P.E.R.C. NO. 92-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and- Docket No. SN-91-83

FOP GARDEN STATE LODGE #3,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the subject of a grievance filed by Fraternal Order of Police Garden State Lodge #3 against the Township of Pennsauken is within the scope of negotiations. The grievance asserts that the Township violated the parties' collective negotiations agreement when its police chief prohibited police officers from taking more than two weeks of summer vacation.

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Appearances:

For the Petitioner, Tomar, Simonoff, Adourian & O'Brien, attorneys (James Katz, on the brief)

For the Respondent, John F. Strazzullo, attorney

DECISION AND ORDER

On May 14, 1991, FOP Garden State Lodge #3 petitioned for a scope of negotiations determination. The FOP seeks a declaration that a grievance it wishes to submit to binding arbitration is mandatorily negotiable. The grievance asserts that the Township of Pennsauken violated the parties' collective negotiations agreement when its police chief allegedly prohibited police officers from taking more than two weeks of summer vacation.

The parties have filed exhibits and briefs.[1/] These facts appear.

1/ The Township's brief was filed on Monday, July 8, one week late. We accept the late filing since the secretary working on the case became incapacitated by lower-back difficulties and temporary employees had to be hired to finish the brief. But we reject the Township's motion to file a supplemental memorandum in response to the FOP's brief.

The FOP represents the Township's police officers including detectives, but excluding the chief and deputy chief. The parties entered into a collective negotiations agreement effective from July 1, 1986 through June 30, 1989 and a successor agreement effective from July 1, 1989 through June 30, 1992. Each agreement's grievance procedure ends in final and binding arbitration of alleged contractual violations.

On March 22, 1988, the police chief issued a memorandum concerning the selection of vacations between May 23 and September 9, 1988. The memorandum stated:

> No one will be permitted more than two (2) weeks at one time unless requested in writing and approved by the Chief of Police.

The memorandum also limited the number of officers in particular ranks and sections who could take vacations at the same time; stated that vacation selections would be made by seniority; and directed that vacation selections be submitted before May 20.[2/]

On June 6, 1988, the chief, having reviewed the selections and finding a "deviation of past practices and policies," issued a new memorandum. It stated, in part:

> In order to maintain the manpower level needed, and grant each and every officer's request for holiday, vacation and personal time off between the June 6 and September 19, 1988 summer vacation period, an officer may select two (2) weeks vacation only.

2/ Similar memoranda had been issued in 1984, 1985, 1986 and 1987.

Noting that some officers had requested three to five weeks off, the chief directed them to resubmit requests limited to two weeks.

The next day the FOP filed a "class action" grievance asserting that the two week limit violated the contract. The grievance stated:

> Your memorandum while recognizing the need to monitor the scheduling of vacations and available personnel is certainly warranted, it does not have the right to mandate when and how much vacation an Officer may take. No where in the contract does it specify that an Officer may only take two weeks vacation during a given time frame. Article XIII, Annual Vacation Leave, provides the criteria for awarding vacation days relative to length of service. If an Officer has the time accumulated he is entitled to take that time off when he so desires, barring any other contractual restrictions. No reference is made as to how much and when this accumulated time is to be taken. Your memorandum is clearly attempting to levy a change in working conditions that must be negotiated before implementation as is provided in Article III of the contract. I would therefore request that you modify your memorandum to the extent that it conforms with the provisions of our contract.

On June 10, 1988, the chief denied the grievance. He stated that he had not attempted to mandate when an officer must take vacation or the number of vacation days which may be taken at a time. While he concurred that the contract did not restrict vacation leave to a given period, he noted that contractual provisions empowered management to determine work schedules and shifts and the number of officers needed at any time and conditioned

the granting of vacations on sufficient staffing.[3/] The chief then stated:

> I have not cancelled or disapproved any vacation leave requests. However, the memorandum should serve as a reminder to those officers who have requested numerous consecutive weeks of vacation leave that their request may be disapproved. The vacation schedule is also necessary to allow everyone an equal opportunity to make vacation plans during the prime vacation period without fear of disappointment.

