

P.E.R.C. NO. 2013-80

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WALLINGTON,

Petitioner,

-and-

Docket No. SN-2012-071

PBA LOCAL 321,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Wallington for a restraint of binding arbitration of a grievance filed by PBA Local 321. The grievance asserts that the Borough violated the parties' agreement when it failed to maintain minimum staffing levels of five police officers per shift. The Commission holds that minimum staffing levels are neither mandatorily nor permissively negotiable and cannot be challenged through binding grievance arbitration. The Commission notes that the PBA's assertion that its grievance concerns the employee workload and safety impacts of the Borough's decision to operate beneath its minimum manpower standards was not supported by a certification of facts.

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, Ruderman & Glickman, P.C.,  
attorneys (John A. Boppert, of counsel)

For the Respondent, Loccke, Correia, Limsky & Bukosky,  
attorneys (Marcia J. Tapia, of counsel)

DECISION

On May 31, 2012, the Borough of Wallington (Borough) petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by PBA Local 321. The grievance asserts that the Borough violated a Memorandum of Agreement between the parties when it failed to maintain minimum staffing levels of five police officers per shift.

The parties have filed briefs and exhibits. Neither party has filed a certification. These facts appear.

The PBA represents the Borough's Police Department employees of all ranks, excluding captains and the chief of police. The PBA and the Borough are parties to a collective negotiations

agreement (CNA) effective from January 1, 2009 through December 31, 2012. The grievance procedure ends in binding arbitration.

In addition to the parties' CNA, they are also parties to a Memorandum of Agreement (MOA) approved via Resolution on August 11, 2008 and signed on August 12, 2008. Section 2.C. of the MOA states: "Each shift shall consist of five (5) officers at all times."

On December 31, 2011, the PBA filed a written Step 2 grievance asserting that the Borough violated the five officers per shift agreement as outlined in section 2.C. of the MOA. On January 5, 2012, Captain Kisala responded to the grievance with a memorandum recommending that it proceed to Step 3.<sup>1/</sup> The PBA filed a Step 3 grievance on January 10, 2012 which reiterated the alleged violation of the MOA and specifically noted: "At the present time Squad C consists of four Officers which is in violation of the contract."

On February 7, 2012, the borough's attorney responded to the grievance by noting that it would be placed on the agenda for consideration at the next Wallington Mayor & Council meeting. On March 19, 2012, the PBA stated that it had received "no response/satisfactory resolution" to its Step 3 grievance, so it demanded arbitration. On April 3, 2012, the Borough's written

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<sup>1/</sup> In the memorandum, Captain Kisala also stated: "I agree with you and have been constantly telling the Mayor and Council that we need more manpower."

Step 3 grievance response stated: "Please be advised that the Wallington Mayor & Council is exploring all options available to it to increase manpower and/or to address the concerns of PBA Local 321." On May 31, 2012, the Borough filed this petition in response to the PBA's March 19, 2012 demand for arbitration.

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 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.

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 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 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). Thus, if we conclude that the PBA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough argues that an agreement specifying minimum manpower levels per shift impermissibly infringes on its non-negotiable managerial prerogative to set minimum manpower levels. It also asserts that a determination to operate a shift at below announced minimum staffing levels is also non-negotiable. The Borough states that even if the disputed minimum staffing provision (MOA Section 2.C.) was agreed to and/or has been observed since 2008, the Borough has not waived its right to assert the non-negotiability of setting staffing levels.

The PBA responds that the Borough has not made the managerial determination that it can safely operate below minimum manpower levels, as indicated by the grievance responses from Captain Kisala and the Borough's attorney noting that more manpower is needed and options are being explored. It argues that it is not seeking to negotiate minimum manpower; rather, its grievance concerns how the Borough's decision to operate beneath its minimum manpower standards impacts employees' workload and safety. The PBA asserts that such workload and safety impacts are mandatorily negotiable and thus arbitrable.

Public employers are not required to negotiate about overall staffing levels or how many police officers will be on duty at a particular time, even where staffing decisions may affect employee safety. Such minimum staffing requirements are not mandatorily or permissively negotiable and cannot be challenged

through binding grievance arbitration. See, e.g., Paterson; Bergen Cty. and PBA Local No. 134, Bergen Cty. Sheriff's Officers, P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983), app. disp. NJPER Supp.2d 143 (¶128 App. Div. 1984); E. Orange and Local 23, E. Orange Firemen's Mutual Benev. Ass'n, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. denied 88 N.J. 476 (1981); Nutley Tp., P.E.R.C. No. 2012-51, 38 NJPER 337 (¶114 2012); Hawthorne Boro., P.E.R.C. No. 2011-61, 37 NJPER 54 (¶20 2011); North Hudson Regional Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); West Paterson Boro., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Camden, P.E.R.C. No. 94-62, 20 NJPER 48 (¶25016 1993); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983); Readington Tp., P.E.R.C. No. 84-7, 9 NJPER 533 (¶14218 1983); City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983); Wanaque Boro., P.E.R.C. No. 82-42, 7 NJPER 613 (¶12273 1981); Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981); Weehawken Tp., P.E.R.C. No. 81-104, 7 NJPER 146 (¶12065 1981); City of Newark, P.E.R.C. No. 76-40, 2 NJPER 139 (1976).

With respect the PBA's assertion that its grievance concerns how the Borough's decision to operate beneath its minimum manpower standards impacts employees' workload and safety, we disagree. The PBA has not submitted a certification containing facts to support its argument that the workload of the police officers increased or that their safety was impacted. Hawthorne Boro.; North Hudson Regional Fire and Rescue. This grievance directly challenges the employer's staffing decision.

ORDER

The request of the Borough of Wallington for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioners Jones and Wall recused themselves.

ISSUED: April 25, 2013

Trenton, New Jersey