

P.E.R.C. NO. 2003-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SPRING LAKE,

Petitioner,

-and-

Docket No. SN-2002-66

SPRING LAKE POLICE BENEVOLENT
ASSOCIATION, LOCAL NO. 50,
and CAPTAIN MARK EVANGELISTA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Spring Lake for a restraint of binding arbitration of a grievance filed by Captain Mark Evangelista. The demand for arbitration was filed by the Spring Lake Police Benevolent Association, Local No. 50. The grievance contests the amount of the captain's overtime compensation. The Borough argues that arbitration should be restrained because the captain is not included in the PBA's negotiations unit and not covered by the PBA's contractual grievance procedures. The Commission concludes that overtime work and the form of payment for overtime are mandatorily negotiable issues. The Commission also concludes, however, that its scope of negotiations jurisdiction does not extend to deciding whether the captain has a right to arbitrate his overtime grievance and that issue must now be addressed to the arbitrator or a court.

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, Eric M. Bernstein & Associates,
L.L.C., attorneys (Eric M. Bernstein, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Charles E. Schlager, Jr., on the brief)

DECISION

On May 24, 2002, the Borough of Spring Lake petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Captain Mark Evangelista. The demand for arbitration was filed by the Spring Lake Police Benevolent Association, Local No. 50. The grievance contests the amount of Evangelista's overtime compensation.

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

The Borough and the PBA are parties to a collective negotiations agreement effective from January 1, 2001 through

December 31, 2003. Article I recognizes the PBA as the representative for all "Policemen and Sergeants," but excludes the "Chief of Police, Captain and Lieutenants. . . ." The grievance procedure ends in binding arbitration.

Ordinance 17-1996 states that "the Police Chief, Captain and Lieutenant shall be entitled to the same benefits and longevity as regular members of the PBA, the patrolmen and sergeants." The ordinance also contains provisions addressing longevity, overtime and compensatory time.

On or after November 20, 2001, Evangelista submitted a letter grievance to the chief summarizing a November 20, 2001 conversation between them about the Borough's rejection of his request for overtime pay for hours worked. Evangelista's grievance references Ordinance 17-1996 and details the reasons he was entitled to 26 hours of overtime pay.

The chief denied the grievance. He stated that he was not in a position to address the overtime concerns, but that for the past five years, time worked in excess of 40 hours was considered overtime even though it had been paid as compensatory time. He referred the grievance to step four of the procedure, the Borough Administrator.

On January 29, 2002, Evangelista was informed that the Mayor and Council had agreed that he would be paid for 26 hours of overtime, subject to the withdrawal of all grievances/complaints against the Borough.

On January 31, 2002, Evangelista responded that his overtime during a kidnapping case resulted in 42 total hours, 26 of which he intended to receive as pay and 16 of which he intended to receive as compensatory time. He stated that he would not withdraw his grievance and requested payment for the 42 hours of overtime.

On January 10, 2002, the PBA's attorney filed this demand for arbitration:

The PBA and its members, specifically Capt. Mark Evangelista, assert that the borough violated the collective bargaining agreement by virtue of borough ordinance 17-1996 and the past practice of the parties when they denied the payment of overtime in the form of a cash payment.

The employer did not object to the appointment of an arbitrator on the ground that the parties' agreement does not provide for the use of the Commission's arbitration service. See N.J.A.C. 19:12-5.1. It participated in the arbitration selection process and later filed the scope of negotiations petition.

Our scope jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus we do not consider the contractual merits of the 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 a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson, at 92-93, outlines the scope of negotiations analysis for police 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.

Because the dispute involves a grievance, arbitration will be permitted if the dispute 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 grievance involves mandatorily negotiable issues: overtime work and the form of payment for the extra hours. See, respectively, State of New Jersey v. Local 195, IFPTE, 169 N.J. 505 (2001); State of New Jersey, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd 11 NJPER 333 (¶16119 App. Div. 1985). The employer argues, however, that we should restrain arbitration because the captain is not included in the PBA's negotiations unit or covered by the PBA's contractual grievance procedure. The PBA responds that Evangelista is a PBA member and that the Ordinance creates a contract with rights to overtime and a grievance procedure.

Our scope of negotiations jurisdiction does not extend to deciding whether the captain has a contractual right to arbitrate his overtime grievance. City of Hoboken, P.E.R.C. No. 96-16, 21 NJPER 348 (¶26214 1995), aff'd 23 NJPER 140 (¶28068 App. Div. 1996) (declining to restrain arbitration and noting that whether grievant is in negotiations unit or covered by arbitration clause is not a scope of negotiations issue). That issue must now be addressed to the arbitrator or a court. Ridgefield Park. Compare D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990) (agreement between union and employer did not authorize employee

to compel arbitration). Given the negotiability of the grievance and our limited scope jurisdiction, we decline to restrain binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002