On August 25, 1988, the FOP demanded binding arbitration. In an amended demand written on September 6, it identified this issue to be arbitrated:

> Department unilaterally has limited the amount of vacation time an employee can take off.

On November 21, 1988, the Township's attorney wrote a letter to the FOP's attorney. This letter stated that the Township would not submit to arbitration because the grievance was not contractually arbitrable and that under Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the FOP could seek a Superior Court order compelling arbitration. The FOP responded that

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3/ For example, Article XX B.3. of the 1986-1989 contract provided:

> Notwithstanding anything to the contrary, when a holiday or vacation day request is made and it is indicated that there is sufficient manpower scheduled pursuant to the then existing requirements of the Department for duty, then the requested days off shall be granted without further restrictions or additional requirements.

the Township should file a scope of negotiations petition because its defense amounted to a claim that it had a managerial prerogative to issue the June 6 directive. Neither party accepted the other party's invitation and the case remained at a standstill for 16 months.

On March 27, 1991, the FOP, represented by a new attorney, began an action to compel arbitration in the Superior Court of New Jersey, Chancery Division, Camden County (Ch. Div. Dkt. No. C-52-91). The Township responded that the grievance was not contractually arbitrable because the contract did not expressly limit its managerial prerogative to deploy its police officers as it deems appropriate and the contract expressly barred the arbitrator from adding any terms. The Township further asserted that there was no negotiability issue before the Court and that any scope of negotiations petition would be premature because the Township had not agreed to any provisions restricting its managerial prerogatives and the FOP had not demanded to negotiate over any such provisions.[4/]

On May 6, 1991, the Honorable Theodore Z. Davis, J.S.C. heard oral argument. The FOP's attorney argued that any assertion that the Township had a managerial prerogative should be raised before this Commission. The Township's attorney repeated his contention that the matter was not contractually arbitrable because

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4/ The record contains the Township's Superior Court brief, but not the FOP's brief.

the contract did not expressly limit the employer's managerial prerogatives.

Judge Davis issued a bench opinion dismissing the Complaint. The Court rejected the FOP's reliance on two cases cited to support its assertion that its grievance made a claim which was facially covered by the contract and within the arbitration clause. The Court then found that the following paragraph from _Ridgefield Park_ was "controlling and...operative in this case and...squarely on point with the factual pattern before this Court" (T26):

> We agree with PERC that contract interpretation is a question for judicial resolution. Thus, where a party resists an attempt to have a dispute arbitrated, it may go to the Superior Court for a ruling on the issue of its contractual obligation to arbitrate. However, the issue of contractual arbitrability may not be reached if the threshold issue of whether the subject matter of the grievance is within the scope of collective negotiations is contested. In that event, a ruling on that issue must be obtained from PERC. Thus, the preferable procedure in the instant case would have been for PERC to have rendered its scope determination before the issue of contractual arbitrability was addressed. [78 _N.J._ at 155]

The Court further stated "that PERC should be the one to determine this particular issue," and that "the FOP should have filed a scope of negotiations determination petition with PERC" or an unfair practice charge after the Township refused to arbitrate (T27). The Court then stated that the contract had left vacation procedures undeveloped and added:

> For the Court to order arbitration would be writing a term into the agreement, at least that's the opinion of this Court. The matter is

> left to the managerial prerogative. Now, a PERC Scope Petition will address whether the managerial prerogative is being capriciously exercised by not taking into account the staffing needs.... Obviously if the Chief is going to be ridiculous about something, PERC could make a determination as to whether or not he's being arbitrary or capricious in the exercise of what appears facially to be his managerial prerogative (T27-T28).

The Court then concluded:

> So again, in the way that I perceive it, the judicial inquiry is whether the parties seeking arbitration have made a claim, which on its face is covered by the contract and within the arbitration clause. I find that it has not -- the complaint that is before the Court filed by the FOP is hereby dismissed and the Court does not retain jurisdiction (T28).

The FOP then filed this petition and appealed the dismissal of its Complaint.

