

P.E.R.C. NO. 92-95

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WALL,

Petitioner,

-and-

Docket No. SN-92-3

WALL TOWNSHIP PBA
LOCAL NO. 234,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by Wall Township PBA Local No. 234 against the Township of Wall. The grievance asserts that the Township violated the parties' collective negotiations agreement when it conditioned salary upgrades upon funding as well as merit. The Commission finds that the PBA and the Township could legally agree to budget money for anticipated pay upgrades and that the Township does not have a statutory right to exclude these upgrades from the budget and then determine that other budgeted funds are insufficient to cover them. While the parties could lawfully have agreed to condition increases on funding, the PBA can lawfully arbitrate its claim that the employer breached the labor agreement when it imposed such a requirement.

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Appearances:

For the Petitioner, Gilroy, Cramer & McLaughlin, attorneys
(Roger J. McLaughlin, of counsel)

For the Respondent, Klatsky & Klatsky, attorneys
(Allison J. Kiffin, of counsel)

DECISION AND ORDER

On July 12, 1991, the Township of Wall petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance which Wall Township PBA Local No. 234 has filed. The grievance asserts that the Township violated the parties' collective negotiations agreement when it conditioned salary upgrades upon funding as well as merit.

The parties have filed exhibits and briefs.^{1/} These facts appear.

^{1/} The PBA, without seeking leave to do so, submitted a response to the Township's reply brief. We do not consider this response.

The PBA represents the Township's patrol officers. The parties entered into a collective negotiations agreement effective from January 1, 1989 through December 31, 1991. The contract's grievance procedure ends in binding arbitration.

Article 25 is entitled Salaries. It sets forth the base salary and hourly rate for 1989, 1990, and 1991 for each classification. The probationary classification is the lowest. There are then five salary grades for patrol officers and five salary grades for detectives.

Article 27 provides for longevity increments to be added to base salaries. Officers qualify for their longevity increments on the anniversary of their employment.

Article 39 is entitled Grades and Ranks. Section A provides:

A. The Township shall issue a complete list of requirements necessary for the advancement of Employees through Grades and Ranks of the Police Department. Such list shall show all prerequisites for advancement through Grades and Ranks and shall include references to present ordinances adopted regarding advancement in Grades and Ranks.

1. Such list shall contain the requirement of "merit" with an express definition thereof.

On April 21, 1989, the police chief sent the PBA president the list of requirements. This document stated, in part:

The Wall Township Police Department under Contract P.B.A. 234 practices a procedure called "Advancement in Grade." This procedure calls for advancement from Probationary Patrolman up to

First Grade Patrolman and Detective. This entire upgrading system takes a total of six years, one of which is served as a Probationary Patrolman. This process of grade advancement is solely on a "merit" issue and shall be conducted at the Officer's anniversary date of hiring of each year for five (5) years after probation. The respective Officer seeking, either permanent status or upgrading, shall submit said request thirty (30) days in advance to their respective supervisor. Said supervisor shall complete an opinion report supporting, denying or deferring to an oral board said request.

The document states that "merit" shall have the same meaning for advancement in grade and promotion in rank. The document then defines merit:

Merit...shall mean without disciplinary action and any negative impact in the Officer's Personnel File. Upgrading shall also require above average evaluation in Personality Trait and Performance Evaluations, along with a passing of an Oral Review Board if averages are in question, or Officer appears to have personal, educational, domestic or police related problems.

It then describes the composition and role of the Oral Review Board. Indicators for a review board "shall be poor evaluation, behavioral problems, average evaluation only, observed negative traits."

In the winter and spring of 1990, the Township announced that it would delay 1990 pay upgrades for patrol officers and for other employees until the Township could be assured that departmental expenditures would be within normal budgeted amounts. At that time, the Township Administrator advised the police chief and officers that requests for pay upgrades should continue to be

processed through the department and that a determination about funding salary increases would be made in November 1990. The Administrator stated that this policy applied only to merit increases, which the Township believed were discretionary and subject to available funding, and that cost of living increases would be paid retroactively to January 1, 1990. Pay upgrades were delayed for 28 patrol officers.

The PBA filed a grievance. That grievance was withdrawn after the Township Committee, at its August 29, 1990 meeting, approved step pay raises for the 28 patrol officers, retroactive to January 1, 1990.

