

P.E.R.C. NO. 2000-46

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROSELAND,

Petitioner,

-and-

Docket No. SN-2000-34

P.B.A. LOCAL 293,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies P.B.A. Local 293's motion to dismiss a scope of negotiations petition filed by the Borough of Roseland. The PBA asserts that the Borough's petition should be dismissed under N.J.A.C. 19:16-5.5(c) and the public policy to expeditiously resolve interest arbitration disputes. The Commission concludes that the rule should be relaxed in the interests of justice because the Commission has not articulated an overall approach to applying 19:16-5.5(c). The Commission also concludes that relaxing the rule in this instance will not undermine the statutory goal of providing for expeditious interest arbitration proceedings. The scope petition was filed approximately one month after the appointment of an arbitrator and two months before the first preliminary meeting with the arbitrator. In denying the motion, the Commission stresses that parties should be attentive to the time period in N.J.A.C. 19:16-5.5(c).

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, Apruzzese, McDermott, Mastro &  
Murphy, P.C., attorneys  
(Frederick T. Danser, III, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys  
(Joseph Licata, on the brief)

DECISION

On September 13, 1999, the Borough of Roseland petitioned for a scope of negotiations determination. The petition seeks a determination that a work schedule proposal that P.B.A. Local 293 has submitted to an interest arbitrator is not mandatorily negotiable.

On September 21, 1999, the PBA filed a motion to dismiss the scope petition and requested that the Commission stay any determination on the merits pending resolution of its motion. On September 24, further processing of the petition was stayed and the Borough was afforded an opportunity to respond to the motion. The Borough's response was filed on October 8. The Borough has also filed certifications of its clerk/administrator and its police chief.

The PBA asserts that the petition should be dismissed pursuant to pursuant to N.J.A.C. 19:16-5.5(c). N.J.A.C. 19:16-5.5(a), (b) and (c) provide:

(a) In the absence of a joint petition requesting the initiation of compulsory interest arbitration, the non-petitioning party shall file within seven days of receipt of a petition, a statement of response setting forth the following:

1. Any additional unresolved issues to be submitted to arbitration;
2. A statement as to whether it disputes the identification of any of the issues as economic or non-economic.
3. A statement as to whether it refuses to submit any of the issues listed on the notification or petition to arbitration on the ground that such issue is not within the required scope of negotiations; and
4. Any other relevant information with respect to the nature of the impasse.

(b) Proof of service on the petitioner of the respondent's statement shall be supplied to the Director of Arbitration. If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the request for the initiation of compulsory interest arbitration as submitted by the filing party. The substance of this response shall not provide the basis for any delay in effectuating the provisions of this chapter.

(c) Where a dispute exists with regard to whether an unresolved issue is within the required scope of negotiations, the party asserting that an issue is not within the required scope of negotiations shall file with the Commission a petition for scope of negotiations determination pursuant to chapter 13 of these rules. This petition must be filed within 10 days of receipt of the petition requesting the initiation of compulsory

interest arbitration or within five days after receipt of the response to the petition requesting the initiation of compulsory interest arbitration. The failure of a party to file a petition for scope of negotiations determination shall be deemed to constitute an agreement to submit all unresolved issues to compulsory interest arbitration.

The chronology of events leading to the scope petition follows.

Between August 1998 and March 1999, the parties had six negotiations sessions. During negotiations, the PBA proposed to change from a four day on, two day off work schedule, with eight-hour shifts, to a work schedule with twelve-hour shifts. In its final proposal, submitted to the PBA negotiating committee on May 5, the Borough opposed the 12-hour shift proposal and contended that it was not mandatorily negotiable. It also stated that it would file a scope petition if the PBA pursued the proposal.

On May 24, 1999, the PBA petitioned for interest arbitration. Under the economic issues in dispute, it listed work schedule as item number 2.

On June 1, 1999, the Commission's Director of Arbitration acknowledged receipt of the interest arbitration petition and advised the Borough that, pursuant to N.J.A.C. 19:16-5.5(a) and (b), its response was due on June 10, 1999. Quoting N.J.A.C. 19:16-5.5(b), the letter also advised that if the Borough did not submit a response, it would be deemed to have agreed to the request for interest arbitration as submitted by the filing party.

