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In the Matter of

COUNTY OF PUTNAM AND PUTNAM
COUNTY SHERIFF,

Charging Party,

and

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

Respondent.

Case No. U-25752

Before JEAN DOERR, Administrative Law
Judge; September 26, 2005

INDEX NOS. 04.25, 15.413, 43.116, 43.131,
43.423, 43.1683, 55.91

The ALJ concluded that the police union violated § 209-1.2(b) of the Act insofar as it submitted nonarbitrable demands regarding overtime disputes, retroactivity, the payment for unused sick leave, and the stipulation of agreement regarding a defibrillator. The union contended the demands were mandatory subjects of bargaining under *Cohoes*, because they merely sought the modification or deletion of items contained in the bargaining agreement. However, the ALJ found that the proper inquiry under § 209.4(g) was not whether the submitted proposal was mandatory in nature, but rather whether it also directly related to compensation. Here, the proposed deletion of the overtime dispute provision related to eligibility for overtime, a

topic specifically excluded from interest arbitration under § 209.4(g). Similarly, the proposal seeking to amend the sick leave buyout provision represented only contingent and potential compensation, and therefore was not directly related to compensation. Although the retroactive wage payment proposal was arbitrable insofar as it directly related to compensation as applied to current employees, the ALJ found the proposal was nonarbitrable as applied to former employees. The ALJ noted that the employer had no obligation to negotiate on behalf of individuals no longer in its employ. Finally, the ALJ found that the stipulation of agreement regarding the defibrillator was nonarbitrable because it bore no relationship to direct compensation.

Roemer Wallens & Minoux LLP (William M. Wallens of counsel), for Charging Party

John M. Cmty, Esq., for Respondent

Decision of Administrative Law Judge

On March 7, 2005, the County of Putnam and Putnam County Sheriff (County) filed an improper practice charge alleging that the Putnam County Sheriff's Department Police Benevolent Association, Inc. (PBA) violated § 209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it sought compulsory interest arbitration of proposals outside the scope of the express provisions of § 209.4(g) of the Act. The PBA filed an answer in which it denied any violation of the Act. No hearing has been held and both the County and the PBA have filed briefs.

The record in this case consists of the charge and its exhibits, the answer and the PBA's letter of April 22, 2005, withdrawing proposal number 21, and clarifying proposal number 22.

Chapter 286 of the Laws of 2004 enlarged the scope of eligibility for interest arbitration by adding § 209.4(g) to the Act which provides, in relevant part, as follows:

(g) 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.

In *New York State Police Investigators Association*, 30 PERB ¶ 3013 (1997), *conf'd sub nom. New York State Police Investigators Association v. PERB*, 30 PERB ¶ 7011 (Sup. Ct. Albany County 1997), the Board, in construing the meaning of the phrase "directly relating to compensation" as set forth in the original text of § 209.4(e)¹ extending interest arbitration to certain members of the Division of State Police held, at page 3028, that:

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 unit of compensation by either payment from the [employer] to or on behalf of an employee or the modification of an employer'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

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the language of § 209.4(e). [emphasis in original]

Before applying the above analysis to the demands herein, an argument raised by the PBA in its brief must be addressed. The PBA asserts that when the legislature amended § 209.4 to add subsection (g) it must be presumed that it knew of and was guided by the Board's decision in *City of Cohoes*.²

In *Cohoes*, the Board expanded the scope of bargaining by adopting a supplemental or conversion theory of negotiability under which nonmandatory subjects contained within a collective bargaining agreement absent circumstances not relevant herein, are converted into mandatory subjects, i.e. nonmandatory terms contained within a collective bargaining agreement become mandatorily negotiable for purposes of bargaining a successor agreement. By extension, therefore, proposals which seek a modification or deletion of language contained within an agreement are, for purposes of bargaining a successor agreement, mandatory subjects of bargaining. The PBA, in the instant case, argues that all of its demands that seek merely a modification or deletion of items contained in its agreement with the County are, under *Cohoes*, mandatory subjects of bargaining and, therefore, properly before the interest arbitration panel.

