

P.E.R.C. NO. 2009-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Petitioner,

-and-

Docket No. SN-2008-063

P.B.A. LOCAL 167, MERCER
COUNTY CORRECTIONAL OFFICERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the County of Mercer for a restraint of binding arbitration of a grievance filed by P.B.A. Local 167. The grievance asserts that the yard towers at the Mercer County Correction Center violate the contractual safety and health clause and State regulations. The Commission holds that this health and safety issue 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, Genova, Burns & Vernioia, attorneys
(Brian W. Kronick, of counsel and on the brief; Shannon
A. Morales, on the brief)

For the Respondent, Alterman & Associates, LLC,
attorneys (Daniel M. Replogle, III, on the brief)

DECISION

On March 17, 2008, the County of Mercer petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 167, Mercer County Correctional Officers. The grievance asserts that the yard towers at the Mercer County Correction Center violates the contractual safety and health clause and State regulations. We hold that this health and safety grievance is legally arbitrable.

The parties have filed briefs and exhibits. The County has submitted the certification of Warden Shirley Tyler. These facts appear.

The PBA represents rank and file corrections officers. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article 24.1 of the parties' agreement provides:

The employer shall at all times maintain safe and healthful working conditions and will provide employees with wearing apparel, tools or devices deemed necessary in order to insure their safety and health. When such materials are issued, they shall be used.

There are three tower structures at the Correction Center, each with two sets of sliding windows. Each tower is constructed mostly of wood. Stairs lead up to a single doorway that has a functioning door. The base of each tower is 10' by 10' and the deck is 9' high. The tower booth is 8'7" x 5'3". One officer is posted in a tower at a time. The purpose of the towers is to conduct surveillance and provide security while prisoners are in the outdoor area of the Correction Center. A propane heater is available for the officer assigned. Officers assigned to the towers are issued protective vests as well as rifles. They are also issued winter jackets and are able to purchase their own employer-approved sweaters and hats. While serving in the towers, officers are responsible to secure the perimeter and must ensure that their weapons are appropriately prepared. Additional responsibilities include ensuring that all gates and fencing are secure, assisting Master Control in getting inmates to and from

the yard in an organized manner, controlling horseplay and unnecessary roughness in the yard, and enforcing all institutional rules and regulations. If an inmate attempts an escape, the yard officer must immediately order the inmate to stop and has authority to shoot if a second warning is ignored. Tower assignments are made through the bidding process. Employees may voluntarily switch or swap shift assignments with another employee prior to the rebid date.

Solomon Dinkins bid for and received a yard tower position. On June 21, 2004, Dinkins filed a grievance alleging violations of the health and safety clause and N.J.A.C. 10A:31-3.4. That Department of Corrections regulation provides, in relevant part:

(a) The requirements within this subchapter shall apply to all areas of the adult county correctional facility with equal importance and shall be considered in the planning process.

(b) The facility should be geographically accessible (such as, but not limited to, public transportation and parking) to the public and to the facility staff, as well as to the officers of the court, attorneys and law enforcement officers.

(c) Staff work stations and control rooms shall be situated to provide the greatest degree of observation of traffic flow and supervised internal activities. The staff work stations and control rooms shall provide access to toilet facilities.

(d) The facility shall be so designed that sections or parts can be closed off for varied use to meet changing needs.

A June 17, 2004, incident report to the warden was attached to the grievance. The report states that the towers pose several unsafe and unhealthy conditions such as: construction consists of untreated wood and nails; the whole tower shakes when going up the steps; there is no electricity, even though there are receptacles, fixtures and switches; there are no toilet facilities; the towers are bug infested and there is no way of keeping the bugs out; it is dangerous to keep a loaded weapon while battling bees and other flying insects and watching inmates; the towers are saturated with chemicals used to kill the insects; there is no air circulation; and the tower is at least ten degrees hotter than the outside temperature. The grievance seeks to have the towers meet all federal and State requirements.

The June 24, 2004 written response to the grievance advised: "Administration will be developing specifications for state-of-the-art towers for the institution. Installation date to be determined."

On September 25, 2007, the PBA president wrote to the County Administrator concerning the Dinkins grievance. His letter stated that Dinkins realizes that the new yard towers are not coming and that he would like upgrades to the current towers to protect him from the harsh conditions he must endure.

On November 13, 2007, the Administrator responded:

Upon examination of the record I believe that it is possible to render a decision fairly

without the need of hearing testimony. Officer Dinkins grieved conditions in the Yard Towers. The Yard Towers are outdoor assignments, like any other outdoor assignments. Officer Dinkins has sought out this duty with full knowledge of the physical conditions. Although it is possible that the proposed new towers may be environmentally controlled, the existing towers are and always have been an outdoor assignment.

