

P.E.R.C. NO. 98-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RUTHERFORD,

Petitioner,

, -and-

Docket No. SN-97-120

RUTHERFORD P.B.A. LOCAL 300,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of Rutherford's request for a restraint of binding arbitration of a class action grievance filed by Rutherford P.B.A. Local 300. The grievance asserts that the Borough did not properly compensate three officers for time spent travelling to and testifying at an Office of Administrative Law hearing involving another Borough officer's disciplinary appeal. The Commission finds, in the context of a disciplinary dispute covered by N.J.S.A. 34:13A-5.3, that being subpoenaed to testify at a hearing involving major discipline, as well as minor discipline, is a continuation of the grievance procedures and that therefore a grievance seeking overtime and travel expenses for being subpoenaed to testify is mandatorily negotiable and 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.

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Appearances:

For the Petitioner, Lane J. Biviano, attorney

For the Respondent, Loccke & Correia, attorneys
(Joseph Licata, of counsel)

DECISION

On May 27, 1997, the Borough of Rutherford petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a class action grievance filed by Rutherford P.B.A. Local 300. The grievance asserts that the Borough did not properly compensate three officers for time spent travelling to and testifying at an Office of Administrative Law hearing involving another Borough officer's disciplinary appeal.

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

The PBA represents the Borough's police officers in ranks below captain. The Borough and the PBA have entered into a collective negotiations agreement effective from January 1, 1996 through December 31, 2000. Article 15, entitled "Court Time," provides:

(1) Court time, as referred to in this Article, shall consist of all time, excluding regular tours of duty, during which any Employee covered under this Agreement shall be required to attend a Municipal Court, Superior Court, Grand Jury proceeding, or other Courts or Administrative Bodies.

(2) When an Employee covered by this Agreement is subpoenaed to appear in a civil court case (example: automobile negligence case, etc.) then he shall be entitled to payment as provided in this Article, however the Employee subpoenaed shall complete the Borough's "Civil Court Overtime Record" form as per departmental procedures.

(3) All such required court time shall be considered as overtime and shall be compensated at time and one-half.

(4) When an Employee covered under this Agreement shall be required to travel to and from any of the Courts or Administrative Bodies as noted in this Article, such travel time shall be considered and included in the computation of the amount of overtime to which the Employee is entitled. Provided, however, that such travel time shall be computed between the Borough of Rutherford and the pertinent court or administrative body, except that there shall be no overtime compensation, or payment for travel time when the pertinent court or administrative body is within five (5) miles of the Borough of Rutherford.

(5) The amount of overtime to which an Employee may be entitled under this Article shall be the actual time required in the Court or Administrative Body, together with any applicable travel time to and from the Borough of Rutherford, provided however, that the Employee's entitlement to overtime under this Article shall not be less than one (1) hour overtime pay. Effective March 15, 1997 the minimum guarantee under this paragraph shall be increased to two (2) hours of overtime pay.

(6) The Borough shall provide cars for court appearances as set forth in Paragraph No. (1) of

this Article. If the vehicle is not available, then said Employee shall be compensated at the rate of Twenty (\$.20) Cents per mile for court travel. The Police Department shall provide a departmental chart showing distances from the Borough of Rutherford to various commonly attended courts and administrative bodies.

The contract's grievance procedure ends in binding arbitration. Minor disciplinary sanctions may be grieved, but an arbitrator cannot decide a dispute subject to Department of Personnel review.

The Borough is a Civil Service community. It filed major disciplinary charges against a police sergeant. The Department of Personnel ordered a hearing before an Administrative Law Judge. The sergeant subpoenaed three patrol officers to testify; according to the PBA, they learned relevant facts while doing their duties.

After the hearing, the PBA filed a grievance invoking Article 15 and seeking overtime compensation and travel expenses for the three officers. The Borough Administrator denied the grievance. He conceded that an ALJ-conducted hearing on a DOP disciplinary appeal could be construed as an administrative hearing covered by Article 15, but did not concede that officers subpoenaed by the accused officer should be compensated under the article. The PBA demanded arbitration and described the grievance as a class action because the disciplinary proceeding was continuing and other officers might be subpoenaed to testify. This petition ensued.

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 defense the Borough may 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. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police and fire fighters:

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 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 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 the dispute arises as a grievance, arbitration will be permitted if the dispute is not preempted by a statute or regulation and is at least 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 parties agree that the subjects of overtime compensation and travel expenses are mandatorily negotiable unless preempted. The Borough asserts only that N.J.S.A. 40A:14-135 preempts its alleged agreement to pay overtime compensation and travel expenses related to administrative proceedings. That statute provides:

The governing body of any municipality may, by ordinance, provide that whenever any member of the police department or force shall be required to appear before any grand jury or at any municipal, County, Superior or Supreme Court proceedings, except in a civil action, the time during which he is so engaged shall be considered a time of assignment to, and performance of duty. When such appearance occurs during the member's assigned duty hours, he shall suffer no loss in compensation. When such appearance occurs outside his assigned duty hours, he shall receive either compensatory time off from his regular duty hours or additional compensation.