On November 28, 1990, the Township Committee revised its ordinance on pay grades. This ordinance now provides:

Promotion to Next Pay Grade. Employees in the department of public works and the police department will be eligible for consideration for promotion to the next grade level upon completion of one full year in their current grade. Promotions in grade shall be based upon merit after written evaluation and recommendation of the department and approved by the township committee and shall be subject to the provision of adequate funds in the annual budget to compensate such employees at the higher rate of pay.

The underlined language was added.

The PBA filed a grievance asserting that the Township violated the contract when it unilaterally amended the ordinance to condition pay upgrades on the availability of budgeted money. No merit upgrades have been made for 1991 or 1992. After the grievance

was denied, the PBA demanded binding arbitration, asserting that the Township's action violated the labor agreement. This petition ensued.

The Township asserts that the PBA's contentions do not arise out of the contract or meet the contractual definition of a grievance and that the fully-bargained clause provides a contractual defense. It also contends that it has a prerogative to adopt promotional criteria and that it is required by the Local Budget Law, N.J.S.A. 40A:4-1 et seq., and by N.J.S.A. 2C:30-4 to ensure that sufficient funds have been appropriated before monies are expended upon pay upgrades. The PBA responds that its grievance is contractually arbitrable and meritorious. It also asserts that the grievance centers on the mandatorily negotiable issue of a change in promotional procedures; the cost of anticipated pay upgrades can be easily budgeted; and by agreeing to the "merit review" process for pay upgrades the Township bound itself to anticipate such upgrades and to appropriate money.

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 (1981), outlines the steps of a scope of negotiations analysis:

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. [87 N.J. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/93). Paterson bans arbitration only if the agreement alleged would substantially limit government's policymaking powers.

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. [Id. at 154]

Thus, we do not consider the validity of the parties' arguments about the contractual arbitrability of the grievance, the merits of the grievance, or any contractual defenses. We ask only whether the employer could legally agree to obligate itself to grant pay upgrades to patrol officers meeting merit requirements and to budget and appropriate necessary funds for expected upgrades. We conclude that it could.

We have repeatedly held that merit pay disputes over receiving pay increments or upgrades are mandatorily negotiable and legally arbitrable. See, e.g., Essex Cty., P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986) and Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), consol. and aff'd, App. Div. Dkt. Nos. A-5803-85T7 and A-1458-86T7 (6/30/87). See also Essex Cty., P.E.R.C. No. 87-113, 13 NJPER 275 (¶18114 1987); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER 838 (¶17322 1986). The Appellate Division has affirmed our holding and the Supreme Court has approved our analysis. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 333 (1989).

Our merit pay precedents govern this case. The Township asserts that it has a prerogative to determine when and whether to promote employees, but this case centers not on promotions to higher ranks for purposes of doing new and more demanding duties, but on pay upgrades for purposes of receiving additional compensation.


Contrast Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) (City cannot legally obligate itself to fill vacancy in rank above patrol officer). In our merit pay cases, we distinguished between the employer's non-negotiable right to determine evaluation criteria for implementing decisions outside the scope of negotiations and the employees' right to negotiate over the criteria for determining the compensation they will receive. That distinction applies here.

The Township asserts that budgetary statutes require it to ensure that sufficient funds have been appropriated before monies are expended upon pay upgrades. It acknowledges, however, that a grievance seeking to require it to appropriate the funds necessary to pay negotiated salary increases would be legally arbitrable. Compare Manchester Tp., P.E.R.C. No. 83-161, 9 NJPER 392 (¶14178 1983) (funds to pay wage increase must be appropriated). We agree with the PBA that the Township could legally agree to budget money for anticipated pay upgrades and that the Township does not have a statutory right to exclude these upgrades from the budget and then determine that other budgeted funds are insufficient to cover them. While the parties could lawfully have agreed to condition increases on funding, the PBA can lawfully arbitrate its claim that the employer breached the labor agreement when it imposed such a requirement. The employer is free to raise before the arbitrator its claim that the contract does not mandate merit salary increases.

ORDER

The request of the Township of Wall for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



O. F. Wenzler
Acting Chairman

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

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992