P.E.R.C. NO. 2002-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE,

Appellant,

-and- Docket No. IA-2000-71

ORANGE SUPERIOR OFFICERS ASSOCIATION,

Respondent.

Appearances:

For the Appellant, Lum, Danzis, Drasco, Positan & Kleinberg, LLC, attorneys (Thomas M. McCormack, of counsel; Joseph M. Wenzel, on the brief)

For the Respondent, Loccke & Correia, attorneys (Richard D. Loccke, of counsel; Michael A. Bukosky, on the brief)

DECISION

The City of Orange appeals from an interest arbitration award involving a negotiations unit of police sergeants, lieutenants, and captains. See N.J.S.A. 34:13A-16f(5)(a). It asks us to vacate the award as it pertains to holiday pay.

The arbitrator resolved the unsettled issues by conventional arbitration, as he was required to do absent the parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2).

The arbitrator awarded a four year contract from January 1, 2000 through December 31, 2003 (Arbitrator's opinion, p. 20). Among other things, he awarded the SOA's holiday pay proposal,

ordering that "[h]oliday pay shall be incorporated into base salary for all years of service," effective January 1, 2001.

The City appeals. It asks us to vacate the portion of the award concerning holiday pay, arguing that it violates an April 2000 Police and Fire Retirement System (PFRS) regulation. It contends that this regulation bars holiday pay from being considered pensionable compensation in the circumstances here. Citing Delran Tp., P.E.R.C. No. 99-86, 25 NJPER 166 (¶30076 1999), the SOA counters that the method of payment for holiday pay is a mandatorily negotiable subject; that the arbitrator did not address the pension effect of the "fold-in" he ordered; and that the Division of Pensions has exclusive jurisdiction to determine such pension implications. It also contends that because the City did not file a timely scope of negotiations petition, the City is estopped from alleging that the holiday pay portion of the award is preempted. See N.J.A.C. 19:16-5.5(c).

The background to this issue is as follows. The parties' predecessor agreement stated that holiday pay was to be included in base salary beginning with the 23rd year of service, whereas prior to that point it was paid as a lump sum (Arbitrator's opinion, p. 17; T162). The parties believed that this provision increased an officer's pension because, under pre-2000 regulations, regular, periodic payments were considered in calculating pension benefits, whereas lump sum payments were not (Arbitrator's opinion; p. 17; T162; N.J.A.C. 17:4-4.1(d)

(repealed)). While this distinction between lump sum and regular, periodic payments still pertains, see N.J.A.C. 17:4-4.1(a)1 and 2iv, the new regulation also states that "creditable compensation" does not include "[a]ny form of compensation which is not included in a member's base salary during some of the member's service and is included in the member's base salary upon attainment of a specified number of years of service." N.J.A.C. 17:4-4.1(a)(2)xiii. The rationale underlying N.J.A.C. 17:4-4.1(a)(2)xiii is that end-of-career salary increases, designed primarily to increase retirement benefits, jeopardize the actuarial integrity of the system because they result in retirees receiving benefits which were not adequately funded by employer and employee contributions throughout the employee's career. Fraternal Order of Police, Garden State Lodge #3, et al. v. Bd. of Trustees of the Police and Firemen's Retirement System, _____ N.J. Super. ____ (App. Div. 2001); Wilson v. Bd. of Trustees of Police and Firemen's Ret. System, 322 N.J. Super. 477, 481-483 (App. Div. 1998).

At the time the SOA filed its interest arbitration petition, N.J.A.C. 17:4-4.1 had been proposed and the SOA sought to fold holiday pay into base salary without regard to years of service. Before the arbitrator, the City maintained that the proposal would not benefit superior officers (Arbitrator's opinion, p. 17). The City argued, as it does now, that N.J.A.C.

17:4-4.1(a)(2)xiii requires that holiday pay must be included in an employee's base wages during all of his or her years of service with the City for it to be used in calculating pension benefits. The City argued that allowing the holiday pay to be considered pensionable compensation for the superior officers only would trigger the actuarial problems referred to in Wilson and would run afoul of N.J.A.C. 17:4-4.1(a)2xiii, since employees do not become superior officers without having some years of service in the rank-and-file unit (Arbitrator's opinion, p. 17).

