

P.E.R.C. NO. 2002-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2001-39

STATE LAW ENFORCEMENT CONFERENCE,
P.B.A. LOCAL 105,

Respondent.

Appearances:

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the State Law Enforcement Conference, P.B.A. Local 105 against the State of New Jersey (Department of Corrections). The grievance seeks compensation from the time officers arrive at their institution. The employer did not claim that compensation for this period is not mandatorily negotiable or 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.

P.E.R.C. NO. 2002-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2001-39

STATE LAW ENFORCEMENT CONFERENCE,
P.B.A. LOCAL 105,

Respondent.

Appearances:

For the Petitioner, John J. Farmer, Jr., Attorney General
(Stephan M. Schwartz, Deputy Attorney General, on the
brief)

For the Respondent, Zazzali, Fagella & Nowak, P.C.,
attorneys (Robert A. Fagella, on the brief)

DECISION

On February 9, 2001, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the State Law Enforcement Conference, P.B.A. Local 105. The grievance alleges that the employer violated a contractual safety provision by eliminating a shift overlap. It seeks compensation from the time officers arrive at the institution.

The PBA represents corrections officers. The State and the PBA are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2003. The grievance procedure ends in binding arbitration.

On June 30, 2000, an interest arbitration award issued that eliminated a 20 minute overlap between shifts. On September 12, the PBA filed a grievance on behalf of Senior Corrections Officer Louis S. Cheeseman. The grievance states that Sections A through H of Article XXXVII were violated. The statement of the grievance provides:

On 6-30-00, a memo from J. Burns was faxed to all Administrators giving them direction to eliminate line-ups and develop procedures to disseminate information and conduct inspections by their Supervisory staff. The memo also states "where overtime is incurred during the course of relieving a post, immediate efforts must be made to complete the relief process within 15 minutes.

On 7-5-00, a memo from Lt. Norton to all staff was issued adjusting the start time of some positions.

On 7-6-00, a Memo from Chief Paterson to all custody staff that formal line-ups will no longer be conducted. Therefor[e] all Officers reporting for duty involving a relief must report directly to their assigned post where they will complete a sign-in sheet.

Four posts were classified as relieved posts at Bayside State Prison. They were the towers, Main Sallyport Patrols, and the back gate Officers. The units and trailers were not included.

What is occurring here now is as soon as an Officer passes through the M.S.P. gates a supervisor in center checks you in on that shift schedule as being here. That puts the Officer in duty status.

As a remedy, the grievance states: "Pay all on duty overtime slips submitted, follow USCA Articles 203, 206, 207."

Article XXXVII, A through H, is a safety clause. It provides that the State will make reasonable provisions for its employees' safety and health, provide appropriate safety devices for their protection, and provide a reasonably safe and healthful place of employment.

Article XXIX is entitled Overtime. It provides that overtime will accrue and be compensated in compliance with Merit System Rules and Regulations and Personnel Manual, that employees will be compensated at time and one-half for overtime accrued in excess of the designated work week, and that compensation may be paid in compensatory time or cash. Section A provides:

1. For the purpose of computing overtime, all holiday hours, whether worked or not, for which an employee is compensated shall be regarded as hours worked. Overtime pay shall not be pyramided.
2. "Scheduled overtime" means overtime assigned prior to the day on which it is to be worked.
3. "Non-scheduled overtime" means assigned overtime made on the day on which it is to be worked.
4. "Incidental overtime" is a period of assigned non-scheduled overtime worked of less than fifteen (15) minutes.
5. When a scheduled workshift extends from one (1) day to the next, it is considered to be on the day in which the larger portion of the hours are scheduled and all hours of the scheduled shift are considered to be on that day.

Section B.3 provides:

Where incidental overtime assignments are made, records of such time worked shall be kept on a daily basis, and shall be paid in cash at time and one-half in the pay period that the incidental overtime is performed.

On October 16, 2000, a grievance hearing was held. At the hearing, Cheeseman stated that once lineups and shift overlap were omitted from the custody routine, overtime became a secondary consideration to officer safety. He stated that once officers enter the institution, they are considered in work status. He stated that the lineups should be continued in order to keep officers informed and that it is imperative that officers be made aware of any problems before they report to their posts. Cheeseman stated that instead of lineups, senior officers report to each area one half hour before the shift and information is passed on during sign-in. Management responded that supervisors are responsible for passing on necessary information to the officers.