The Borough initially responded to the interest arbitration petition on June 9, 1999. However, the Director granted the Borough an extension of time to file an amended response, which the police chief filed on June 14. Paragraph number 5 of the amended response states:

The Borough also may file a Scope of Negotiations Petition regarding the PBA's demand for interest arbitration over the work schedule. The Police Department currently works a four day on, two day off work schedule with eight-hour shifts. The PBA has proposed a twelve-hour shift schedule. My initial analysis of this shift schedule is that it does not and cannot meet the minimum manning requirements which I, as the Chief, have the prerogative to establish. We are still analyzing the PBA's proposal in light of these established minimum manning requirements and other personnel situations that have recently occurred in the Borough; including, but not limited to, the resignation of a civilian dispatcher, the resignation of a police officer to accept a position with another police department, and the long-term loss of another patrolman and a superior officer due to disability. Once the Borough selects an attorney, we will be consulting with him and if the decision is made to file a Scope of Negotiations Petition, it will be filed as soon as possible.

On August 18, 1999, an arbitrator was assigned. A September 2 letter to the arbitrator from the Borough's attorney confirmed that November 22, 1999 was acceptable as the first date for a preliminary meeting. The scope petition was filed on September 13. It states that the chief has determined that the proposal will interfere with minimum staffing requirements and the department's ability to provide police services.

The PBA asserts that the Borough's petition should be dismissed given the unambiguous language of N.J.A.C. 19:16-5.5(c) and the public policy to expeditiously resolve interest arbitration disputes.

The Borough responds that the Commission must consider the merits of its scope petition for five reasons: 1) the Borough placed the PBA on notice of its intent to file a scope petition well before the filing of the interest arbitration petition; 2) the PBA has suffered no harm; 3) the interest arbitration proceedings have not been delayed or impaired; 4) an interest arbitration award on a 12-hour shift would be unenforceable if it is not mandatorily negotiable and 5) the Borough had legitimate reasons, of which the PBA was notified, to delay filing the petition.

The Borough also asserts that under N.J.A.C. 19:10-3.1(a), the Commission can, in its discretion, relax strict adherence to its rules when doing so will prevent injustice and effectuate the purposes of the act.

The PBA disputes the Borough's arguments concerning the selection of an attorney and time to review the work schedule proposal. It asserts that as early as April, the Borough contemplated filing a scope of negotiations petition over the proposal. It maintains that the chief was able to competently respond to the interest arbitration petition and could have filed a timely scope petition while the Borough considered whether to

retain legal counsel. The PBA also asserts that the Borough filed a scope petition in 1993 concerning the same work schedule proposal. It states that briefs were filed in that matter by both parties, but the issue was resolved and the petition was withdrawn.

The chief responds that he was not the chief in 1993 and thus was not involved in the analysis of the 1993 proposal. After the interest arbitration petition was filed, he reviewed the 1993 analysis and realized that it was out of date and that the 1993 proposal was different from the current proposal. He asserts that it took him approximately three months to analyze how the proposal would affect minimum staffing requirements given the department's current staffing, workload and overtime pay restrictions.

Before addressing the parties' arguments, we review our case law construing N.J.A.C. 19:16-5.5 in general, and subsection (c) in particular. We then clarify how we will evaluate motions to dismiss scope petitions filed after the time specified in N.J.A.C. 19:16-5.5(c).

N.J.A.C. 19:16-5.5 structures the interest arbitration process and ensures that the parties and the arbitrator know the nature and extent of the controversy at the outset. Borough of Allendale, P.E.R.C. No. 98-27, 23 NJPER 508 (¶28248 1997). In setting deadlines for filing scope petitions and submitting responses to a petition, the rule furthers the statutory goal of providing for an expeditious, effective and binding procedure for

the resolution of disputes between law enforcement officers and firefighters and their public employers. N.J.S.A. 34:13A-14a. However, there are circumstances where we have considered scope petitions filed after the time period in N.J.A.C. 19:16-5.5(c).

Where a petition challenges the negotiability of clauses in an expired contract, as opposed to items proposed to be submitted to interest arbitration, we have held that a party does not necessarily have to act within the time specified by N.J.A.C. 19:16-5.5(c). That is because the arbitrator was not going to assert jurisdiction over those issues anyway. See Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981); accord Edison Tp., P.E.R.C. No. 98-15, 23 NJPER 490 (¶28236 1997), recon. denied, P.E.R.C. No. 98-78, 24 NJPER 50 (¶29031 1997); Borough of Rutherford, P.E.R.C. No. 89-31, 14 NJPER 642 (¶19268 1988). The scope proceeding in that instance is independent of the interest arbitration proceeding.

