

P.E.R.C. NO. 86-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK

Petitioner,

-and-

Docket No. SN-86-24

P.B.A. LOCAL 166,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that certain proposals P.B.A. Local 166 submitted during successor contract negotiations with the Township of South Brunswick are mandatorily negotiable and may be submitted to interest arbitration, but that other proposals are not mandatorily negotiable and may not be submitted to interest arbitration. The mandatorily negotiable proposals are: pay differential for officers serving in Investigative and Juvenile Bureaus; police patrol vehicle equipment related to police officer safety; and procedural aspects of disciplinary matters and internal investigations. The proposals not mandatorily negotiable are: parity clause; job assignments based on seniority; legal reference materials at police station; restrictions on Town's ability to evaluate or discipline officers; expungement of records; criminal investigations of police officers and arbitration of disciplinary disputes where an alternate statutory review procedure exists and polygraph and physiological testing.

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Appearances:

For the Petitioner, Mark S. Ruderman, Esq.

For the Respondent, Daniel J. Hussey, Esq.

DECISION AND ORDER

On October 2, 1985, the Township of South Brunswick ("Township") filed a Petition for Scope of Negotiations Determination. The Township seeks a determination whether certain proposals made by Policemen's Benevolent Association Local 166 ("PBA"), the majority representative of the Township's police patrol officers, detectives and sergeants, during successor collective negotiations are mandatorily negotiable.^{1/} The Township and the PBA are engaged in interest arbitration proceedings pursuant to N.J.S.A. 34:13A-14 et. seq. Both parties have filed briefs.

^{1/} A Minimum manning article, listed in the Township's petition, is no longer in dispute as the PBA has agreed to delete the disputed provisions from the contract.

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.^{2/}

The Court stated:

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.

Id at 92-93 (citations omitted).

This scope of negotiations determination will consider only whether the proposals are mandatorily negotiable. It is the Commission's policy not to decide whether contract proposals, as

^{2/} The scope of negotiations for police and fire employees is broader than for other public employees because P.L. 1977, c. 85 provides for a permissive as well as a mandatory category of negotiations. Compare, IFPTE, Local 195 v. State, 88 N.J. 393 (1982).

opposed to contract grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. e.g., Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Holidays, Medical Health Benefits-Parity

The Township contends that Article IV, ¶2(B) -- granting police an extra day off if Township employees are "awarded" additional holidays -- and Article XVIII, ¶6 -- giving police improved medical benefits if "given" to other Township employees -- are illegal parity clauses. The PBA argues that the clauses are permissible because they do not refer specifically to benefits "negotiated" by other bargaining units. However, we held in Township of Montville, P.E.R.C. No. 84-143, 10 NJPER 364 (¶15168 1984) that similar clauses were illegal because they did not unambiguously apply only to benefits granted unilaterally by the public employer without reference to negotiations with any other bargaining units. The instant clauses are not unambiguous and as worded are illegal.^{3/} Compare Borough of Wanaque, P.E.R.C. No. 81-103, 7 NJPER 613 (¶12273 1981) (clause that would grant benefits to unit members where employer unilaterally grants such benefits to other employees is mandatorily negotiable).

^{3/} The Township is not a member of the State Health Benefits Plan so the applicability of N.J.S.A. 34:13A-18 is not an issue.

Job Rotation

The Township challenges the negotiability of Article XVII which secures for each patrolman the right, based upon seniority, to rotate through all units and bureaus of the police department. The PBA contends that since the article only makes the assignments temporary and not permanent, it does not significantly interfere with managerial prerogatives. We find the article would prevent the Township from permanently assigning patrol officers to particular assignments for which an individual officer may be best suited. e.g., Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983). The article is not mandatorily negotiable except for language which provides a five per cent pay differential to patrol officers while serving in the Investigative and Juvenile Bureaus.

Working Conditions and Equipment

Paragraphs 7, 8, 10, 12 and 13 of this article are challenged as non-negotiable.^{4/} Paragraph 7 contains a list of equipment to be maintained in police patrol vehicles: armored vest, helmet with detachable face shield, head restraints, lap and shoulder belts, flares, cable cutters, fire extinguishers and clip board. The Township maintains that all these items except flares are unrelated to police officer safety and therefore are not mandatorily negotiable. Based upon the standards in Union County,

^{4/} We decline the Township's invitation to rule on Paragraph 3 by making comments like those in Township of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). The negotiability of this paragraph, which was not listed in the Township's petition, is not really disputed by the Township and the PBA is aware of the limitations expressed in Franklin.

