

Before MICHAEL CUEVAS, Chairman; and JOHN T. MITCHELL, Member; December 19, 2005

INDEX NOS. 15.413, 24.132, 42.12, 43.131, 43.137, 43.168, 55.91

An ALJ did not err in directing a police officer's union to withdraw from compulsory arbitration, proposals relating to union dues and agency fees. Even though the proposals were mandatory subjects of negotiations the proposals were not arbitrable under § 209.4(g) because they were not directly related to compensation and were secondary to the employment relationship. The county also argued that the union's proposals regarding medical insurance for employees and their dependents upon retirement was nonarbitrable because the duration of the benefit extended beyond the term of the CBA or an Interest arbitration award. However, the PERB affirmed the ALJ's determination that the proposed benefits were compensation for services rendered because they were earned while unit members were employed. The Board similarly declined to find that the inclusion of nonunit titles in the union's retirement proposal rendered the proposal ambiguous, and therefore not arbitrable. With respect to the 1/60th benefit aspect of the proposal, the Board found that the Retirement and Social Security Law exclusion of such benefits from interest arbitration for police units did not apply to additional pension benefits such as the optional 20-year retirement plan. The Board noted that since § 553 did not foreclose negotiation over the subject matter, the proposal was both mandatory and negotiable. The Board also concluded the ALJ properly determined that the union's sick leave proposal, which concerned time off from work without loss of pay, was not arbitrable because the primary characteristic of the proposal affected hours of work and not compensation. Accordingly, the ALJ's decision, 38 PERB ¶ 4563 (2005), was affirmed.

¶38-3033

In the Matter of

COUNTY OF ULSTER AND ULSTER COUNTY SHERIFF,

Charging Party,

and

ULSTER COUNTY DEPUTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

Case No. U-25870

Back reference: 38 PERB 4563

*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 County of Ulster and Ulster County Sheriff (County) and by the Ulster County Deputy Sheriff's Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge<sup>1</sup> (ALJ) on a charge filed by the County alleging 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 County excepts to the ALJ's finding that certain of the PBA's proposals are arbitrable. The PBA excepts to the ALJ's decision on the law and his determination that its proposals for membership dues and agency shop dues deduction are not arbitrable. The PBA filed a response to the County's exceptions.

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

#### Facts

The ALJ decided the case upon a stipulated record that included the improper practice charge, verified answer and the notice of conference. The improper practice charge alleged in substance that the County and the PBA previously negotiated a collective bargaining agreement for the term of January 1, 1999 through December 31, 2002.<sup>2</sup> Subsequently, negotiations for a successor agreement reached impasse and, after mediation proved unsuccessful, the PBA filed a petition for compulsory interest arbitration, dated April 12, 2005.<sup>3</sup>

Pursuant to § 209.4(g) of the Act, the provisions for compulsory interest arbitration for County deputy sheriffs:

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. ...

The County alleged that the PBA's proposals for membership dues deduction, agency shop fee, retiree health insurance, sick leave and retirement were non-arbitrable. The language of each proposal is set forth below in the DISCUSSION portion of this decision.

#### Discussion

The Act was amended in 2004 to provide interest arbitration for bargaining units of deputy sheriff who are engaged in criminal law enforcement that comprises more than 50% of their duties. The amendment, § 209.4(g), limits binding arbitration to the terms of the collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits.

The PBA contends that the language of § 209.4(g) is exactly the same as former § 209.4(e), which applied to interest arbitration for members of the New York State Police. In 1997, PERB decided an improper practice charge filed by the State of New York (Governor's Office of Employee Relations) alleging that the New York State Police Investigators Association included demands which were not arbitrable in a petition for compulsory interest arbitration pursuant to § 209.4(e) of the Act.<sup>4</sup> At that time, § 209.4(e) specifically provided for interest arbitration of terms:

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 prescribed by law.

Section 209.4(e) was amended in 2002<sup>5</sup> to specifically prohibit from interest arbitration for members of State police bargaining units only issues relating to

disciplinary procedures and investigations or eligibility and assignment to details and positions which shall be governed by other provisions prescribed by law.

The scope of interest arbitration for State police units is now contained in § 209.4(d). This includes:

the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

The Board determined in *State Police Investigators Association* (hereafter, *State Police*),<sup>6</sup> that "the phrase 'directly relating to compensation' does not and cannot mean ... only 'direct compensation' to unit employees from the State". The Board looked at the use of the word compensation in other parts of § 209 and determined that the Legislature intended the word compensation to include a wide variety of subjects. The Board then tested the relationship between a particular bargaining demand and compensation:<sup>7</sup>

If the sole, predominate, 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, predominate or primary characteristic only when it seeks to effect some change in the amount or level of compensation by either payment from the State to or on behalf 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 relation-

ship 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).

