

138-3031

In the Matter of

COUNTY OF PUTNAM AND PUTNAM
COUNTY SHERIFF,

Charging Party,

and

PUTNAM COUNTY SHERIFF'S DEPART-
MENT POLICE BENEVOLENT ASSOCIA-
TION, INC.,

Respondent.

Case No. U-25752

Before MICHAEL CUEVAS, Chairman; and
JOHN T. MITCHELL, Member; December
19, 2005INDEX NOS. 04.25, 15.413, 43.116, 43.131,
43.1683, 55.91

The PERB affirmed the ALJ's decision insofar as she found that the police union violated § 209-1.2(b) of the Act by submitting nonarbitrable demands relating to overtime pay disputes, payment for unused sick leave, and the stipulation of agreement regarding a defibrillator. In its exceptions the union argued that the ALJ erred because the overtime pay proposal did not deal with eligibility, but rather the procedure to resolve such pay disputes. The Board agreed that the proposal did not deal with overtime eligibility, which was specifically excluded from interest arbitration, but found that the proposal was nevertheless inarbitrable because it did not deal directly with compensation. The union's argument regarding the arbitrability of the sick leave buyout proposal was also rejected because the proposal represented contingent and potential compensation, and therefore was not directly related to compensation. The Board similarly rejected the union's claim that the demand regarding the stipulation agreement was directly related to compensation because it merely sought to effectuate a technical change in the definition of employees covered by the stipulation.

PERB also denied the county's exception to the ALJ's finding that the health insurance proposal was nonarbitrable, concluding that health benefits extended to employees upon their retirement constituted deferred compensation. However, PERB reversed the ALJ's decision with respect to the non-arbitrability of the retroactivity proposal. Although the demand covered both unit employees at the time the award became effective and employees who left county employment during the contract hiatus, the Board found that demand directly related to compensation because it dealt solely with the retroactivity of wages and other economic benefits.

Back reference: 38 PERB 4564

*Roemer Wallens & Mineaux LLP (William M. Wallens of counsel), for Charging Party**John M. Crotty, Esq., for Respondent***Board Decision and Order**

This case comes to us on exceptions filed by the Putnam County Sheriff's Department Police Benevolent Association, Inc. (PBA) and by the County of Putnam and Putnam County Sheriff (County) to a decision of an Administrative Law Judge (ALJ) finding that the PBA violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) when it submitted to compulsory interest arbitration certain proposals that were not arbitrable under §209.4(g) of the Act.

Exceptions

The PBA excepts to the ALJ's determination that the Board's decision in *City of Cohoes*,¹ (hereafter, *Cohoes*), does not render certain of its demands arbitrable under § 209.4(g) of the Act and also to the ALJ's determination that its proposals relating to overtime pay disputes, payments for accumulated sick leave and unused sick leave, retroactive wages and benefits, and to the 1997 stipulation of agreement are not arbitrable.

The County excepts to the ALJ's determination that the PBA's proposal relating to health

insurance for retirees and their dependents is mandatory and arbitrable under § 209.4(g) of the Act.

Based upon our review of the record and our consideration of the parties' arguments, we affirm, in part, and reverse, in part, the decision of the ALJ.

Facts

In 2004,² the Legislature amended the interest arbitration provisions of the Act to add § 209.4(g), which provides in relevant part, as follows:

With regard to members of any organized unit of deputy sheriffs ... the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law.

Pursuant to § 209.4(g), the PBA filed a petition for compulsory interest arbitration with PERB, setting forth the proposals it alleged were open and arbitrable. The County filed the instant improper practice charge alleging that the PBA violated § 209-a.2(b) of the Act by submitting demands to interest arbitration which were nonmandatory and/or non-arbitrable under the Act.

The language of the in-issue demands are set forth in the DISCUSSION portion of this decision.

Discussion

Access to the compulsory interest arbitration procedures of the Act were not extended by the Legislature to deputy sheriffs without limitation. Section 209.4(g) limits arbitration to only those terms which are directly related to

compensation, including salary, stipends, location pay, insurance and medical and hospitalization benefits. Certain subjects are specifically excluded from arbitration, such as job security, disciplinary procedures and actions, deployment or scheduling and overtime compensation.

