

P.E.R.C. NO. 98-133

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF GALLOWAY,

Petitioner,

-and-

Docket No. SN-98-10

MAINLAND PBA LOCAL 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of several contractual provisions of an expired collective negotiations agreement between the Township of Galloway and Mainland PBA Local #77. The Township asserts that these provisions are preempted by certain statutes or regulations. The Commission finds two sections of a Policemen's Rights provision concerning advice of rights and civilian complaints not to be preempted by statute. The Commission finds only the first sentence of the provision on polygraph tests to be preempted. The Commission also finds a terminal leave/pay provision and a longevity provision not to be preempted.

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.

P.E.R.C. NO. 98-133

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF GALLOWAY,

Petitioner,

-and-

Docket No. SN-98-10

MAINLAND PBA LOCAL #77,

Respondent.

Appearances:

For the Petitioner, Genova, Burns & Vernoia, attorneys  
(Sandro Polledri, on the brief)

For the Respondent, Schaffer, Plotkin & Waldman,  
consultants (Myron Plotkin, on the brief)

DECISION

On July 28, 1997, the Township of Galloway petitioned for a scope of negotiations determination. The Township seeks a declaration that several provisions of its expired collective negotiations agreement with Mainland PBA Local #77 are preempted by various statutes or regulations.

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

The PBA represents the Township's full-time police personnel below the rank of sergeant. The parties' most recent contract expired on December 31, 1996. The parties have engaged in successor contract negotiations and the PBA has petitioned for interest arbitration.

Preliminarily, we deny the PBA's request to dismiss two issues in the Township's petition as untimely. The interest

arbitration petition was filed on July 14. The Township was notified that its response was due by July 28. On July 24, the Township indicated to the Director of Arbitration that it intended to file a scope of negotiations petition on these two issues as well as other issues. The scope of negotiations petition was filed on July 28. We decline to dismiss these two issues since the petition was filed on the day the Township's response was due.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines a scope of negotiations analysis for police officers and firefighters:

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]

Where an assertion is made that a contract provision or proposal conflicts with a statute or regulation, we will find that

negotiations are preempted only where the statute or regulation "expressly, specifically and comprehensively" controls the subject addressed in the disputed language. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). Since the employer argues only that the disputed contractual clauses are preempted by statutes or regulations, we will consider only preemption issues in applying the Paterson tests.

Article VIII Policemen's Rights, Section C.2

Advice of Rights

The officer has the right not to incriminate himself by answering questions, oral or written, propounded to him in the course of a departmental or criminal investigation. Nor shall the officer be compelled to give a statement oral or written relating to said investigation without first being read and having waived his Miranda rights.

The Township asserts that this article is preempted by

N.J.S.A. 2A:81-17.2a1. N.J.S.A. 2A:81-17.2a1 provides:

It shall be the duty of every public employee to appear and testify upon matters directly related to the conduct of his office, position of employment before any court, grand jury or the State Commission of Investigation. Any public employees failing or refusing to so appear and to so testify, after having been informed of his duty to appear and testify under this act, by the prosecuting attorney, or a member of or attorney for the State Commission of Investigation, as the case may be, shall be subject to removal from his office, position or employment.

This statute addresses proceedings before a grand jury, a court or the State Commission on Investigation. It does not address internal departmental or non-criminal investigations.

There is also an important counterpart to N.J.S.A.

2A:81-17.2a1. The next statute provides:

2A:81-17.2a2. Immunity from use of evidence  
after claim of privilege against  
self-incrimination; perjury or  
false swearing

If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this state; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

These statutes are part of Chapter 72 of the Public Laws of 1970, enacted in response to Garrity v. State of New Jersey, 385 U.S. 493, 17 L.Ed. 2d. 562 (1967). Garrity holds that when a public employee is required, on pain of forfeiture of his public job, to make incriminating statements, such statements amount to coerced confessions and may not be used in any criminal prosecution of the employee. The purpose of these companion statutes is to compel a public employee to testify in proceedings concerning his conduct in public office without depriving the employee of the constitutional right against self-incrimination. This goal is accomplished by providing that when an employee is compelled, on pain of discharge, to testify, no statement he made

may be admitted in any criminal proceeding against the employee. Absent the grant of such "use immunity," the confession would be deemed coerced. If the employee still refuses to testify despite the use immunity grant, the forfeiture of office offends no constitutional right. See also Banca v. Phillipsburg, 181 N.J. Super. 109, 113 (App. Div. 1981).<sup>1/</sup>