While the arbitrator appeared to agree with this interpretation of the pension regulations, he nevertheless awarded the SOA proposal. He reasoned:

> Conceptually the parties have an accord as to the enrichment of salary to be used for computation of pension benefits. Both parties have benefited from the provision in the 1999 Agreement which delays the combination until the 23rd year since neither makes contributions to the pension for years before that point and the addition to salary is not a function of overtime or other base salary rates prior to the inclusion. However, the Pension Division has made it clear that to be an accepted part of the pay rate for computation of pension benefits the holiday pay or any other element considered to be salary must be incorporated for the entire period of employment.... The City argues that as long as the PBA unit of patrolmen, the source of appointments to the ranks in this unit, do not have such a program, that is incorporation of holiday pay at initial appointment or when the Pension Division may have otherwise allowed, there is no value to the individual to effect a change in this unit. On the other hand, should the demand be rejected and should such an acceptable plan be initiated for patrolmen, then when they are promoted to sergeant they would become ineligible for the value of holiday pay as a

> part of their pensionable wages according to the terms of the SOA 1999 Agreement. This would seem to be unfair and probably a disincentive for accepting the promotion as well. If one can presume that such a program, if consummated with the PBA unit, has the support of the City, then having an Agreement with the SOA which precludes it remaining effective appears to be inappropriate. Based on this line of reasoning, I intend to provide a remedy for this situation which reflects the circumstances outlined above. [Arbitrator's opinion, p. 17].

Based on this analysis, the arbitrator ordered that "[h]oliday shall be incorporated into base salary for all years of service", effective January 1, 2001.

We first consider the SOA's contention that, because the City did not file a scope of negotiations petition, it is now barred from arguing that the holiday pay portion of the award is preempted. See N.J.A.C. 19:16-5.5(c) (where party does not file a scope of negotiations petition, it is deemed to have agreed to submit all unresolved issues to interest arbitration).

A claim that a proposal contravenes a statute or regulation is a claim that the proposal is not mandatorily negotiable. See Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). Accordingly, it should be raised in a scope of negotiations petition that, under the regulations in effect in

February 2000, had to be filed within 10 days of a respondent's receipt of an interest arbitration petition.[1/]

We will assume for purposes of analysis that the deadline in N.J.A.C. 19:16-5.5(c) did not apply because, while the SOA's February 25, 2000 petition listed "holiday pay in base pay" as one of the disputed issues, the regulation on which the City relies was not adopted until February 28, 2000 and did not become effective until April 3. See 32 N.J.R. 1246(a). While the City could have filed a scope petition after the regulation was adopted, our regulations did not mandate that it do so. Compare Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301, 303 n.1 (¶23129 1992) (declining to find that petition filed after N.J.A.C. 19:16-5.5(c) deadline was untimely where revised work schedule proposal raised new negotiability concerns and petition was filed after employer received revised proposal).

In these circumstances, we will consider the merits of the City's claim. We do so given the effective date of the regulation; the principle that a public sector arbitration award must conform to statutes and regulations, see Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527 (1985) and Jersey City Ed. Ass'n v. Jersey City Bd. of Ed., 218 N.J. Super. 177, 188

1/ Regulations effective July 2, 2001 change the deadline to fourteen days after a respondent's receipt of the Director of Arbitration's Notice of Filing of an interest arbitration petition. See 33 N.J.R. 1169(a); 33 N.J.R. 2281(a).

(App. Div. 1987); and the City's contention that the award violates a regulation. Compare Borough of Roseland, P.E.R.C. No. 2000-46, 26 NJPER 56 (¶31019 1999) (one factor that may be considered in evaluating whether to relax the time requirements for filing a scope petition is whether a party alleges that a proposal contravenes a statute or regulation).

We now turn to the merits of the City's appeal. We agree with the SOA that this case is largely governed by two principles set forth in Delran.

The first principle is that an arbitrator may not issue any "finding, opinion or order regarding any aspect of the rights duties, obligations in or associated with ... any governmental retirement system or pension fund...." See N.J.S.A. 34:13A-18.

The second principle is that, while the subject of pensions is not mandatorily negotiable, see N.J.S.A. 34:13A-8.1 and State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 83 (1978), pension statutes and regulations do not automatically preempt proposals relating to terminal leave, longevity or holiday pay, even though those proposals may trigger questions about how the compensation will be treated for pension purposes. Delran; Town of Kearny, P.E.R.C. No. 2001-58, 27 NJPER 189 (¶32063 2001); Town of Harrison, P.E.R.C. No. 99-54, 25 NJPER 40 (¶30016 1998); Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998); Voorhees Tp., P.E.R.C. No. 96-77, 22 NJPER 198 (¶27105 1996). Stated another way, our case law has focused not on whether a form

of compensation may, under pension regulations, be used to calculate pension benefits, but on whether it is negotiable separate and apart from its pension implications.