The PBA argues that notwithstanding the limitation on those subjects that may be arbitrated as set forth in §209.4(g), our decision in *Cohoes* renders arbitrable all of its demands which target a provision of its collective bargaining agreement with the County. It asserts that the Legislature must have intended this result because *Cohoes* was decided before the enactment of § 209.4(g) and the Legislature is presumed to have adopted the interpretation of statutory language in existence at the time of the legislation. The ALJ rejected this argument, finding that the inquiry under § 209.4(g) of the Act is not whether a proposal submitted to interest arbitration is mandatory in nature but, in addition to being mandatorily negotiable, whether or not it is directly related to compensation.

The ALJ was correct in determining that *Cohoes* does not control the analysis of arbitrability under § 204.9(g) of the Act. The conversion theory of negotiability in *Cohoes* was designed to render mandatory, as between the parties in a bargaining relationship, those terms of a collective bargaining agreement that are in issue in negotiations so that there can be finality in negotiations. A finding that a contract term is mandatorily negotiable does not necessarily resolve issues of arbitrability under § 209.4(g). That analysis is totally different, requiring a determination as to whether a demand is directly related to compensation or is one of the subjects that the Legislature expressly excluded from arbitration. A demand may be a mandatory subject of negotiations and still not be arbitrable as to deputy sheriffs because of the express language of the statute.

In *New York State Police Investigators Association* (hereafter, *State Police*),³ we interpreted the meaning of language virtually identical to the

language of § 209.4(g) of the Act. That case involved the language of the former § 209.4(e), granting interest arbitration to investigators, senior investigators and investigator specialists of the state police force, which limited arbitration to those items directly relating to compensation and excluded demands related to noncompensatory matters including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation that were governed by other provisions prescribed by law.⁴ In defining what was meant by "directly relating to compensation," we stated⁵:

All noncompensatory demands are excluded from compulsory arbitration under § 209.4(e) because they necessarily have no relationship to compensation. This does not mean, however, ... that all compensatory issues are arbitrable unless their relationship to compensation is as attenuated as the subjects which are specifically listed as examples of noncompensatory issues. That argument drains all significance from the word "directly." The subjects excluded from arbitration under § 209.4(e) do not define the subjects which are included because a subject must satisfy two conditions simultaneously to be arbitrable under § 209.4(e). It must fall within the included compensatory category and fall without the excluded category of noncompensatory subjects. Even if a subject is not excluded from arbitration as noncompensatory, it is not necessarily arbitrable. A subject does not fit within the included category, even if it is compensatory in nature, unless it also "directly" relates to compensation. The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent directly relates to compensation. A demand has compensation as its sole, predominant or primary characteristic

only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance co-payment). If the effect is otherwise, then the relationship of the demand to compensation becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of § 209.4(e).

Our analysis in *State Police* is dispositive of the issues before us here. As a result, we find, as did the ALJ, that certain of the PBA's demands are not arbitrable and must be withdrawn from interest arbitration.⁶ Those demands are: Number 2, Recognition and Association Rights, Paragraph G; Number 5, Personal Leave; Number 6, Hours of Work, Overtime and Recall—paragraphs C(2) and C(3); Number 10, Vacations; Number 11, Grievance Procedure; Number 12, Sick Leave as to subparagraph A2, C and D; Number 13, Disciplinary Procedure; Number 15, Negotiations to delete subparagraph B; Number 16, Maintenance of Operations, Paragraphs A, B and C; Number 17, Separability; Number 19, Fully Bargained Agreement; and Number 20, Duration.⁷

As to the remaining demands, we affirm the decision of the ALJ.

The PBA excepts to the ALJ's determination that its proposals relating to overtime pay disputes, payments for accumulated sick leave and unused sick leave, retroactive wages and benefits and to the 1997 stipulation of agreement are not arbitrable.

PBA demand Number 6, *Article 8—Hours of Work, Overtime and Recall*

D. Overtime Compensation

2. Overtime Compensation Dispute

In the event the overtime claimed by an employee is being denied in whole or in part, such employee

will be so notified. Thereafter, if the employee wishes to object to such denial, he/she may do so in the following manner:

- a. The employee will reduce the complaint to writing and refer the matter to the President and Vice President of the Association.
- b. The staff officer, President and Vice President and member of the Association involved will then confer with reference to the dispute and attempt to work out an agreement.
- c. If an agreement is not reached, then a hearing will be held with the Sheriff, staff officer involved, President and Vice President and member of the Association involved in the dispute.
- d. In the event the Sheriff, President and Vice President of the Association fail to reach an agreement as to the overtime for which an employee is to be compensated, then the dispute shall be submitted to the County as a grievance in accordance with the terms of this Contract.

