P.E.R.C. NO. 2023-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Petitioner,

-and- Docket No. SN-2023-009

PBA LOCAL 338,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for restraint of binding arbitration of the PBA's grievance contesting the Borough's prohibition of the grievant from performing extra-duty work for 60 days and by not holding a disciplinary hearing over it. As the prohibition on extra-duty work was imposed as part of a formal reprimand, the Commission finds it was a minor disciplinary penalty subject to review in arbitration. The Commission also finds that the Borough's alleged violation of disciplinary hearing procedures prior to imposing the extra-duty work prohibition is legally arbitrable. Finally, the Commission finds that the Borough did not establish a governmental policy need to deviate from its usual allocation of extra-duty work; therefore, arbitration over the grievant's removal from extra-duty work would not significantly interfere with its managerial prerogative to administer the extra-duty work program.

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 Michael A. D'Aquanni, LLC, attorneys (Heather J. Fay, of counsel and on the brief)

For the Respondent, Law Offices of Nicholas J. Palma (Valerie Palma DeLuisi, of counsel and on the brief)

DECISION

On September 21, 2022, the Borough of Milltown (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the PBA Local 338 (PBA). The grievance alleges that the Borough violated the parties' collective negotiations agreement (CNA) by prohibiting the grievant from performing extra-duty work for 60 days as a disciplinary penalty and by not holding a disciplinary hearing prior to imposing that monetary penalty.

The Borough filed briefs, exhibits, and the certification of Police Chief Brian Knelle. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The PBA represents all Milltown Patrolmen, Corporals, and Sergeants. The Borough and PBA were parties to a CNA in effect from January 1, 2017 through December 31, 2019. The grievance procedure ends in binding arbitration.

The PBA's request for arbitration cites the following CNA clauses as being violated:

> Article XXXV - Outside Employment
>
> Officers shall be permitted to contract work other than normal patrol duties and normal police work. Uniformed outside employment shall be contracted through the Chief of Police and the Chief, or his designee, shall equally distribute such work, to the extent possible, on a rotating basis among the Officers (pursuant to the overtime procedures).
>
> Article XXXVII - Bill of Rights
>
> If the investigation or interrogation of an officer results in a recommendation of some action, such as a demotion, dismissal, transfer, loss of pay, reassignment or other similar action which would be considered a punitive measure, then before taking such action, the Department shall give notice to the office that he is entitled to a hearing on the issues.

On May 16, 2022, Lt. Daniel Cononie notified the grievant that he was scheduled to appear for Grand Jury in Middlesex County on May 18 at 8:30 a.m. Knelle certifies that Lt. Cononie advised the grievant that he could not move his grand jury appearance to work an extra-duty assignment. On May 16, the grievant advised Lt. Cononie that the May 18 grand jury

appearance was rescheduled for June 2022. The grievant worked from 12 p.m. to 6 p.m. on May 17, 2022. He was also scheduled to work from 6 p.m. on May 17 to 6 a.m. on May 18, but he left at 12 a.m. and put in six hours of "time due." Unknown to his supervisors, the grievant's May 18 grand jury assignment was not actually rescheduled. The grievant accepted an extra-duty assignment for May 18 from 7 a.m. to 12 p.m. despite having rescheduled his grand jury assignment for 12 p.m. Knelle certifies that on May 18, the grievant left his extra-duty assignment early, without getting someone to cover him, and without advising Headquarters that he was leaving the post.

Knelle certifies that on May 18, an employee from the Middlesex County Prosecutor's Office ("MCPO") notified Lt. Cononie that the grievant arrived late to the grand jury, was unprepared for his testimony, and had an unprofessional appearance. The MCPO employee advised that she had rescheduled the grievant's grand jury appearance from 8:30 a.m. to 12 p.m. after the grievant contacted her on May 16 stating that he could not arrive at 8:30 a.m. The department investigated the complaints. On July 11, the Borough issued the grievant a written reprimand for violation of department rules, regulations, standards, and operating procedures. The reprimand prohibited the grievant from working extra-duty contractor work for a period of sixty (60) days. Knelle certifies that this decision was made

because it served the best interests of the department, i.e., the safety, efficiency, reputation and integrity of the department.

