

P.E.R.C. NO. 90-106

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF GARFIELD,

Petitioner,

-and-

Docket No. SN-89-91

P.B.A. LOCAL 46,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains, in part, binding arbitration of a grievance filed by PBA Local 46 against the City of Garfield. The grievance protests the reassignment of a police lieutenant from the investigative bureau to the patrol division. The Commission grants the restraint to the extent the grievance asserts that the officer was improperly reassigned. The Commission denies the restraint to the extent the grievance asserts that the officer had greater seniority than another officer and should have been given a shift selection preference.

P.E.R.C. NO. 90-106

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of  
CITY OF GARFIELD,

Petitioner,

-and-

Docket No. SN-89-91

P.B.A. LOCAL 46,

Respondent.

Appearances:

For the Petitioner, Lawrence J. Jaskot, City Attorney

For the Respondent, Loccke & Correia, attorneys  
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On June 26, 1989, the City of Garfield petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance P.B.A. Local 46 has filed. The grievance protests the reassignment of police lieutenant John Gervato from the investigative (detective) bureau to the patrol division.

The parties have filed briefs and documents, the last of which was received on April 4, 1990. These facts appear.

The PBA represents the City's police. The City and the PBA are parties to a collective negotiations agreement effective from January 1, 1987 to December 31, 1988. Its grievance procedure ends in binding arbitration. The agreement also contains the following:

PRESERVATION OF RIGHTS

The Employer retains and reserves unto itself...the following rights:

\* \* \*

(b) To hire all Employees...to determine their qualifications and conditions for continued employment or assignment and to promote and transfer Employees;

(c) To suspend, promote, demote, transfer, assign, reassign, discharge, or take any other disciplinary action for good and just cause according to law.

\* \* \*

The Employer agrees that all benefits, terms and conditions of employment relating to the status of Employees, which benefits, terms and conditions of employment are not specifically set forth in this Memorandum of Agreement, shall be maintained at not less than the highest standards in effect at the time of this Memorandum of Agreement.

\* \* \*

#### SENIORITY

Traditional principles of seniority shall apply to Employees covered by this agreement. Such principles shall apply to lay off, recall and transfer. Seniority is defined to mean the accumulated length of service with the Department, computed by time in grade for each rank. In the event time in grade cannot be determined by date of rank, then in that event time in service by date of appointment shall apply....

In September, 1984, Gervato was assigned to the detective bureau. In April 1985, he assumed command of the bureau.

In December 1987, Gervato, then a sergeant, placed first on a civil service promotion list for captain. On April 6, 1989, Gervato placed first on a civil service promotion list for lieutenant. On April 13, 1989, Gervato and Sergeant Kevin Amos, who

placed third on the lieutenant's exam, were appointed lieutenants and Lieutenant Thomas LaMantia, who placed second to Gervato on the captain's exam, was promoted to captain.<sup>1/</sup> The City deemed Amos to have been promoted first. The PBA asserts that Gervato had one more year in the sergeant's grade and 3 1/2 more years with the department than Amos.

On or about April 25, 1989, the police chief issued General Order No. 89-04 which gave these officers their assignments in their new ranks. The assignments took effect May 1, 1989. The order reads:

Appointment of a Captain will mean enlargement of his responsibilities. Presently, as Administrative Aide to the Police Chief he handles all assignments designated by the Chief, plus the operation and control of the Record Section. Included in his new assignments will be the command and control of the Investigative Bureau. This will free one man to place in the vacancy of the Patrol operation. He also will do any and all assignments that are directed by the Police Chief.

The Lieutenants are Tour Commanders. They will be assigned so there are four on each tour. They will operate in sets with the same days off.

This will bring the tours to even numbers again.

7:30 am Tour     Puzio & Keating  
                      Amos & Ciolino

3:30 pm Tour     Andrezzi & Mati  
                      Maguire & Dukes

11:30 pm Tour    Cimino & Patire

---

<sup>1/</sup> LaMantia's promotion was the first one made from the captain's list promulgated in December 1987.

