

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-82-14

FRATERNAL ORDER OF POLICE,
LODGE NO. L,

Respondent.

SYNOPSIS

In a scope of negotiations determination, the Public Employment Relations Commission rules that proposals pertaining to leaves of absence, work week, and rates of pay for employees appointed to temporary or acting positions are mandatorily negotiable and may be submitted to an interest arbitrator. The Commission also rules that proposals pertaining to minimum manning, suspensions, exchanges of hours and day of duty, limited duty assignments, weapons, and appointments to acting positions are not mandatorily negotiable and may not be submitted to interest arbitration.

P.E.R.C. NO. 82-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-82-14

FRATERNAL ORDER OF POLICE,
LODGE NO. 1,

Respondent.

Appearances:

For the Petitioner, Murray, Granello & Kenney, Esqs.
(James P. Granello, of Counsel)

For the Respondent, Kirschner, Walters & Willig, Esqs.
(Richard Kirschner, of Counsel)

DECISION AND ORDER

On October 13, 1981, the City of Camden (the "City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. Noting that it has, along with the Fraternal Order of Police, Lodge No. 1 (the "FOP"), filed a Petition to Initiate Compulsory Interest Arbitration pursuant to N.J.S.A. 34:13A-16(b), the City seeks an order by the Commission removing certain present contractual provisions from the consideration of the interest arbitrator for inclusion in the successor agreement on the grounds that the provisions are not mandatory subjects of collective negotiations. N.J.S.A. 34:13A-16(f)(4).

In In re Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), our Supreme Court recently confirmed that, for police and fire employees, there are three

categories of subjects of negotiations: mandatorily negotiable, permissively negotiable, and non-negotiable. Further, the Court agreed with the Commission's analysis of the permissive category which provides that police and fire employees may not pursue permissive subjects to interest arbitration unless the employer consents; a permissive contractual provision remains in effect only during the term of the agreement; and either party is free to delete it from a successor contract by refusing to negotiate on it. See also, In re City of Newark and Superior Officers' Ass'n, P.E.R.C. No. 81-27, 6 NJPER 438 (¶11222 1980). Thus, given the City's position that it will not agree to submit these clauses to interest arbitration if they are permissively negotiable, we shall only decide whether the contested provisions fall within the mandatorily negotiable category. If a proposal is found to be mandatorily negotiable, it may be presented to an interest arbitrator. See, Town of West New York and West New York PBA Local No. 88, P.E.R.C. No. 82-34, 7 NJPER ____ (¶_____ 1981).

We shall now proceed to examine the proposals herein. The full text of each proposal can be found in the Appendix.

ARTICLE V LEAVE OF ABSENCE

The proposed Article V would require the City to grant an unpaid leave of absence of no more than six months to any employee who has been employed for four years; no more than five employees may be on leave at any one time unless the Business Administrator

decides to increase the number.^{1/} The City concedes that leaves of absence are negotiable,^{2/} but contends that the provisions are inconsistent with specific statutes and interfere with its managerial prerogative to determine manpower levels.

Turning first to the relevant statute and regulation, we find that neither N.J.A.C. 4:1-17.2 (allowing local governments to grant leaves of absence without pay) nor N.J.S.A. 40A:14-136 (allowing leaves of absence without pay to members or officers of municipal police departments) precludes the proposed provisions. Those provisions neither specify the qualifications for leaves of absence nor limit the number of employees who may be granted leaves of absence at one time.

The Commission and the appellate courts have consistently held that provisions concerning leaves of absence, including leaves for personal reasons or sicknesses, directly and intimately affect the work and welfare of public employees and, in the absence of a factual record to the contrary, do not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy. See, e.g., Burlington County College Faculty Ass'n v. Bd. of Trustees, Burlington County College, 64 N.J. 10, 14 (1973); Board of Education of the

^{1/} While the City objects to only sections 1 and 4 of the Leave of Absence article, the entire article has been reproduced in the Appendix.

