

P.E.R.C. NO. 2009-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEEHAWKEN,

Petitioner,

-and-

Docket No. SN-2008-078

WEEHAWKEN POLICE BENEVOLENT
ASSOCIATION, LOCAL NO. 15,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township of Weehawken's request for a restraint of binding arbitration of a grievance filed by Weehawken Police Benevolent Association, Local No. 15. The grievance asserts that a change in vacation procedures violates a past practice and the parties' collective negotiations agreement. The Commission holds that the grievance is at least permissively negotiable and therefore 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, David F. Corrigan, LLC, attorneys
(David F. Corrigan, of counsel; Bradley D. Tishman, on
the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Merick H. Limsky, of counsel and on
the brief; Lauren P. Sandy, on the brief)

DECISION

On May 12, 2008, the Township of Weehawken petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Weehawken Police Benevolent Association, Local No. 15. The grievance asserts that a change in vacation procedures violates a past practice and the parties' collective negotiations agreement. We find that the grievance is at least permissively negotiable and therefore legally arbitrable.

The parties have filed briefs and exhibits. The Township has filed the certification of Jeffrey Welz, its public safety director. These facts appear.

The PBA represents all police officers, sergeants, lieutenants and captains. The parties' collective negotiations agreement is effective from July 1, 2002 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article II, Management Rights, provides in part that the Township retains the right "to decide the number of employees needed for any particular time."

Article XV, Vacation, bases total vacation leave on years of service. Section I provides:

All employees will be guaranteed 12 vacation days during the period of June 15 through September 15. Employees shall be entitled to receive pay for up to twelve (12) unused prime time vacation days only with the approval of the Director of Public Safety in the first pay period following approval. All employees shall be treated as equally as possible.

Article XVIII, Time Off, provides:

A. Upon request of the employee and subject to the discretion of the Director of Public Safety or his designee, an employee may be permitted time off by providing a substitute police officer of the same rank capable to perform his tour of duty to work such tour of duty.

Article XXXIII, Maintenance of Standards, provides that wages, hours of work, overtime, differentials and general working

conditions will be maintained at no less than the prevailing standards in effect when the agreement was signed.

On April 8, 2005, a departmental order was issued stating that when regular staffing falls below four uniformed officers, an overtime officer shall be called in.

On March 9, 2007, this departmental order was issued:

Be advised, in reference to the taking of time, whether it be Vacation, Day Due or RFD, Squads having seven officers are permitted to have two officers off. One may be a supervisor and one patrol officer, or two patrol officers. Two Supervisors may not be off at the same time. In the event a third officer needs off (whether it be a patrol officer or supervisor) that officer may submit a request for a shift swap. In detail squads with less then [sic] 7 officers only one officer will be permitted off at a time. If any other additional officers need the day off they also may submit a request for a shift swap.

The public safety director states that the order was consistent with a past practice that had not previously been reflected in writing.

On March 13, 2007, the PBA filed a grievance asserting that the order changed vacation procedures and violated the parties' agreement and past practice. The grievance was denied at all levels and on March 28 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.

Arbitration will be permitted if the subject of a dispute involving police or firefighters 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 (¶1111 App. Div. 1983). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), bars arbitration only if the agreement alleged to have been violated is preempted or would substantially limit government's policymaking powers. There is no preemption claim in this case.

The Township argues that it has a managerial prerogative to ensure adequate staffing and supervision within the department. It maintains that the department order merely sets forth the pre-existing practice and does not interfere with employees' time off since it provides that officers whose requests cannot be granted may request shift swaps. The Township also argues that there is

no specific dispute over the denial of leave time. Finally, the Township states that the contract does not limit the number of officers that may schedule time off at once.

The PBA argues that the scheduling of time off is mandatorily negotiable and does not place significant limitations on government's policymaking powers. The PBA asserts that the grievance does not concern the negotiability of staffing levels, but instead the denial of leave time. It maintains that an employer does not have a managerial prerogative to limit leave time or the number of employees on leave absent a showing that minimum staffing levels would be jeopardized. The PBA asserts that prior to the department order, staffing levels were sufficient.

Scheduling of vacation leave or other time off is negotiable and arbitrable, provided the employer can meet its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987). An employer may deny a requested leave day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford, P.E.R.C. No.

97-12, 22 NJPER 322 (¶27163 1996); Town of Secaucus, P.E.R.C. No. 2000-73, 23 NJPER 174 (¶31070 2000). An employer does not have a prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements would be jeopardized. Pennsauken.

South Brunswick Tp., P.E.R.C. No. 94-100, 20 NJPER 199 (¶24094 1994), one of three cases the Township relies on, is distinguishable because the grievance directly challenged the employer's minimum staffing levels. Woodbridge Tp., I.R. No. 99-11, 25 NJPER 113 (¶30049 1999), is distinguishable because the employer proved a need to place limits on the number of officers in the specialized bicycle unit that could be off at any one time in order to maintain minimum staffing requirements in that unit. Finally, as the Township acknowledges, the hearing examiner's analysis in Lacey Tp., H.E. No. 86-27, 12 NJPER 107 (¶17042 1985), which found that the employer had a right to limit leave time to provide adequate staffing, was not adopted by the Commission Chairman in the final agency decision. P.E.R.C. No. 86-88, 12 NJPER 193 (¶17071 1986).

Under Paterson and its negotiability tests, absent a showing that staffing levels will drop below minimum standards, a grievance asserting that the employer limited the number of employees who may go out on vacation or other leave is legally arbitrable, even if an employer must call in an officer on

overtime to maintain its desired staffing levels. Whether the departmental order changed the past practice or otherwise violated the parties' contract is for the arbitrator to decide.

ORDER

The request of the Township of Weehawken for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan and Joanis voted in favor of this decision. Commissioner Watkins voted against this decision. Commissioners Branigan and Fuller were not present.

ISSUED: October 30, 2008

Trenton, New Jersey