The grievance references State and Federal Standards, but there is no documentation that there is any violation or that such standards even exist. This grievance is denied.

On November 27, 2007, the PBA demanded arbitration.^{1/}

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.

^{1/} On December 10, 2007, the PBA filed an unfair practice charge alleging that the health and safety conditions of the towers violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The charge was dismissed for failing to allege facts constituting a violation of the Act.

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 County argues that arbitration must be restrained because the yard towers have been constructed in accordance with State guidelines and, accordingly, the PBA's claim is preempted by applicable State regulations. The County also argues that as corrections officers bid for the yard tower assignments, they are willing to serve in the towers and fully understand the condition of the post and the responsibilities of the assignment.

The PBA states that the conditions of the towers raise health and safety issues: towers have no dependable connection to a master control; in the winter, they are heated with kerosene heaters and officers must inhale kerosene fumes; in the summer, they have no air conditioning so the windows must be left open; and the towers are infested with bees and other flying insects.

The PBA argues that inhaling kerosene during the winter and combating bees and other flying insects during the summer relate to health and safety issues that are mandatorily negotiable and unless abated will harm its members. It also argues that the towers lack proper State-mandated environmental controls and that dependable communications between the tower post and the master control are a security concern. It cites N.J.A.C. 10A:31-3.3, which provides that all adult county correctional facility construction or renovations shall comply with regulations required by State and local building codes.

The County replies that the PBA's assertions about compliance with State standards and the assertion that there is no dependable communications between the tower and the master control are not supported by any certification as required by N.J.A.C. 19:13-3.5(f)(1). The County is correct and we will not accept those assertions as facts.

This Commission and the Appellate Division have held that issues concerning physical facilities and conveniences related to employee comfort and safety are mandatorily negotiable. In re Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12, 27-30 (App. Div. 1977). Our Supreme Court has also stated that in the absence of issues demonstrably affecting governmental policy, employee safety is mandatorily negotiable. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322,

332 (1989); see also Maurice River Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987) (proposal that employees shall not have to perform tasks or work under conditions that would endanger their health, safety or well-being is mandatorily negotiable).

We have also often found negotiable and arbitrable issues concerning equipment in police cars or other vehicles that constitute the daily work environment for the employees assigned to them. See, e.g., South Brunswick Tp., P.E.R.C. NO. 86-115, 12 NJPER 363, 364 (¶17138 1986) (finding mandatorily negotiable the equipping of patrol vehicles with armored vest, helmet with detachable face shield, head restraints, lap and shoulder belts, flares, cable cutters, fire extinguishers and clip board). The Appellate Division has agreed that repair of police vehicles is mandatorily negotiable to the extent it relates to employee health and safety. In re Middlesex Cty., 6 NJPER 338, 339 (¶11169 1980), aff'g in pertinent part, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979).

The analogy between employee work areas and police vehicles is applicable here. The employer has cited rules and policies governing the construction of correctional facilities. The issue presented by the grievance is not whether the towers, when built, met specifications, but whether their current condition adversely

affects employee health and safety.^{2/} The cited regulations do not preempt a claim that a work station is uncomfortable, unsafe, and in disrepair and violates a contractual commitment or a legal obligation to provide officers with safe and healthy working conditions.^{3/}

Our cases hold that, even though an employer has a prerogative to choose the make, model and non-safety related equipment when purchasing police cars, contract language mandating that the vehicles be properly maintained and repaired is mandatorily negotiable and legally enforceable through binding grievance arbitration. See Atlantic Cty. Sheriff, P.E.R.C. No. 93-68, 19 NJPER 148 (¶24073 1993) (finding legally arbitrable a police union's grievance alleging that sheriff violated agreement by requiring employees to use vehicles that were unsafe due to age, excessive mileage and lack of proper maintenance).

The County notes (without conceding that the PBA's grievance is arbitrable) that although we allowed arbitration in Atlantic Ct. Sheriff, we ruled that the arbitrator lacked authority to

^{2/} The County's argument that officers are assigned to yard towers through competitive bidding is not relevant to our task of determining whether the subject of the grievance is legally arbitrable.

^{3/} In State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 458 (¶16162 1985), we noted that enforcement of a contractual guarantee of a safe work place was consistent with the Legislature's declaration in N.J.S.A. 34:6A-26 that the safety and health of public employees in the workplace was a primary concern.

direct the sheriff to buy more vehicles. The union, however, had conceded that point given Byram's statement that proposals for employee facilities that would cause an employer to incur major capital expenditures may not be mandatorily negotiable. 152 N.J. Super. at 24-25. We normally decline to speculate about the legality of a remedy an arbitrator might award in the event a grievance is sustained. See Atlantic Cty. Sheriff; State of New Jersey. We will follow that practice here as well.

ORDER

The request of the County of Mercer 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