^{2/} Brief at p. 5. See, e.g., South River Bd. of Ed. and South River Education Ass'n, P.E.R.C. No. 81-108, 7 NJPER 157 (¶12069 1981).

Twp. of Piscataway v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (1977); South Orange-Maplewood Education Ass'n. v. South Orange-Maplewood Bd. of Ed., 146 N.J. Super. 457 (1977); In re Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981); In re South River Bd. of Ed., supra; In re Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981); In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); In re Willingboro Bd. of Ed., P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), cert. den. 87 N.J. 320 (1981). We thus have no doubt that the leave of absence benefit is a mandatorily negotiable provision.

Section 4 providing that no more than five employees may be on leave at any one time unless the City Administrator increases that number, as the City argues, may have a tangential effect on manning in that it allows officers who would otherwise be available for duty to be excused. However, on balance, and viewed in the context of the entire leave of absence Article, we find that the Article is mandatorily negotiable. The Article, of which Section 4 is a part, is not a manning level provision. Section 4 only establishes one of the criteria for the application of the leave of absence policy to a particular employee. Thus, like the requirement of Section 1 that an employee must have four years of experience to be eligible for a leave of absence, this latter requirement prohibits an employee from taking a leave of absence if five employees are already out on leaves.^{3/}

^{3/} In negotiating this provision into the existing contract, the parties have actually negotiated a protection for the City. To declare this section or the entire Article non-negotiable simply because a number of employees is mentioned would be to over-emphasize the "label" to the total exclusion of the meaning of the provision and its possible effect on the employees and the employer. In a sense, any contractual provision providing for vacation, holidays, leaves of absence or other special absences from the workplace interferes with an employer's total freedom to determine the number of employees available for work on a given day.

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 Supervisory 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 find that Article V, including both disputed provisions, may be submitted to interest arbitration.

^{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.

ARTICLE VIII - WORK WEEK
ARTICLE XXVI - EMPLOYEES' SAFETY

The contested proposals in Section 1 and 5 of Article VIII would establish a four day on, two day off work week which the City could alter after consultations with the FOP if excessive abuse of sick leave threatened public safety. Within the framework of the City's right to determine the number of employees on duty at a given time, the Commission has consistently held that the number of days and hours in an employee's work week is mandatorily negotiable. In re Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd App. Div. Docket No. A-3329-79 (1981); In re Borough of Montvale, P.E.R.C. No. 81-55, 6 NJPER 542 (¶11274 1980); and In re City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981). In the Appellate Division decision affirming our decision in Borough of Roselle, supra, the Court specifically distinguished Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), cert. den. 82 N.J. 296 (1980), the case relied upon by the City, in upholding the negotiability of a four day on, two day off work schedule. We believe that analysis applies herein.

The City also contests Section 4 of Article VIII, which would require the City to staff all motorized patrol units on certain shifts with two employees, and Article XXVI, which would require the appointment of two employees on various shifts. These proposals are minimum manning proposals and are not mandatorily negotiable. See, e.g., In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14, 18 (¶12006 1980); In re City of East Orange, P.E.R.C.

No. 81-11, 6 NJPER 378 (¶111184 1980), aff'd App. Div. Docket No. A4851-79 (7/15/81), pet for cert. den. N.J. (1981).

ARTICLE XVII - SUSPENSIONS

Article XVII, Section 1 provides in its entirety that:

No employee shall be suspended without pay for any departmental charges or for the commission of a disorderly persons act without a departmental hearing in accordance with Civil Service procedures.

Article XVII, Section 2 provides in its entirety that:

In the case of any criminal charge or charges other than set forth in Section 1 of this Article, the Chief of Police shall have the right to immediately suspend an employee with pay. Provided, however, that the Chief of Police, will have the right to suspend such employee without pay where he would decide that to allow the employee to work with pay would be detrimental to public safety or the good order of the Division of Police.

