

P.E.R.C. NO. 84-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-84-9

EDISON P.B.A. LOCAL #75,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds mandatorily negotiable proposals of Edison P.B.A. Local #75 concerning: overtime compensation; standby compensation; paid sick leave for one year or less; vacations; and notice of the table of organization. The Commission holds not mandatorily negotiable proposals concerning paid sick leave in excess of one year and which official will have the power to approve vacations.

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Appearances:

For the Petitioner, Lawrence Pollex, Assistant
Township Attorney, Township of Edison

For the Respondent, Bosco-McDonnell Associates
(Dr. William Philip McDonnell, On the Brief)

DECISION AND ORDER

On September 6, 1983, the Township of Edison ("Township") filed a Petition For Scope of Negotiations Determination with the Public Employment Relations Commission.^{1/} The Township contends that several provisions in its current collective negotiations agreement with the Edison Township PBA Local #75 ("PBA") are not mandatorily negotiable and thus may not be included in a successor agreement.

Both parties have filed briefs. The Township has also filed a reply brief.^{2/}

The PBA is the exclusive representative of the Township's approximately 150 police officers through the rank of Captain.

1/ The Township had filed a Petition for Scope of Negotiations Determination on March 2, 1983, but withdrew that petition on August 31, 1983 and submitted the instant petition.

2/ The PBA, in its brief, agreed with the Township that the following provisions are not mandatorily negotiable:
Article XII, §2 and Article XXVII, §§1, 2, 3, 5, and 6.
The parties have also agreed that Article XXIV is no longer in dispute. Accordingly, we will not consider these provisions.

The PBA and the Township were parties to a collective negotiations agreement effective from January 1, 1977 through December 31, 1982. The parties are now involved in interest arbitration proceedings since negotiations over a successor agreement reached impasse.

In cases dealing with the negotiability of proposals arising during the course of negotiations for contracts covering police and fire employees, the Commission will only address the question of whether a disputed proposal is mandatorily negotiable. Since an employer is free to withhold its consent to submit a permissive subject to interest arbitration, there is no need to determine whether or not a matter is permissively negotiable. N.J.S.A. 34:13A-16(b) and N.J.S.A. 34:13A-16(f)(4); In re Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981); In re Tp. of Hillside, P.E.R.C. No. 83-132, 9 NJPER 271 (¶14123 1983).

Article VI, Overtime, states in part:^{3/}

Section 1. (Amended 1978) Scheduled tours of duty shall not be changed unless four (4) days advanced notice is given. Whenever an Employee's scheduled work hours are changed, the Employee is to receive time and one-half for the newly scheduled hours, if a change is made within said four (4) days notice.

* * * *

Section 3. (Amended 1981) Employees will be scheduled for all duty-related appearances in Municipal Court while on duty. Where this is not possible, they will be paid at the rate of time and one-half (1 1/2) their regular salary for all off-duty appearances, with a minimum pay of four (4) hours or the actual hours spent,

^{3/} Since the Township did not address §2 and §6 in its brief, we decline to rule on these provisions. In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980).

whichever is greater. If an Employee is scheduled for an off-duty Municipal Court appearance, it is his obligation to immediately notify the Municipal Court Clerk and the Division Commander. If they are unable to reschedule his appearance to coincide with his regular on-duty time then he shall be paid. If the Employee fails to provide this immediate notification then this provision will not apply.

Section 4. Whenever an Employee is required to be placed on stand-by alert during any twenty-four (24) hour period, he shall be paid two (2) hours of overtime pay at time and one-half (1 1/2), in addition to any other time he is called in.

Section 5. (Amended 1978) Any Employee called in for any period of time during his off-duty hours on his regular schedule for duty, shall receive a minimum of two (2) hours of overtime pay at time and one-half (1 1/2). If called in on an off-duty day, he shall receive no less than eight (8) hours of overtime pay at the rate of time and one-half (1 1/2).

* * * *

Section 1, which provides for additional compensation at one and one-half times the officer's rate of pay under certain circumstances, directly and intimately affects the work and welfare of police officers by compensating them for having personal plans disrupted on short notice. It does not significantly interfere with the Township's governmental policy-making powers or conflict with any statute or regulation.^{4/} Thus, Section 1 is mandatorily negotiable.

Sections 3 and 5 provide for minimum overtime compensation at one and one-half times an officer's rate of pay when an officer is required to work during off-duty hours or on off-duty days. The Township argues that these provisions are preempted by

^{4/} We note that Section 1 does not restrict the Township's ability to deploy its personnel and to make necessary assignments within the four day period. A blanket prohibition on such assignments would not be valid. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (12306 1981). Instead, this section, read as a whole, only provides for overtime if the Township does not provide the requisite notice for a tour of duty change.

