

P.E.R.C. NO. 93-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TUCKERTON BOROUGH,

Petitioner,

-and-

Docket No. SN-93-15

POLICEMEN'S BENEVOLENT
ASSOCIATION, INC. #175,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a petition for a scope of negotiations determination filed by Tuckerton Borough. The petition sought a declaration that a proposal it sought to submit to interest arbitration with Policemen's Benevolent Association, Inc. #175 was mandatorily negotiable, but the Commission determines that it has no procedural basis for determining whether the Borough's proposal can be legally submitted to interest arbitration since the PBA had not challenged the negotiability of the Borough's proposal in this forum and had not sought a restraint of arbitration.

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Appearances:

For the Petitioner, Mulvaney, Coronato & Brady, attorneys
(Terry F. Brady, of counsel)

For the Respondent, Szaferman, Lakind, Blumstein, Watter &
Blader, P.C. (Sidney H. Lehmann, attorney)

DECISION AND ORDER

On August 21, 1992, Tuckerton Borough petitioned for a scope of negotiations determination. The petition seeks a declaration that a proposal it seeks to submit to interest arbitration with Policemen's Benevolent Association, Inc. #175 is mandatorily negotiable. That proposal would require that overtime compensation be taken in the form of compensatory time off. The PBA responds, in part, that the Borough's petition is untimely. Under the circumstances of this case, we decline to entertain the Borough's petition.

The parties have filed exhibits and briefs. These facts appear.

Patrolmen's Benevolent Association, Inc. #175 represents the six patrol officers employed by the Borough, excluding all

officers at or above the rank of sergeant. The parties entered into a collective negotiations agreement effective from April 1, 1990 through March 31, 1991. Article V is entitled Schedule. Sections B and C provide:

B. Call Time and Overtime

* * *

2. Overtime shall be paid at the rate of time and one half (1 1/2) the employee's regular hourly rate of pay for all time worked in excess of forty (40) hours in any work week. For the purpose of determining the work week, the following shall count as regular work days: sick days, vacation days, personal days shall be used in calculating a work week.

* * *

C. Compensatory Time Off

Any employee may at his or her option indicate, at the time overtime is assigned, that he or she wishes compensatory time off at time and one half (1 1/2) in lieu of money payment. Once made, this decision cannot be changed, except by agreement of the Chief of Police.

Sometime after the contract expired on March 31, 1991, the Borough stopped paying police officers for overtime worked and credited them with compensatory time off instead. The police officers apparently have not used this compensatory time.

On August 7, 1991, negotiators for the Borough and the PBA reached a tentative agreement on a 1991-1992 contract. The memorandum stated, in part:

As a condition of settlement, the Boro Police Officers agree to take 50% of accumulated

overtime in the form of comp time. The Boro will, as per law, pay the remaining overtime due in money.

The language of Section C was not changed. According to the PBA, each individual officer was prepared to accept this settlement of the accrued overtime issue.

On August 19, 1991, the Borough Council exercised its expressly reserved right to reject the memorandum. The Borough has since continued to credit officers working overtime with compensatory time off.

On August 29, 1991, the PBA petitioned to initiate interest arbitration. The PBA did not list the unresolved issues since it did not know the Borough's reasons for rejecting the memorandum.

In the interest arbitration proceedings, the Borough has sought to modify Section C of Article V to state:

Overtime compensation would be in the form of compensatory time off.

The PBA has refused to accept this proposal.

On August 17, 1992, the PBA's attorney sent a letter to the Borough's attorney. The letter alleged that the Borough had violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 et seq., by not paying overtime compensation and stated that the police officers would file a lawsuit seeking overtime payments, statutory penalties, and attorneys' fees. The PBA's attorney had advised the Borough's attorney of these FLSA claims in previous telephone conversations. A draft complaint was enclosed. A complaint has since been filed in the United States District Court for the District of New Jersey.

On August 18, 1992, the initial arbitration hearing was held. This petition was filed three days later. Subsequent hearing dates were postponed pending this decision.

The Borough asserts that its proposal is mandatorily negotiable and can be submitted to interest arbitration because the FLSA permits a collective bargaining agreement to provide for compensatory time off instead of paid overtime compensation. 29 U.S.C. §207(o)(2).^{1/} The PBA responds that the Borough's petition is untimely under N.J.A.C. 19:16-5.5; a non-consensual interest arbitration award is not a collective bargaining agreement under 29 U.S.C. §207(o)(2); and the Commission cannot entertain the Borough's implied contention that an interest arbitration award calling for compensatory time off would retroactively void the accrued rights of police officers to paid overtime compensation.

Under N.J.A.C. 19:16-5.5(c), a party asserting that an unresolved issue is not negotiable must petition for a scope of negotiations determination within 10 days of receiving a petition requesting the initiation of interest arbitration proceedings. Here, the PBA asserts that an interest arbitration award may not legally require employees working overtime to take compensatory time

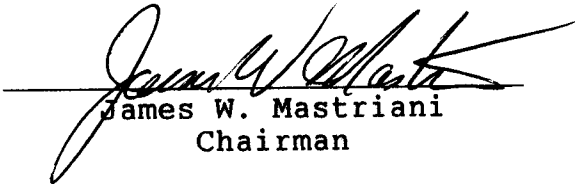
^{1/} This subsection provides, in part: "A public agency may provide compensatory time under paragraph (1) only -- (A) pursuant to -- (1) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees...."

off, but it has never petitioned for a scope of negotiations determination and it instead asks that this petition be dismissed. Since the PBA has not challenged the negotiability of the Borough's proposal in this forum, we have no procedural basis for issuing a restraint against the submission of the Borough's proposal to interest arbitration.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992