P.E.R.C. NO. 2022-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY SHERIFF'S DEPARTMENT
(CORRECTIONS),

Petitioner,

-and- Docket No. SN-2022-005

PBA LOCAL 400,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Salem County Sheriff's Department (Corrections) for a restraint of binding arbitration of a grievance filed by PBA Local 400 asserting that a corrections officer (CO) was denied a bid request to work on a shift (the B shift), in violation of the grievant's seniority rights under the parties' collective negotiations agreement (CNA). The shift bid denial came in the context of the grievant's return to work following a disciplinary suspension on charges that he made racist remarks to another CO on the B shift, which were sustained in a final agency decision. The victim requested that the grievant not be assigned to her shift upon his return to work. The Commission finds that under the specific facts of this case, allowing the grievant's attempted exercise of his contractual seniority rights in shift selection to go to arbitration would compromise the County's managerial prerogative to determine that keeping the grievant and the victim on separate shifts, after the incidents of verbal harassment and the grievant's return to work, would best effectuate the operations of its facility and staff; subject to reevaluation of the separation at a timing of the County's discretion.

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, DiNicola & DiNicola, LLC, attorneys (Joseph M. DiNicola, of counsel)

For the Respondent, Sciarra & Catrambone, LLC, attorneys (Christopher A. Gray, of counsel and on the brief; Frank C. Cioffi, on the brief)

DECISION

On September 6, 2021, the Salem County Sheriff's Department (Corrections) (County) filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by PBA Local 400 (PBA) on behalf of one of its members, B.P., a correction officer (CO) employed at the Salem County Correctional Facility (Facility or SCCF). The grievance asserts that on November 6, 2020, after B.P. had made a bid request to work on a shift (the B shift) at the Facility, another CO with less seniority than B.P. was awarded the shift, in violation of B.P.'s seniority rights under the parties' collective negotiations agreement (CNA).

The County filed a brief, exhibits and the certification of John Cuzzupe, Warden of the Facility. The PBA filed a brief, exhibits and the certification of its counsel, Frank C. Cioffi.[1/] These facts appear.

The PBA is the exclusive bargaining agent for all full-time, permanent and provisional COs employed by the County, excluding: sergeants; lieutenants; captains; managerial executives; supervisory personnel; confidential, craft and professional employees; and those represented by other bargaining units.

The County and the PBA are parties to a CNA with a term from January 1, 2017 through December 31, 2020. The CNA's grievance procedure ends in binding arbitration. At Article 18, paragraph F, the CNA states:

> Unless the New Jersey Civil Service statutes or rules otherwise require, in cases of promotion, demotion, the setting of vacation schedules, and the assignment to interdepartmental postings within the facility a permanent New Jersey Civil Service Employee with the greatest amount of seniority in the work classification affected shall be given preference, provided that any decision as to the employee's ability to perform the work shall remain the exclusive province of management and shall be exercised at the sole discretion of the Board of Chosen Freeholders.

1/ Cioffi's certification lists exhibits attached thereto. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts recited in a party's brief be supported by certification(s) based upon personal knowledge.

Article 18 further states, at paragraph C:

> Any employee may exercise seniority to bid for vacancies on shift changes and specialist positions provided that the Employer's criteria for qualifications are met. The Employer's criteria for qualifications may include the Employee's entire personnel record. The Employer will post any criteria. Seniority will be a consideration for selection.

On January 29, 2020, the Civil Service Commission (CSC) issued a final agency decision modifying the initial decision of an Administrative Law Judge (ALJ) which sustained B.P.'s disciplinary removal from employment at the Facility, based upon charges of conduct unbecoming a public employee, violations of rules and regulations, and other sufficient cause. The charges alleged that on April 8, 2019, B.P. made harassing, racial comments toward S.E., a fellow CO. Specifically, the ALJ found as follows:

> I FIND as FACT on April 8, 2019, [B.P.], who is Caucasian, was assigned to relieve COs as they went on break. When he appeared at Unit B-6 to relieve another CO, he overheard [S.E.] as she expressed interest in the booking officer position and advised her that she would not get the position because T[.], the sergeant in charge of booking, is racist.
>
> I FIND as FACT that [S.E.] expressed her confusion to the appellant's accusation because she was aware that H[.], an African American female, was working as a booking officer. The appellant informed [S.E.] that the reason she would not get the position is because H[.] is "Salem County Black" and she is "Black-Black" and has a "Black attitude." [S.E.] was offended, surprised, shocked and