As the Supreme Court noted in Twp. of West Windsor v. P.E.R.C., 78 N.J. 98, 116 (1978), "...in N.J.S.A. 40A:14-147 et seq., the Legislature has dealt comprehensively with the matter of discipline of municipal police employees...." Section 1 is consistent with this statutory scheme and does not place any substantial limitations on the employer's ability to discipline. Rather, it reiterates the procedural protection of the statute afforded a police officer before a suspension, pending a disciplinary determination, can be imposed.

Section 2, however, impermissibly conflicts with a specific statute governing the suspension of police officers charged with criminal offenses. N.J.S.A. 40A:14-149.1 provides:

Notwithstanding any other law to the contrary, whenever any municipal police officer is charged under the law of this State, another state, or the United States, with an offense, said police officer may be suspended from performing his duties, with pay, until the case against said officer is disposed of at trial, until the complaint is dismissed, or until the prosecution is terminated; provided, however, that if a grand jury returns an indictment against said officer, or said officer is charged with an offense which is a high misdemeanor or which involves moral turpitude or dishonesty, said officer may be suspended from his duties, without pay, until the case against him is disposed of at trial, until the complaint is dismissed or until the prosecution is terminated.

Under this section, immediate suspensions with pay must end if the charge is disposed of favorably to the accused. Immediate suspensions without pay can only be imposed if a grand jury returns an indictment or the offense is a high misdemeanor or involves moral turpitude or dishonesty; further, said suspension must end if the charge is disposed of favorably to the accused. Because section 2 is inconsistent with the limitations on suspensions of N.J.S.A. 40A:14-149.1, it is preempted. See, Shusted v. Traenkner, 155 N.J. Super. 23 (1978), appeal dismissed, 163 N.J. Super. 445 (1978) ^{4/}

ARTICLE XIX - EXCHANGE OF HOURS OF DUTY AND DAY OF DUTY
ARTICLE XXXIV - LIMITED DUTY ASSIGNMENT

These proposals would require the City to grant requests from employees for exchanges of hours and days of duty, and to keep an injured or ill officer on limited duty until the officer

^{4/} Because we find section 2 to be preempted, we do not reach the City's contention that section 2 is invalid under State of New Jersey v. Local 195, IFPTE and Local 518, SEIU, 179 N.J. Super. 146 (App. Div. 1981), pet. for certif. pending; City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 179 N.J. Super. 137 (App. Div. 1981), pet. for certif. pending.

is certified by the police surgeon to return to full duty. Such provisions would impede the employer's decisions to assign certain individuals to provide a given service. The right to make such assignments is not mandatorily negotiable. See, e.g., Township of Saddlebrook and PBA Local 102, P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978); Mainland Reg. Teachers Ass'n v. Mainland Reg. Bd. of Education, P.E.R.C. No. 80-8, 6 NJPER 301 (¶10162 1979), aff'd 176 N.J. Super 476 (App. Div. 1980), cert. den. 87 N.J. 312 (1981); and Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), cert. den. 82 N.J. 296 (1980).

ARTICLE XXII - EQUIPMENT AND VEHICLE SAFETY

This Article would require the City to have available, at all times, such armaments as rifles, shotguns, tear gas, and grenades. The FOP argues that these items are essential to employee safety, and are thus mandatorily negotiable. The City argues that the provision significantly interferes with its managerial prerogative to determine the manner and means by which it provides police services.

The Commission has previously ruled that the decision to arm employees is not mandatorily negotiable, despite the possible impact on employee safety. Brookdale Community College Police and Brookdale Community College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977), appeal dismissed App. Div. Docket No. A-3041-76. We are convinced that the instant weapons clause is not mandatorily negotiable as it relates primarily to governmental policy considerations.

