

¶39-4593

In the Matter of

**COUNTY OF SULLIVAN AND SULLIVAN
COUNTY SHERIFF,**

Charging Party,

and

**SULLIVAN COUNTY PATROLMEN'S
BENEVOLENT ASSOCIATION, INC.,**

Respondent.

Case No. LJ-26671

Before DAVID P. QUINN, Administrative Law
Judge; August 15, 2006

INDEX NOS. 15.414, 55.92

To the extent a police union's proposal regarding officers' receipt of regular pay for hours worked up to 40 hours per week and time and a half for hours worked in excess of that amount, the ALJ concluded the proposal was directly related to compensation, and therefore arbitrable. However, the remainder of the proposal regarding the placement of earned overtime into an "overtime bank," was not arbitrable insofar as it sought to allow employees to earn and accumulate compensatory time, and then convert it to cash at their option. Because the conversion to cash was merely "potential" compensation, that aspect of the proposal was not related to compensation for purposes of arbitration under § 209.4(g) of the Act. The ALJ also found that the union's proposals regarding amendments to the rates of accumulation for holiday, vacation and sick leave as well as proposed changes to contract provisions dealing with suspen-

sion, discipline, discharge and civil service status were not arbitrable because they did not directly relate to compensation or dealt with disciplinary procedures which were specifically excluded from the scope of compulsory arbitration

Roemer Wallens & Mineaux LLP (Elayne G. Gold of counsel), for Charging Party

John M. Crotty, Esq. for Respondent

Decision of Administrative Law Judge

On March 31, 2006, the County of Sullivan and Sullivan County Sheriff (Employer) filed an improper practice charge in which it alleged that the Sullivan County Patrolmen's Benevolent Association (PBA) violated § 209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting certain bargaining proposals to compulsory interest arbitration that are not arbitrable under § 209.4(g) of the Act. The PBA filed an answer admitting that it submitted the at-issue proposals to interest arbitration and alleging that they are arbitrable.

The parties submitted the matter for decision on a stipulated record consisting of the charge and attachments including the at-issue proposals, the notice of conference and the answer. Each has filed a brief.

The PBA and the Employer are parties to a collective bargaining agreement that expired on December 31, 2003. Negotiations for a successor resulted in an impasse. After mediation failed, the PBA filed a petition for compulsory interest arbitration under § 209.4(g) of the Act. Section 209.4(g) provides:

With regard to members of any organized unit of deputy sheriffs who are engaged directly in criminal law enforcement activities that aggregate more than fifty per centum of their service as certified by the county sheriff and are police officers pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law as certified by the municipal police training council, 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. Provided, further, that with regard to any organized unit of deputy sheriffs who are engaged directly in criminal law enforcement activities that aggregate more than fifty per centum of their service and are police officers pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law as certified by the municipal police training council, the provisions of this subdivision pertaining to interest arbitration shall only apply in the event that the collective bargaining agreement between the public employer and the public employee organization has been expired for a period of not less than twelve months and the parties have fully utilized all other impasse resolution procedures available under this subdivision.

Virtually the same statutory language was addressed by the Board in *New York State Police Investigators Association (hereinafter, State Police)*¹ where it considered the arbitrability of certain bargaining proposals under § 209.4(e). There, the Board held:²

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).

Here, the Employer argues that Proposals Nos. 4, 7, 8 and 9 in the PBA's petition for interest arbitration are not arbitrable under § 209.4(g) of the Act. Each is discussed separately below.

Proposal No. 4

This proposal contains three discrete parts, only two of which are in issue here.³ They seek to delete sections 402(a) and 407 of Article IV of the collective bargaining agreement and to replace them with new language.

Article IV, § 402(a), provides that employees are to receive regular pay for hours worked up to 40 hours per week, and time and a half for hours worked after 40. The PBA seeks to replace § 402(a) with the following language:

An employee who works more than his/her regularly scheduled eight (8) hour tour of duty, or when not scheduled to work, or in excess of his/her scheduled workweek, shall be paid overtime at the rate of one and one-half times (1.5x) his/her applicable hourly rate of pay for all hours, or part thereof worked.

I find that the demand is directly related to compensation; specifically, the rate of pay for hours worked under certain circumstances. In effect, the demand is for premium pay. It is no different, for example, than a demand for a night shift differential, or extra pay for hazardous duty or out-of title work. It is immaterial to the primary nature of the demand that the rate of pay changes with the circumstances. The demand is wholly compensatory and, thus, arbitrable.

In reaching that conclusion, I am mindful that § 209.4(g) bars arbitration concerning "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. ..." [Emphasis added.] I find that the reference to "issues relating to eligibility for overtime compensation." when read in context, means non-compensatory issues such as procedures by which employees become eligible to work overtime, not the rate of pay for work that the employer chooses to assign that are outside of the regularly scheduled work day or work week, no matter what those additional hours are called.

