

P.E.R.C. NO. 2016-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and-

Docket No. SN-2015-039

PBA LOCAL 109A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the County of Hudson's request for a restraint of binding arbitration of a grievance filed by PBA Local 109A. The grievance contests the County's unilateral rescheduling of work assignments, shifts, and days off without utilizing a shift-bidding process. The Commission holds that its decision in Hudson Cty., P.E.R.C. No. 97-16, 22 NJPER 328 (¶27167 1996), finding that the same contract provision was not mandatorily negotiable, is controlling such that non-negotiability has previously been determined.

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, Donato J. Battista, County Counsel
(Daniel W. Sexton, of counsel)

For the Respondent, Detzky, Hunter & DeFillippo, LLC,
attorneys (David J. DeFillippo, of counsel and on the
brief)

DECISION

On December 8, 2014, the County of Hudson (County) filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by PBA Local 109A (PBA). The grievance asserts that on November 1, 2013, the County violated the parties' collective negotiations agreement (CNA) by unilaterally rescheduling the work assignments, shifts, and days off for five lieutenants without utilizing a shift-bidding process. We grant the County's request for a restraint of binding arbitration.

The parties have filed briefs and exhibits. The PBA has filed the certification of Lieutenant Thomas Monteleone (Monteleone), one of the grievants.^{1/} These facts appear.

The PBA represents all Sergeants and Lieutenants employed by the County Department of Corrections. The parties last fully executed CNA covers the years 1994-1998, and same has been extended through a series of interest arbitration awards and side agreements up through the most recent term of 2013-2017. The grievance procedure agreed to by the parties ends in binding arbitration.

Article X, RIGHTS OF PARTIES, Sections 10.1 and 10.2 provide:

10.1 The County hereby retains the right to manage and control its Correctional Facilities and, in addition, retains the right to hire, promote, transfer, discipline or discharge Employees for just cause.

10.2 The County, in accordance with applicable laws and regulations, retains full jurisdiction and authority over matters of policy and retains the right to relieve Employees from duties because of lack of work or other legitimate reasons.

Article XVII, SHIFT BIDDING, Section 17.1 provides:

17.1 In the event a vacancy is created or occurs, Employees shall be entitled to bid for choice of shift assignment, in order of

^{1/} The County did not recite facts "supported by certification(s) based upon personal knowledge." N.J.A.C. 19:13-3.6(f)1.

seniority based upon rank-for-rank and seniority within rank.

The CNA also includes a past practice clause.

According to the grievant's certification, in early 2009 the DOC posted a notice to all lieutenants that the assignment of Unit Manager was available and a shift-bidding process was undertaken which was determined by seniority. The grievant's certification also states that on November 1, 2013, without any notice or shift-bidding process, the Captain sent correspondence to five lieutenants informing them that, effective November 2, 2013, their work assignments, shifts, and days off were being changed. Specifically:

-Lt. Monteleone was assigned to the 6-2 tour as Officer-in-Charge (OIC) without Saturdays/Sundays off;

-Lt. McCleary was assigned to the 6-2 tour as OIC without Saturdays/Sundays off;

-Lt. Yurecko was assigned to Unit 3 management;

-Lt. Geoghegan was assigned to Unit 4 management; and

-Lt. Oyola was assigned to the 2-10 tour as OIC without Saturdays/Sundays off.

In its brief, the County asserts that these changes were made in anticipation of retirements. Specifically, the County asserts that 11 of 14 lieutenants filed for retirement - two retirements were to take place in 2014 and six were to take place in 2015. The brief claims that the DOC sought to provide unit

management with continuity and stability by reassigning officers who were anticipated to retire with officers who had no such anticipated date.

The grievant's certification states that despite being closer to retirement eligibility, several lieutenants were reassigned to manager positions. The PBA filed a grievance with the County claiming a violation of Articles XVII (shift-bidding) and XXVI (past practice) of the parties' CNA. The grievance was not resolved at any of the internal steps of the procedure. On March 25, 2014, the PBA filed a Request for Submission of a Panel of Arbitrators with the Commission. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 Local 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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). Thus, if we conclude that the 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. Paterson, 87 N.J. at 92-93.

The County asserts that the grievance filed by the PBA infringes on its managerial prerogative to reassign lieutenants in anticipation of retirements. Further, the County contends that we previously ruled that Article XVII was not mandatorily negotiable because it did not preserve management's right to deviate from a seniority-based shift assignment system to accomplish its governmental policy goals.

The PBA acknowledges the prior Commission ruling on this issue, but asserts that the County's right to deviate from a seniority-based shift assignment system is preserved through other provisions in the CNA. Further, the PBA challenges the County's deviation from the seniority-based shift assignment system based on past practice.