The ALJ found that the PBA's demand to delete the above provision from the collective bargaining agreement was not arbitrable because it dealt with overtime eligibility, which is specifically excluded from arbitration by the language of § 209.4(g) of the Act. The PBA argues that the ALJ erred because the proposal does not deal with eligibility but with a procedure to resolve overtime pay disputes. We agree that the provision does not deal with eligibility for overtime, but neither does it deal directly with compensation. As only those items that deal directly with compensation are arbitrable, the PBA's demand relating to a procedure for resolving overtime disputes, which is not directly related to compensation, is not arbitrable.

PBA proposal 12; Article 15—Sick Leave

J. Amend the schedule to read as follows:

Days: 1-70 days	—all days accumulated at 20% of daily rate
71-110 days	—all days accumulated at 40% of daily rate
111-150 days	—all days accumulated at 60% of daily rate
151-180 days	—all days accumulated at 80% of daily rate
181 days and Above	—all days accumulated at 100% of daily rate

NEW I: The County shall pay, in first (1st) pay period of January of each year, the following sick leave incentive bonus:

Sick Leave Days Used	Amount
0-1	4 days Base Wage
2	2 days Base Wage
3	1 day Base Wage

The ALJ found both demands to be improperly submitted to arbitration as not dealing directly with compensation, relying on *State Police*. There, we determined that proposals providing for sick leave accumulation were not arbitrable because, while such proposals "could eventually confer an economic benefit upon the employee," they represented potential compensation and were not directly related to compensation. The PBA argues that the demands here in issue call for the payment of cash either upon separation from employment or at the first of each year in which sick leave has not been used or used sparingly. But, as Supreme Court found with the sick leave accrual demand in *State Police*, the mere fact that the demands could result in the payment of cash and as such seek to increase the rate of compensation is not a sufficient basis upon which to find that the demands are directly related to compensation.⁸ They are, therefore, not properly submitted to arbitration.

PBA demand Number 18; Article 21—Legislative Action and Retroactivity

B. Amend to read as follows:

All wages, economic and other benefits shall apply and be paid to any employee who worked during the expired term of this Agreement.

The ALJ found that this demand, which covers both unit employees who are working at the time the arbitration award becomes effective as well as those employees who leave the County's employ before that time, is not arbitrable as it seeks payment to former employees for whom the County has no obligation to negotiate. We disagree. In *Bridge and Tunnel Officers Benevolent Association*,⁹ in deciding the retroactivity of a demand, we held that:

"Current" employees, for purposes of assessing the negotiability of a demand in negotiations, and unless otherwise defined by the parties, must mean all employees who were employed during the term of the contract being negotiated, even if the negotiations continue, as they so often do, beyond the term of the prior contract and the demand in issue is not first presented until well into the negotiations. Just as a demand may be retroactive, so too may its application to the class of employees covered by the demand.

This demand deals solely with the retroactivity of wages and other economic benefits and is thus directly related to compensation. That it applies to employees who are still employed when the arbitration award is issued, as well as those who left the County's service during the contract hiatus, does not render it non-arbitrable.

PBA demand Number 22: Appendix D—Stipulation of Agreement Dated April 29, 1997.

Replace the reference to CFR to CFR—Defibrillator

The ALJ determined that this demand is not arbitrable as it has no relation to compensation.

The PBA argues that the April 29, 1997 Stipulation of Agreement contains provisions for the payment of tuition, equipment, supplies and stipends. This demand seeks to clarify who is eligible to receive the monies and benefits set forth in the Stipulation and, as such, the PBA argues that it is directly related to compensation. As the demand seeks merely to effectuate a technical change in the definition of those employees covered by the Stipulation, it is not directly related to compensation and is not properly submitted to arbitration under § 209.4(g) of the Act.

The County excepts to the ALJ's determination with respect to retiree health insurance.

Article 5—insurance—New: G

Effective January 1, 2003, upon retirement the County shall pay one hundred percent (100%) of the health insurance premium or cost for the retiree and eligible dependents. The health insurance plan shall be the same as provided to active employees.

