

P.E.R.C. NO. 2016-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2015-063

PBA LOCAL NO. 108,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Union County Sheriff's Office's request for a restraint of binding arbitration of a grievance filed by PBA Local No. 108. The grievance contests the Sheriff's designation of the Crime Scene Unit (CSU) as a specialized unit and its replacement of two officers in the CSU with less senior employees. The Commission holds that the Sheriff's decision to fill the CSU positions based on its determination of the most qualified officers is not arbitrable, nor is the PBA's related claim for loss of overtime/call-in compensation. Finding that an alleged contractual requirement to provide a list of qualifications criteria used for selection to the CSU unit is arbitrable, the Commission denies restraint of binding arbitration to the extent the grievance asserts violation of a procedural obligation to promulgate a list of qualifications.

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.

P.E.R.C. NO. 2016-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2015-063

PBA LOCAL NO. 108,

Respondent.

Appearances:

For the Petitioner, Bauch Zucker Hatfield, LLC,
attorneys (Elizabeth F. Murphy, of counsel and on the
brief)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (James M. Mets, of counsel and on the brief;
Brian J. Manetta, on the brief; Matthew T. Clark, on
the brief)

DECISION

On March 30, 2015, the Union County Sheriff's Office (UCSO) filed a scope of negotiations petition. UCSO seeks a restraint of binding arbitration of a grievance filed by PBA Local No. 108 (Local 108). The grievance asserts that USCO violated the parties' collective negotiations agreement (CNA) when it designated the Crime Scene Unit as a specialized unit and replaced the two grievants with less senior employees.

UCSO has filed briefs, exhibits and the certification of the supervising lieutenant of crime scene duties within the Bureau of Criminal Investigation (Supervising Lieutenant). Local 108 has

filed a brief, exhibits and the certifications of both grievants. These facts appear.

Local 108 represents Sheriff's Officers and Investigators employed by UCSO. UCSO and Local 108 are parties to a CNA in effect from January 1, 2005 through December 31, 2009. After negotiations for a successor contract were unsuccessful, the parties filed for interest arbitration and an interest arbitration award (Award) was issued for the term January 1, 2010 through December 31, 2014. On July 19, 2012, we denied UCSO's appeal of the Award. On April 23, 2014, the Appellate Division affirmed our decision. The grievance procedure ends in binding arbitration.

The Award modified Article X, HOURS OF WORK, of the CNA to add the following provision:

The parties recognize that certain posts may require special skills. The Sheriff or his designee shall have sole discretion in deciding which posts require special skills. All posts not requiring special skills shall be annually posted for bid in November for the subsequent calendar year. Employees shall be permitted to bid on positions and work shifts based upon departmental seniority. The Sheriff or his designee shall retain the authority to reassign employees from their bidded position for training purposes or to cover a vacant shift.

The Supervising Lieutenant certifies that starting in 2013, Sheriff's Officers could choose posts and shifts in the Courts, Prisoner Transportation, Sheriff's Labor Assistance Program,

Courthouse Security, Park Madison, Plainfield Probation, and Legal Process. Three other units were originally considered to be posts requiring special skills and were not subject to the bidding process - Search and Rescue, Bureau of Criminal Identification (BCI), and Family Violence and Warrants. With respect to the BCI, the Supervising Lieutenant certifies that the duties assigned to that unit have evolved over time. Prior to 1998, Sheriff's Officers only performed criminal identification duties^{1/} while crime scene investigations were conducted primarily by the Union County Prosecutor's Office. Between 1998 and 2005, Sheriff's Officers performed criminal identification duties and assisted the Prosecutor's Office with crime scene investigations. Since 2005, crime scene investigations have been conducted solely by Sheriff's Officers.

In the Fall of 2014, the Supervising Lieutenant recommended that the BCI be split into two units: (1) a BCI which would continue to conduct criminal identification duties; and (2) a Crime Scene Unit (CSU) which would conduct crime scene investigations. The Supervising Lieutenant certifies that she made her recommendation because these two responsibilities are

1/ According to the Supervising Lieutenant, criminal identification duties include processing arrestees charged with indictable and certain other offenses and documenting suspicious fires. Processing includes, among other things, recording pedigree information, taking mug shots, and obtaining fingerprints.

distinct in nature and pulling officers off of their criminal identification responsibilities to send them out to crime scenes was disruptive and inefficient. According to the Supervising Lieutenant, her recommendation was accepted and the CSU was created effective November 7, 2014. Thereafter, BCI was included in the UCSO's bid process while CSU was not.