In Kayne v. Mayor and Council of the Borough of East Paterson 121 N.J. Super. 296 (Law Div. 1972), the Court held ultra vires an ordinance requiring payment for municipal court appearances since N.J.S.A. 40A:14-135 did not expressly mention such appearances at that time.^{1/} Given Kayne's interpretation of N.J.S.A. 40A:14-135, we have held that this statute preempted negotiations over certain contract proposals and grievances. See Borough of Bradley Beach P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989) (declaring not mandatorily negotiable proposal requiring payment for civil court appearances); Borough of Sayreville, P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986) (restraining arbitration of grievance seeking payment for civil court appearances); Borough of Moonachie, P.E.R.C. No. 83-45, 8 NJPER 605, 606 (¶13286 1982) (declaring not mandatorily negotiable proposal requiring payment for unspecified administrative proceedings).

The PBA acknowledges these precedents, but asserts that the federal Fair Labor Standards Act, 29 U.S.C. §201 et seq. (FLSA), requires overtime compensation payments in this case and supersedes any contrary mandate of State law. The PBA cites a 1995 letter ruling from a Deputy Assistant Administrator of the United States Department of Labor. That ruling states:

This is in response to your letter requesting an opinion concerning whether a New Jersey statute which prohibits police officers from being compensated, either on or off duty, for

^{1/} The statute was later amended.

appearances in civil court actions, is affected by the Fair Labor Standards Act (FLSA).

You state that an opinion you received from an attorney in New Jersey states that it is illegal for the municipality to pay police officers for appearances in civil court under State law. In an FLSA seminar in June 1993, conducted by the U.S. Department of Labor you were advised that all court time must be compensated as long as the court action arises out of the officer's official duties.

We have held that time spent by police officers testifying at court or other proceedings is compensable hours of work under the FLSA if the time spent testifying (whether voluntary or mandated by the courts) is controlled or required by a State or local government, if attendance at the proceedings is intended to benefit the state or local government, or if attendance at the proceedings is a direct result of the performance of official police duties. Such time is considered hours worked under the FLSA for police officers and would have to be combined with regular on-duty hours in determining proper overtime compensation under section 7 of the FLSA notwithstanding New Jersey law.
[DOL, Division of Wage and Hour Letter Ruling, September 21, 1995]

The Borough does not assert that this letter ruling incorrectly interprets the FLSA.

We need not decide whether the FLSA requires payments in this case or whether the FLSA, as a matter of constitutional law, overrides N.J.S.A. 40A:14-135 as interpreted in Kayne. Compare Franklin Lakes Bd. of Ed., P.E.R.C. No. 95-24, 20 NJPER 395 (¶25198 1994), aff'd 21 NJPER 362 (¶26224 App. Div. 1995) (constitutional issues should not be reached unless necessary). We also need not decide whether our precedents applying Kayne remain good law in light of Hunterdon Cty.

Freeholder Bd. v. CWA, 116 N.J. 322, 330 (1989) (issue in preemption cases is not whether statute authorizes a benefit, but whether statute proscribes one). We decide this case on a narrower basis.

N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and disciplinary review procedures. That section further states that negotiated review procedures may permit binding arbitration of minor disciplinary disputes involving Civil Service employees. Minor discipline means a suspension or fine of five days or less. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). Section 5.3 also permits Civil Service employees to appeal major disciplinary determinations through negotiated review procedures short of binding arbitration, but requires that any binding determination be made by the Department of Personnel. The Legislature thus granted Civil Service employees the opportunity for neutral review of disciplinary determinations, through either binding arbitration of minor disciplinary determinations or DOP review of major disciplinary determinations.

In Sayreville, we declined to restrain arbitration of a grievance seeking overtime compensation for police officers who testified for an accused officer at a disciplinary proceeding that was part of the grievance procedure. We stated:

This grievance is arbitrable. An employer can validly agree to grant an employee paid leave to administer the collective negotiations agreement. Axelson, Inc. v. NLRB, 599 F.2d. 91

(5th Cir. 1979), enforcing 234 NLRB 414, 97 LRRM 1234 (1978); cf. Querques and Buonocore v. City of Jersey City, 198 N.J. Super. 567 (App. Div. 1985), certif. den. 101 N.J. 242 (1985). Since the hearing was part of the grievance procedure, allowing employees paid time to appear involves administration of the collective agreement and is mandatorily negotiable.

[P.E.R.C. No. 87-2 at 5, 12 NJPER at 598]

Even though the hearing in this case took place before an ALJ in a DOP disciplinary appeal, rather than before an arbitrator hearing a disciplinary grievance, the same reasoning applies. It would be anomalous to hold that an employer can agree to compensate police officers subpoenaed to testify at a disciplinary hearing involving a suspension or fine of five days or less, but cannot agree to compensate officers subpoenaed to testify at a disciplinary hearing involving a suspension of more than five days or a removal. Compare N.J.A.C. 1:1-5.4(a)(6) and N.J. Court Rules, R.1:21-1(e)(5) (non-attorney union representatives who may represent employees in grievance proceedings involving minor discipline may also represent employees in major disciplinary appeals before OAL and DOP). In the context of a disciplinary dispute covered by section 5.3, we view an appeal of a major disciplinary determination to DOP as effectively a continuation of grievance procedures ensuring the ultimate neutral review desired by the Legislature. We therefore decline to restrain arbitration of this grievance seeking overtime compensation and travel expenses for being subpoenaed to testify in a DOP disciplinary appeal.

ORDER

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

BY ORDER OF THE COMMISSION

Millicent A. Wasell

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: January 29, 1998
Trenton, New Jersey
ISSUED: January 30, 1998