ARTICLE XXIX - SPECIAL PAY

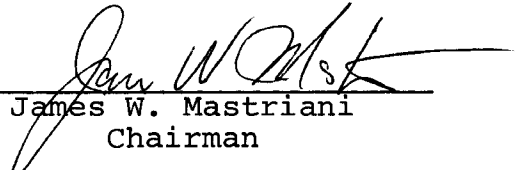
This contested provision sets forth a maximum of days (15) an employee can work in an acting capacity and a requirement that the City appoint as Acting Sergeant the employee highest on the current Civil Service promotional list within his unit or, if there is no standing promotional list, the most senior employee in the Division of Police assigned to that unit. To the extent that this Article dictates a particular appointment to an acting position or limits the number of days an employee can work in an acting capacity, it is not mandatorily negotiable. To the extent that it provides for rates of pay for employees who are appointed to temporary or acting positions, the subject matter is mandatorily negotiable. See, e.g., Kearny PBA Local No. 21 v. Town of Kearny, App. Div. Docket No. A-1617-79, (decided December 18, 1981), affirming P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980); In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER (¶12006 1980); and In re Town of Kearny, P.E.R.C. No. 81-23, 6 NJPER 431 (¶11218 1980).

ORDER

IT IS HEREBY ORDERED that the above subjects of collective negotiations found to be mandatorily negotiable may be submitted to the interest arbitrator. Those subjects of collective

negotiations found not to be mandatorily negotiable cannot be submitted for the interest arbitrator's consideration.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hipp dissented from that part of the order which prohibited the submission to interest arbitration of proposals found not to be mandatorily negotiable.

DATED: Trenton, New Jersey
January 12, 1982
ISSUED: January 13, 1982

APPENDIX

The following provisions are contested in the Scope of Negotiations proceeding herein. The contested portions of these provisions are underlined unless the entire provision is contested.

ARTICLE V

SECTION 1. A Leave of Absence without pay, shall be granted to any employee who has been employed for four (4) years, except during such time as an employee is under criminal or disciplinary investigation or a period of suspension, provided, however, that the Business Administrator shall be permitted to grant a leave to employees under departmental investigation or criminal investigation.

SECTION 2. No person shall be required to take a Leave of Absence without his written consent made in the presence of the Lodge's authorized representative.

SECTION 3. The maximum time for which an employee shall obtain a Leave of Absence shall be for a period of up to six (6) months. Following the utilization of six (6) consecutive months, further Leave of Absence shall be accorded only with the expressed approval of the City Council.

SECTION 4. No more than five (5) employees shall be on such Leave of Absence at any one time, provided that such number can be increased by the Business Administrator.

ARTICLE VIII

Section 1

Regular motorized patrol shall work under a four (4) day on two (2) day off work schedule (hereafter referred to as the 4-2 work schedule), other employees shall where possible.

Working hours under the 4-2 work schedule shall be as follows:

Tour of Duty A

Four (4) consecutive days of a 12:00 midnight to 7:00 a.m. work schedule.

Tour of Duty B

Two (2) consecutive days of a 6:45 a.m. to 1:45 p.m. work schedule, immediately followed by two (2) consecutive days of a 9:00 a.m. to 5:00 p.m. work schedule.

Tour of Duty C

Four (4) consecutive days of a 4:00 p.m. to 12:00 midnight work schedule.

Each tour of duty will be immediately followed by two (2) consecutive days off. Also, each tour of duty will be worked on a continual clockwise rotation basis, i.e., Tour of Duty A, followed by Tour of Duty B, followed by Tour of Duty C.

ARTICLE VIII (continued)

Section 4

Employees working Tour of Duty B (6:45 a.m. to 1:45 p.m. and 9:00 a.m. to 5:00 p.m.) shall be assigned to one (1) man patrol units at the discretion of the Chief of Police. All motorized patrol units on Tour of Duty C (4:00 p.m. to 12:00 midnight) and Tour of Duty A (12:00 midnight to 7:00 a.m.) shall consist of two (2) employees. However, employees on Tour of Duty C or A may volunteer to work a one (1) man "Special Tactical Force-Supplementary Patrol" unit. Any such volunteer Police Officer may be accepted at the discretion of the City. Employees who work a one (1) man unit during Tour of Duty C and A will be part of the "Special Tactical Force-Supplementary Patrol" (STF-SP) and, therefore, will be so compensated for that tour of duty.

