

P.E.R.C. NO. 2000-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WEST PATERSON,

Petitioner,

-and-

Docket No. SN-2000-25

WEST PATERSON P.B.A.

LOCAL 173,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Borough of West Paterson for a restraint of binding arbitration of two grievances filed by West Paterson P.B.A. Local 173. The grievances allege that the Borough violated its minimum staffing levels on certain shifts and filled temporary shift vacancies with civilian dispatchers rather than police officers. The PBA asserts that civilians were called in because the Borough did not want to pay overtime required when police are reassigned on short notice in non-emergencies. The Commission grants a restraint to the extent the grievances assert the Borough was required to call in and assign a third police officer to patrol duties on the shifts which are the subject of the March 25 and May 25, 1999 grievances. The request for a restraint of arbitration is otherwise denied.

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, Gerber & Samson, L.L.C., attorneys
(Mary Pat Gallagher, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Leon B. Savetsky, on the brief)

DECISION

On August 27, 1999, the Borough of West Paterson petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of two grievances filed by West Paterson P.B.A. Local 173.^{1/} The grievances allege that the Borough violated its minimum staffing levels on certain shifts and filled temporary shift vacancies with civilian dispatchers rather than police officers. The PBA asserts that civilians were called in because the Borough did not want to pay overtime required when police are reassigned on short notice in non-emergencies.

^{1/} The PBA acknowledges that a third grievance is moot because the program it challenges has been discontinued.

On September 23, 1999, a Commission designee heard oral argument on the Borough's interim relief application. He restrained arbitration pending a final decision on the petition.

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

The PBA represents police officers employed by the Borough, excluding the chief. The Borough and the PBA are parties to a collective negotiations agreement effective from January 1, 1998 through December 31, 2000. Article VI, §2 provides:

The duty roster shall be prepared on an annual basis and shall be posted no later than January 15, of each calendar year in which it is operative. The duty roster shall continue for each successive month subject to change by the Chief of Police upon thirty (30) days notice to the employees affected. The thirty (30) day notice may be lessened or increased by one or two days without paying the premium rate so that the police officer changing shifts will still work four (4) consecutive days consisting of the same tour of duty. Such changes in the duty roster shall not occur except in emergent situations, which shall not include normal sick leave or other approved leaves, but shall refer to long-term illnesses, injuries, resignations or the like. It is understood and agreed that the work schedule itself is not subject to modification unless so negotiated between the parties.

Section 1 of the grievance procedure provides, in part:

This grievance procedure shall cover issues of application or interpretation of this Agreement and is meant to provide means by which employees covered by this Agreement may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them including safety related issues.

The grievance procedure ends in binding arbitration.

In 1997, the Borough hired civilian dispatchers. The PBA then filed an unfair practice charge alleging that the Borough had illegally transferred unit work to the civilian dispatchers. The PBA sought assurances that dispatchers would be laid off before police officers and that three officers per shift would be assigned to patrol. To settle the charge, the Borough agreed to adopt a resolution addressing those issues. That resolution stated, in part:

1. It is hereby declared to be the intent of the Borough of West Paterson that no police officer shall be laid off so long as there are civilian employees performing the dispatching or communication functions of the Police Department; and
2. It is further declared that it shall be the policy of the Borough of West Paterson to make all reasonable efforts to maintain a minimum staffing level of three (3) police officers assigned to patrol at any given time; and
3. It is further declared that when calculating the minimum staffing level of three (3) police officers, only those officers actually assigned during the period of that officer's shift to patrol will be included in the calculation; and
4. It is further declared that for purposes of this resolution, the Chief of Police and those police officers not "assigned to patrol" shall not be counted towards the aforementioned minimum staffing level of three (3) police officers.

The department operates on three shifts: 7:00 a.m. to 3:00 p.m.; 3:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 7:00 a.m.

Prior to January 15 of each year, the Chief posts a duty roster for the year. The 1999 posting was made based upon a force of 21 officers. Four or five persons were scheduled per shift, usually one civilian dispatcher and three or four officers. Before the hiring of civilian dispatchers, three officers were on a shift, one at the front desk for dispatching and the other two on patrol. However, the chief states that, on some shifts, police officers are still assigned as dispatchers.

In March 1999, an officer resigned, reducing the number of officers available for patrol on the shift he had worked. Later that month, an officer called in sick and a civilian dispatcher, rather than another officer, was brought in to fill the vacancy.^{2/} In May, one civilian and one officer called in sick on the same shift. The civilian dispatcher was replaced by another civilian. The absent officer's post was not filled.

