

P.E.R.C. NO. 2009-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2008-076

P.B.A. LOCAL NO. 11,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the City of Trenton for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 11. The grievance alleges that the City violated the contract by routinely assigning mandatory overtime without declaring an emergency or first soliciting volunteers. The Commission holds that the PBA may arbitrate the portion of its grievance seeking to have overtime assigned first to volunteers as part of an overall allocation system. However, to protect against any substantial limitations on the employer's managerial interests, the Commission restrains arbitration to the extent the PBA claims that the City must declare an emergency under N.J.S.A. 40A:14-134 before it may deviate from an overtime allocation system.

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, Laufer, Knapp, Dalena, Trimboli & Cadicina, LLC, attorneys (Stephen E. Trimboli, on the brief)

For the Respondent, Kroll, Heineman & Giblin, attorneys (Raymond G. Heineman, on the brief)

DECISION

On May 2, 2008, the City of Trenton petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 11. The grievance alleges that the City violated the parties' collective negotiations agreement by routinely assigning mandatory overtime without declaring an emergency or first soliciting volunteers. We decline to restrain arbitration over the allocation of overtime to volunteers, but restrain arbitration to the extent, if any, the PBA may be seeking to require the City to declare a statutory emergency before deviating from that allocation system.

The parties have filed briefs and exhibits. The City has filed the certification of its police director.

The PBA represents all police officers below the rank of sergeant. The parties' most recent contract is effective from July 1, 2000 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article VII is entitled Hours of Employment. Section 7.03 provides:

The official of the Employer having charge of the Division of Police may, in the case of an emergency as defined by the applicable Statutes of the State of New Jersey, summon and keep on duty any and all members of the Department as such emergency shall require. In such event the official having such authority shall first make a formal declaration of the nature and extent of the emergency and all members of the division thus summoned or kept on duty shall be entitled to receive overtime pay as hereinafter set forth for all time worked over the normal hours of employment as above defined.

On May 1, 2007, the PBA filed a grievance with the police director asserting that for several years the police department has been working under a mandatory overtime system in violation of the parties' agreement and Title 40A of the New Jersey statutes.

The police director states that the City has needed to mandate overtime to meet minimum staffing requirements given the size of the department, the number of posts needed to combat

crime and protect the public, and the limitations imposed by the contractual work schedules of police officers and superior officers.

On June 6, 2007, the police director denied the grievance as untimely. On July 12, the PBA demanded arbitration. 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 alleging a contract violation, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Arbitration will not be restrained unless the agreement alleged

to have been violated is preempted or would substantially limit government's policymaking powers. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). No statute or regulation is asserted to preempt arbitration.

Public employers have a managerial prerogative to determine staffing levels for the police department as a whole and for each position to be filled and each duty to be performed. Paterson at 97; Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1982). In City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), we distinguished between a police department's prerogative to decide that overtime must be worked and its duty to negotiate over the allocation of overtime opportunities among qualified employees. We also noted that even though the allocation of overtime is generally negotiable, an urgent situation might necessitate deviation from a negotiated allocation system. Also, if an employer needs a particular employee with special skills and qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus ensure that its needs are met. Local 195, IFPTE v. State, 88 N.J. 393 (1982). In sum, the allocation of overtime is a mandatory subject of negotiations, provided the employer remains assured that it will be able to obtain enough qualified and physically sound employees to perform the tasks at hand.

Under this case law and its application of the negotiability balancing test, the PBA may arbitrate the portion of its grievance seeking to have overtime assigned first to volunteers as part of an overtime allocation system.

The PBA also seeks to arbitrate its claim that the City could not mandate overtime without first complying with Article VII's notice provision. It is difficult to evaluate this claim because Article VII references "applicable Statutes" and the PBA has cited to N.J.S.A. 40A:14-146.9b. That statute applies only to special police and the PBA has not responded to our invitation to address N.J.S.A. 40A:14-134, an emergency statute that applies to regular police. Nor has the City argued that Article VII's notice provision is not enforceable. It instead argues, based on cases from the 1970s and early 1980s, that we should not consider arguments raised for the first time in a respondent's brief. However, we have long since clarified that the question of whether a grievance or demand for arbitration properly raises a particular contractual claim presents a contractual arbitrability question rather than a precondition to a legal arbitrability determination. City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992).

We conclude that the PBA may pursue its claim that overtime should be offered first to volunteers, consistent with Long

Branch. However, to protect against any substantial limitations on the employer's managerial interests under Long Branch, we restrain arbitration to the extent, if any, the PBA claims that the City must declare an emergency under N.J.S.A. 40A:14-134 before it may deviate from an overtime allocation system.

ORDER

The request of the City of Trenton for a restraint of binding arbitration is denied except to the extent, if any, the PBA claims that the City must declare an emergency under N.J.S.A. 40A:14-134 before it may deviate from an overtime allocation system.

BY ORDER OF THE COMMISSION

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

ISSUED: September 25, 2008

Trenton, New Jersey