The Supervising Lieutenant certifies that the grievants were assigned to BCI for the past 20 years. Although they remained in the new BCI, they were not chosen for the CSU. The Supervising Lieutenant chose officers for the CSU based on a number of criteria including, but not limited to: proficiency test scores,^{2/} ability to perform highly technical tasks, crime scene analysis work product, and report writing. The Supervising Lieutenant certifies that the grievants have consistently scored below par on the proficiency test^{3/} and the crime scene portion of testing.

Further, the Supervising Lieutenant certifies that despite the grievants being sent to remedial or basic courses in the hope that they would improve, their execution of certain tasks was

2/ According to the Supervising Lieutenant, the proficiency test is comprised of a written section on photography, basic crime scene protocol, bloodstain pattern recognition, and latent fingerprinting. The practical portion of the test is typically evidence processing, photography, and/or a fingerprint comparison.

3/ Out of 11 UCSO employees who took the 2013 proficiency test, the grievants' scores were two out of the three lowest.

still not at the level needed to perform crime scene duties if either grievant was alone at a crime scene. According to the Supervising Lieutenant, when the grievants were called to a crime scene in the past, they routinely left the task of report writing to their partner.^{4/} The Supervising Lieutenant certifies that in the rare instances when the grievants wrote reports, their reports were deficient and demonstrated a general lack of writing skills.^{5/}

The grievants have provided additional factual background. In particular, they certify that UCSO has never promulgated a specific list of qualifications necessary for a Sheriff's Officer to be assigned to BCI and/or CSU. According to the grievants, although they were routinely evaluated pursuant to UCSO's formal Performance Evaluation System,^{6/} they never received any indication that their criminal identification or crime scene investigation skills were in any way deficient or in need of improvement.

4/ The Supervising Lieutenant certifies that both grievants' partners in the past were assigned based on the junior partner's ability to handle the additional case load of heavy report writing and completion of case files.

5/ According to the Supervising Lieutenant, an incident occurred in 2010 where one of the grievants overlooked important evidence at a homicide scene when the grievant's partner was a newer officer whom he was assigned to train.

6/ One of the grievants certifies that some of these evaluations were completed by the Supervising Lieutenant.

With respect to the proficiency test, the grievants certify that they were never given notice as to what the assessment would be based upon. Rather, the Supervising Lieutenant indicated that the proficiency exam was for training purposes only and would not be used against the grievants. The grievants certify that they were advised that they had "passed" the proficiency test when it was administered. The grievants also certify that due to their removal from CSU, they have lost the opportunity to earn a significant amount of overtime and call-in compensation.

On November 21, 2014, Local 108 filed a grievance alleging that UCSO violated the terms of the CNA when it designated the CSU as a specialized unit and replaced the grievants with less senior employees. UCSO denied the grievance. On December 10, 2014, Local 108 demanded binding arbitration. This petition ensued.^{7/}

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

^{7/} On July 16, 2015, we denied Local 108's request for an evidentiary hearing.

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 Local 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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982),

aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. Paterson, 87 N.J. at 92-93.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

UCSO argues that arbitration should be restrained in this matter because the Sheriff simply exercised his managerial prerogative to appoint the most qualified officers to the CSU. To the extent Local 108 is grieving the fact that the CSU is a non-biddable post, UCSO maintains that the qualifications of the CSU are not the same as - or equal with - those of biddable posts because the CSU requires special skills including a high level of analytical, technical and reporting skills.

Local 108 responds with several arguments as to why this grievance is arbitrable. Initially, Local 108 contends that this is a factual dispute about the nature of a CSU assignment and whether employees with more seniority who have been deemed qualified are skilled enough to perform the job duties. Local 108 argues that permitting an arbitrator to make this determination will not significantly interfere with UCSO's managerial prerogatives. Next, Local 108 claims that it has articulated an arbitrable procedural challenge regarding the

manner in which the grievants were removed from, and candidates were selected for, the CSU given that a specific list of qualifications was never promulgated. Local 108 also argues that the grievance raises a severable dispute that is a mandatory subject of negotiations regarding the grievants' loss of overtime and call-in compensation. Finally, Local 108 maintains that this matter is arbitrable to the extent that UCSO's brief raises a factual issue regarding whether the grievants are sufficiently skilled to work in the CSU.