> taken aback by the appellant's accusations. She had never been referred to in such a way. She felt that the comments were racist and that the appellant was racially prejudiced. When [S.E.] repeatedly asked the appellant to explain his comments, he simply replied that she knew what he meant.
>
> I FIND as FACT that ultimately, the appellant appeared as he had offended [S.E.] and attempted to apologize. [S.E.] did not believe that his apologies were sincere. [S.E.] expressed her concern that she then understood what the appellant truly thought about her. She has not spoken to the appellant since that day, except in passing.
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> I FIND as FACT that after this confrontation, [S.E.] was approached by CO U[.], a co-worker and close friend of the appellant. U[.] attempted to justify what the appellant said by detailing the appellant's tough upbringing. Ellis felt as though U[.] was trying to discourage her from reporting the incident.
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> Finally, I FIND as FACT that the SCCF is divided because S.E. and H[.] came forward with the complaint. There is tension in the facility and coworkers do not speak to them anymore. S.E. and H[.] feel that their jobs are more dangerous now and they fear retaliation.
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> [ALJ Initial Decision at 11-12.]

While agreeing with the ALJ's determination to sustain all of the charges against B.P.[2/], the CSC modified the ALJ's recommended penalty of removal to a six-month suspension, the most severe penalty permitted in lieu of removal, and diversity

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2/ The CSC also noted that neither party challenged the ALJ's determination to uphold all charges against B.P.

training; and further ordered that B.P. receive back pay, benefits and seniority for the period after the imposition of the six-month suspension through the date of reinstatement.

Warden Cuzzupe certifies that upon reinstatement B.P. was immediately placed on pay status, but was not permitted to go back to work until after he completed the required diversity training and after the CSC ruled on a motion for reconsideration filed by the County.

The record does not contain a copy of the CSC's ruling on the County's motion for reconsideration. An undated letter to the PBA's counsel from County Counsel Karen M. Wood states that B.P. completed his diversity training on June 22, 2020. The letter further states that the County filed a motion for reconsideration and request for a stay, and that the CSC reopened the case on July 31, 2020 for further fact finding, but denied the County's request for a stay; whereupon the County determined that it was appropriate to return B.P. back to work. The same letter concludes as follows:

> Please note that it is imperative that Officer [B.P.] understand that he is expected to have no contact, except for necessary work-related matters, with Officer [S.E.] and Officer [H.], the victims of his harassment. If it is found that he is having unsolicited and improper contact with Officer [S.E.] and Officer [H.], he will be subject to further discipline, including up to termination.

Cuzzupe certifies that when discussion began regarding which shift B.P. would return to, his administration had a conversation with S.E., who stressed that she did not feel comfortable with B.P. being on her shift, the B shift, and asked that B.P. not be permitted to work on her shift as she wanted to minimize her potential contact with him. Cuzzupe certifies that B.P., however, "insisted" that he be on the same shift as S.E. The grievance at issue states that B.P. expressed a desire to return to the B shift.

B.P. returned to work toward the end of September 2020. According to email correspondence among the parties dated September 17, 2020, B.P. was offered a choice of three shifts upon returning to work: the A shift, the C shift, or the D shift, with the following understanding:

> 1. There is no limit on [B.P.] working overtime on any shift.
>
> 2. [B.P.] will be able to schedule time off for the rest of the year. Understanding that [B.P.] has time to use[,] he will be able to submit all time off requests and they should not be denied. (In light of the circumstances, the 60/hour limitation shouldn't apply to his time off. As he was unable to put in any time previously).
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> 3. The ban on [B.P.] and [S.E.] working on B [shift] will be reevaluated in the future base[d] on the successful reintegration of [B.P.] into the jail.

According to the same email correspondence, B.P. selected the C shift, with an indicated start date of September 26, 2020.

Cuzzupe certifies that B.P. is losing no pay and was offered the A shift which has the same daytime schedule as the B shift but on "opposite" days, however B.P. opted to work the night schedule on the C shift. Cuzzupe certifies that he is keeping B.P. off the B shift not for disciplinary reasons, but for the betterment and effective operation of the Facility.