Further, we have held that N.J.A.C. 19:16-5.5(c) does not bar an employer from arguing, even after an award, that subjects are illegal rather than permissive. That is because a public body cannot be bound by an illegal award. See Town of Kearny, P.E.R.C. No. 81-23, 6 NJPER 431 (¶11218 1980) ("Kearny"); Town of Kearny, P.E.R.C. No. 81-38, 6 NJPER 455 (¶11233 1980). Kearny stated that N.J.A.C. 19:16-5.5(c) was designed to allow a party to object to having an item considered in interest arbitration because it was permissively rather than mandatorily negotiable. See Kearny, 6



NJPER at 432; N.J.S.A. 34:13A-16f(4); N.J.A.C. 19:15-5.7(g). Contrast Professional Fire Officers Ass'n, Local 1860, IAFF v. City of Newark, NJPER Supp.2d 204 (¶180 App. Div. 1989), certif. denied, 117 N.J. 87 (1989) (in rejecting City's argument that interest arbitration award improperly addressed pension creditability of holiday pay, the Appellate Division held that that issue could have been raised in a scope proceeding and that, having failed to do so, the City was estopped from challenging the provision and "belatedly trying to undermine the authority of the arbitrator").

However, more recent cases have not reiterated the analysis in the two Kearny cases, and have taken a case-by-case approach to determining whether to dismiss a petition filed after the deadline in N.J.A.C. 19:16-5.5(c). For example, in City of Newark, P.E.R.C. No. 92-20, 17 NJPER 416 (¶22200 1991), we dismissed a petition alleging that a proposal to include holiday pay in base pay was contrary to a Division of Pensions ruling. The petition was filed one month after the arbitration record closed and, in holding that it was untimely, we noted that the City had been aware of the negotiability issue for over two years and had agreed to a reopener to negotiate over the holiday pay issue. We concluded that a Division of Pensions letter that the City alleged supported its position simply confirmed what it already knew. In Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301, 303 n.1 (¶23129 1992), we declined to dismiss a

petition filed after the ten-day period, reasoning that while the petition might be time-barred with respect to a work schedule initially proposed by the union, the union had revised its proposal in response to the petition and a new dispute had come into being over the negotiability of that revision. See also Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998) (declining to dismiss a petition where it was filed on the due date, set by the Director of Arbitration, for responding to an interest arbitration petition); cf. Delran Tp., P.E.R.C. No. 99-86, 25 NJPER 166 (¶30076 1999) (stating that Township's contention that arbitrator lacked jurisdiction to consider a proposal was in the nature of a scope of negotiations challenge and cautioning that, in the future, such challenges should be made in the time and manner prescribed by N.J.A.C. 19:16-5.5(c); Commission considered Township's arguments in appeal of interest arbitration award, noting that union did not object to consideration of issue and that Township had not received Division of Pensions letter on which it relied until well after the parties' initial interest arbitration filings).

Finally, N.J.A.C. 19:10-3.1(b) provides that the time periods in our rules may be altered where strict adherence will work surprise or injustice or interfere with the proper effectuation of the Act. See also N.J.A.C. 19:10-3.1(a) (in unusual circumstances, or for good cause shown, rules shall be liberally construed to prevent injustice). We have held that the

time periods in N.J.A.C. 19:16-5.5(a) and (c) may be relaxed in accordance with N.J.A.C. 19:10-3.1. See Delran Tp.; Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997).

Against this backdrop, we clarify that where a scope petition contends that an item proposed for interest arbitration is not mandatorily negotiable, it is presumptively time-barred unless it is filed within the time prescribed by N.J.A.C. 19:16-5.5(c) or by the date set by the Director of Arbitration for a response to the interest arbitration petition.<sup>1/</sup> However, consistent with Middlesex, we will consider, on a case by case basis, arguments that N.J.A.C. 19:16-5.5(c) should be relaxed. Further, consistent with the two Kearny cases, we will evaluate the nature of the negotiability challenge. Where a party alleges that a proposal contravenes a statute or regulation, or would significantly interfere with a clearcut and dominant government policy interest, that factor may weigh in favor of relaxing N.J.A.C. 19:16-5.5(c). In those circumstances, it may be

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<sup>1/</sup> Since the time periods for responding to an interest arbitration petition and filing a scope petition are linked, N.J.A.C. 19:16-5.5(a) and (c), we think it is reasonable to extend the time for filing a scope petition to coincide with the date set by the Director for filing a response to the interest arbitration petition. See Galloway. In addition, we reiterate that the rule does not pertain to petitions that challenge clauses in an expired contract that have not been proposed for interest arbitration. See, e.g., West New York. We also note that the rule may not apply if the responding party did not know what the proposal was or if a subsequent revision raised new negotiability concerns.

fruitless and time consuming to require an interest arbitrator to consider a proposal that, if awarded, would require us to vacate the award. N.J.S.A. 34:13A-16f(5) (a).