The question before us is whether the parties could have legally agreed to allow corrections officers to bid for assignments based upon seniority. Under the circumstances of this case, the answer is no.

"The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any agreed-upon seniority system must be assessed case-by-case" focusing on "the specific wording of a contract proposal or the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented... ." Mercer County Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998);

see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998). In Camden County Sheriff, P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), denying recon. P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), the Commission stated that "public employers and majority representatives may agree that seniority can be a factor in shift selection where all qualifications are equal and managerial prerogatives are not otherwise compromised." See also City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); Mercer County Sheriff, supra; City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); contra Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶25196 1994) (clauses that base shift selection solely on seniority are not mandatorily negotiable). However, "public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs." Camden County Sheriff, supra.

The doctrine of res judicata is applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits. See Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd NJPER Supp.2d 151 (¶134 App. Div. 1985) (citing Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583 (3d Cir. 1975); Lubliner v. Bd. of

Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428, 435 (1960)). Further, the doctrine of collateral estoppel is applicable when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally, the same two parties, regardless of whether the causes of action were identical and bars relitigation of that particular question of fact. See Newark Bd. of Ed., supra (citing State v. Redinger, 64 N.J. 41 (1973); Harbor Land Development Corp., Inc. v. Mirne, Newels, Tumem, Magee & Kirschner, Esqs., 168 N.J. Super. 538 (App. Div. 1979)). In Hudson Cty., P.E.R.C. No. 97-16, 22 NJPER 328 (¶27167 1996)^{2/}, a case involving the same parties herein, we held that a contract proposal seeking to include Article XVII, Section 17.1 in successor contracts was not mandatorily negotiable.^{3/} Therein, we found:

Because this dispute involves contract proposals and the employer need not negotiate over a permissive subject, we need only decide whether the proposals are mandatorily negotiable. Paterson; Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

* * *

In City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶125197 1994), we reviewed the precedents on shift assignments, including several cases establishing that proposals

^{2/} Hereinafter Hudson Cty. I.

^{3/} The County filed its scope of negotiations determination in Hudson Cty. I on June 2, 1995. At that time, the parties' collective negotiations agreement had expired.

basing shift assignments solely on seniority were not mandatorily negotiable because they did not preserve management's right to deviate from a seniority system to accomplish its governmental policy goals. See, e.g., Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶125196 1994); Teaneck Tp., P.E.R.C. No. 93-66, 19 NJPER 122 (¶24058 1993), aff'd 20 NJPER 406 (¶25205 App. Div. 1994). Under these precedents, section 17.1 is not mandatorily negotiable because it appears to mandate that shift assignments be based solely on seniority and does not appear to preserve management's right to deviate from a seniority shift assignment system to accomplish its governmental policy goals. Local 109A's assertion that the provision merely establishes the order in which the employer must consider employees for shift assignments is not consistent with the language of the provision. If the provision is to be so construed, clarifying and limiting language must be added.

[Hudson Cty., P.E.R.C. No. 97-16, 22 NJPER 328 (¶27167 1996)]^{4/5/6/}

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- 4/ As indicated by the Commission in a footnote, the PBA also filed an unfair practice charge seeking to enforce the provisions at issue in Hudson Cty. I. Based upon the PBA's representation, that charge was withdrawn pursuant to a resolution as memorialized in a Side Agreement.
- 5/ Although not cited by either of the parties, the Commission is also aware of its decision in Hudson Cty., P.E.R.C. No. 2013-78, 39 NJPER 495 (¶157 2013) (Hudson Cty. II). Therein, the County petitioned for a scope of negotiations determination related to several of the PBA's contract proposals, including a new seniority-based shift-bidding process. The Commission dismissed the County's petition as moot based upon the fact that an interest arbitration award was issued prior to its decision and no issues remained in dispute.
- 6/ The record does not reflect why the language in Article XVII of the CNA remained unchanged after our ruling. Failure to change such language has resulted in the unusual situation
(continued...)

Given our prior decision in Hudson Cty. I, and for the reasons set forth therein, we find that the issue of shift-bidding by seniority as presented by the facts of this case is not mandatorily or permissively negotiable. The PBA's assertion that there is a past practice of shift-bidding by seniority does not undermine the holding of our prior decision. "Once the negotiability of a proposal or provision has been determined, its negotiability may not be challenged each time the contract expires." City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988).

ORDER

The request of the County of Hudson for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall recused himself.

ISSUED: August 13, 2015

Trenton, New Jersey

6/ (...continued)
of having a provision that was declared not mandatorily negotiable in 1996 remain within an agreement and the subject of continued litigation up to the present. We encourage the parties to remedy this issue during the next round of negotiations.