

P.E.R.C. NO. 98-95

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EGG HARBOR CITY,

Petitioner,

-and-

Docket No. SN-97-114

MAINLAND PBA LOCAL NO. 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Egg Harbor City for a restraint of binding arbitration of a grievance filed by Mainland PBA Local No. 77. The grievance asserts that the City violated the parties' collective negotiations agreement by using special police officers outside Local 77's negotiations unit to meet staffing levels rather than calling in regular police officers in Local 77's negotiations unit and paying them overtime compensation. The Commission finds that a public employer must negotiate over shifting work traditionally done by a group of employees within a negotiations unit to another group of its employees outside its unit. The Commission also finds that regular police officers in a negotiations unit may seek contractual protection against having their opportunities to earn overtime compensation reduced through the use of special police officers to fill in for absent officers.

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, Robert J. Pinizzotto, attorney

For the Respondent, Schaffer, Plotkin & Waldman,
consultants (Myron Plotkin, consultant)

DECISION

On May 13, 1997, the City of Egg Harbor City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Mainland PBA Local No. 77. The grievance asserts that the City violated the parties' collective negotiations agreement by using special police officers outside Local 77's negotiations unit to meet staffing levels rather than calling in regular police officers in Local 77's negotiations unit and paying them overtime compensation.

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

Local 77 represents the City's regularly-appointed, full-time police officers. Excluded from the unit are the

Director of Public Safety and the Police Clerk. There is no police chief.

The parties' collective negotiations agreement is effective from January 1, 1996 through December 31, 1998. The grievance procedure ends in binding arbitration. The contract recognizes Local 77 as the majority representative, protects certain rights of police personnel, addresses overtime compensation, and continues all existing benefits. The contract also sets forth certain management rights, including the employer's right to "determine the methods, means and personnel by which its operations are to be conducted."

The department has 13 regular police officers, four of whom are sergeants. The City also employs two special police officers. The special police officers are not included in the negotiations unit and are paid \$10.00 an hour.

For day shifts, it appears that only one officer is on duty. But the employer seeks to have at least two officers on duty from 4:00 p.m. to midnight every day and also from midnight to 8:00 a.m. on weekends. A contractual provision entitled Hazardous Duty Pay requires the employer to "make a good faith attempt to continue the current practice/policy regarding the number of officers assigned and working each shift" and permits Local 77 to reopen negotiations regarding hazardous duty pay if the employer does not.

According to Local 77, before March 1997, the employer sometimes used special officers to increase the staffing level on certain shifts to three officers; but did not use special officers to replace absent regular officers. If a regular officer was sick or on a leave of absence, the employer would either call in another regular officer and pay that officer overtime or would not call in any replacement, thus having only one officer on duty for that shift. In March 1997, however, the employer allegedly began using special officers at their hourly rates to replace absent regular officers. In the event of absences, staffing for shifts requiring two officers was thus met by using one regular officer and one special officer, who was paid at the hourly rate, rather than two regular police officers, one of whom was paid at overtime rates. According to Local 77, special officers were also used to do regular police officer duties such as filing computerized reports and processing arrests.

In March 1997, the PBA filed a grievance. Its grievance stated:

The PBA stands aggrieved by the action of the City and/or its agent(s) by which Special Officers are being regularly scheduled effective March 1, 1997, to perform the functions of and/or replace regularly employed police officers who are members of the bargaining unit. This action constitutes a denial of the preservation of unit work by assigning police work normally assigned to regularly employed police officers to Special Officers. The result of this action is the denial of overtime opportunities for bargaining unit members to which they previously would have been entitled if additional manpower was

necessary. The PBA does not argue management's right to determine the number of officers scheduled to work, however, utilizing Special Officers in lieu of offering overtime to regularly employed officers if additional manpower is required, is not only a violation of negotiated Agreement, but also a violation of the state statute regarding the use of Special Officers (40A:14-146.8 et seq.).

The grievance asserted that the employer violated contract provisions concerning recognition, employee rights, overtime compensation, and benefits and sought a return to having regular officers called in at overtime rates rather than using special officers.

On March 5, 1997, the director denied the grievance. His response stated that the grievance cited no instance where a special officer had been assigned to replace a regular police officer; neither he nor the supervisor (a PBA member) who prepared the March work schedule had received any complaints; out of 94 shifts during March no special officer had been scheduled for more than 12 shifts; and no PBA member had requested and been denied overtime.

The City Administrator and the City Council also denied the grievance, asserting that the employer had a contractual and statutory right to use special officers. Local 77 demanded arbitration and 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 defenses, including the management rights clause, the City may have.

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. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Ridgefield Park. Paterson outlines the steps of a scope of negotiations analysis for police officers 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. [87 N.J. at 92-93; citations omitted]

Because the dispute arises as 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).

A statute or regulation will not preempt negotiations unless it expressly, specifically, and comprehensively fixes an employment condition, thereby eliminating the parties' discretion to vary it through negotiations. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); Paterson at 96-97; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The question is not whether a statute or regulation authorizes a personnel action; the question is whether the statute or regulation prohibits the personnel action. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 330 (1989).

N.J.S.A. 40A:14-146.10 authorizes the employer to hire special police officers so long as no such officer (with certain inapplicable exceptions) works more than 20 hours a week, N.J.S.A. 40A:14-146.16, and the number of special police officers does not exceed 25% of the number of regular police officers. N.J.S.A. 40A:14-146.17. Special police officers may be used to assist the

local police force, but may not be employed to replace or substitute for full-time, regular police officers or in any way diminish the number of full-time officers. N.J.S.A. 40A:14-146.16b.

The grievance does not contest the employer's power to employ two special police officers. It asserts instead that the employer changed its past practice and violated the parties' contract by using special police officers to meet staffing levels when regular officers were absent rather than call in other regular officers at overtime rates. No statute or regulation compels the employer to use special officers rather than regular officers under such circumstances so we reject any preemption claim.

A public employer must negotiate over shifting work traditionally done by a group of employees within a negotiations unit to another group of its employees outside its unit. See, e.g., City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd 23 NJPER 325 (¶28148 App. Div. 1997), certif. granted S.Ct. Dkt. No. 44,268; Borough of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988), aff'd NJPER Supp.2d 222 (¶195 App. Div. 1989); Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶1113 App. Div. 1983); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pertinent part 6 NJPER 338 (¶11169 App. Div. 1980); Rutgers, the State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980). We have specifically held that regular

police officers in a negotiations unit may seek contractual protection against having their opportunities to earn overtime compensation reduced through the use of special police officers to fill in for absent officers. Belmar; see also Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (118056 1987); Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (116178 1985); Washington Tp., P.E.R.C. No. 83-166, 9 NJPER 402 (114183 1983). An employer's desire to reduce labor costs does not render a unit work dispute non-negotiable. Belmar; Paramus. We therefore decline to restrain arbitration of this grievance.

ORDER

The request of the City of Egg Harbor City for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



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