

P.E.R.C. NO. 99-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SCOTCH PLAINS,

Petitioner,

-and-

Docket No. SN-99-73

SCOTCH PLAINS P.B.A. LOCAL 87,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Scotch Plains for a restraint of binding arbitration of a grievance filed by Scotch Plains P.B.A. Local 87. The grievance contests the denial of an employee's shift selection for 1999. Given that the contractual clause protects the employer's operational needs and given the factual dispute between the parties, the Commission declines to restrain arbitration. The Commission retains jurisdiction. If the employer prevails in arbitration, the case will be over. But if the employer loses in arbitration and if it believes that the award substantially limits its governmental policy powers, it may reactivate its petition and make that argument to the Commission.

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, Ruderman & Glickman, P.C., attorneys
(Joel G. Scharff, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Joseph Licata, on the brief)

DECISION

On March 26, 1999, the Township of Scotch Plains petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by Scotch Plains P.B.A. Local 87. The grievance contests the denial of an employee's shift selection for 1999.

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

The Township and the PBA are parties to a collective negotiations agreement effective from January 1, 1995 through December 31, 1997. The PBA represents police department employees, excluding the chief of police and civilian employees. The grievance procedure ends in binding arbitration.

Schedule B of the parties' agreement provides, in part:

2. SHIFT ASSIGNMENT Shift assignment shall be made each year in accordance with a seniority bid system. Shifts shall be Eleven (11) hours in duration, with starting/ending times as outlined in this schedule. The starting/ending times of said shifts may be adjusted during review periods consistent with the best interest of the Police Department. Standard slips for shift selection shall be distributed to all employees on or about October 1st of each year, and shall be returned promptly so that assignments can be made on or before October 31st of that year.

3. SHIFT PREFERENCE Each employee shall list his first, second, and third preference for shift assignment, and consistent with the efficient operation of the Department, assignments shall be made based upon seniority. The procedure to be used shall provide the employee with his highest shift preference in accordance with seniority and the efficient operation of the Department.

Claude Franco is a patrol officer and has been employed by the Township since 1989. He has worked the 9:00 p.m. to 8:00 a.m. shift for the past five years. He successfully bid for that shift each year until his bid to work that shift in 1999 was rejected.

On December 7, 1998, Franco wrote to Police Chief O'Brien grieving the denial of his shift selection for 1999. Franco stated that on November 20, he was called into Captain Nelson's office and told that his shift selection was denied and that he would be assigned to work the 11:00 a.m. to 10:00 p.m. shift. Franco states that when he asked why his shift preference was denied, he was told it was due to his poor evaluation and abuse of

sick time. Franco listed these five issues as being involved in his grievance:

1. Sgt. Cassidy's notoriously harsh evaluations of officers he does not like.
2. The department's failure to train the evaluators leaving the process open to subjective opinions not to objective observations.
3. The department has no process in place to appeal evaluations.
4. The department uses or ignores evaluations good or bad depending on the whim of the person making decisions.
5. How the "efficient operation of the department" can be enhanced by my shift change.

On December 17, 1998, a hearing on the grievance was held. On December 23, the chief advised Franco that, after reviewing the facts, he concurred with the recommendation of Sergeant Cassidy and the assignment by Captain Nelson placing Franco on the second shift in Platoon B effective January 1, 1999. The chief cited Franco's absences and wrote, in part:

This escalation over the past two years, in conjunction with the notation on your evaluation denoting a negative attitude and poor motivation, raised a concern from your immediate supervisor, Sgt. James Cassidy, and Captain Marshall Nelson. I explained, from a management perspective, that the total number of sick days taken by an employee is only an indicator of potential abuse, and not necessary [sic] indicative of actual abuse. What is important is the total number of separate instances that are taken and the correlation to days off or vacation. That is why it is one of the areas indicated on the evaluations. In your case for 1998, you had a total of seven separate instances, three of which were taken in conjunction with vacation or regular scheduled days off.

The chief further cited Franco's 1998 evaluation which sought improvements in attitude, productivity and cooperation. The chief also indicated that Franco had to be reminded to improve his performance; he had not made any arrests the previous year; and he had written the minimum number of summonses. The chief concluded that he concurred in changing Franco's shift for two reasons: the change would provide Franco with an opportunity to be more productive, and the new shift would enable him to receive increased training with minimal schedule changes and overtime costs.

On December 20, 1998, the PBA moved the grievance to the third step of the grievance procedure. On January 19, 1999, the municipal manager denied the grievance. He stated that the contract had not been violated. On February 3, the PBA demanded arbitration. This petition ensued.

The Township asserts that denial of Franco's shift preference was based on an assessment of the need for training, education and supervision in performing his duties and that the new shift would be better for his attendance at training programs and consistent staffing within the department.