The parties dispute the nature of the Court's ruling and the ruling's effect on our jurisdiction. The FOP argues that the Court ruled that a scope of negotiations determination had to be obtained from the Commission before the issue of contractual arbitrability could be resolved; therefore any discussion of the contractual arbitrability issue was dictum and is irrelevant to a scope determination. The Township argues that the Court held that the dispute was not contractually arbitrable; therefore the Commission does not have jurisdiction because the Court's ruling permits it to refuse to arbitrate this grievance and there is no pending negotiations proposal.

We first consider whether we have jurisdiction. We conclude we do.

N.J.S.A. 34:13A-5.4(d) provides:

> The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations.

As recognized by N.J.A.C. 19:13-2.2(a)4, a negotiability dispute usually arises in one of two contexts: 1) during collective negotiations when one party seeks to negotiate over a proposal which the other party contends is not mandatorily negotiable, and 2) during grievance proceedings when one party seeks to submit to binding arbitration a dispute which the other party contends is not mandatorily negotiable. This case involves the second type of dispute.

The Court's opinion is ambiguous and provides support for both parties' arguments. We need not decide which party is correct. The FOP has appealed the Court's opinion and the Township has continued to base its contractual arbitrability defense on the premise that the contract does not expressly limit its asserted managerial prerogative to deploy its officers as it sees fit. Under these circumstances, this petition is within our jurisdiction.

Our jurisdiction is narrow. Ridgefield Park 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. [78 N.J. at 154]

We thus do not consider the contractual arbitrability defense, the reasonableness or arbitrariness of the chief's actions, or the merits of the grievance.[5/]

The scope of negotiations for police and fire employees is broader than for other 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. Paterson, 87 N.J. 78 (1981) outlines the steps of a scope of negotiations analysis for police 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

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5/ We distinguish our jurisdiction to decide the negotiability of grievances from our lack of jurisdiction to decide the merits of contractual disputes. Our scope jurisdiction is not dependent upon a contract containing an express provision limiting an asserted managerial prerogative. Whether or not a contract expressly or impliedly confers a certain benefit or permits a certain action is a contractual merits question which we cannot address. We ask only whether the agreement alleged is within the scope of negotiations.

> 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 policy-making 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]

Arbitration is permissible if the subject of the dispute is either mandatorily or permissively negotiable. See Middletown Tp. P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

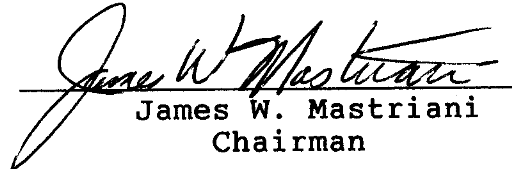
The scheduling of time-off is mandatorily negotiable, so long as an agreed-upon system does not prevent the employer from meeting its staffing requirements. Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); Bor. of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988): Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987); Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-81T3 (3/23/84); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). The FOP concedes that the employer may determine its minimum staffing levels and that the chief may disapprove a particular vacation request in light of those levels. It asserts only that the

employer may legally agree that it will not establish a per se rule limiting officers to two weeks of summer vacation and that it will instead review each vacation request in light of its staffing requirements.[6] We agree with this proposition since the method of allocating available vacation time and the length of vacations are mandatorily negotiable. See Town of West New York; Marlboro Tp.; Town of Harrison; City of Elizabeth. We accordingly hold that the subject of the grievance is within the scope of negotiations.[7]

ORDER

The subject of the grievance filed by Fraternal Order of Police Garden State Lodge No. 3 is within the scope of negotiations.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: September 30, 1991
Trenton, New Jersey
ISSUED: October 1, 1991

6/ Given the limits of our jurisdiction, we cannot consider such questions as whether the employer entered into such an agreement, whether it adopted such a per se rule, or whether it changed a past practice. We also do not consider the wisdom of the agreement alleged. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977). In particular, the employer contends that a limit on summer vacations is equitable and good for morale. That argument goes to the wisdom, not the negotiability, of that agreement. Town of Harrison.

7/ This holding does not compel the Township to arbitrate this grievance. It need not do so unless and until its contractual arbitrability defense is rejected.