N.J.S.A. 40A:14-133 and 134^{5/} since the minimum hours provision may require the Township to pay an amount of money greater than would have been required based on time and one-half payments for hours actually worked. We disagree. The Commission has held such provisions to be mandatorily negotiable as long as an employer does not agree to pay overtime in excess of time and one-half the officer's rate of pay. In re Borough of Bound Brook, P.E.R.C. No. 79-66, 5 NJPER 126 (¶10075 1979). The provisions here do not require the Township to pay overtime in excess of time and one-half. Such provisions are common and protect the employees' interest in compensation for having their off-duty plans and personal life disrupted. Thus, N.J.S.A. 40A:14-133 and 134 do not preempt

5/ N.J.S.A. 40A:14-133 states in part:

* * * *

The days of employment of any member or officer of the police department or force, including any officer having supervision or regulation of traffic upon county roads, parks and parkways shall not exceed 6 days in any one week, except in cases of emergency the officer, board or official in charge of such police department or force shall have authority to retain on duty any member or officer during the period of the emergency, but in any such case and within 12 months thereafter, such member or officer shall be given a day off for each extra day so served by him during the emergency.

N.J.S.A. 40A:14-134 states:

* * * *

In any municipality in which the officer, board of official having charge or control of the police department or force has authority, in times of any such emergency to summon and keep on duty any paid members of the police department or force for a period or periods of time in excess of the hours of ordinary duty, the governing body may provide compensation for some or all of such emergency duty by any such policeman at his prevailing wage, or at a rate not in excess of 1 1/2 times his prevailing hourly wage rate, which compensation shall be in lieu of any compensatory time off otherwise due for the emergency duty so compensated.

negotiations.^{6/}

Section 4 provides for minimum overtime compensation when an officer is required to be on stand-by alert. The Township's position concerning this section is the same as with Sections 3 and 5. We again disagree. In In re Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979), police officers were required to remain on standby status for 4 days. The Court upheld an arbitration award in which the arbitrator concluded that the town must compensate officers at overtime rates for all hours on standby in excess of the eight hour workday. Section 4 is consistent with the Court's analysis in Kearny which implicitly recognized that such clauses are mandatorily negotiable.

We conclude that Sections 1, 3, 4 and 5 of Article VI are mandatorily negotiable.

Article XIV, Sick Time,^{7/} states:

Section 1. Each member shall be granted one and one-quarter (1 1/4) sick days per month for a total of fifteen (15) days per year up to the time of termination of employment. Sick time shall be cumulative and each member shall be paid for each such accumulated time in the following manner:

a. (Amended 1978) Members will be paid for one-half (1/2) of the total amount of sick days accrued from the year 1963 to date of termination of employment, if the termination occurs while in good standing, at a rate equal to the highest salary attained at the time of termination of employment by that member terminating his employment excluding overtime.

b. Members will be paid the remaining fifty (50) percent of the accumulated sick days as terminal leave; payment to be made at a rate equal to

^{6/} Although in Bound Brook the Commission discussed the preemptive effect of N.J.S.A. 40A:14-134 and 135, we see nothing in N.J.S.A. 40A:14-133 to cause us to rethink our analysis.

^{7/} The Township does not address §§3, 5, and 8-11 in its brief. We decline to rule on these provisions. See Footnote 3.

the highest salary attained by that member terminating his employment, if termination occurs while in good standing and excluding overtime.

c. Payments made in accordance with (a) and (b) above shall be made by lump sum on the day of termination of employment or the nearest pay day thereafter.

Section 2. The heirs, assigns or designees of a member whose employment is terminated by death and while in good standing, shall receive the payments as set forth in Section 1, paragraphs (a) to (c) of this Article.

* * * *

Section 4. After all accrued sick time is taken, members will be granted an extension for illnesses which are not service connected for an additional forty-five (45) days. Time taken after such extension shall be deducted from their salary.

* * * *

Section 6. Hospital confinement and major illness or injury shall be treated in the following manner:

a. Any member who is confined to a hospital for nonrelated service injuries, or major illness, for any period up to one year, will not be charged under sick time. Any time over one year will be subject to review and time may or may not be deducted.

b. Members who enter the hospital and/or suffer a major illness shall request, as soon as possible, a letter from the attending physician, indicating the type of illness and recommended recuperative time. This letter shall be sent to the Chief of Police.

c. After verification of the recommended recuperative time is made by the Township Appointed Physician, if such verification is requested, and such recuperation time is completed, the officer shall return to duty. An officer failing to return to duty after completion of such time shall have sick time deducted for each day he fails to return to duty.

d. Reasonable recuperative time shall not be deducted from accrued sick time.

e. The Employee shall receive full pay during the periods as set forth herein.