The City shall also have the right to assign STF-SP and K-9 personnel to one (1) man patrol units.

Section 5

After consultation with the Lodge, the City shall have the right to revert back to the work week and minimum manning ARTICLE in the prior contract if the excessive abuse of sick time results in an insufficient number of patrol units so as to be detrimental to public safety in the City.

ARTICLE XVII

SECTION 1. No employee shall be suspended without pay for any departmental charges or for the commission of a disorderly persons act without a departmental hearing in accordance with Civil Service procedures.

SECTION 2. In the case of any criminal charge or charges other than set forth in Section 1 of this Article, the Chief of Police shall have the right to immediately suspend an employee with pay. Provided, however, that the Chief of Police, will have the right to suspend such employee without pay where, he would decide that to allow the employee to work with pay would be detrimental to public safety or the good order of the Division of Police.

ARTICLE XIX

SECTION 1. Exchange of hours of duty by an employee shall be granted by the Division of Police provided that such an exchange shall not result in any employee, who has engaged in such exchange, working outside of his job title, and further provided that such exchange does not result in any employee working in excess of sixteen (16) hours in any twenty-four (24) hour period.

SECTION 2. Exchange of duty by an employee shall be granted by the Division of Police provided that an employee who has engaged in such exchange does not result in an employee working outside of his job title, and further provided that no employee shall exchange any more than five (5) consecutive working days without the specific approval of the Chief of Police, or his designee. Days off shall not be considered part of the phrase, "consecutive work days."

SECTION 3. Any employee who intends to engage in an exchange of hours or days shall give his immediate superior prior notification.

ARTICLE XXII

SECTION 3

The City shall have available at all times twelve (12) shotguns, two (2) rifles and sufficient ammunition therefor. The City shall also have available at all times tear gas grenades and launchers for same. The City shall supply to each employee: mace, cannister and holder for same, and shall repair or replace used and all defective cannisters and holders.

ARTICLE XXVI

SECTION 1. Whenever a patrol unit of the Patrol Division shall be utilized and, in such utilization, is occupied by one (1) employee as defined in Article I, Section 1, of this Agreement, such unit shall also be occupied by at least one (1) other member of the Division of Police unless otherwise provided for in this Agreement.

SECTION 2. All walking patrols during daylight hours within a hazardous area shall consist of two (2) employees. The determination as to what constitutes a hazardous area shall be the sole and absolute determination of the Chief of Police in consultation with authorized representatives of the Lodge. In the event the City determines that a walking patrol during daylight hours shall consist of one (1) employee, the City shall immediately advise the appropriate Lodge representative of its determination within a reasonable time prior to the effectuation of such determination and set forth the reason therefor.

ARTICLE XXVI (continued)

SECTION 3. All walking patrols during the hours of darkness shall consist of two (2) employees.

SECTION 4. The unit assigned to be the Accident Investigation Unit shall only be required to have one (1) employee assigned to it, provided, however, that it shall not be assigned to any hazardous or dangerous duty without two (2) employees assigned thereto.

ARTICLE XXIX

Section 1

The practice of appointing employees to higher ranks in an acting capacity is discouraged. No employee shall be required to act in a higher ranking capacity for a period to exceed fifteen (15) consecutive days. Any employee required to act in such higher ranking capacity for any length of time, shall receive pay commensurate with such position in which he acts.

The employee to be appointed to the position of Acting Sergeant shall be the employee who is placed highest on the current Civil Service promotional list within his respective unit. At such time when there is no standing promotional list, employees to be appointed to acting sergeant shall be the most senior employee in the Division of Police assigned to that particular unit.

ARTICLE XXXIV

SECTION 1. When an employee who has been injured or is ill is determined by the Police Surgeon to be capable of performing limited duty, the City may, in order to keep the employee from being removed from the payroll, utilize said employee in accordance with such limitations as set by the Police Surgeon.

SECTION 2. Such duty shall continue until the employee is certified as capable of **returning to full duty** by the Police Surgeon.