The grievant certifies that on May 16, 2022, he was informed that he was to appear and testify on May 18 before a grand jury in Middlesex County Superior Court. He certifies that officers usually receive approximately thirty days of notice before any grand jury appearance. He was concerned about such short notice and potential issues such as childcare, because the time he was to testify (8:30 a.m.) was outside of his regular 6 p.m. to 6 a.m. overnight shift. He certifies that he raised his concerns about short notice to the MCPO and the MCPO moved his grand jury appearance to the following Wednesday at 2:30 p.m.

The grievant certifies that he then took an additional shift with the Department to work from 12 p.m. to 6 p.m. on May 17, 2022. Later that day, he was informed that the grand jury proceeding was rescheduled for May 18 at 8:30 a.m. The grievant informed Lt. Cononie of his childcare issues and asked for departmental time off to prepare and rest in addition to complying with the limits of 18 hours of work in a 24-hour period. The Department denied his request. The grievant certifies that the grand jury proceeding was moved back from 8:30 a.m. to 12 p.m. to resolve his downtime issue. He then resolved the childcare issue after discussion with his wife. The grievant agreed to complete an extra-duty work assignment for PSE&G on the

morning of May 18, 2022 before the grand jury appearance after Lt. Cononie agreed to split the PSE&G extra-duty shift with him. The grievant certifies that Lt. Cononie did not arrive in time to relieve him from the PSE&G post. When he left, he forgot to announce that he was leaving the town. He arrived at 12:11 p.m. for the grand jury proceeding and did not notice that his uniform was unkempt.

The grievant certifies that he printed out the necessary reports for the grand jury proceeding, which was confirmed in the electronic system. He prepared for the proceeding that morning by reading the reports in his car during the PSE&G shift. He certifies that, as is regular practice in the Department, he did not bring the reports with him and the Prosecutor informed him that he did not need to have the reports with him. The grievant certifies that he was prepared for the grand jury proceeding and knew the answers to the questions he was asked during that proceeding.

On July 7, 2022, the Borough issued the grievant a written "Reprimand Notice" concerning the events of May 18, 2022. The reprimand stated (emphasis added):

> [Grievant] you are being reprimanded for violating department rules, regulations, and standard operating procedures. Specifically by: arriving late to Grand Jury on May 18, 2022 and having an unprofessional appearance. You are also being reprimanded for not following direct orders given by Lt. Cononie and for putting in over time voucher hours

> for hours you were not entitled to receive. In the future you will make sure your uniform appearance is always up to our standards, especially when appearing in Superior Court. In the future you will contact Lt. Johnson when/if a conflict arises with a grand jury subpoena. You are not authorized to contact grand jury staff on your own to make changes to subpoenas. In the future if you have questions regarding overtime hour procedures you will bring the matter to the attention of [your] supervisor using the chain of command. In addition to this reprimand notice you will not be allowed to work extra duty contractor work for a period of sixty days starting with the date you receive this notice. This does not apply to patrol road coverage, emergency patrol work, or prisoner transports.

On August 1, 2022, the PBA filed a grievance on behalf of the grievant.[1/] On August 2, Chief Knelle denied the grievance, stating: "The penalties I imposed are extremely fair, valid and just." The Borough denied the grievance at all steps of the grievance procedure. On September 7, the PBA filed a request for binding grievance arbitration seeking to arbitrate the following:

> Art. XXXVII of the parties' collective negotiations agreement ("cna") affords Officers a disciplinary hearing prior to the imposition of a monetary penalty. Milltown PD imposed a monetary penalty on [Grievant] without affording him such a hearing. Specifically, Officer DeFalco was docked for overtime he already worked, and he was

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1/ The record does not include the actual language of the grievance at any of the steps prior to the PBA's request for arbitration. The record does include the dates the grievance was submitted at various stages of the grievance procedure, and e-mails from the PBA advancing the grievance and from the Borough denying the grievance.

