

P.E.R.C. NO. 2013-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

Petitioner,

-and-

Docket No. SN-2012-034

FOP LODGE #130,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Clayton for a restraint of binding arbitration of a grievance filed by FOP Lodge 130. The grievance asserts that the Borough violated the parties' collective negotiations agreements when the Chief of Police issued an amended general order that unilaterally changed the procedures for overtime opportunities and assignment. The Commission holds that arbitration of the grievance would not substantially limit the Borough's policymaking powers and the grievance is therefore at least permissively negotiable.

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, Law Office of Timothy D. Scaffidi,
attorneys (Timothy D. Scaffidi, of counsel)

For the Respondent, The Cushane Law Firm, LLC,
attorneys (Thomas A. Cushane, of counsel)

DECISION

On January 17, 2012, the Borough of Clayton petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by FOP Lodge #130 and FOP Lodge #130 (Superiors). The grievance asserts that the Borough violated the parties' collective negotiations agreements when Chief of Police Dennis Marchei issued an amended General Order entitled "Overtime Call-In Guidelines," that allegedly unilaterally changed the procedures for overtime opportunities and assignment. We decline to restrain arbitration.

The parties have filed briefs and exhibits. Neither party has filed a certification based upon personal knowledge.

The FOP represents all police officers and superior officers.^{1/} The parties' most recent contracts are effective from January 1, 2010 through December 31, 2012. The grievance procedures end in binding arbitration.

Article VII in the superior officers' contract is entitled Overtime:

1. Each employee required to work beyond his/her normal shift shall be entitled to time and one-half compensation or to accumulate compensatory time of equal monetary value, up to a maximum of two hundred and fifty (250) hours.

2. a. It is understood and agreed that the term "normal shift" shall be defined as the shift that is normally scheduled for the position held, be it 8 hours, 10 hours or 12 hours in a 24-hour period on a routine basis.

b. It is further agreed that the normal work week for the employees covered by this agreement shall consist of no more than 40 hours in any work week. A seven day work period shall be defined as beginning 12:01 a.m. Monday, and extending through 11:59 p.m. on Sunday.

3. For the purpose of computing overtime, all hours worked in excess of the "normal shift" in a 24-hour period shall be compensated at a rate of one and one-half (1 ½) times the officer's regular base pay.

4. All overtime will be computed using base salary, plus shift differential, plus education incentive. All overtime will be computed on a 2,080 hour work year.

5. The Captain shall not be entitled to any compensatory time and/or overtime.

^{1/} The police officers and superior officers have separate contracts.

Article VII in the police officers' contract is entitled
Overtime:

1. Each employee required to work beyond his/her normal shift shall be entitled to time and one-half compensation or to accumulate compensatory time of equal monetary value, up to a maximum of two hundred and fifty (250) hours.

2. It is understood and agreed that the term "normal shift" shall be defined as any continuous twelve (12) hour period within any continuous period of twenty-four (24) hours. It is further agreed and understood that the normal work week for the employees covered by this Agreement shall consist of no more than forty (40) work hours in any week. A seven day work period shall be defined as beginning at 12:01 a.m. Monday, and extending through 11:59 p.m. on Sunday.

3. For the purpose of computing overtime, all hours worked in excess of twelve (12) hours in one twenty-four (24) hour day shall be compensated at a rate of one and one-half (1 ½) times the officer's regular base pay.

4. For the purpose of computing overtime for the personnel working an eight (8) hour shift, all hours worked in excess of eight (8) hours in one twenty-four (24) hour period shall be compensated at a rate of one and one-half (1 ½) times the officer's regular base pay.

5. All overtime will be computed using base salary, plus shift differential, plus education incentive. All overtime will be computed on a 2,080 hour work year.

On October 16, 2011 the Chief issued a general order
entitled Overtime Call-In Guidelines providing in pertinent part:

1. Purpose:

To establish procedures that ensure equality and fair distribution, in the assigning of and the accurate recording of overtime for the Officers of the Clayton Police Department. And to reduce the likelihood of an Officer working an extended amount of hours without ample time of rest.

PRE-SCHEDULED EVENTS/OVERTIME:

The procedure regarding pre-scheduled events such as vacations, Personal Days (pre-scheduled), Off-Duty Roadwork, Athletic Events, Parades, Special Events, etc. will be as follows:

The Chief or designee will schedule all of the above utilizing the pre-scheduled events log book, the coverage will then be posted for informational purposes. The next eligible officer will be offered the overtime based on past offerings/availability/ample time of rest, etc. once an officer takes the shift, in the event the officer cannot work it, it shall be his/hers responsibility to get it covered by contacting the Chief and utilizing the pre-scheduled events log book, in the event it cannot be covered the officer shall use comp/personal/vacation day.