On October 8, 2020, according to the grievance at issue, a posting for a voluntary shift change (to the B shift) was sent to all officers via interdepartmental email. B.P. responded to that posting before the closing date and time listed, but he was not awarded the shift, nor was his request acknowledged. Instead, new officers were assigned to the shift on November 6, 2020. Filed on November 13, the grievance alleges that this violated B.P.'s contractual seniority rights, specifically Article 18, paragraph F of the CNA. B.P. further alleges in the grievance, in pertinent part:

> When I returned [to work], I was only given the option to go to A, C, or D shifts, even though I expressed my desire to return to B shift. All other transport/HED officers that have been temporarily displaced pending reinstatement ... by the appellate courts were given the option to choose their desired shift. The reason given ... for preventing me from being on B-Shift was that there was a "conflict of interest" since one of the complaining parties for the charges that resulted in my wrongful termination was

> assigned to B-Shift. It should be noted that 1- it was specifically stated by administration that Officer [S.E.] and I working overtime on the same shift was no problem; 2- I was also given the option to go to A-Shift where the second complaining party regarding my wrongful termination was assigned; 3- that there was no order given by Civil Service to keep me separated from any complaining parties; 4- that I have successfully completed diversity training and plan on being the "champion of cultural pluralism" that the diversity trainers believe I can be; and 5- that I have requested mediation between myself and the complaining parties multiple times but have been repeatedly denied.
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> . . .
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> Since my return to work on 10/01/20, Officer [S.E.] and I have worked together a total of 22 times (and counting) on the same [overtime] shift with no issues. There have been many instances in the past where officers have had problems with each other. However, none of those instances have resulted in an officer being banned from working a particular shift together. I insist that I be allowed to work the shift that my seniority and contractual rights dictate that I am allowed to work.

The County denied the grievance. On January 27, 2021, the PBA filed a Request for Submission of a Panel of Arbitrators. (Dkt No. AR-2021-296). An arbitrator was assigned on April 15. On August 27, the arbitrator conducted a hearing via Zoom video conference wherein both parties presented witness testimony and exhibits. This petition ensued.

Both parties included with their exhibits herein a copy of the complete transcript of the grievance arbitration hearing. At

the hearing, among other things, S.E. testified under oath that after B.P. was returned to work she "made it known" that she "didn't feel comfortable working with him," and further that:

> [T]he best way is to keep on different shifts, in my opinion. I mean, I work with him if I have to but that doesn't mean I'm not going to feel uncomfortable. I'm offended by what he said about me. I'm very upset, and in my 30 years, I've never been spoken to like that, and it is going to stay with me the rest of my life. . . . Every time I see him, regardless of overtime or not, feelings come back. I feel like to keep that down as much, I prefer not to work on the same shift as him. If he choose[s] to work over[time] and I do too, that's fine. But when I run into him, I feel those feelings. I don't know what to do. That's just how I feel.

According to the County, the arbitrator had not issued a ruling in the grievance proceeding as of the date the County filed its scope brief, September 21, 2021.

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 merits of the grievance or any contractual defenses that the County may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> [Id. at 404-405.]

The scope of negotiations for police officers and firefighters 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 Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> 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 this dispute involves a grievance, arbitration is 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). Thus, if we conclude that the SOA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal

and managerial prerogatives are not otherwise compromised. City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2004). "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," focusing on "the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented." City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

The County concedes that seniority as a factor in shift assignments is a negotiable subject. But it contends that the third prong of the Local 195 test is at issue here; that is, whether negotiation over the subject of the grievance would significantly interfere with the determination of government policy. The County argues that its governmental policy of ensuring the effective operation of the Facility, the public safety, and the integrity of the Facility is best served by its decision, at the request of a victim of B.P.'s harassment, to not permit B.P. to work on the same shift together with that victim. The County contends that the victim's interests outweigh B.P.'s interest in working the B shift, particularly where the County's decision is not disciplinary in nature and where the shifts

offered to B.P. have the same rate of pay and hours as the B shift.

The PBA argues that Cuzzuppe's determination to ban B.P. from working with S.E. contradicts the County's position as relayed in County Counsel Wood's letter, quoted supra, stating that B.P. was to have "no contact, except for necessary work-related matters, with Officer [S.E.] and Officer [H.], the victims of his harassment." The PBA contends Wood's letter did not prohibit B.P. from working the same shift as S.E., and that since both the County and the CSC issued decisions in which B.P. was to return to work "without restrictions," Cuzzuppe went "above and beyond" those decisions by prohibiting B.P. from working with S.E. The PBA contends that Cuzzuppe's decision was "well outside" his managerial rights.