P.E.R.C. No. 84-23 , 9 NJPER 588 (¶14248 1983) and Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) we find all of these items are predominantly related to employees' safety and comfort and are mandatorily negotiable.

The Township argues that to the extent paragraph 8 requires the Township to purchase a fungible amount of backup equipment and spare parts, it is not mandatorily negotiable. Since the PBA states that it will delete the third sentence of this paragraph which addresses this issue and the Township does not contest the first two sentences, no dispute exists concerning this paragraph.

Paragraph 10 requires the Township to maintain a law library containing certain specified volumes at police headquarters. The Township objects that it would require major captial expenditures to comply. The PBA responds that the cost is relatively minor. We have not addressed such language in a case involving police officers, but we find the issue to be analogous to a demand by teachers for certain specified reference materials which we found not mandatorily negotiable in In re Byram Twp. Bd. of Ed. and Byram Twp. Ed. Ass'n, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977). Accordingly, paragraph 10 is not mandatorily negotiable.

Paragraphs 12 and 13 require the Township to equip police vehicles or officers with certain specified guns, other weapons and quantities of ammunition. These requirements are not mandatorily negotiable as they are more closely related to matters of governmental policy than employee safety. See Egg Harbor Township P.E.R.C. No. 86-20, 11 NJPER 518 (¶16181 1985), and Borough of Wanaque, P.E.R.C. No. 81-103, 7 NJPER 613 (¶12273 1981).

Bill of Rights

Article XXVIII of the most recent contract is an 18-page section spelling out the respective rights and obligations of the department and police officers with respect to disciplinary matters and internal investigations. The Township contests the negotiability of several of the 51 paragraphs in the article.

Time Limits

Various time limits in Paragraphs 1, 2, 6 and 8 state that failure to comply with such time limits will provide a complete defense to the infraction charged. The Township asserts these time limits impermissibly restrict its ability to evaluate or discipline officers. Under City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983), these limitations are not mandatorily negotiable. However, paragraph 6's requirement that a complaint concerning a law enforcement officer be memorialized in writing within 24 hours of receipt is mandatorily negotiable, provided it applies only to job-related, non-criminal complaints. We read it to pertain to procedural aspects of the disciplinary process affecting

employees. Under N.J.S.A. 34:13A-5.3, as amended, such items are mandatorily negotiable. Township of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224, 227 (¶16087 1985).

Expungement of Records, Contents of Personnel Files

The Township maintains that paragraphs 7, 26 and 46, which mandate expungements of disciplinary records after specified periods of time, are not mandatorily negotiable. State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985). We agree. Jersey City. The restrictions against placing unfounded complaints in officers' personnel files contained in Paragraphs 7 and 9 are mandatorily negotiable in view of contemporaneous language in paragraph 9 which allows the department to maintain a separate record of such complaints.

Criminal or Quasi-Criminal Investigations

The last sentence of paragraph 27 and all of paragraphs 28 and 29 are allegedly not mandatorily negotiable because they would hamper the Township's right to investigate misconduct of a criminal or quasi-criminal nature. The PBA addresses its argument solely to the last sentence of Paragraph 27. We sustain the Township's position on these paragraphs. Cf. Township of Franklin; see City of Trenton, P.E.R.C. No. 76-11, 1 NJPER 58, 59 (1975).

Disciplinary Procedures and Hearings

Paragraphs 32 through 40 set a procedure for trying alleged disciplinary infractions through a hearing conducted by the Township administrator or other hearing officer appointed by the Township Committee. Article 41 provides for an appeal from an unfavorable

decision to either the Superior Court of New Jersey in a de novo proceeding or through use of the contractual grievance procedure which ends in binding arbitration. Paragraph 43 allows an officer to apply to the Superior Court for enforcement or protection of the rights granted by the agreement. Paragraph 45 limits suspensions of police officers to seven or eight days unless extended by a majority vote of the Township Committee. The Township contends that all these provisions are preempted by N.J.S.A. 40A:14-147 through 151, which provides a procedure for the suspension, hearing and removal of police officers. The PBA contends that the provisions should remain in the contract as the Township has not shown or argued that the paragraphs conflict with the statutory provisions.