The inquiry under § 209.4(g) of the Act is not whether a proposal submitted to interest arbitration is only mandatory in nature but, in addition to being mandatorily negotiable, whether or not it is directly related to compensation. The decision of the Board, in *New York State Police Investigators Association, supra*, reversing the decision of the Administrative Law Judge,³ in part, is illustrative. The Board affirmed the decision as to five proposals, all which dealt with hours of work, clearly mandatory subjects of bargaining. Those proposals, however, were not as concluded by the ALJ, properly before the interest arbitration panel pursuant to § 209.4(e) of the Act because they were not directly related to compensation. Thus, whether a bargaining demand is determined to be a mandatory subject of bargaining

under the pre-*Cohoes* or post-*Cohoes* analysis of negotiability which requires an examination of the subject nature of the demand at issue, or seeks to modify or remove a provision in an existing agreement, the analysis under § 209.4(g) must go one step further and determine the demand's relationship to compensation.

For the above-stated reasons, I reject the PBA's argument that the Board's decision in *City of Cohoes, supra* controls the arbitrability issues under § 209.4(g) of the Act. In addition, I adopt the Board's decision in *New York State Police Investigators Association, supra*, as instructive as to the appropriate analysis of § 209.4(g) of the Act. The PBA conceded, in its brief, that should I make the determinations set forth above, that certain at-issue proposals would not be arbitrable pursuant to § 209.4(g) of the Act, and I concur.⁴ Those proposals are as follows: No. 2, Recognition and Association Rights, Paragraph G; No. 5, Personal Leave; No. 6, Hours of Work, Overtime and Recall—paragraphs C(2) and C(3); No. 10, Vacations; No. 11, Grievance Procedure; No. 12, Sick Leave as to subparagraph A2, C and D; No. 13, Disciplinary Procedure; No. 15, Negotiations to delete subparagraph D; No. 16, Maintenance of Operations, Paragraphs A, B and C; No. 17, Separability; No. 19, Fully Bargained Agreement; and No. 20, Duration.

Remaining Proposals

PBA Proposal number 3; 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.

The Board has held that demands for health insurance benefits for current employees after they retire are mandatorily negotiable.⁵ The PBA's proposal Number 3 is such a proposal. The plain language of § 209.4(g) of the Act sets forth subjects of bargaining

"directly relating to compensation" and includes among them insurance and medical and hospitalization benefits. PBA proposal Number 3 is therefore arbitrable unless the County's argument, as proffered in its brief, has merit.

The County argues that benefits for retirees that extend beyond the term of the collective bargaining agreement and/or interest arbitration award under which an employee retires and for the employee's dependents are not mandatory and therefore not arbitrable under § 209.4(g) of the Act.

In *Cohoes Police Benevolent and Protection Association, supra*, at 3136, the Board held that: "The duration of a benefit cannot be material to a determination regarding its negotiability." At issue in that case was a challenge by the City of Cohoes to a demand submitted by the PBA to arbitration which proposed that the City provide, at its cost, health insurance coverage for the life of an employee who retires on or after the effective date of the agreement and his or her dependents. There, the City argued that the demand was nonmandatory because it would apply to employees who retire after the expiration of the contract under which the benefit is extended. The Board, in reaching its determination that the demand was a mandatory subject of bargaining, reexamined a prior line of cases which held that the continuation of health insurance for current employees after they retire is limited to the duration of the contract under which the employees retire. Those cases, the Board stated, could be traced to a decision in *Lynbrook Police Benevolent Association*.⁶

The demand at issue in *Lynbrook* involved the provision of hospitalization insurance for the dependents at the time of the demise of both current and retired employees.⁷ The Board held, and the Court of Appeals agreed, that as to retirees, the demand was prohibited under § 201.4 of the Act. The Board, however, found that as to persons employed at the time of negotiations, the demand for a continuation of hospitalization insurance for them and their families was mandatorily negotiable.

The County argues, however, that the Board in *Cohoes* misinterpreted *Lynbrook*, which it described as simply a determination that the demand at issue in *Cohoes* was a retirement benefit prohibited by § 201.4 of the Act. The County's interpretation of the Court of Appeals' decision in *Lynbrook*, which reinstated the Board's determination as to the negotiability of the demand at issue and described above, is not entirely accurate as it fails to acknowledge that even as it determined that § 201.4 of the Act was not applicable, the Board's determination as to negotiability was "free from the taint of irrationality ..."⁸

The County further argues that the conversion theory of negotiability as set forth in *City of Cohoes*, 31 PERB ¶ 3020 (1998), obligating employers to negotiate benefits for retirees and their dependents which extend beyond the duration of the contract in effect at the date of retirements, creates a bargaining imbalance.⁹ The conversion theory of negotiability which the County now labels unfair is, however, inapplicable in the instant case as the PBA's proposal concerning health insurance is new and not a provision already contained in the parties' collective bargaining agreement. The County also argues that a determination, consistent with prior cases,¹⁰ i.e., that the PBA's proposal is mandatory, may, at some point in the future, create problems for it. This argument is attenuated and premature, and not one I need to address in the instant case.

