

P.E.R.C. NO. 2009-14

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF NORTH ARLINGTON,

Petitioner,

-and-

Docket No. SN-2008-077

NORTH ARLINGTON POLICEMEN'S  
BENEVOLENT ASSOCIATION, LOCAL NO. 95,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of North Arlington for a restraint of binding arbitration of a grievance filed by the North Arlington Policemen's Benevolent Association, Local No. 95. The grievance seeks compensation for work in a higher rank. The Commission holds that a claim that a police officer has been performing the duties of a higher rank and is entitled to receive additional compensation is severable from the decision to assign those duties and is legally arbitrable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Chasan, Leyner & Lamparello, P.C.,  
attorneys (David J. Heintjes, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &  
Bukosky, attorneys (Michael A. Bukosky, on the brief)

DECISION

On May 9, 2008, the Borough of North Arlington petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the North Arlington Policemen's Benevolent Association, Local No. 95. The grievance seeks compensation for work in a higher rank. We deny the request for a restraint.

The parties have filed briefs and exhibits. The Borough has submitted the certification of Police Chief Luis M. Ghione. These facts are derived from the chief's certification.

The PBA represents all police officers except the chief. The parties' collective negotiations agreement is effective from

January 1, 2004 through December 31, 2006. The grievance procedure ends in binding arbitration. Article III lists the salaries of sergeants, lieutenants and captains and provides that each rank shall be paid 9% more than the lower rank.

The chief states that, because of staffing shortages, he has not assigned a lieutenant as tour commander on the night shift since February 2005. The chief further states that, pursuant to department rules, Sergeant Francis Guanci is a supervisory officer and has been acting as tour commander because he is the senior member of his platoon. Guanci reports to Lieutenant John Hearn.

On March 12, 2008, the PBA filed a grievance concerning the "issue of failing to pay Sergeant Guanci, and any and all similarly situated unit members, for work traditionally performed by Lieutenants." The grievance states that the table of organization calls for a platoon to consist of one lieutenant, two sergeants, and five officers, but that Sergeant Guanci has had the responsibility of supervising the platoon and supervising other police sergeants. The PBA seeks compliance with the contract and adherence to N.J.S.A. 40A:9-6. That statute provides:

Any person who has held or who may hereafter hold, de facto, any office or position in the public service of any county or municipality and who had or shall have performed the duties thereof, shall be entitled to the emoluments and compensation appropriate to

such office or position for the time in fact so held and may recover therefor in any court of competent jurisdiction, notwithstanding any refusal or failure of any other person or officer to approve or authorize the payment of the said emoluments and compensation.

The Borough denied the grievance. On April 16, 2008, the PBA filed a demand for arbitration and identified the dispute as "out of title pay." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.  
[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

\_\_\_\_\_As this dispute arises in the context of a grievance involving police officers, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. A subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with

the exercise of a management prerogative. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). A subject involving a management prerogative can still be permissively negotiable if agreement would not place substantial limitations on government's policymaking powers.

The Borough argues that this grievance is preempted by Borough ordinances and regulations that grant the chief the authority to make assignments. The Borough further argues that arbitration of the grievance would substantially limit its policy making powers. It maintains that the chief assigned duties to improve the department's efficiency and effectiveness; Guanci holds a supervisory rank and may be assigned as a tour commander; and paying an employee additional compensation for duties set forth in the job description would be an impermissible burden on the Borough's ability to determine the duties of department members.

The PBA responds that it is not challenging the assignment, but only seeking out-of-title pay. It argues that such pay is mandatorily negotiable and may only be preempted if a State statute or regulation specifically and comprehensively sets the term and condition of employment.

The Borough replies that the PBA has violated N.J.A.C. 19:13-3.5(f)1 because it did not provide any certifications to

support its position. It asserts that arbitration should be restrained because its arguments are unopposed.

The PBA has filed a sur-reply stating that it does not oppose the facts asserted in the chief's certification, but that it does oppose any legal conclusion that the Borough has a managerial prerogative to deny out-of-title pay.

Under N.J.A.C. 19:13-3.5(f)1, a respondent must file a certification if it disputes facts asserted in a petitioner's supporting certification. The rule does not require that a respondent file a certification to respond to a petitioner's legal arguments. Here, the respondent accepts the facts in the chief's certification. We will now address the parties' competing legal arguments.

The Borough's own ordinance and department rules do not preempt arbitration of this dispute. A public employer cannot, by passage of a local ordinance, unilaterally preempt a negotiable term and condition of employment; only a specific State statute or regulation can do so. City of Paterson, NJPER Supp.2d 93 (¶76 App. Div. 1981), aff'g P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979). In any event, the cited ordinance and regulation address the chief's authority to assign, not compensation for an assignment.

\_\_\_\_\_ A claim that a police officer has been performing the duties of a higher rank and is entitled to receive additional

compensation is severable from the decision to assign those duties and is legally arbitrable. See City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 360 (¶31144 2000) (sergeant serving as tour commander); see also Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993) (deputy chief serving as acting chief).

This dispute is similar to the one in Springfield Tp., P.E.R.C. No. 2006-15, 31 NJPER 294, 295-296 (¶115 2005). There, the police department's table of organization was changed and one of two lieutenant positions was eliminated. A sergeant was assigned the supervisory responsibilities formerly performed by a lieutenant. The sergeant filed a grievance alleging that he was entitled to additional pay for performing lieutenant duties. We denied the employer's request for a restraint of arbitration stating that the employer could argue to an arbitrator that the sergeant was, in fact, performing duties normally assigned to sergeants and not duties distinctively assigned to lieutenants. See also Cherry Hill Tp., P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992) (captain allegedly performing duties of deputy chief); Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992) (sergeant performing duties lieutenant had performed as traffic coordinator).

The Borough cites City of Jersey City, P.E.R.C. No. 2007-7, 32 NJPER 278 (¶115 2006),<sup>1/</sup> for the proposition that it is not required to pay extra compensation because serving as tour commander is a normal duty for a sergeant. However, in Jersey City, the New Jersey Department of Personnel ("DOP") had conducted a classification review and found that the duties of tour commander/desk sergeant in that jurisdiction were commensurate with the job description for police sergeant. We are not aware of any such determination in this jurisdiction. See City of Hoboken, P.E.R.C. No. 96-7, 21 NJPER 280 (¶26179 1995) (DOP desk audit results are relevant and admissible but pendency of desk audit does not warrant restraint of arbitration over grievance claiming out-of-title assignment).

Finally, whether N.J.S.A. 40A:9-6 requires extra compensation bears on the merits of the grievance and is outside our jurisdiction. An arbitrator may consider whether the statute is pertinent and, if so, apply it consistent with court decisions construing it. See West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978).

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<sup>1/</sup> P.E.R.C. No. 2007-7 was reconsidered and modified in P.E.R.C. No. 2007-26, 32 NJPER 356 (¶149 2006).



ORDER

The request of the Borough of North Arlington for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: September 25, 2008

Trenton, New Jersey