We and the courts have repeatedly addressed issues of employee discipline since the amendments to N.J.S.A. 34:13A-5.3 (L. 1981, c. 706), See e.g., CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 190 (1984) and Bergen Cty Law Enforcement Group v. Bergen Cty Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983). However, we have not yet determined whether the cited statutes constitute an "alternate statutory appeal procedure," thus precluding binding arbitration of disciplinary disputes involving police officers without Civil Service protections.

N.J.S.A. 40A:14-147 provides in part:

[N]o permanent member or officer of the police department or force shall be removed from

his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank or from office, employment or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer.
(emphasis supplied)

N.J.S.A. 40A:14-148 grants subpoena power to the officer or board designated to hear the charges. N.J.S.A. 40A:14-150 allows for review de novo on the record below in Superior Court.

Reviewing the disputed paragraphs against these statutory procedures, we find nothing in paragraphs 32 through 40 which conflicts with these procedures. The statutory appeal procedures contemplate an initial proceeding before some municipal officer or body. Paragraphs 32 through 40 provide such a procedure. The Superior court sits as a reviewing body with the power to try the charges de novo on the record below taking whatever additional evidence and testimony as is necessary. See e.g., Grasso v. Borough Council of Bor. of Glassboro, 205 N.J. Super. 18 (App. Div. 1985). However, because Paragraph 41 gives the disciplined police officer the option of using the statutory procedure or binding grievance arbitration, it conflicts with the admonition of N.J.S.A. 34:13A-5.3 that "The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure." The hearing before the Township Administrator or other designee is

consistent with N.J.S.A. 40A:14-147 through 151 which we hold is an alternate statutory appeal procedure for non-civil service police who receive disciplinary sanctions set forth in the statute (suspensions, fines, removals, reductions in rank or position). However, the option to use binding arbitration to review suspensions, removals, fines and reductions in rank is illegal. Paragraph 43 does not conflict with any of the cited statutes and is mandatorily negotiable. We agree with the Township that the limitations placed upon the length of suspensions in Paragraph 45 is inconsistent with the provisions of N.J.S.A. 40A:14-149.1 and is illegal.

Polygraph, Physiological Testing

The Township contends that bans contained in Paragraphs 30 and 31 on polygraph and other truth testing, and blood, tissue and breathalyzer tests (the last three to determine officers' fitness for duty) are not mandatory subjects of negotiations. It cites State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985). The PBA calls our attention to a criminal statute, N.J.S.A. 2C:40A-1 which makes it a disorderly persons offense for an employer (except for those in the pharmaceutical industry) to require that an employee take a lie detector test. We adhere to our previous ruling and find that paragraphs 30 and 31 are not mandatorily negotiable. While N.J.S.A. 2C:40A-1 apparently makes the compulsory use of a lie detector illegal, that does not mean that the decision to use a lie detector involves a term and condition of employment.

Miscellaneous

The Township states that the contents of 25 of the paragraphs in the Bill of Rights article could easily be condensed into the succinct language found in an 8-paragraph, mandatorily negotiable proposal quoted in Township of Franklin. Since the Township does not challenge the negotiability of the present, allegedly cumbersome language, there is nothing for us to decide. The parties are free to streamline their agreement on their own.

ORDER

A. These articles or proposals are mandatorily negotiable. Any unresolved dispute with respect to these matters may be submitted to interest arbitration: Article XXVII, ¶7; Article XXVIII, ¶s 6, 9, 32, 40 and 43.

B. The following articles or proposals are not mandatorily negotiable. Any unresolved disputes with respect to these matters may not be submitted to interest arbitration without the consent of the Township: Article IV ¶ 2(B); Article XVIII, ¶6; Article XVII, except for language granting a five percent pay differential for work in the Investigative and Juvenile Bureaus; Article XXVII, ¶s 10, 12 and 13; Article XXVIII, ¶s 1,2,7 (except for the portion barring placement of unfounded complaints in officers' personnel files), 8, 26-31, 41 (All language following the words "State of New Jersey"), 45 (Except first sentence), and 46.

C. The remaining portions of the petition are dismissed as moot.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
April 18, 1986
ISSUED: April 21, 1986