However, we decline to follow the Kearny cases to the extent they hold that N.J.A.C. 19:16-5.5(c) pertains only to petitions claiming that proposals are permissively rather than mandatorily negotiable. In light of N.J.S.A. 34:13A-14a, there is a strong interest in promptly establishing the issues to be decided by the interest arbitrator. See Allendale; Delran. That objective can be accomplished without violating the principle that a public body cannot be bound by an illegal award. An interest arbitrator is required to consider the public interest and other statutory criteria in arriving at an award. N.J.S.A. 34:13A-16g. Where a party believes that an award is inconsistent with the public interest, or any other statutory criteria, or would violate statutes or regulations, it may appeal the award to us. See N.J.S.A. 34:13A-16f(5) (a); Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999) (while employer was required to file scope petition if it sought to prevent arbitrator from considering work schedule proposal, employer could contend in appeal of award that arbitrator did not give enough weight to, or consider evidence concerning, such issues as the proposed work schedule's cost or its impact on department operations, discipline or supervision); cf. Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141, 150 (1995); Old Bridge Tp. Bd. of Ed. v. Old

Bridge Ed. Ass'n, 98 N.J. 523, 528 (1985) (public sector grievance arbitration awards must conform to governing law).

We turn to the facts of this case. We are not persuaded that the Borough's desire to review the proposal and retain an attorney constitutes good cause or extraordinary circumstances to extend the time period in N.J.A.C. 19:16-5.5(c) by over three months or to allow the scope petition to be filed almost three months after the Borough filed its response to the interest arbitration petition. The Borough had concerns about the proposal from the outset and, in response to the PBA's negotiations proposals, stated that it intended to file a scope petition and pursue the matter through the courts, if necessary. Under our regulations, it should have pursued that course promptly and could have refined its position in the course of briefing the matter. Compare Middlesex (employer had a statutory obligation to engage in interest arbitration and was not entitled to delay its response to an interest arbitration petition until it determined what position to take with respect to its other units). In the future, this type of fact situation would not provide a basis for relaxing N.J.A.C. 19:16-5.5(c).

However, we conclude that the rule should be relaxed in the interests of justice. Prior to this decision, we had not articulated an overall approach to applying N.J.A.C. 19:16-5.5(c). Some of our decisions stated that a party was never barred from arguing that a proposal was an illegal subject of

negotiations, see Kearny, P.E.R.C. No. 81-23, and we had dismissed scope petitions only in circumstances more extreme than that here. See Newark. In this posture, the Borough could have reasonably believed that we would not apply N.J.A.C. 19:16-5.5(c) to dismiss a scope petition that alleged that a PBA proposal would interfere with its minimum staffing requirements and its ability to deliver police services. Stated another way, this is not an instance where the petition maintained that a subject was permissively rather than mandatorily negotiable and where the Borough would have been on notice that the terms of N.J.A.C. 19:16-5.5(c) would apply. Kearny, P.E.R.C. No. 81-23.

Moreover, relaxing the rule in this instance will not undermine the statutory goal of providing for expeditious interest arbitration proceedings. The scope petition was filed approximately one month after the arbitrator was appointed and two months before the first preliminary meeting with the arbitrator. The time attributable to consideration of the Borough's petition will not appreciably delay, if at all, the interest arbitration proceeding. We note that the arbitrator may take evidence on this and other issues, should the proceeding advance to that stage, while the petition is pending. N.J.A.C. 19:16-5.7(g).

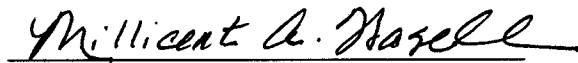
While we deny the PBA's motion to dismiss the petition, we stress that, in the future, parties should be attentive to the time period in N.J.A.C. 19:16-5.5(c) and aware that a scope petition is presumptively time-barred unless filed within the time specified by that rule or the time set by the Director of

Arbitration for filing a response to the interest arbitration petition.

ORDER

The PBA's motion to dismiss the scope of negotiations petition filed by the Borough of Roseland is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: December 16, 1999  
Trenton, New Jersey  
ISSUED: December 17, 1999