This test was adopted by Supreme Court, Albany County, in its decision confirming the Board's decision.<sup>8</sup>

The PBA proposed to make certain additions and amendments to the parties' collective bargaining agreement. The following proposals are in dispute:

1. ARTICLE 2—RECOGNITION, MEMBERSHIP DUES DEDUCTION, AGENCY SHOP FEE AND OTHER REDUCTIONS: (pp. 1-2)

Section 2—Membership Dues Deduction:

Add the following to the first (1st) paragraph:

The Employer shall provide, each payroll period to the Union Treasurer, the names and addresses of each employee represented by the Union and dues deductions made to date. The Employer shall deduct from part time employees, any and all arrearages of dues owed from the payroll periods not worked. The Employer shall forward all dues deductions to the Union on the same day as the payroll is made.

Section 3—Agency Shop Fee:

Add the following to the second (2nd) paragraph:

The Employer shall provide, each payroll period to the Union Treasurer, the names and addresses of each employee represented by the Union and Agency Shop Fee deductions made to date. The Employer shall deduct from part time employees, any and all arrearages of Agency Shop Fee deduc-

tions owed from the payroll periods not worked. The Employer shall forward all Agency Shop Fee deductions to the Union on the same day as the payroll is made.

The A.L.J. found that while the PBA's proposals for membership dues deduction and agency shop are mandatory subjects of negotiations, they were not arbitrable. We agree. PBA's proposal number 1, sections 2 and 3, Membership Dues Deduction and Agency Shop Fee, do not meet the test for compensation. There is no nexus between the dues deduction and the unit members' relationship to the County. The relationship exists between the unit member and the PBA. The proposal is secondary to the employment relationship and must, therefore, be excluded from the scope of compulsory arbitration.<sup>9</sup>

## 2. ARTICLE 5—EMPLOYEE BENEFITS: (pp. 5-15)

### Section 1—Health Insurance:

#### Paragraph 2—Amend to read as follows:

The Employer agrees to pay 100% of the premium or cost for all full time employees and dependents health insurance coverage who have completed five (5) years or more of service.

Upon retirement, the Employer shall pay 100% of the premium or cost for full time employees and dependents health insurance coverage in effect at that time.

The County argues that PBA's Proposal #2, Section 1 demanding that the County provide fully paid medical insurance to unit members and their dependents upon retirement is not subject to interest arbitration because it is not directly related to compensation within the

meaning of § 209.4(g) of the Act. Furthermore, the County argues that the duration of the benefit extends beyond the term of the collective bargaining agreement and/or the interest arbitration award.<sup>10</sup> The County urges us to decline to follow our "conversion theory"<sup>11</sup> of negotiability with regard to this proposal because it will result in an undue burden. As we decided today in *Putnam County Sheriff's Department Police Benevolent Association, Inc.*<sup>12</sup>

Health insurance benefits for current employees after they retire are mandatory subjects of negotiations.[footnote omitted] 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*, [32 PERB ¶ 3042, at 3095 (1999)] 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.[See *Aeneas McDonald Police Benevolent Ass'n., Inc. v City of Geneva*, 92 NY 2d 326, 31 PERB ¶ 7503 (1998). See also *Lynbrook*,

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

#### Section 17—Retirement:

Add the following:

3. The Employer shall adopt and implement the Special Retirement Plan for Sheriffs, Undersheriffs and Deputy Sheriffs (Article 14-B: Section 552, 20 Year Service Retirement and 553, the additional 1/60th benefit) for all service.

The County contends that the PBA's Proposal #2, Section 17 requiring the County to adopt and implement the 20-year retirement plan and the additional 1/60th benefit is not subject to interest arbitration because it includes the nonunit titles of Sheriff and Undersheriff. The County also argues that the benefit does not directly relate to compensation and that, pursuant to Retirement and Social Security Law, § 384-e(c), the 1/60th benefit for each year of service may not be negotiated under § 209.4 of the Act.

The PBA correctly argues in its brief to the ALJ that the negotiability and arbitrability of retirement benefits available by law has been firmly established.<sup>13</sup> The Court of Appeals in *Association of Surrogates and Supreme Court Reporters Within the City of New York v State of New York*<sup>14</sup> (hereafter, *Surrogates*) interpreted compensation within the meaning of the Act to include such subjects as insurance, pensions, vacations, military leave, and even uniform allowances. The Court in *Surrogates* relied upon *Matter of Teachers Association, Central High School District No. 3 v Board of Education, Central High School District No. 3, Nassau County*<sup>15</sup> (hereafter, *Teachers Association*) for its opinion that pensions are a form of compensation. In *Teachers Association*, the Appellate Division determined that<sup>16</sup>:

[T]he courts have recognized that the State and its municipalities in granting pensions, vacations or military leave are not conferring gifts upon their employees, but that essentially the promised rewards are conditions of employment—a form of compensation withheld or deferred until the completion of continued and faithful service (citations omitted).