The hearing officer found that Cheeseman had not demonstrated that the institution had failed to provide for its employees' reasonable health and safety and therefore had not shown that management violated Article XXXVII. The hearing officer also commented that Cheeseman had not demonstrated that any officer had worked overtime in excess of 15 minutes without the proper compensation and that therefore the employer had not violated Article XXIX.

On December 1, 2000, the PBA requested arbitration. This petition ensued.

The employer asserts that the parties have negotiated this issue, the PBA has received a monetary benefit in lieu of overtime for the shift overlap, and the PBA has waived its right to negotiate further. The employer also asserts that if an employee is called on to perform a function that takes less than 15 minutes, that time is compensated as incidental overtime. It states that mere presence in the prison does not qualify as "work."

The PBA acknowledges that to the extent the grievance concerns a safety violation, it is subject to advisory arbitration only. The PBA asserts, however, that it may submit to binding arbitration its claim that employees are entitled to incidental overtime compensation for the period between arrival at the institution and arrival at their posts. The PBA contends that an arbitrator can determine whether officers are "working" when they travel to their posts. It argues that Department of Personnel regulations do not address or define what constitutes work. It also relies on a letter opinion from a Compliance Specialist for the United States Department of Labor, Wage-Hour Division, to the PBA's president and its attorney, in response to their concerns regarding this time period. The letter states, in part:

With regard to the issue you have raised in your correspondence, let me briefly restate the facts as I understand them. Corrections Officers employed by the New Jersey Department of Corrections are required to report to a particular corrections facility at the beginning of their work shifts. Under long-standing procedure, these employees were

first required to attend a "pre-shift line-up." In essence, this was a brief meeting with a superior officer, to discuss that shift's assignments and any specific issues pending for that shift. Under that prior procedure, by custom, practice, and agreement with the union, employees were automatically credited with a fixed amount of work hours for this function (I believe this was 20 minutes).

Sometime earlier in 2000, the New Jersey Department of Corrections decided to change this practice. The line-up activity was eliminated. Employees are now required to report directly to their assigned posts within the facility at the beginning of each shift. This entire scenario, both the prior and current practices, is well-articulated in a letter from Deputy Attorney General Keith Hemming, dated 26 July 2000.

* * *

We believe that there is no question of the compensability of any time spent by the corrections officers from the minute they clear the secure entry portal, on through the time they arrive at their assigned daily post. Not only are the corrections officers required to be prepared in the event of any incident from the moment of clear entry, their mere physical presence in a uniformed, ready state, must be construed as an intended deterrent to inappropriate behavior by the inmate population.

Consequently, the New Jersey Department of Corrections should implement appropriate record-keeping and pay practices to both capture the accurate amount of time spent working by each officer each day (from the minute they clear the secure entry portal), and to compensate the employees fully for all the time they have worked in each workweek. The compensation is addressed by the minimum wage and overtime provisions of the Federal Fair Labor Standards, with additional reference to 289 CFR part 553 (the implementing regulations on the application of the Fair Labor Standards Act to public sector employers).

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 this grievance or any contractual defenses the City might have.

The scope of negotiations for police and fire employees 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 PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps for a scope of negotiations analysis for police officers and firefighters:

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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be 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).

The PBA does not seek to submit its safety claim to binding arbitration and the employer has not sought a restraint of binding arbitration over that issue. Accordingly, we need not consider it.


As for the PBA's compensation claim, we find that the issue may be submitted to binding arbitration. The employer's argument that the PBA has waived its right to negotiate further changes to the contract does not go to the negotiability of the PBA's claim. The employer may raise its waiver defense to an arbitrator. Ridgefield Park. Similarly, the employer's argument that the contract grants it the right to set when a shift begins and ends is a contractual defense that must be raised to an arbitrator. Absent any claim that compensation for this period is

not mandatorily negotiable or legally arbitrable, we decline to restrain binding arbitration.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: July 26, 2001
Trenton, New Jersey
ISSUED: July 27, 2001