> forbidden from performing "extra duty contractor work" for a period of 60 days as part of his disciplinary penalty. Milltown PD also violated Article XXXV of the cna, which requires contract work to be equally distributed among all officers on a rotating basis. This Article contains no clause allowing contract work to be withheld as part of a disciplinary penalty.

On September 21, the Borough filed this scope of negotiations petition seeking to restrain binding arbitration.[2/]

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 contractual merits of the grievance or any contractual defenses the employer may have.

2/ The PBA's request for arbitration also alleges the Borough violated the CNA's disciplinary procedures by failing to allow him to be accompanied by an attorney during a disciplinary interview and violated a contractual overtime clause by not paying the grievant for four hours of overtime when he was called in outside of regular work hours for the interview. However, the Borough's reply brief states that its scope petition does not address those issues.

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.

Arbitration is permitted if the subject of the grievance 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 a 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 asserts that arbitration should be restrained because it has a managerial prerogative to manage extra-duty employment to maintain the Department's integrity and reputation. It argues that it restricted the grievant from extra-duty work for 60 days because his extra-duty work had an adverse effect on his regular duty assignments. The Borough contends it had a managerial prerogative to suspend the grievant from extra-duty assignments following his alleged misconduct involving his late grand jury appearance. It asserts that restricting the grievant from extra-duty work was not discipline because it is not part of an officer's regular work or salary. The Borough argues that the reprimand did not include a monetary penalty because extra-duty assignments are offered on a rotating basis to all qualified officers per the CNA, so the grievant was never guaranteed any extra-duty work income during the 60-day revocation.

The PBA asserts that the grievance is arbitrable because it concerns the mandatorily negotiable issues of the review of the Borough's imposition of discipline on the grievant and procedural

aspects of extra-duty employment. It argues that, while the Borough has a managerial prerogative to administer the extra-duty work program, it does not have a non-negotiable managerial prerogative to remove the grievant from the contractual extra-duty assignment rotation as a form of discipline without complying with the disciplinary review process. The PBA contends that the Borough's managerial prerogative to administer the extra-duty work program is not undermined by adherence to the parties' negotiated eligibility system for equally distributing extra-duty assignment opportunities among the officers.

We first address the parties' dispute over whether the Borough's 60-day removal of the grievant from extra-duty assignments constituted discipline and is subject to the parties' contractual disciplinary review procedures, including binding arbitration. The Borough's July 7, 2022 written reprimand of the grievant for his late arrival and unkempt appearance at the May 18 grand jury proceeding included the following penalty: "In addition to this reprimand notice you will not be allowed to work extra duty contractor work for a period of sixty days starting with the date you receive this notice." As the prohibition from extra-duty assignments potentially cost the grievant opportunities for additional compensation and was imposed as part of a disciplinary action, the grievant may seek review of that minor discipline in binding grievance arbitration. N.J.S.A.

34:13A-5.3; Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd, 27 NJPER 357 (¶32128 App. Div. 2001); Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997) (minor discipline of police officers is arbitrable).

We next address the PBA's request to arbitrate over the Borough's alleged violation of contractual disciplinary procedures such as the right to a hearing prior to the imposition of a monetary penalty. The Commission and courts have held that procedural safeguards associated with discipline and investigations are mandatorily negotiable because they intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. See, e.g., Rutgers University, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), aff'd, 45 NJPER 45 (¶12 App. Div. 2018) (pre-disciplinary investigation procedures were arbitrable); N.J.I.T., P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd, 29 NJPER 415 (¶139 App. Div. 2003) (contractual right to legal representation during due process hearing is arbitrable); and Rutgers University, P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995) (alleged denial of pre-disciplinary hearing was arbitrable). Accordingly, the PBA's allegation that the Borough violated disciplinary hearing procedures prior to imposing the 60-day removal from extra-duty work opportunities is legally arbitrable.