Thus, we affirmed an award in Delran, also involving a police superiors unit, where an arbitrator awarded a union proposal to include holiday pay in base pay. Delran was decided before the 2000 regulation was adopted, but the employer's argument was conceptually the same as the City's: the holiday pay portion of the award should be vacated because, given Division of Pension requirements, SOA members' holiday pay could not be considered part of their base salary for pension purposes. We rejected that claim, reasoning that the arbitrator's award did not address the pension effect of the fold-in he had ordered and that the award could be legally implemented by including holiday pay in base pay for the purpose of calculating overtime -- one of the SOA's objectives in proposing the fold-in. 25 NJPER at 169. We held that the method of payment for holiday pay and the base pay rate for overtime purposes were mandatorily negotiable. We reasoned that these compensation issues were separate from how the holiday pay was treated for pension purposes. While noting that the arbitrator's opinion reflected his view that the award would result in slightly higher pensions for unit members, we stressed that neither we nor the arbitrator had jurisdiction to direct what was to be included in base salary for pension purposes. Ibid.

Delran governs this case. As in Delran, the arbitrator's award addresses a mandatorily negotiable compensation issue: the method of payment for holiday pay that also, as the SOA notes, affects overtime and other pay rates calculated on an officer's base salary. The award does not direct that holiday pay be included in base pay for pension purposes and it can be legally implemented, regardless of whether the Division of Pensions finds the compensation to be pensionable, by adding holiday pay to base salary for the entire period of time an individual is in the SOA unit rather than, as before, with the 23rd year of service. We stress that the Division of Pensions must resolve the pension implications, if any, of changing the method for paying holiday pay for the SOA unit. Delran; Galloway.

Consistent with this analysis, we conclude that the arbitrator did not, as the City argues, exceed his authority by awarding the fold-in when the PBA unit does not have a similar provision. The City's argument rests on the assumption that the holiday pay will be pensionable only if and when holiday pay is also included in the base salary of rank-and-file unit members. Even if we assume that to be the case, the award can, as noted, still be legally implemented as it affects the method of payment for holiday pay -- and overtime and other pay rates -- for this unit. While the arbitrator could, as the City notes, have made his award contingent upon the PBA unit's receiving the provision, see Borough of Matawan, P.E.R.C. No. 99-107, 25 NJPER 324 (¶30140 1999), he was not required to do so.

In so holding, we recognize that the 23rd year fold-in in the parties' predecessor agreement was intended to increase members' pensions. And we also recognize that the SOA may have proposed to fold-in holiday pay without regard to years of service so as to retain or obtain pensions at a particular level, while conforming to the new regulation. However, the fact that an award on a compensation issue may, after Division of Pensions review, also affect pension benefits, does not make the award invalid. See Delran, 25 NJPER at 169 (commenting that one effect of the arbitrator's award could be to increase pension benefits if other requirements then in effect were also met).

In affirming the arbitrator's award, we note one difference between this case and Delran. In Delran, the Division of Pensions had already advised the Township that holiday pay would not be included in an SOA member's pensionable base salary unless all other Township employees who belonged to PFRS -- i.e., rank-and-file police officers -- also received holiday pay on a regular, periodic basis instead of as a lump sum. In this case, we have no Division of Pension communication relating to this employer, and the April 2000 pension regulation appears to take a different approach from the Division of Pensions letter referred to in Delran.[2/] Thus, we have less basis than in Delran to

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2/ N.J.A.C. 17:4-4.1(a)1 and N.J.A.C. 17:4-4.1(a)2xi now focus on whether a form of compensation is paid uniformly among members of the same negotiations unit who: (1) receive the compensation and (2) who are also members of the same retirement system.

surmise that the Division of Pensions will conclude that the holiday pay is not creditable for pension purposes, and less reason to vacate an award that addresses the mandatorily negotiable issue of the method of payment for holiday pay.

ORDER

The arbitrator's award is affirmed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: July 26, 2001
Trenton, New Jersey
ISSUED: July 27, 2001