The PBA further contends that there have been no complaints about B.P. since his return to work, and that Cuzzuppe admitted while testifying before the arbitrator that no posts on the B shift actually have a male and a female officer working together, except in relief situations where interaction would occur when a relieving officer is male and the officer being relieved is female. The PBA points out that S.E. has not asked the County to prohibit B.P. from working overtime shifts with her, and that she testified that she voluntarily worked many hours of overtime with him since his return to work, with no issues. The PBA further

contends that the County has "done nothing to try to mediate any outstanding animosity" between B.P. and S.E., although it was recommended in B.P.'s diversity training that the two meet in the presence of a third party to mediate the issues between them. The PBA further contends that the County's alleged efficiency reasons for separating the two are "baseless," citing testimony before the arbitrator regarding incidents in which the County previously allowed two officers who each made sexual harassment complaints against the other to work on the same shift, and in which S.E. previously made complaints about other officers on the same shift yet the County allowed those officers to continue working with her.

Prong three of the Local 195 test is dispositive in this case. The County does not dispute that it denied B.P.'s voluntary shift transfer bid to work the B shift, and that it awarded the shift to an employee with less seniority than B.P. Nor does the County dispute the negotiability of the seniority-based shift selection provisions in Article 18 of the CNA. Therefore, we must ask, under the specific facts of this case, whether allowing B.P's attempted exercise of his contractual seniority rights in shift selection to go to arbitration would compromise the County's governmental policymaking powers. We find that it would, as the County has a managerial prerogative to determine that keeping B.P and S.E. on separate shifts after the

incidents of verbal harassment and B.P's return to the workplace would best effectuate the operations of its facility and staff.

We have held that a public employer's non-disciplinary decision to separate employees who are the subject of a workplace harassment complaint (i.e., the accuser and the accused) while that complaint is being investigated is not mandatorily negotiable or legally arbitrable. See, Town of West New York, P.E.R.C. No. 2021-10, 47 NJPER 197 (¶43 2020). Separating such employees is justified as an exception to any agreed-upon seniority system under those circumstances, so that the County can ensure effective functioning of its staff and facility.

In this matter, the disciplinary charges against B.P. for making racist remarks to S.E. were sustained in a final agency decision. Neither party challenged that determination. The PBA does not dispute that upon B.P.'s return to work following the completion of his reduced disciplinary penalty, S.E. requested that B.P. not be assigned to her shift. Nor does the PBA dispute the County's contention that its decision to grant S.E.'s request was not disciplinary as to B.P., because he suffered no loss of pay or hours as a result of that decision. The County had a legitimate managerial need to address S.E.'s request that B.P. be kept off her regular shift, sufficient to support its decision to depart from the agreed-upon seniority provisions as they pertain to B.P.'s shift bid. We are not persuaded by the PBA's arguments

that the CSC's final agency decision and County Counsel Wood's letter did not expressly bar B.P. from working on the same regular shift with S.E.

We add that the accuracy of the PBA's contention that there were "no issues" during the overtime shifts is not clear from the testimonial record, at least from S.E.'s perspective. When asked about those shifts, S.E. testified that there were a "few occasions where he [B.P.] came to do my break and I refused a break because I don't feel comfortable being around him." There is a difference between S.E. working the occasional overtime shift with B.P. and having him permanently assigned to her regular shift, and S.E. has some measure of control over whether to accept an overtime assignment. We also do not find the PBA's arguments about the County's handling of prior incidents of harassment to be determinative of the legal arbitrability of B.P's grievance here, based on the record presented.

Finally, we note that B.P. has served his penalty of a six-month suspension and attended the required diversity training. The County represented in a September 17, 2020 email that "[t]he ban on [B.P.] and [S.E.] working on B [shift] will be reevaluated in the future base[d] on the successful reintegration of [B.P.] into the jail". Barring any further incidents, we find the reevaluation of the ban to be appropriate at a timing of the County's discretion.

ORDER

The request of the Salem County Sheriff's Department (Corrections) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Voos voted in favor of this decision. Commissioners Jones and Papero voted against this decision.

ISSUED: November 23, 2021

Trenton, New Jersey