The PBA contends that the asserted reasons for denying Franco's shift selection were absenteeism and his 1998 evaluation. The PBA asserts that the need for training was not cited by Captain Nelson on November 20 when he advised Franco of the denial of his shift preference. Franco's alleged sick leave

abuse and lack of productivity were cited. The PBA rejects the chief's assertion that shift scheduling and overtime costs would be minimized on the new shift. The PBA contends that the shift change has caused severe hardship to Franco's family because he cannot spend time with his children during the day. The PBA also notes that no other employees were denied their shift preference.

The PBA asserts that the contract protects the Township's managerial concerns. It concedes that the efficient operation of the department may include the need to deny an annual shift selection based on supervisory and training concerns and special qualifications. It argues, however, that an arbitrator should be entrusted to determine whether the employer's stated operational needs were substantiated or whether the Township acted arbitrarily by denying Franco's selected work shift. The PBA has submitted an arbitrator's award where the arbitrator rejected three grievances because the employer's reasons for denying the shift requests were not unreasonable. The PBA concludes that arbitration of this grievance will not substantially limit the Township's ability to monitor Franco's sick leave usage or productivity. It asserts that this grievance is at least permissively negotiable and therefore arbitrable.

The Township relies on the police chief's certification. He denies that Franco's reassignment was because of absenteeism. He states that he had conversations with Nelson concerning his meeting with Franco and that Nelson indicated that sick time was

only mentioned to make Franco aware of it. The chief also objects to Franco's assertion that there is an artificial standard that each officer, regardless of shift, must issue one motor vehicle summons per day. The chief stresses that this is a standard, not a quota. He notes that if an officer does not write a motor vehicle summons each day, his entire activities for the day are reviewed. The chief further denied that the department has incurred no overtime expenses for officers attending training. He notes instances where personnel had to be reassigned to cover the evening shift for employees in training and when reassignments could not be achieved, officers had to be assigned on an overtime basis. The chief states that it was imperative that Franco be assigned to a shift where he would get more supervision and where he would benefit from direction, counseling and monitoring.

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 cannot consider the contractual merits of this grievance or any contractual defenses the employer 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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982). In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers 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 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).

In Teaneck Tp., P.E.R.C. No. 93-66, 19 NJPER 122 (¶24058 1993), aff'd 20 NJPER 406 (¶25205 App. Div. 1994), we reviewed our long-established case law that finds a shift selection by seniority clause to be mandatorily negotiable only if it expressly preserves management's right to act unilaterally when necessary - for example, when special qualifications are needed for particular tasks, minimum staffing levels must be met, training is required, or emergencies occur. That approach carefully balances the employees' interests in negotiating over their work hours and the employer's duty to protect public safety. As we stated in City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391, 394 (¶25197 1994):

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. The assessment in each case must focus on ... the specific nature of an arbitration dispute given the specific facts contained in the record and the specific arguments presented to us. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

These parties have negotiated a shift bidding clause which requires that shift assignments be by seniority so long as they are "consistent with the efficient operation of the department." The contract's exclusion from a seniority-based bidding system are consistent with the exclusions required by our case law and protect the employer's governmental policymaking powers.

This cases involves a dispute arising under the shift bidding clause. The Township asserts that training and

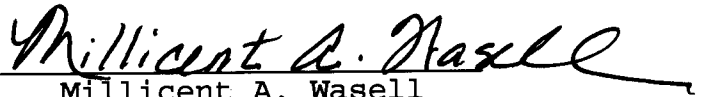
supervision needs motivated the shift denial and that it thus had a contractual right and a managerial prerogative to deny Franco's bid. The PBA appears to acknowledge that a bid denial based on supervisory and training concerns would be contractually permissible; but it asserts that the shift change was instead based on Franco's alleged absenteeism and alleged lack of productivity. It states that Nelson did not cite training as a reason for his decision and the chief did cite absenteeism in his grievance response.

Given that the contractual clause protects the employer's operational needs and given the factual dispute between the parties, we decline to restrain arbitration. We will permit the arbitrator to consider the factual issues initially, as well as the contractual claims and defenses raised by both parties. Because the contract clause protects the employer's prerogative concerns, an arbitrator cannot issue an award inconsistent with that protection. If the employer prevails in arbitration, the case will be over. But if the employer loses in arbitration and if it believes that the remedy awarded substantially limits its governmental policy powers, it may reactivate its petition and make that argument to us. See Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998); contrast City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989) (restraint of arbitration denied where no factual dispute and no specific managerial reason asserted for denying shift preference).

ORDER

The request of the Township of Scotch Plains for restraint of binding arbitration is denied. Jurisdiction is retained so that if the arbitrator finds a contractual violation of the shift bidding system, the Township may reactivate its petition to argue that the award substantially limits its governmental policymaking powers.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: June 22, 1999
Trenton, New Jersey
ISSUED: June 23, 1999