On its face, the existing contract clause does not conflict with and is not preempted by this statutory scheme. In the event the PBA seeks to enforce this clause in a manner which is inconsistent with applicable law, the Township may seek to restrain arbitration at that time or seek to vacate an adverse award. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208 (1979); Lower Tp., P.E.R.C. No. 98-57, 23 NJPER 630 (128306 1997).

Article VIII Policemen's Rights, Section D

Civilian Complaint

No complaint by a civilian against an officer shall result in any disciplinary action unless the complaint be duly sworn to by the complainant before an official authorized to administer oaths.

The Township argues that this proposal is preempted by N.J.S.A. 40A:14-181. That statute took effect January 9, 1997 and

---

<sup>1/</sup> Banca upheld the Civil Service Commission's dismissal of disciplinary charges because the officer, who was given his Miranda warnings, was not further advised of his statutory right not to have such statements used against him. The Court held that the use immunity guarantee applied even though the investigation was departmental, rather than before a court, a grand jury or the SCI.

requires municipal police departments to develop internal affairs investigation guidelines. Such guidelines are not to conflict with tenure, civil service laws and existing contractual arrangements and are to be modeled on a manual promulgated by the Department of Law and Public Safety. The Township asserts that the manual requires that all complaints, even anonymous ones, should be investigated. The PBA responds that the clause only limits the Township's right to proceed at disciplinary hearings based on an anonymous complaint and does not impair the Township's right to investigate anonymous charges of misconduct.

The guidelines include procedures for recording citizen complaints, including anonymous ones, but do not address the procedures for disciplining officers after a complaint is investigated. We see no conflict between any mandate in the guidelines and Article VIII, Section D. Article VIII does not impair the Township's right to conduct investigations based on anonymous complaints. We therefore hold that it is not preempted.<sup>2/</sup>

---

<sup>2/</sup> One section of the guidelines addresses "immediate suspension pending investigation and disposition." It states that suspension at this stage is a serious matter but may be appropriate where the police executive determines that an officer has been formally charged with a crime, is unfit for duty, or would be a hazard if permitted to remain on the job. Since this section states that the reasons for suspending an officer pending an investigation must be clearly documented and justified, it is not inconsistent with Article VIII, Section D.

Article VIII Policemen's Rights, Section G

Polygraph Test

No officer shall be compelled to submit to a polygraph examination without his express written consent. No disciplinary action or other recrimination whatsoever shall be taken against an officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere that the officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible in any police department proceeding, to the effect that the officer refused to take a polygraph examination.

The employer asserts that this language, specifically the portion allowing an employee to consent to a polygraph test, is preempted by N.J.S.A. 2C:40A-1. That statute provides (with certain exceptions not pertinent here):

Any person who as an employer shall influence, request or require an employee or prospective employee to take or submit to a lie detector test as a condition of employment or continued employment, commits a disorderly persons offense.

The PBA asserts that the contract language is consistent with the statute and is mandatorily negotiable.

The broad scope of N.J.S.A. 2C:40A-1 reflects the view that, given economic realities, an employee realistically has no choice but to submit to a test if requested by an employer. See State v. Community Distributors, Inc., 64 N.J. 479, 484-85 (1974). Indeed, the statute has been construed to prohibit an employer from administering a lie detector test even when requested by an employee. See State v. Berkey Photo Inc., 150



N.J. Super. 56, 60 (App. Div. 1977) (sustaining employer's conviction on several counts of violating statute, even though some employees testified that they volunteered to be tested). By stating that an employee may not be tested without his express written consent, the first sentence of Article VIII, Section G implies that the Township could request that consent. Given the breadth of N.J.S.A. 2C:40A-1, we hold that it preempts the first sentence of Article VII, Section G. The remainder of the article is consistent with N.J.S.A. 2C:40A-1 and provides protections, consistent with the spirit of the statute, should an employer request and an employee refuse to take a lie detector test.