Finally, we address the Borough's assertion that its removal of the grievant from extra-duty work for 60 days cannot be challenged as discipline because it had the non-negotiable managerial prerogative to deny him such work. A public employee's ability to earn extra income through outside employment is generally mandatorily negotiable. Ass'n of New Jersey State College Faculties, Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974). However, a public employer also has a managerial interest in administering extra-duty employment involving police-type services performed by police officers. City of Elizabeth, P.E.R.C. No. 2014-94, 41 NJPER 67 (¶21 2014), aff'd, 42 NJPER 454 (¶124 App. Div. 2016) (managerial prerogative to limit extra-duty work to ranks below captain); Livingston Tp., P.E.R.C. No. 2014-66, 40 NJPER 448 (¶156 2014), aff'd, 41 NJPER 461 (¶142 App. Div. 2015) (managerial prerogative to prohibit officers out on terminal leave from extra-duty work); and City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003) (managerial prerogative to administer extra-duty work).

Although a public employer has a right to administer extra-duty work arrangements involving police services, many issues concerning such extra-duty assignments remain mandatorily negotiable. Monmouth Cty. Sheriff's Office, P.E.R.C. No. 2021-20, 47 NJPER 260 (¶60 2020) (ban on extra-duty employment requiring firearm was mandatorily negotiable); Clayton Bor.,

P.E.R.C. No. 2005-19, 30 NJPER 411 (¶134 2004) (ban on extra-duty work was mandatorily negotiable); Somerset Cty. Sheriff, P.E.R.C. No. 2002-60, 28 NJPER 221 (¶33077 2002) (rate of pay for extra-duty work was negotiable); and Montclair Tp., P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989) (extra-duty work procedures mandatorily negotiable). Specifically, the Commission has held that the allocation of extra-duty work opportunities among qualified police officers is mandatorily negotiable and legally arbitrable. City of Elizabeth, P.E.R.C. No. 2016-78, 42 NJPER 555 (¶153 2016) (denial of extra-duty work to officers accused of excessive absenteeism was arbitrable); Hanover Tp., P.E.R.C. No. 94-85, 20 NJPER 85 (¶25093 1994) (seniority-based allocation of extra-duty work arbitrable); and Brookdale Community College, P.E.R.C. No. 2017-68, 43 NJPER 450 (¶127 2017) (denial of extra-duty work for officers using comp time was arbitrable).

In this case, the Borough has not questioned the grievant's fitness for duty for regular or extra-duty assignments and has not asserted that the grievant lacks any qualifications necessary to perform extra-duty assignments. The Borough has not demonstrated how suspending the grievant from extra-duty work satisfies a particularized governmental policy need to deviate from its usual distribution of extra-duty assignments pursuant to the CNA. The Borough has not established how arbitration of the grievant's 60-day removal from extra-duty work would

significantly interfere with its managerial prerogative to administer the extra-duty work program. Accordingly, we find that arbitration over the alleged violation of contractual extra-duty work allocation procedures would not substantially limit the Borough's policy-making powers. Paterson, 87 N.J. at 92-93.

The cases relied on by the Borough are distinguishable. Here, there is no issue regarding being out on terminal leave or otherwise not being subject to regular departmental oversight (Livingston, P.E.R.C. No. 2014-66, supra), there is no supervision and abuse issue related to officers of different ranks in the extra-duty work program (Elizabeth, P.E.R.C. No. 2014-94, supra), and there is no dispute concerning union mismanagement of the program (Paterson, P.E.R.C. No. 2004-6, supra). Rather, this case is similar to Elizabeth, P.E.R.C. No. 2016-78, supra, in which the Commission held that the employer's denial of extra-duty work to grievants with allegedly excessive absenteeism in their regular assignments was legally arbitrable. As in this case, the union asserted that the denial of extra-duty work both violated the contract and imposed discipline without due process. The Commission determined that the employer failed to demonstrate that the officers' attendance records made them unqualified for extra-duty work, and failed to articulate how it would "adversely affect safety, efficiency, or the Department's reputation." Elizabeth, 42 NJPER at 557. The Borough here

similarly has not demonstrated a sufficient connection between the May 18 allegations against the grievant and substantial limitation on the Borough's governmental policy objectives in administering the extra-duty work program.

ORDER

The request of the Borough of Milltown for a restraint of binding grievance arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: February 23, 2023

Trenton, New Jersey