . . contributions required by Public Law 2011, Chapter 78, nothing in this Paragraph shall be deemed to exempt any retired County Police Officer from the obligation to contribute toward the cost of his or her health benefits in retirement.

At Paragraph 14, Dismissal/Settlement of Current Litigation, the Settlement Agreement states in pertinent part (emphasis added):

Upon ratification of this Agreement, PBA 49 shall dismiss all pending litigation against the County, the Bergen County Sheriff's Office, and any of either's officers or employees, with the exception of the

grievance filed under Docket No, AR-2018-307
([T.M.] retirement benefits.)

The Settlement Agreement further states, at Paragraph 15:

PBA 49 shall retain standing to address any
dispute regarding the implementation of this
Agreement in accordance with its terms.

The County asserts, in its briefs, that all of Local 49's members have either accepted lateral title changes pursuant to the Settlement Agreement, or were previously laid off, retired or resigned; and that in March 2021, after the CSC's approval of the Settlement Agreement, the last County police officer accepted a lateral title change, leaving Local 49 with no remaining members. This petition ensued.

ANALYSIS

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if we conclude that the grievances are either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

Ridgefield Park, supra, 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.

[78 N.J. 144, 154 (1978).]

Health benefits are mandatorily negotiable unless preempted by statute or regulation. State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402, 403 (¶30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (¶153 2003); West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993).

The County argues that the PBA does not have standing to pursue the grievance as it is not the representative of any County employees, since Local 49 effectively has been dissolved and no longer has any members. The County argues that the authority of a union as an exclusive bargaining agent terminates when the union ceases to exist as the result of the loss of its entire membership. The County argues that therefore, its compliance with "any order to negotiate" would be impossible because there is no one with whom to negotiate.

The County argues that Commission cases holding that a majority representative may seek to enforce, through binding arbitration, alleged contractual obligations on behalf of retired employees are based upon a presumption that the union is a majority representative of its members. Again, the County maintains that Local 49 has effectively been dissolved and is no longer the majority representative of any former members, including its retirees.

Local 49 argues, among other things, that in addition to the subject of health benefits being a negotiable issue, the County agreed to arbitrate that issue when it signed the Settlement Agreement. The County waived any objection to negotiability by agreeing to arbitrate the grievance, which Local 49 filed in 2017, prior to the "final merger" with the County Sheriff's Office in 2021, on behalf of Officer T.M. and all similarly situated members; as to whom the County recognized the PBA as their exclusive bargaining agent pursuant to the Settlement Agreement, by which the PBA retained the right to represent them.

Local 49 further argues that cases the County cites in support of its argument that the PBA lacks standing for lack of membership are distinguishable in that those matters, unlike here, did not involve a departmental merger or a settlement agreement that dictated the rights of those affected by it. Finally, the PBA contends the County filed its scope action in an

improper venue, because the Settlement Agreement also requires that any dispute "arising out of or in connection with [it] shall be adjudicated in the Superior Court of New Jersey."

We deny the County's request for a restraint of arbitration. In doing so we note that the arguments the County now makes in support of its scope petition are not enhanced by the fact that the County, in the Settlement Agreement, expressly agreed to carve out the grievance arbitration at issue, expressly agreed to continue the benefits of "currently retired County Police Officers . . . on the same terms and conditions as . . . provided to current and future active employees, notwithstanding the dissolution of PBA 49," and expressly agreed that the PBA would "retain standing to address any dispute regarding" the Settlement Agreement.

The County asserts that the PBA does not have standing to bring this claim as it no longer has members. We highlight that the grievance arose in 2017 at a time when, it is undisputed, the PBA represented all County police officers and sought to avoid layoffs resulting from the County Police Department's merger with the County Sheriff's Department. It is also undisputed that the PBA continued to represent officers and retirees in the unit after the merger. Given the Commission's narrow scope jurisdiction, as outlined in Ridgefield Park, we do not consider the County's standing argument as part of this scope

determination. The County's standing argument may be raised to the arbitrator, who can consider any subsequent events resulting from the merger that affected the PBA's majority status. See Passaic County Superintendent of Elections, P.E.R.C. No. 2017-66, 43 NJPER 446 (¶125 2017) (declining to rule on arguments made by superintendent and union that county lacked standing to intervene, as an alleged joint employer, in grievance arbitration between superintendent and union, finding that question may be posited directly to arbitrator); see also, City of Newark, P.E.R.C. No. 94-7, 19 NJPER 417 (¶24186 1993) ("we do not consider the City's procedural arguments that [the grievant] lacked standing to file the grievance and that it was untimely. These questions are for the arbitrator."); Town of Kearny, P.E.R.C. No. 92-40, 17 NJPER 481 (¶22233 1991) (declining to "consider the argument that only individual officers have standing to file grievances contesting unjust discipline"); Rutgers, the State University, P.E.R.C. No. 91-88, 17 NJPER 226 (¶22098 1991) ("we cannot decide whether" a terminated employee "has contractual standing to invoke" a CNA provision, whether that provision "affords him any rights; or whether the parties . . . contractually authorized the remedy he seeks").

Further, we find that a Commission case relied upon by the County, Essex Cty. Educational Services Commission, P.E.R.C. No. 86-68, 12 NJPER 13 (¶17004 1985), is distinguishable from the

facts here. In Essex Cty., we found that after a lawful, good faith reduction in force by which the employer eliminated its entire workforce including every unit member represented by a teacher's union, and thereafter the county employed no teachers for 16 months, the employer had no obligation to negotiate with that union over a proposed contract. In so holding we reasoned, among other things, that the employer had a good faith doubt of the union's continued majority status during the 16-month period after the layoffs when no teachers were hired, and that although new employees were later hired, the record did not indicate that the new employees desired the union to represent them, or that it had previously done so.

Here, by contrast, some PBA members remained employed well after the initial merger of the County Police Department with the Sheriff's Department, and it is undisputed both that the PBA represented their interests while they remained in the unit, and that it previously represented them as well as those retirees who are the subject of the grievance at issue. Nor is there any indication in the record that those persons did not desire the PBA's representation. Cf, NLRB v. West Ohio Gas Co., 172 F.2d 685 (6th Cir. 1949) (denying enforcement of NLRB's order finding that employer coerced employees in the exercise of their rights, discriminated against an employee by discharging him for union activities, and raised wages in order to forestall union

organization, where "almost the entire membership voted to withdraw from the union"); NLRB v. National Shirt Shops, Inc., 212 F.2d 491 (5th Cir. 1954) (order requiring employer to bargain with union reversed where "every employee . . . had revoked his membership in the union more than a year before").

As the County concedes in its brief, we have permitted majority representatives to seek arbitration to enforce a contract on behalf of retired employees, because they have a cognizable interest in ensuring that the terms of their CNAs are honored. Tp. of Voorhees, P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd, 39 NJPER 69 (¶27 2012); Union City, P.E.R.C. No. 2011-73, 37 NJPER 165 (¶52 2011); Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006); New Jersey Turnpike Auth., P.E.R.C. No. 2006-13, 31 NJPER 284 (¶111 2005). Here, the PBA has a cognizable interest in ensuring that retired employees receive whatever retirement benefits were contracted for in the CNA that was in effect at the time the employees identified in its grievance retired.

Finally, as the County has not asserted preemption or demonstrated that arbitration over the retiree health benefits grievance would significantly interfere with the exercise of managerial prerogatives, we hold that the subject of the grievance is mandatorily negotiable and legally arbitrable.

ORDER

The request of the County of Bergen for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: October 28, 2021

Trenton, New Jersey