Health insurance benefits for current employees after they retire are mandatory subjects of negotiations.¹⁰ Section 209.4(g) of the Act specifically makes insurance and medical and hospitalization benefits arbitrable. The County argues that benefits for retirees that extend beyond the term of the collective bargaining agreement and/or arbitration award under which they retire and benefits for beneficiaries of employees are nonmandatory subjects of negotiations and not arbitrable within the meaning of § 209.4(g) of the Act. In *Town of Shawangunk*,¹¹ we held that "health insurance benefits extended to an individual upon that individual's retirement from employment are a form of deferred compensation representing a payment in the future for services a former employee has rendered in the past." As both compensation and insurance, health insurance benefits for retirees are arbitrable under § 209.4(g). To the extent that the County is urging this Board to reconsider its prior decisions holding health insurance coverage for current employees upon their retirement and

for the dependents of such employees to be mandatory, the County articulates no new or compelling reasons for such reconsideration, even were it possible to do so in light of court decisions holding that such subjects are mandatorily negotiable.¹²

Based on the foregoing, we deny the County's exceptions, and grant the PBA's exceptions as to clarifying that certain of its demands have not already been withdrawn and as to PBA Demand 18. We reverse the ALJ's decision as to PBA Demand 18 and affirm, as modified, the ALJ's decision as to the remaining PBA demands.

We find that the PBA violated § 209.2(b) of the Act when it submitted to arbitration, pursuant to § 209.4(g) of the Act, the following demands:

- Number 2, Recognition and Association Rights, Paragraph G;
- Number 5, Personal Leave;
- Number 6, Hours of Work, Overtime and Recall—paragraphs C(2) and C(3);
- Number 6, D. 2 (overtime disputes)
- Number 10, Vacations;
- Number 11, Grievance Procedure;
- Number 12, Sick Leave as to subparagraph A2, C and D;
- Number 12, 15(J) and new addition to Article 15;
- Number 13, Disciplinary Procedure;
- Number 15, Negotiations to delete subparagraph B;
- Number 16, Maintenance of Operations, Paragraphs A, B and C;
- Number 17, Separability;
- Number 19, Fully Bargained Agreement; and
- Number 20, Duration.

IT IS, THEREFORE, ORDERED that the PBA withdraw these demands from arbitration. In all other respects, the charge is dismissed in its entirety.

¹ 31 PERB ¶ 3020 (1998, *confirmed sub nom. Uniform Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *aff'd* 276 AD2d 184, 33 PERB ¶ 7019 (3d Dep't 2000), *leave to appeal denied* 96 NY2d 711, 34 PERB ¶ 7018 (2001).

² L 2004, ch 286.

³ 30 PERB ¶ 3013 (1997), *confirmed sub nom. New York State Police Investigators Association v PERB*, 30 PERB ¶ 7011 (Sup. Ct. Albany County 1997).

⁴ Section 209.4(e) was amended by Chapter 587 of the Laws of 2001 to repeal this restrictive language relating to binding arbitration.

⁵ 30 PERB at 3028.

⁶ The ALJ interpreted the PBA's concession that, if *State Police* controlled, certain of its demands were not arbitrable under that decision, as providing a basis upon which to conclude that these demands had been withdrawn from arbitration. The PBA, however, argues in its exceptions that the demands have not been withdrawn.

⁷ PBA's Petition for Compulsory Interest Arbitration.

⁸ 30 PERB ¶ 7011, at 7019-20 (Sup Ct Albany County 1997).

⁹ 29 PERB ¶ 3012, at 3033 (1996).

¹⁰ See *City of Cohoes, supra; Bridge and Tunnel Officers Benevolent Assn*, 29 PERB ¶ 3012 (1996); *Cohoes Police Benevolent and Protective Assn*, 27 PERB ¶ 3058 (1994).

¹¹ 32 PERB ¶ 3042, at 3095 (1999). See also *Lynbrook Police Benevolent Assn*, 10 PERB ¶ 3067 (1977), *rev'd in part sub nom. Incorporated Village of Lynbrook v PEHB*, 64 AD2d 902, 11 PERB ¶ 7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979).

¹² See *Aeneas McDonald Police Benevolent Assn, Inc v City of Geneva*, 92 NY 2d 326, 31 PERB ¶ 7503 (1998). See also *Lynbrook*, note 9.