The second part of Proposal No. 4 addresses Article IV, § 407, of the collective bargaining agreement, which gives employees the option of placing earned overtime pay into an "overtime bank." Currently, the funds in the "overtime bank" are paid to the employees on two designated dates during the year, unless they withdraw it first upon written notification to, and approval by, the Sheriff. Proposal No. 4 seeks to delete current section 407 in its entirety and to replace it with the following:

An employee shall be entitled to elect either payment for overtime worked, or compensatory time as set forth in Section 402 above. The employee shall be entitled to either be paid in the first (1st) pay period of December each year for all or part of his/her accumulated compensatory time, or upon separation from employment, or any compensatory time not paid for, shall be placed in a health insurance on retirement account for additional coverage as set forth in Article 20 — PENSIONS AND HEALTH INSURANCE. However, in the event an employee uses all of his/her accumulated sick leave, he/she shall be entitled to use all or part of his/her accumulated compensatory time in the health insurance on retirement account to insure a paycheck for that period of time for which the compensatory time covers.

In *County of Putnam and Sheriff*,⁴ the Board addressed a similar demand dealing with the accumulation of paid leave and the

right to convert it to cash. Applying *State Police*, *supra*, to the facts in *County of Putnam*, the Board held:

[In *State Police*], 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 [footnote omitted]. They are, therefore, not properly submitted to arbitration.

Simply put, the Board has plainly held that the rights to accumulate paid leave and to convert it to cash at a later date are not directly related to compensation and, therefore, not arbitrable under § 209.4(g) of the Act. Under *County of Putnam*, it appears to be of no moment that the conversion to cash affects the amount of money the employee earns when the conversion is made. The conversion to cash is merely "potential" compensation because the employees have the right of election. Arguably, if the conversion to cash were automatic, it would be arbitrable, because it would not be "potential" compensation. But that is not the case here.

Therefore, I find that this aspect of Proposal No. 4 is arbitrable only to the extent it seeks payment of earned wages in cash at some time in the future, because it is clearly directly related to compensation.⁵ However, to the extent the proposal enables employees to earn and accumulate compensatory time, and

then to convert it to cash at their option, it is not arbitrable, as in *County of Putnam*.

Proposal No. 7

Proposal No. 7 seeks to amend Article XIII of the collective bargaining agreement, entitled "Holiday Schedule." Currently, Section 1303(A) allows employees to accrue one holiday per month. Proposal No. 7 would delete that section in its entirety and replace it with a provision that would require the Employer to credit each employee thirteen full and two half days of holiday leave on January 1st of each year. Under the proposal, the employees would be permitted to elect to receive payment in cash for any unused holidays in the first pay period of December of each year or upon separation from employment, or the employees may elect to convert unused holiday leave to premiums for health insurance during retirement. In addition, the proposal would permit employees to draw from unused holiday leave after their sick leave runs out during their employment.

I find that the demand is not arbitrable for the same reasons that the PBA's proposal concerning the accumulation and conversion of compensatory time is not arbitrable.

Proposal No. 8

Proposal No. 8 would amend several provisions in Article XIV of the collective bargaining agreement dealing with vacation and sick leave. The PBA seeks to change the rate of accumulation of such paid leave and to permit employees to convert unused leave to cash at a later date, or to convert it to insurance premiums upon retirement.

Again, for the reasons already addressed, the demands are not arbitrable.

Proposal No. 9

Proposal No. 9 seeks to amend several sections of Article XIX of the collective bargaining agreement which deal with suspension, discipline, discharge and civil service status. The PBA's proposal is for a new, comprehensive procedure that defines the parties' rights and responsibilities concerning the administration

of General Municipal Law (GML) § 207-c, including a hearing procedure by which employees can contest adverse decisions.

Section 209.4(g) of the Act specifically excludes disciplinary procedures from the scope of compulsory interest arbitration, even though such procedures can affect virtually every aspect of an employee's job, including his or her wages, hours, and other terms and conditions of employment. Indeed, such procedures can affect whether the employee can keep his or her job. The PBA's GML § 207-c procedure is indistinguishable from a disciplinary procedure in that it, too, can affect virtually every aspect of a line-of-duty injured employee's rights and obligations concerning his or her employment, including the employee's ability to receive regular wages and medical treatment. The only difference between the two procedures is that disciplinary procedures tend to address the threatened loss of wages and other benefits, while the PBA's GML § 207-c procedure addresses both the acquisition and retention of such rights and benefits. I find that distinction is immaterial, and that the PBA's proposal is not arbitrable under 209.4(g) of the Act, as with disciplinary procedures.

Accordingly, the PBA is ordered to withdraw from compulsory interest arbitration those proposals found herein not to be arbitrable under § 209.4(g) of the Act.

¹ See, *New York State Police Investigators Ass'n*, 30 PERB ¶ 3013 *conf'd sub nom. New York State Police Investigators Ass'n v PERB*, 30 PERB ¶ 7011 (Sup Ct Albany County, 1997).

² *Id.* at 3028.

³ See, Employer's brief at p. 5.

⁴ 38 PERB ¶ 3031 (2005) at p. 3106.

⁵ See, e.g., *County of Ulster and Sheriff*, 38 PERB ¶ 3033 (2005).