

P.E.R.C. NO. 80-161

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Petitioner,

Docket No. SN-80-121

-and-

FRATERNAL ORDER OF POLICE,
LODGE 77,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Chairman determines that a disputed contractual vacation schedule provision is a mandatorily negotiable subject. The Chairman analyzed the article allegedly breached and, citing In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (14188 1978), concluded that vacation scheduling is a mandatorily negotiable term and condition of employment. Negotiations on this subject, however, must occur within the context of the employer's unilaterally determined manning requirements.

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Appearances:

For the Petitioner, Murray, Granello & Kenney, Esqs.
(Robert Emmet Murray, of Counsel)

For the Respondent, Vaughan & Seeliger, Esqs.
(Richard C. Vaughan, of Counsel)

DECISION AND ORDER

On April 10, 1980, a Petition for Scope of Negotiations Determination was filed by the Hudson County Board of Chosen Freeholders (the "County") with the Public Employment Relations Commission seeking a determination as to whether a matter in dispute between the County and the Fraternal Order of Police, Lodge 77 (the "FOP") is within the scope of collective negotiations.

The County indicated in its scope petition and brief that the instant dispute arose with respect to a particular matter that the FOP sought to process pursuant to a negotiated grievance procedure in which the FOP filed a request for the institution of arbitration proceedings. The County agreed to submit the dispute to arbitration but reserved the right to challenge the negotiability and arbitrability of the contract provision in dispute as applied

to this matter. The arbitrator's decision was issued on March 5, 1980 and affirmed the FOP position. Subsequently, the County sought an order by the Superior Court delaying the implementation of the arbitration award pending a determination by this Commission on the negotiability issue. Both parties in the instant matter filed briefs all of which were received by April 29, 1980.

The relevant grievance relates to the scheduling of vacation for a female correction officer. The issue arose when the grievant was informed that another female officer with greater seniority had requested that same time period. The grievant, however, was very high on the overall seniority list but was denied the requested time off even though a male correction officer with less seniority than she was permitted to take the same week off. The County argues that it had a policy of not assigning males to guard female inmates and therefore vacation scheduling for men and women was performed separately. The grievant argued that the collective negotiations agreement does not establish a separate seniority category for women and that she should be entitled to use seniority without restriction to male or female categories.

The pertinent vacation provisions that were in effect when the grievance arose are as follows:

Article VI, Section 1. Annual vacations shall be granted strictly in accordance with seniority.
Section 2. The vacation period shall commence January 1st and continue until December 31st of each year....
Section 3. All employees shall receive at least 10 days of their respective vacations during the period from June 15th to September 15th of each year, if requested. The Employer may require the balance of the vacation to be taken before

June 15th or after September 15th....
Section 4. In the event the employee is changed from one shift to another for any reason his vacation schedule shall remain the same. 1/

The Commission, pursuant to N.J.S.A. 34:13A-6(f), has delegated to the undersigned, as Chairman of the Commission, the authority to issue scope of negotiations decisions on behalf of the entire Commission when the negotiability of the particular issue or issues in dispute has previously been determined by the Commission and/or the judiciary.

The instant matter is controlled by the Commission decision in In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978) wherein the Commission concluded that vacation scheduling was a contractually protected established practice and a term and condition of employment. The Commission found that any change in vacation scheduling was a violation of the New Jersey Employer-Employee Relations Act.

1/ The relevant seniority provisions provide: "Seniority
Section 1. Seniority - Seniority is defined as an employee's total length of service with the employer, beginning with his date of hire.
Section 2. Seniority for all purposes is defined in accordance with Civil Service Rules and Laws.
Section 3. The employer shall maintain an accurate, up-to-date seniority list showing each employee's date of hire, classification and pay rate and shall furnish copies of same to the Local upon request.
Section 4. The employer shall promptly advise the appropriate Local representative of any changes which necessitate amendments to the seniority list.
Section 5. Permanent employees to be laid off will receive 45 days notice, or 45 days pay in lieu of notice."

The instant matter does not concern the County's right to determine minimum manning levels within its operation. The Commission held in City of Orange, supra, that the public employer has the right to establish manpower requirements, but once those requirements are established, the public employer must negotiate over a vacation scheduling system within the framework of the manpower requirements. Therefore, although the vacation schedule issue is clearly mandatorily negotiable and arbitrable, it must be negotiated -- or arbitrated -- within the County's unilaterally determined manning requirements.

The County also argued in this matter that "right to privacy" considerations existed warranting a separate seniority/vacation policy for female as opposed to male correction officers. Moreover, the County argued that the arbitrator's decision would make it impossible for the County to maintain minimum staffing levels of female guards during certain periods of time. However, the Commission has frequently stated that the issue to be determined in a scope proceeding is whether the issue in dispute is within the scope of collective negotiations, and not whether other defenses exist,^{2/} or whether the arbitrator's award was proper.^{3/}

^{2/} See In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, (1975).

^{3/} The Commission has held that it will not review factual issues in an arbitrator's award in a scope matter. In re Weehawken Bd. of Ed., P.E.R.C. No. 80-119, 6 NJPER 190 (¶11091 1980). Regarding the instant matter, however, it is noted that nothing would prevent the County from hiring additional female employees if it desires in order to meet its perceived needs. Such a decision would not be mandatorily negotiable.

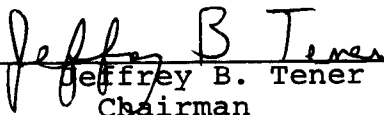
The New Jersey Supreme Court in Ridgefield Park Ed Assn v. Ridgefield Park Bd of Ed, 78 N.J. 144 (1978) also discussed the proper procedure in resolving scope of negotiations cases and cited approvingly the Commission's description of its role in such cases:

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. 78 N.J. 154

ORDER

Based on the above discussion, it is hereby determined that the vacation schedule provision at issue is a mandatorily negotiable subject.^{4/}

BY ORDER OF THE COMMISSION


 Jeffrey B. Tener
 Chairman

DATED: Trenton, New Jersey
 June 27, 1980

^{4/} The Commission has concluded that the subject of the scheduling of vacations is a mandatorily negotiable term and condition of employment. However, the Appellate Division has held almost since the inception of public sector collective negotiations in this State that the enforceability of collective negotiations agreements must take cognizance of the contractual doctrine of impossibility. Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969)

The County's argument that the female officer grievant could not be given her vacation at the time she requested because that would leave the jail seriously understaffed with female personnel, raises such questions and may require a factual analysis beyond the parameters of this scope proceeding. The decision to use female officers to guard female prisoners is a governmental policy determination involving questions of proper security, prisoners' rights and other considerations beyond the purview of mandatory negotiability.