The County's argument that the proposal includes the Sheriff and Undersheriff and is, therefore, not arbitrable lacks merit. The PBA's proposal is not ambiguous simply because the Sheriff's and Undersheriff's titles are mentioned in the proposal. Article 14-B of the Retirement and Social Security statute is entitled "Special Retirement Plans for Sheriffs, Undersheriffs and Deputy Sheriffs Engaged in Law Enforcement Activities". The PBA's proposals at § 17 simply identify the origin of the plan. The County's objection is, therefore, to the form of the proposal rather than its substance.

As to the arbitrability of the 1/60th benefit, the County contends that Retirement and Social Security Law, § 384-e(c) excludes the benefit from interest arbitration for police units and should apply in the instant case. However, this proscription was not included in § 553 of the Retirement and Social Security Law, entitled "Additional Pension Benefit for Members of Optional Twenty Year Retirement Plan", and the PBA argues that its omission in § 553 evidences the Legislature's intent to permit negotiation over the benefit. It is axiomatic that, under the Taylor Law, the public policy of New York in favor of collective bargaining is strong and sweeping.<sup>17</sup> The presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or where a specific statutory directive leaves no room for negotiation.<sup>18</sup> Thus, only where a statute clearly forecloses negotiation of a particular subject may that subject be deemed a prohibited subject of bargaining.<sup>19</sup> Since § 553 does not foreclose

negotiation over the subject matter, the demand is both mandatory and arbitrable.

Section 6—Sick Leave:

Amend to read as follows:

All full-time employees shall be credited with eight (8) hours (1 work day) of sick leave on the first (1st) day of each calendar month, without limitation to accumulation.

The PBA argues that this proposal providing for unlimited sick leave accumulation is directly related to compensation. The ALJ found the subject excluded from interest arbitration under the test used to determine compensation in *State Police*. We agree with the ALJ.

One of the demands at issue before us in *State Police* also proposed sick leave accumulation. The demand, as here, concerned time off from work without loss of pay. We found the effect of such a demand on compensation was clear but nevertheless indirect. The PBA's proposal simply maintains a member's salary or wage at the negotiated rate during an employee's absence from work. There is no change in compensation. Consequently, the predominant or, at least, primary characteristic of this proposal affects hours of work and not compensation. Thus, we find that the PBA's sick leave proposal is non-arbitrable.

In reaching our conclusions regarding the aforementioned proposals, we are not deciding the merits of the proposals, only their negotiability. Our decision in any scope of negotiations case should be construed only as a determination of whether, as in this case, a proposal may properly be submitted to interest arbitration under § 209.4(g) of the Act.

Based on the foregoing, the County's exceptions are denied and the PBA's specific exception as to membership dues deduction and agency shop fee is denied. The decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the PBA withdraw from compulsory interest arbitration the proposals numbered:

1. Article 2, Section 2—Membership Dues Deduction

Section 3—Agency Shop Fee

2. Article 5, Section 6—Sick Leave.

In all other respects, the charge is dismissed.

- <sup>1</sup> 38 PERB ¶ 4563 (2005).
- <sup>2</sup> Improper Practice Charge—Exhibit A.
- <sup>3</sup> Improper Practice Charge—Exhibit B.
- <sup>4</sup> See *New York State Police Investigators Assn*, 30 PERB ¶ 3013, confirmed sub nom *New York State Police Investigators Assn v PERB*, 30 PERB ¶ 7011 (Sup Ct Albany County 1997).
- <sup>5</sup> L 2002, ch 232.
- <sup>6</sup> *Supra*, note 4, at 3027.
- <sup>7</sup> *Id.*
- <sup>8</sup> *State Police Investigators Assn.*, 30 PERB at 7018-19.
- <sup>9</sup> See also *City of Troy*, 28 PERB ¶ 3027 (1995).
- <sup>10</sup> See *Village of Saugerties Police Benevolent Assn*, 38 PERB ¶ 3034 (December 19, 2005).
- <sup>11</sup> See *City of Cohoes*, 31 PERB ¶ 3020 (1998), confirmed sub nom, *Uniform Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1998), aff'd 276 AD2d 184, 33 PERB ¶ 7018 (3d Dept 2000), lv to appeal denied, 96 NY2d 711, 34 PERB ¶ 7018 (2001).
- <sup>12</sup> 38 PERB ¶ 3031 (December 19, 2005).
- <sup>13</sup> See *Fairport Police Billy Club*, 14 PERB ¶ 3079 (1981), confirmed sub nom, *Matter of Vil. of Fairport v Newman*, 90 AD2d 293, 15 PERB ¶ 7000 (4th Dept 1982), appeal dismissed 58 NY2d 1112, 16 PERB ¶ 7013 (1983).
- <sup>14</sup> 76 NY2d 143, 24 PERB ¶ 7520 (1991).
- <sup>15</sup> 34 AD2d 351 (2d Dep't 1970).
- <sup>16</sup> *Id.*, at 353.
- <sup>17</sup> *Board of Education of the City School District of the City of New York v New York State Pub. Empl. Relations Bd.*, 75 NY2d 660 (1990).
- <sup>18</sup> *Id.*, at 667.
- <sup>19</sup> *City of Watertown*, 95 NY2d 73 (2000).