The chief states that on both occasions he left two officers on patrol because he has the right to determine staffing levels and because that patrol complement, which was standard

^{2/} At the interim relief hearing, the Borough attorney stated, without contradiction, that three officers had been originally assigned to patrol duties on that shift [Tr. at pp. 5-6]. The record does not indicate who was originally assigned to dispatching duties, but it is undisputed that a civilian dispatcher replaced the absent officer, leaving two officers on patrol.

practice before 1997, is not unsafe.^{3/} He states that he used civilians to replace the absent personnel because Article IV, §2 circumscribes his ability to fill temporary shift vacancies with police officers. The mayor asserts that the 1997 resolution does not guarantee a minimum staffing level. He adds that the PBA is aware that the Borough has only pledged to make "all reasonable efforts" to maintain a patrol complement of three officers. The PBA president states that the mayor told him that financial considerations were the reason that only two officers were left on patrol. The PBA's allegation that the Borough acted for financial reasons is undisputed.

On March 25, 1999, the PBA filed a grievance alleging that the Borough violated long-standing operational procedures by changing working conditions affecting bargaining unit work, work operations, work load, overtime and officer safety. On May 25, the PBA filed a second grievance charging that the Borough violated the December 1997 resolution by using civilians, rather than police, to fill temporary vacancies. It asserted that this practice had left shifts with "minimal staff with a patrol officer as supervisor" on occasions when there were higher-ranking officers who had signed up for overtime to fill such vacancies.

^{3/} On June 1, 1999, another officer went on an extended leave in anticipation of retirement, but the chief anticipated that his place would be taken on September 1, 1999 when a new officer completed his training.

The grievances were denied at all levels. On June 22, 1999, the PBA demanded arbitration, claiming a violation of long-standing policies and agreements affecting police officer safety and compensation. 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 the grievance or any contractual defenses the employer 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 Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), 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 this dispute involves grievances, 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).

The Borough maintains that requiring it to replace an absent police officer significantly interferes with its non-negotiable prerogative to determine staffing levels. The mayor also asserts that the grievance challenges the chief's right to make assignments, a prerogative protected by the Borough's resolution and N.J.S.A. 40A:14-118. The chief contends that safety is not a factor, noting that only two officers per shift were assigned to patrol before civilian dispatchers were hired.

The PBA observes that the Borough has not attempted to amend or repeal the resolution and disputes that the Borough used "all reasonable efforts" to meet the document's staffing goals.

Noting the Borough's economic motivation, the PBA argues that the pledge in the resolution would be meaningless if the chief left patrol vacancies unfilled to avoid paying overtime. It also asserts that a shift with only two officers on patrol affects police officer safety. It argues that the grievances, if sustained, would not substantially limit any governmental policy goal.

We reject the Borough's preemption argument. A statute or regulation will not preempt negotiations unless it speaks in the imperative and fixes an employment condition specifically, expressly, and comprehensively. See, e.g., Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Local 195 at 403-404; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); State of New Jersey (State Colleges), P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999). N.J.S.A. 40A:14-118 is a general statute providing for the creation of a municipal police department. It does not address the issues raised by the grievances and is not preemptive. City of Newark, P.E.R.C. No. 98-108, 24 NJPER 163 (¶29080 1998); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989); Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd NJPER Supp.2d 198 (¶176 App. Div. 1988); Carteret Bor., P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Lacey Tp., P.E.R.C. No. 87-120, 13 NJPER 291 (¶18122 1987); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983); Franklin Tp., P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982); see also Paterson at 96-97.

We now determine whether arbitration would substantially limit the Borough's attainment of its policy goals. The grievances identify a variety of interrelated issues.

The number of police officers who are assigned to a particular shift or patrol post intimately affects the safety of police officers: the more officers, the safer working conditions will likely be for each officer. But requiring a set number of officers to patrol during a shift or in each police vehicle may also impede a public employer's prerogatives to determine the size of its work force and how to deploy its police to best protect citizens. These interests are difficult to reconcile.

Balancing these competing interests, our cases generally bar negotiations over or enforcement of contract clauses binding employers to specific staffing levels. See Bergen Cty. and PBA Local No. 134, Bergen Cty. Sheriff's Officers, NJPER Supp.2d 143 (¶128 App. Div. 1984), aff'g P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983) (despite impact on safety, a negotiations proposal that would always require that two officers transport and guard a prisoner taken to the County hospital's secure ward was not mandatorily negotiable); see also Paterson; Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990) ("Lopatcong I"); City

of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983);
Readington Tp., P.E.R.C. No. 84-7, 9 NJPER 533 (¶14218 1983).