Section 7. Service connected disabilities shall be treated in the following manner:

a. Members who are injured while in the performance of duty or who sustain an illness directly related to the police occupation, will receive up to one (1) year sick leave, not chargeable under sick time regulations. After a period of one (1) year, the illness will be reviewed on a monthly basis and further sick leave will be approved or denied.

b. Any service connected disability must be verified by the police reports and verified by the Township Appointed Physician.

c. The Employee shall receive full pay during the periods as set forth herein but will endorse and turn over to the Employer any compensation checks received during said time of disability.

* * * *

Section 1 provides for accumulation of sick days and for payment of accrued sick time at time of termination. The Township argues, without supporting citations, that this section provides a salary bonus and not compensation for illness and that salary bonuses are a policy determination within its discretion. In In re Somers Point, P.E.R.C. No. 77-48, 3 NJPER 99 (1977) ("Somers Point"), however, we held that these provisions were mandatorily negotiable precisely because they were a type of compensation. See also Maywood Education Ass'n, Inc. v. Maywood Bd. of Education, 131 N.J. Super. 551 (Ch. Div. 1974).

Section 2 permits an officer to designate "heirs, assigns or designees" to receive the accumulated sick leave payment if death terminates the officer's employment. The Township

argues, without supporting citations, that State probate laws preempt this provision. We disagree. The provision does not dictate who shall receive an officer's sick leave payment. It only permits an officer to designate who should receive the payment. However, state probate laws will ultimately determine who will receive the payment. Section 2 is, therefore, mandatorily negotiable.

The Township objects to Sections 4, 6 and 7 because these sections allegedly conflict with N.J.S.A. 40A:14-137 which states:

The governing body of any municipality, by ordinance may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.

Section 4 requires the Township to give an officer 45 additional sick days for non-service related injuries after that officer has exhausted his accrued sick leave. The Township asserts that this provision is a non-negotiable bonus system and conflicts with N.J.S.A. 40A:14-137. We disagree. This provision concerns sick leave benefits and does not, on its face, conflict with N.J.S.A. 40A:14-137. It is thus mandatorily negotiable.^{8/}

Section 6(a) provides that an officer who is hospitalized for a non-service related injury for up to one year will not have any sick time deducted. The Township may or may not use accrued sick time for any period of hospitalization exceeding one year.

^{8/} If, however, the provision is applied to require paid sick leave exceeding one year, then it would conflict, as applied, with N.J.S.A. 40A:14-137 and, upon the filing of another petition, we would restrain binding arbitration over such a claim.

Section 6(e) requires the Township to provide full pay to the officer during this period, and during any recuperative periods under Section 6(a). We agree with the Township that N.J.S.A. 40A:14-137 preempts this provision because it prohibits the payments in excess of one year which this provision would allow.^{9/}

Sections 7(a) and (c) require the Township to pay an officer for periods of sick leave in excess of one year. We note that in Section 7(a), as in Section 6(a), the question of whether sick leave may be deducted from sick time is mandatorily negotiable. However, these sections are not negotiable to the extent they require the Township to pay an officer for periods of sick leave in excess of one year and, thus, conflict with the express language of N.J.S.A. 40A:14-137. Section 7(b), however, is consistent with the statute as it requires that the physician appointed by the Township verify an officer's disability.

Article XXV, Vacations, provides in part:

Section 4. (Amended 1978) Vacation leave, subject to the approval of the Chief of Police or his designee, may be taken at times in units of full working days from one full day to twelve full working days. Vacation time in excess of twelve (12) consecutive full working days may not be taken except if there is no conflict with other members of that person's squad, and the other members of said squad agree that the person may take more than twelve consecutive full working days.

^{9/} Section 6(d), standing by itself, is mandatorily negotiable. However, to the extent Section 6(e), as applied, requires payment for more than one year, Section 6(d) is also preempted by N.J.S.A. 40A:14-137. We also note that Section 6 does not specifically recognize the obligation of the Township's examining physician to certify any injury, illness or disability for which a leave of absence is sought. Any attempt to hinder the ability of the Township's physician to discharge this obligation would be preempted by N.J.S.A. 40A:14-137.

Section 5. (added 1979) Subject to other provisions of this contract and depending on manpower or squad strength, two (2) men shall be permitted off on each shift in order to go on vacation, and said two men on each shift shall be permitted off during the same period of time.

The Township asserts that these provisions are not mandatorily negotiable because they allegedly infringe on its right to determine manpower levels. The Township also states that decisions concerning vacation leave must be made by the Director of Public Safety, not the Chief of Police who is his subordinate. The PBA argues that these provisions do not infringe on the Township's right to determine manpower levels because the Township has a reserved right to determine vacation schedules.