On November 2, 2011 the FOP filed a grievance. On December 16, 2011, the Mayor and Council denied the grievance.^{2/} On December 21, the FOP demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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

^{2/} The Borough's Administrator sent a memorandum to the FOP on December 27, stating that the grievance was denied because the Chief of Police had a management right to implement the overtime policy and that the policy did not contradict any article in the FOP contracts.

are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. We specifically do not determine the parties' past and current practices concerning procedures for assigning overtime and whether the Chief's order conforms with those practices.^{3/}

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and

^{3/} City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555 (1998), is not pertinent as it concerns whether an employer has a prerogative to determine if dispatching duties should be performed by police or civilians where the department sought to increase the number of officers on patrol. This dispute involves the allocation of overtime among police officers.

firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Because this dispute involves a grievance, arbitration is permitted if 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.^{4/}

The Borough argues that the assignment of overtime does not intimately and directly affect the work and welfare of police because it would not affect overtime earnings. It asserts that negotiation of overtime assignments would significantly interfere with the determination of governmental policy. The Borough relies on Borough of Atlantic Highlands v. Atlantic Highlands PBA

4/ N.J.S.A. 40A:14-118, cited by the Borough, is a general statute that does not preempt negotiations over terms and conditions of employment. See Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101, 102-103 (¶31041 2000).

Local 242, 192 N.J. Super. 71 (App. Div. 1983). It also cites Morris County Sheriff's Office v. Morris County Policemen's Benevolent Ass'n, Local 298, 418 N.J. Super. 64, 77 (App. Div. 2011) for the proposition that the Chief's decision to rotate overtime "implicates the essential duty of government to 'spend funds wisely.'"

The FOP argues that its grievance challenges neither the Borough's prerogative to determine staffing levels, nor its ability to determine when overtime work is needed. It contends that the sole issue involved is how to distribute overtime among qualified officers. It cites Town of Kearny and Kearny Superior Officers Ass'n, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999) and City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982)

In Long Branch, we distinguished between a police department's prerogative to decide that overtime is needed and its duty to negotiate over the allocation of overtime opportunities among qualified employees.^{5/} This dispute involves

^{5/} Neither Atlantic Highlands, nor County of Morris controls. The former case involved the establishment of overall work schedules, not overtime allocation. The latter decision involved an attempt to maintain overtime assignments when the County had determined that those posts did not need to be filled.

only how overtime will be allocated. See also State v. IFPTE, Local 195, 169 N.J. 505 (2001).^{6/}

The Borough has neither asserted nor substantiated that any of the rank and file or superior officers are unqualified to perform the overtime assignments. The policy does state a concern that officers should not work for an extended time without ample rest, but there has been no showing that fatigue has been an issue and the employer has not cited any case law addressing that issue.

Where a public employer has demonstrated that adhering to a particular work schedule has produced fatigue among public safety personnel, we have restrained arbitration of a grievance challenging the alteration of a work schedule to meet that concern. See City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's un rebutted evidence, including a supervisor's operational report, showed that 12-hour shift had resulted in staffing, supervision, and fatigue problems and had compromised police officer safety because of reduced number of officers on evening shift). But, in the absence of such a showing, we have held that similar disputes are at least permissively negotiable and arbitrable. See City of Vineland, P.E.R.C. No. 94-69, 20 NJPER 60 (¶25023 1993) (absent evidence

^{6/} The Borough's assertion that for 20 years the FOP has acquiesced in the practice of the chief making overtime assignments goes to the merits of the grievance and does not affect whether the dispute is legally arbitrable.

that 12-hour tours had fatigued Emergency Medical Technicians, proposal to preserve such tours rather than switch to eight-hour tours found negotiable). See also City of Newark, P.E.R.C. No. 2006-60, 32 NJPER 40 (¶22 2006).^{7/}

Under this case law and the Paterson standards, we hold that arbitration of the grievance would not substantially limit the Borough's policy-making powers.

ORDER

The request of the Borough of Clayton to restrain binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: December 13, 2012

Trenton, New Jersey

^{7/} The order in dispute is a comprehensive overtime allocation procedure. In the event the Borough refuses to assign overtime in a given situation because it finds that the officer is too fatigued to continue on duty, then it can seek to restrain arbitration if that personnel action is challenged.