However, other cases generally allow negotiations over, and arbitration to enforce, contract language protecting employee safety. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998) (conditionally allowing arbitration of grievance asserting the employer violated safety clauses when it did not assign two guards to medium security prison housing wings; employer could file new petition if award directed that a particular staffing level be maintained); see also Franklin Bor., P.E.R.C. No. 98-138, 24 NJPER 273 (¶29130 1998) (proposal requiring two patrol officers on a shift not mandatorily negotiable; premium pay proposal for officers working alone mandatorily negotiable); State of New Jersey (Dept. of Corrections); Lopatcong I (staffing clause mandatorily negotiable to extent it would require minimum number of officers on patrol after sunset, but extra compensation for officers working alone at night is mandatorily negotiable); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989) (grievances alleging employer violated contractual commitments to provide safe work place arbitrable despite non-negotiability of staffing levels). Cf. Lopatcong Tp., P.E.R.C. No. 96-12, 21 NJPER 290 (¶26184 1995) ("Lopatcong II") (employer violated act by repudiating clause requiring double-time pay for patrol officers working alone after sunset where Township routinely scheduled two officers after dark).

We have also generally declined to restrain arbitration where the predominant issue is not staffing but rather which qualified employee or category of qualified employees should be called in when an employer decides to fill a vacant shift slot. See Wayne Tp., P.E.R.C. No. 97-74, 23 NJPER 42 (¶28029 1996), aff'd 24 NJPER 141 (¶29071 App. Div. 1998); City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

We now apply this body of law to the claims raised by the grievances. On both occasions, two officers, instead of the scheduled three, performed patrol duties on the shifts after an officer called in sick. And on both occasions, a civilian dispatcher, not previously scheduled to work, was called in to fill a temporary vacancy. In March, the vacancy was caused by the absence of a police officer. In May, a civilian filled in for an absent civilian, while a vacant patrol officer's post on the same shift remained unfilled.

In temporarily restraining arbitration, the Commission designee relied on Lopatcong I. There, a contract clause mandated that: (1) "[a]ny assigned officer not able to report for duty will be replaced by another" on shifts occurring after sunset; and (2) officers working alone after sunset would receive premium pay. That employer asserted that the clause could not be submitted to interest

arbitration for inclusion in a successor agreement. It also sought to restrain arbitration of a grievance challenging the employer's failure to call in patrol officers on a midnight shift where the assigned officers were diverted to a special county narcotics task force. The chief and a superior officer combined to cover those temporary vacancies. We held that the mandate to fill patrol vacancies was not mandatorily negotiable, but the premium pay clause was. Ruling on the arbitrability issue, we held:

We agree with the Township, in the absence of any argument to the contrary, that the grievances are not legally arbitrable to the extent they claim the Township was compelled to replace absent police officers to maintain staffing levels. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). But we also agree with the PBA that the grievances are arbitrable to the extent they merely involve the question of which officers would work the shift in question, given the employer's staffing levels. Long Branch; see also Bor. of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988), aff'd App. Div. Dkt. No. A-2418-88T2 (12/22/88); New Jersey Sports & Exposition Auth. We do not decide whether, as the PBA alleges, the grievances encompass this latter claim. That is a question for the arbitrator. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-73, 16 NJPER 141 (¶21056 1990). [16 NJPER at 480]

The Commission designee properly applied Lopatcong I in restraining arbitration of the challenges to the Borough's decision not to call in additional police officers so that a total of three officers were assigned to patrol. Those claims are not arbitrable. Whether the employer's motive was purely economic or whether it believed that two officers on patrol (which had been

the practice prior to 1997) was adequate to ensure public safety, its action was primarily a staffing decision.^{4/}

However, under Lopatcong I and our other precedents, the remaining claims are legally arbitrable. The PBA's claims assert that employee safety is affected when two officers, rather than three, are assigned to patrol on a given shift. Our cases allow arbitration of grievances asserting that requiring officers to patrol on shifts where staffing falls below employer set minimums violate contractual safety assurances, and/or entitle such employees to premium pay. The May grievance also claims that a police officer, rather than a civilian, should have been called in to replace the absent dispatcher. It is undisputed that some dispatching is still performed by police. A dispute over which of two qualified classes of employees may fill a temporary vacancy in order to earn overtime is legally arbitrable. See Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999); Camden. Cf. 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); Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113

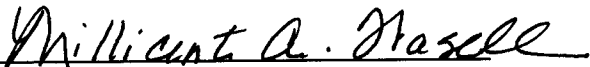
^{4/} A public employer may hire or lay off for purely economic reasons.

App. Div. 1983) (grievances asserting employer assigned work to non-unit personnel to avoid paying overtime are arbitrable).

ORDER

The request of the Borough of West Paterson for a restraint of arbitration is granted to the extent the grievances assert the Borough was required to call in and assign a third police officer to patrol duties on the shifts which are the subjects of the March 25 and May 25, 1999 grievances. The request for a restraint of arbitration is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: January 27, 2000
Trenton, New Jersey
ISSUED: January 28, 2000