We find that Section 4 is, in general, mandatorily negotiable. It is undisputed that a public employer has the right to determine manpower requirements. However, Section 4 does not infringe on this right. In In re City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303, 305 (¶13134 1982), appeal pending, App. Div. Docket No. A-4635-81T3, the Commission stated:

Our case law is also consistent that the granting and scheduling of time off [are] clearly negotiable subject[s] to the extent that the agreed-upon system does not cause manpower levels to fall below an employer's manning requirement.

See also In re Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456, 458 (¶12202 1981). Thus, the portion of Section 4 concerning the number of consecutive vacation days is mandatorily negotiable. We agree, however, with the Township that Section 4 is not mandatorily negotiable to the extent that it dictates who in the Township's organization structure must approve vacation leave. Such a provision infringes upon an inherent managerial prerogative to determine who in its table of organization will make certain

personnel decisions and is thus not mandatorily negotiable. See In re City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER ____ (¶ ____ 1983).

We hold that Section 5 is mandatorily negotiable. In In re City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982) ("Camden"), we held mandatorily negotiable a contractual clause concerning the number of employees who could be on a leave of absence at any one time unless the employer decided to increase that number. In reasoning applicable to the instant case, we stated:

Because this case arises in the context of the negotiations for a successor contract and not as a dispute over the Article's application in a particular situation, we do not have a specific factual record before us in which to assess whether its inclusion in the contract would significantly interfere with the City's policy judgments as to the manning level for the police department. However, the City's scope petition states that there are approximately 200 police officers in the unit covered by this contract. Applying the balancing test of State v. State Superisory Employees Ass'n, 78 N.J. 54, 67 (1978) and In re Paterson, *supra* at 86, we do not believe that a clause permitting a maximum of five officers in a force of 200 to be on leave at a given time imposes a sufficient limitation on the City's managerial prerogatives to displace the general presumption that proposals pertaining to leaves of absence are mandatorily negotiable.[4/] Therefore, we

[4/] If in some future situation, the City finds that it cannot grant a particular employee a leave of absence and still provide governmental services efficiently, the City always has the power to deny the leave of absence. Assuming the employees were to grieve the denial of that benefit, the City can file a scope proceeding at that time seeking to restrain the arbitration, and we will have the benefit of a more concrete factual context in which to make our determination. As the Supreme Court noted in Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 217 (1979), the public interest and welfare are always at issue in the public sector. See also Porcelli v. Titus, 108 N.J. Super. 301 (App Div. 1969), cert. den. 55 N.J. 310 (1970), excusing a public employer from its obligation to abide by the provisions of the collective negotiations agreement in an emergency situation. (Fn. in original, p. 112).

find that Article V, including both disputes provisions, may be submitted to interest arbitration. Id. at p. 111.

In the instant case, we similarly hold, in the absence of a specific factual record to the contrary, that a clause permitting two employees (out of 150) per shift to be on vacation at the same time and expressly conditioning such permission on manpower and squad strength does not impose a sufficient limitation on the City's managerial prerogatives to displace the general presumption that proposals concerning vacations are mandatorily negotiable.

Article XXVII, Section 4, Manpower, states:

The Employer shall establish a Table of Organization for the police department specifically setting forth minimum manpower requirements for all divisions and bureaus and specifically setting forth the number and rank of superior officers in each division and bureau.

The Township asserts that this provision infringes on its right to establish manpower levels. The PBA asserts that Section 4 does not require the Township to maintain the manpower levels set forth in the table of organization, but instead enables the PBA to oversee enforcement of the contract, including provisions concerning vacations and personal days.

In In re City of Jersey City, No. 84-24, 9 NJPER 591 (¶14249 1983), the Commission held that a provision which permitted a committee of city and union officials to provide non-binding input into the development of a table of organization or to be informed of an existing table of organization or any changes was mandatorily negotiable. The key in Jersey City was that this committee could only discuss the table of organization and could not commit the City to a particular table of organization.

However, a provision implicating an employer's prerogative to determine unilaterally its organizational structure is not mandatorily negotiable. In re City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983).

We agree with the PBA that Section 4 is mandatorily negotiable to the extent that it simply gives PBA members notice of the department's organizational structure. We emphasize, and the PBA recognizes, however, that the Township has a reserved and non-negotiable right to change the table of organization whenever it wants so long as it notifies the PBA of any changes.


ORDER

The Public Employment Relations Commission orders that:

A. The following provisions are mandatorily negotiable: Article VI, §§1, 3, 4 and 5; Article XIV, §§1, 2 and 4; Article XXV, §4, (with the exception of the clause designating who will approve vacations), and §5; and Article XXVII, §4.

B. The following provisions are not mandatorily negotiable: Article XIV, §§6 and 7; and that part of Article XXV, designating who will approve vacations.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioners Hartnett and Graves were not present.

DATED: Trenton, New Jersey
January 18, 1984
ISSUED: January 20, 1984