Article XVIIC Terminal Leave/Pay

1. Upon an eligible employee's declaration of his intent to retire, the employee shall select one of the two following options:

a. Option One - Terminal Pay

(1) An employee may select to actively work until the effective date of separation and receive a lump sum payment for all unused days of leave and compensatory time accrued to the date of separation.

(2) An employee's base salary from the date of notification of intent through the date of separation shall consist of his base salary, longevity and college allowances and include wage increases granted him under the provisions of this Agreement.

b. Option Two - Terminal Leave

(1) An employee on terminal leave is not considered to be retired until the effective date of retirement which completely severs his employment relationship with the Township. Until that time, the employee on

terminal leave is entitled to all rights and benefits afforded to all employees under this Agreement or any future Agreements subject to any limitations as specifically provided for in this section (Option Two - Terminal Leave).

(2) An employee may select to utilize all of his accrued leave and compensatory time earned up to the date that the Terminal Leave actually commences. No additional days of leave shall be earned by an employee during the period of such Terminal Leave.

(3) Such Terminal Leave may not exceed 365 calendar days. Any employee having more than 365 days of accrued leave shall be paid for the remaining days at the employee's per diem rate at the time the Terminal Leave commenced.

(4) An employee on Terminal Leave shall not be eligible to receive holiday pay, clothing/maintenance allowance nor shall he be eligible for any salary increases effective after the date that his Terminal Leave commenced.

#### Article XVIID Longevity

Upon receipt of an employee's notice of intent to retire, regardless of which Terminal Option he selects, said employee shall receive ten percent (10%) longevity effective beginning the employee's twenty-fifth (25th) year and such longevity shall be included in the employee's base salary from the time of receipt of the notice of intent [to retire] to the Township until the date of separation. It is understood that this 10% longevity is only given to employees who commenced their 25th year of service and furnishing notice of intent to retire to the Township.

The Township argues that a statute and regulation governing the Police and Firemen's Retirement System preempt negotiations over Article XVII, Sections C and D. These cited

statutes and regulations pertain to the calculation of employee pensions. N.J.S.A. 43:16A-1(26) provides:

"Compensation" shall mean the base salary, for services as a member as defined in this act, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary duties beyond the regular workday.

N.J.A.C. 17:4-4.1 provides:

(a) Only a member's base salary shall be subject to pension contributions and creditable for retirement and death benefits in the system.

(b) The board shall reserve the right to question any salary to determine its credibility where it is evident from the record that a salary reported for benefits includes extra compensation.

(c) Such extra compensation shall not be considered creditable for benefits and all contributions made thereon shall be returned.

(d) Some of the forms of compensation that have been defined as extra compensation include overtime; bonuses; longevity lump sum payments; individual retroactive salary adjustments or individual adjustments to place a member at the maximum of his or her salary range in the final year of service; increments granted for retirement credit or in recognition of the member's forthcoming retirement or in recognition of the member's years of service in the community.

The PBA acknowledges that the determination of an officer's salary for pension purposes is within the jurisdiction of the pension board. It maintains that the disputed provisions

are predominantly concerned with forms of compensation, such as terminal leave and longevity payments which have been found mandatorily negotiable by the Commission and the courts. It asserts, without conceding, that even if the portion of the agreement could be construed as conflicting with a pension statute or regulation, to the extent the provision bears on the amount of compensation the officer is entitled to receive for unused leave allowances, that issue is severable and is not preempted by any statute or regulation. It thus asserts that the entire provision, including Article XVIIC.1.a.(2) and XVIID, may remain in the agreement.

