

P.E.R.C. NO. 89-95

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and-

Docket No. SN-89-32

HOBOKEN POLICE SUPERIOR OFFICER'S  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Hoboken Police Superior Officer's Association against the City of Hoboken. The grievance alleges that the City violated the parties' collective negotiations agreement when it failed to follow a seniority bidding agreement in assigning a captain to a shift. The Commission determines that the grievance arises under language which preserves the City's right to make assignments where the need for special qualifications warrants it, and that on this record, no apparent need exists.

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Appearances:

For the Petitioner, Eugene O'Connell, City Attorney  
(Anthony A. Catalano, Assistant City Attorney)

For the Respondent, Schneider, Cohen, Solomon  
Leder & Montalbano, Esqs. (David Solomon, of counsel)

DECISION AND ORDER

On December 5, 1988, the City of Hoboken ("City") filed a Petition for Scope of Negotiations Determination. The City seeks a restraint of binding arbitration of a grievance filed by the Hoboken Police Superior Officer's Association ("Association"). The grievance alleges that the City violated the parties' collective negotiations agreement when it failed to follow a seniority bidding procedure in assigning a captain to a shift.

The parties have filed briefs and documents. These facts appear.

The Association is the majority representative of the City's police sergeants, lieutenants and captains. The parties entered a collective negotiations agreement effective January 1,

1987 through December 31, 1988. The grievance procedure ends in binding arbitration. Article 9, "Work Day and Work Week," provides:

Section 1. Work Week. The work week shall consist of Forty (40) hours. There shall be bidding for steady shifts on a seniority basis. All bids shall be received no later than September 15. The new shift assignment shall be implemented no later than 45 days thereafter. This shall not include assignments requiring special skills.

On August 4, 1988, Police Chief George Crimmins assigned Captain Patrick Totaro as captain and commander of the uniform division during the 0801-1601 tour of duty, Monday through Friday.

On August 8, 1988, the Association filed a grievance on Totaro's behalf. The grievance alleges that the shift assignment was made by a "flip of a coin" and not in consideration of Totaro's having "the most time in grade."

On August 16, 1988, the City denied the grievance. The Association demanded arbitration and this petition ensued.

The City concedes that the contested provision intimately and directly affects the work and welfare of police officers, but asserts that Article 9 "significantly interferes with the chief's managerial authority" and is preempted by N.J.S.A 40A:14-118(c). That statute provides that chiefs of police shall "pursuant to policies established by the appropriate authority: ...c. Prescribe the duties and assignments of all subordinates and other personnel."

The Association contends that the contested provision does not significantly interfere with the chief's managerial prerogative to base shift assignments on special skills. Rather, the

Association argues that the provision simply directs that where all qualifications are equal, seniority shall be used as the basis for assigning steady shifts. In addition, the Association asserts that N.J.S.A. 40A:14-118 does not preempt negotiations over work schedules.

The boundaries of the Commission's scope of negotiations jurisdiction are narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154; emphasis added].

Accordingly, we only address whether the City could have legally agreed to arbitrate this dispute.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlined the steps of a scope of negotiations analysis for police and fire fighters.<sup>1/</sup> The Court stated:

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

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<sup>1/</sup> 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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making 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 either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

Arbitration is not preempted. N.J.S.A. 40A:14-118 is a general statute providing for the creation of a municipal police department.<sup>2/</sup> It does not address the subject of the grievance

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<sup>2/</sup> The cases cited by the employer construe this statute to find that chiefs of police, rather than municipal governing bodies, have the power to direct a department's day-to-day operations. See, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984). The cases do not hold that the statute preempts negotiations.

and is not preemptive. Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd App. Div. Dkt. No. A-1398-87T8 (12/12/88); Bor. of Carteret, P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Tp. of Lacey, P.E.R.C. No. 87-120, 13 NJPER 291 (¶18122 1987); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983); Franklin Tp., P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982).

Applying the remaining Paterson tests, we find the grievance to be arbitrable. In Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985), we found mandatorily negotiable language providing that: "Shift work shall consist of steady shift assignment which shall be made on the basis of choice by seniority. It is understood that the Chief could deviate from the seniority list in special cases in which special skills are required or in emergency situations...." Id. at 226. We noted that the "Township may legally agree that, as a general rule, it will schedule work in accordance with contractual seniority provisions where all qualifications are equal." See Bor. of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd. App. Div. Dkt. No. A-3071-82T2 (12/15/83); Middletown Tp.

Article 9, section 1 contains language which preserves the City's right to make assignments where the need for special qualifications warrants it. However, on this record, no apparent need exists. Accordingly, the grievance cannot be said to substantially limit any governmental policy-making.

ORDER

The City's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioners Bertolino and Wenzler were not present.

DATED: Trenton, New Jersey  
March 9, 1989  
ISSUED: March 10, 1989