UCSO replies that neither the Commission nor an arbitrator should be allowed to second guess the UCSO's determination as to which Sheriff's Officers are the most qualified to perform CSU work. With respect to any procedural violation related to announced selection criteria, UCSO argues that Local 108 has not alleged same in its grievance nor has it identified any particular procedure that was violated. With respect to lost compensation, UCSO maintains that there is no way to separate the grievants' dispute regarding performing CSU work from the grievants' ability to work overtime and/or call-in within the CSU. Finally, UCSO clarifies that it has not conceded that a factual dispute exists as to whether the grievants are sufficiently skilled to work in the CSU.

We have consistently held that public employers and majority representatives may agree that seniority can be a factor in shift

selection where all qualifications are equal and managerial prerogatives are not otherwise compromised. County of Union and PBA Local No. 108, P.E.R.C. No. 2013-4, 39 NJPER 83 (¶32 2012), aff'd 40 NJPER 453 (¶158 2014) (citing Camden Cty. Sheriff and P.B.A. Local No. 277, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), recon. den. P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd 27 NJPER 357 (¶32128 App. Div. 2001)). We have also consistently held, however, that public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs (*id.*; see also Local 195) and that any loss of overtime or other additional compensation as a result of the exercise of that prerogative is not a severable claim. (City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987)). While contract clauses may legally give preference to senior employees when all qualifications are substantially equal, the employer retains the right to determine which, if any, candidates are equally qualified. Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015).

In a prior related case involving these same parties, we specifically held: “[i]f the Sheriff determines that a particular officer is required and qualified for any assignment, that is within his sole discretion.” County of Union and PBA Local No. 108. Moreover, “[w]here an employer fills a position or a

vacancy based upon a comparison of employee qualifications, that decision is neither negotiable nor arbitrable." South Brunswick Tp., P.E.R.C. No. 91-47, 16 NJPER 599 (¶21264 1990).

Accordingly, UCSO's decision to appoint the employee it determined was best qualified for the CSU is not subject to binding arbitration nor is the intertwined claim regarding loss of overtime and/or call-in compensation.

Although substantive decisions to transfer or reassign police officers are not legally arbitrable, related procedural claims may be. City of Orange Tp., P.E.R.C. No. 2007-59, 33 NJPER 115 (¶40 2007) (citing City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985); City of Vineland, P.E.R.C. No. 84-58, 10 NJPER 8 (¶15005 1983)). The ability to apply for promotional or other vacancies and the right to know the basis upon which candidates for the posts will be evaluated have been held to be mandatorily negotiable procedures. South Brunswick Tp. (citing State of New Jersey v. State Troopers NCO Ass'n, 179 N.J. Super. 80, (App. Div. 1981)).

While the alleged procedural violations were not fully set out in the grievance, we may look beyond the initial grievance documents to determine the essence of a union's claim. City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); see also North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707 (¶16245 1985). In this instance, Local 108's

procedural claim regarding the promulgation of a list of qualifications for assignment to CSU was fully briefed by the parties.

We find that Local 108's procedural claim is mandatorily negotiable. That is, an arbitrator may determine whether the parties' CNA required UCSO to promulgate a list of qualifications for selection to CSU and also, whether the UCSO complied with such a requirement. "Unless an employer has announced a change in its method of evaluating fitness for a promotion or assignment, it may remain obligated to fill positions from a list created by applying the employer-selected criteria to the eligible candidates and, accordingly, a grievance asserting that personnel procedures have been breached is arbitrable even if the arbitrator cannot review the employer's assessment of qualifications." South Brunswick Tp. (citing Camden Cty., P.E.R.C. No. 88-115, 14 NJPER 350 (¶19135 1988)). No showing has been made in this case that providing grievants with the basis upon which candidates for the CSU were to be evaluated would have significantly interfered with UCSO's asserted prerogatives.

ORDER

The request of the Union County Sheriff's Office for a restraint of binding arbitration is granted to the extent the grievance challenges UCSO's decision to appoint the employees it determined were best qualified for the CSU and any intertwined claim regarding loss of overtime and/or call-in compensation. The request for a restraint of binding arbitration is denied to the extent the grievance alleges a procedural violation related to UCSO's failure to promulgate a specific list of qualifications necessary to be assigned to CSU.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Bonanni and Wall were not present.

ISSUED: November 19, 2015

Trenton, New Jersey