Inasmuch as the County's arguments are found to be without merit, I reiterate that PBA proposal Number 3, *Insurance*, is both mandatorily negotiable, directly related to compensation and, therefore, arbitrable under §209.4(g) of the Act.

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

D. 1. Amend to read as follows:

Work for all employees in excess of the scheduled eight (8) hours in a workday or when not regularly scheduled to work or forty (40) hours in any workweek shall be considered overtime. Overtime shall

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be paid at the rate of one and one-half times (1.5x) the employee's applicable hourly rate of pay, in cash or in compensatory time, as set forth herein.

D. 2. Delete in its entirety [Overtime Compensation Disputes]

NEW: Add a subsection to read as follows:

On any tour of duty where a Sergeant is not actually working, the senior employee working or the officer designated as tour supervisor shall be paid at the Sergeant's rate of pay for that tour of duty.

NEW: All employees of the Bureau of Criminal Investigation (BCI) shall provide coverage during times when no Investigator/Detective is regularly scheduled to work. In recognition for being placed on stand-by, each employee shall be paid one (1) hour of straight time for every two (2) hours of coverage or any part thereof.

The County argues that the overtime proposal, D. 1, is related to overtime eligibility and specifically excluded from interest arbitration pursuant to §209.4(g) of the Act.

A similar proposal¹¹ was found by the Board to be arbitrable pursuant to § 209.4(e) of the Act in *New York State Police Investigators Association, supra*. The Board held, at page 3030, that

The issues which [the union] seeks to define through its overtime proposals deal only with how much those unit employees who are eligible for overtime compensation under applicable law will be paid and the point at which their entitlement to overtime compensation will attach.

The County argues further that inasmuch as the Fair Labor Standards Act (FLSA) requires that employees be paid overtime, D. 1 is pre-empted, and therefore non-arbitrable. It is beyond cavil that the FLSA provides mini-

mum wage and hour standards, however, it does not prevent the parties from negotiating agreements with regard to those standards. To the contrary, FLSA regulation 29 CFR § 778.102, relative to overtime compensation provides, in relevant part, that: "Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract. ..."¹² As the FLSA does not pre-empt the parties from negotiating overtime provisions, the PBA demand seeking to amend D. 1 of Article 8 is directly related to compensation and is arbitrable.

The PBA's proposals seeking to add new sections to Article 8 are arbitrable pursuant to § 209.4(g) of the Act as directly relating to compensation. The first "new" section sets forth the amount of out-of-title pay afforded those who work a tour of duty in the absence of a Sergeant, and the second "new" section establishes a level of stand-by pay for employees of the Bureau of Criminal Investigation. Both standby pay and out-of-title pay are forms of compensation.

The PBA proposal to delete Article 8, D. 2—Overtime Compensation Disputes, is not arbitrable as it outlines a procedure relative to disputes arising from the denial of overtime. As the section sought to be deleted deals with issues relating to eligibility for overtime it cannot properly come before an interest arbitration panel within a plain reading of § 209.4(g) of the Act.

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 - all days accumu-
 days - lated at 80% of
 daily rate

181 days - all days
 and accumu-
 Above lated at
 100% of
 daily rate

The PBA's proposal seeks to increase the sick leave buyout provisions of the parties' agreement, available to current employees upon actual retirement from County service.

The County does not deny that payment for unused sick days is compensation, but only that as the proposal's primary characteristic pertains to the utilization of sick leave, it is only indirectly related to compensation.

The Court, in its decision¹³ confirming the Board's decision in *New York State Police Investigators Association, supra*, determined that proposals providing for sick leave accumulation could

eventually confer an economic benefit upon the employee; however, simply because they represent potential compensation does not mean that they are arbitrable because they do not *directly relate to compensation*. [emphasis in the original].

Similarly, it must be found that the PBA proposal Number 12, seeking to amend Article 15(J), is not arbitrable pursuant to § 209.4(g) of the Act.

PBA proposal number 12, Article 15:

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

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As this proposal is indistinguishable from the foregoing, it is not arbitrable as it represents only contingent and potential compensation and, therefore, is not directly related to compensation.

PBA Proposal Number 14; Article 16—Miscellaneous

B. Funeral Expenses: Insert "seven thousand five hundred dollars (\$7,500.00)" where "five thousand dollars (\$5,000.00)" appears.