Granting employees compensation for unused leave allowances through either lump sum payments or at regular pay periods as terminal leave is mandatorily negotiable. See Morris School Dist. Bd. of Ed., P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd App. Div. Dkt. No. A-006013-96T2 (4/22/98); State of New Jersey (State Troopers), P.E.R.C. No. 92-3, 17 NJPER 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-5, 17 NJPER 409 (¶22195 1991), aff'd NJPER Supp.2d 278 (¶225 App. Div. 1992), certif. den. 130 N.J. 596 (1992); Middlesex Cty. Prosecutor, P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991), aff'd NJPER Supp.2d 280 (¶227 App. Div. 1992); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (¶17036 1985); Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121

(¶15063 1984); City of Newark, P.E.R.C. No. 83-143, 9 NJPER 296 (¶14137 1983); Somers Point, P.E.R.C. No. 77-48, 3 NJPER 99 (1977).

We have previously rejected claims that, by defining "salary" for pension purposes, the pension statutes and regulations preempted contract clauses concerning the amount of terminal leave, holiday or longevity payments which an employee is entitled to receive at, or shortly prior to, retirement. For example, in Paramus Bor., P.E.R.C. No. 86-17, 11 NJPER 502, 506-507 (¶16178 1985), we rejected an assertion that a proposal to increase longevity payments due senior officers during their 23rd year of service was preempted by a pension regulation prohibiting certain pre-retirement increases in salary. We concluded that, based on the record before us, it was not clear that the longevity proposal violated the regulation. We stated that the employer should address any contentions of pension eligibility to the Consolidated Police and Firemen's Pension Fund for investigation and resolution. Similarly, in Voorhees Tp., P.E.R.C. No. 96-77, 22 NJPER 198 (¶27105 1996), we rejected a claim that, by excluding retroactive salary adjustments from the definition of salary for pension purposes, N.J.A.C. 17:6-2.1 precluded a claim for retroactive payment of the higher salary an employee was contractually entitled to receive during the last year of employment. We stated that any issues of pension eligibility could be presented to the Division of Pensions. Cf. Prof. Fire

Officers Ass'n of Local 1860, IAFF v. City of Newark, NJPER Supp.2d 204, 205-206 (¶180 App. Div. 1989), certif. den. 117 N.J. 87 (1989) (citing Paramus with approval, court refused to vacate interest arbitration award on grounds that it violated pension regulations by directing that holiday pay be included in salary for pension purposes; court held that the employer objection was untimely and that it could have sought a scope of negotiations determination from us).

The analysis in Paramus and Voorhees pertains here. Article VIIC1(a) addresses the lump sum terminal leave payment an employee may elect to receive on retirement. The pension statutes defining base salary for pension purposes do not address, and do not preempt, negotiations over how base salary is defined for purposes of calculating terminal leave payments. See discussion in Galloway Tp., P.E.R.C. No. 98-132, 24 NJPER \_\_\_\_ (¶\_\_\_\_ 1998) (issued today) involving identical provisions in a contract between this employer and the representative of its supervisory police officers.

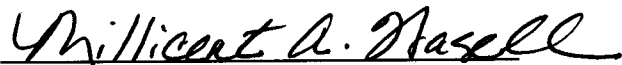
Article XVII, Section D would entitle an employee to a 10% longevity allowance after the employer receives his or her notice of intent to retire. It further states that these payments shall be included in the employee's base salary. This language appears to describe the method by which the longevity allowance will be paid (i.e., periodic rather than lump sum payments). However, it may also conflict with N.J.S.A.

43:16A-1(26) ("compensation" for pension purposes excludes individual salary adjustments which are granted primarily in anticipation of retirement). We need not and do not decide whether such payments can be included in an employee's base salary for pension purposes, a matter that is within the jurisdiction of the Division of Pensions. Paramus. We stress that pensions are not mandatorily negotiable. N.J.S.A. 34:13A-8.1; N.J.S.A. 34:13A-18; Morris; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978). Within this framework, Article XVII, Section D may be retained in the contract as a clause that provides for, and defines the method of payment of, pre-retirement longevity allowances.

ORDER

The following articles are not preempted: Article VIII Section C, ¶2; Article VIII, Section D; Article XVII, Section C, ¶1.a.(2); Article XVII, Section D. The first sentence of Article VIII Section G is preempted; the remainder of the Article is not.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: April 30, 1998  
Trenton, New Jersey  
ISSUED: April 30, 1998