C. Delete—Fire Arms Training: (Payment when training is scheduled on an employee's day off):

The Court in *New York State Police Investigators Association v. PEHB, supra*, confirmed the Board's determination that a demand which would require "the State to pay all funeral expenses incurred by the family of a member who dies in the line of duty"¹⁴ is "indistinguishable from 'insurance, medical and hospitalization benefits,' which are specifically included in § 209.4(e) as arbitrable subjects."¹⁵ As the PBA's proposal seeking an increase in the amount to be paid to cover the cost of the funeral services and expenses incurred by survivors upon the death of an employee in the line of duty is a form of insurance, it is arbitrable pursuant to §209.4(g) of the Act.

The PBA proposal seeking to eliminate language at Article 15(C) which provides for the payment of premium pay for training on off-duty time is a demand directly related to compensation and therefore arbitrable.

PBA proposal Number 16—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.

This proposal seeks to amend language in the contract concerning retroactive wage payments. The payment of retroactive wages, eco-

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nomic and other benefits is a form of compensation. To the extent, however, that this proposal applies to current employees it is arbitrable as directly related to compensation. However, to the extent that the proposal seeks payment for former employees (the goal of the proposal described in the PBA's brief), it is not arbitrable as there is no obligation for the employer to negotiate on behalf of those no longer in its employ. In reliance upon the PBA's admitted purpose for advancing this proposal, I find it to be non-arbitrable.

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

Replace the reference to CFR to CFR—
Defibrillator

As the above-referenced demand bears no relationship to direct compensation it is not arbitrable.

For the reasons set forth above, I find that the Putnam County Sheriff's Department Police Benevolent Association, Inc., violation § 209-1.2(b) of the Act when it filed a petition for arbitration pursuant to § 209.4(g) of the Act containing the following non-arbitrable demands:

Number 6, D. 2 (overtime disputes)

Number 12, 15(J) and new addition to Article 15

Number 18—retroactivity

Number 22—stipulation of agreement

In accordance with my decision, I order that each of the above referenced demands be withdrawn from interest arbitration.

¹ Section 209.4(e) was amended by Chapter 587 of the Laws of 2001 to repeal the restrictive language relating to binding arbitration, to wit, "... terms of collective bargaining agreements directly relating to compensation ..." and the specific examples which followed.

² 31 PERB ¶ 3020 (1998), *conf'd sub nom. Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. Cuevas*, 32 PERB ¶ 7026 (Sup. Ct. Albany

County 1999), *aff'd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dep't 2000), *lv. to appeal denied*, 96 NY2d 711, 34 PERB ¶ 7018 (2001).

³ 29 PERB ¶ 4629 (1996).

⁴ I am treating these proposals as having been withdrawn by the PBA in light of its concession that they are not arbitrable within the meaning of § 209.4(g) of the Act.

⁵ See *City of Cohoes, supra*; *Bridge and Tunnel Officers Benevolent Ass'n*, 29 PERB ¶ 3012 (1996); *Cohoes Police Benevolent and Protection Ass'n*, 27 PERB ¶ 3056 (1994); See also *Town of Shawangunk Police Benevolent Ass'n*, 34 PERB ¶ 4510 (2001).

⁶ 10 PERB ¶ 3067 (1977), *rev'd in part sub nom. Incorporated Village of Lynbrook v. PERB*, 64 AD2d 902, 11 PERB ¶ 7012 (2d Dep't 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979).

⁷ See *Cohoes Police Benevolent and Protection Ass'n, supra*, at 3137, note 2.

⁸ The Board's decision in *City of Cohoes* describes in detail that its adoption of the conversion theory of negotiability was designed to remedy imbalance in collective bargaining faced by both employers and employee organizations.

⁹ See note 2 herein.

¹⁰ *Incorporated Village of Lynbrook, supra*.

¹¹ See *New York State Police Investigators Ass'n*, 29 PERB ¶ 4629, at 4850-4851 (1996), for the text of the proposal.

¹² See also 29 CFR § 553.21 § 7(o)(2)(A)(i). An agency may provide compensatory time off in lieu of overtime compensation to employees of a State or political subdivision thereof, through applicable provisions of a collective bargaining agreement.

¹³ 30 PERB ¶ 7011 at 7019-7020. (Sup. Court Albany County 1997).

¹⁴ *New York State Police Investigators Ass'n*, 29 PERB ¶ 4629 at 4852 (1996).

¹⁵ *New York State Police Investigators Ass'n*, 30 PERB ¶ 3013, at 3026 (1997).