## Gervato &amp; Skultety

The order thus reassigns Gervato from command of the detective division to be the second lieutenant assigned to the midnight (third) shift in the patrol division. Prior to Gervato's reassignment, the third shift had three superior officers. The first two patrol shifts had four. Amos, who had been a sergeant on the day (first) shift prior to his promotion, remained on that shift as a second lieutenant. LaMantia, the newly appointed captain, continued to work as an administrative officer assigned to the Records department, but now commanded the investigative bureau as well. No other sergeant or lieutenant was moved to the investigative bureau in place of Gervato following the transfer.<sup>2/</sup> Gervato allegedly lost a detective's pay differential when he was reassigned.

On April 25, 1989, having learned of his transfer, Gervato wrote a memo to the chief asserting seniority over Amos and requesting assignment to the day shift. The chief responded, without elaboration, that seniority was not a factor and that the

---

<sup>2/</sup> The employer has supplied duty rosters showing the assignments of all superior officers from April 1, 1989 through May 15, 1989. The PBA has supplied information about personnel moves and shift assignments of superior officers through March 15, 1990. Effective March 1, 1990, Gervato became the shift commander on the midnight patrol tour. The most recent personnel moves, precipitated by the chief's retirement and the promotion of a captain to replace him, resulted in another lieutenant other than Gervato being promoted to Captain. However Captain LaMantia remained in charge of detectives from May 1, 1989 through March 15, 1990.

assignment was based upon "where I feel you can be of the most value to our department."

On May 5, 1989, Gervato filed a grievance protesting his reassignment from the detective division to patrol.<sup>3/</sup> The City denied Gervato's grievance and the PBA demanded arbitration. This petition ensued.

The employer asserts that it has a non-negotiable right to make assignments to or from the investigative bureau notwithstanding Gervato's loss of a detective's pay differential. Citing Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987), it contends that the pay differential alone does not make a transfer arbitrable as a disciplinary action. The City asserts that the Department of Personnel does not regard assignment as a promotion and that the pay differential is for detectives' irregular work hours.<sup>4/</sup>

---

<sup>3/</sup> On May 18, 1989, Gervato filed two separate appeals with the Department of Personnel (DOP). One alleged that the City acted arbitrarily when it promoted Amos ahead of Gervato, diminishing Gervato's seniority. The other alleged that the City acted arbitrarily in not promoting Gervato to captain. The Merit System Board denied Gervato's request for a hearing on the latter claim and an appeal is now pending in the Appellate Division. The former claim is still pending before DOP. Gervato also commenced a proceeding under the Law Against Discrimination. On July 27, 1989, the Division on Civil Rights issued a complaint charging the City had discriminated against Gervato on the basis of age when it denied him a promotion to captain. It is still pending.

<sup>4/</sup> The City asserts that DOP does not offer a competitive exam for detective nor does it review detective assignments.

The PBA asserts that Gervato's reassignment violated the past practice and seniority articles which allow the senior officer in rank to chose his assignment. Citing Pennsauken Tp., P.E.R.C. No. 88-126, 14 NJPER 408 (¶19162 1988), it states that the grievance is arbitrable because provisions allowing assignments to be based upon seniority are mandatorily negotiable. It counters that the reassignment, which moved Gervato from command of the detective division to "an obscure position" as an extra lieutenant on the midnight shift, was designed to undermine his promotional aspirations. The PBA concludes that the City has not met its burden of showing that arbitration would interfere with governmental policy making because the transfer was neither based on an emergency nor on a need for an officer with special skills.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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 assess the merits of the grievance or the claims pending in other forums.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 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]

Because this dispute arises as a grievance, arbitration will be permitted if 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. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

Decisions about organizing police departments and deploying command or supervisory personnel involve governmental policy. Local 195; see also Ridgefield Park. Unless made for disciplinary reasons such decisions usually cannot be arbitrated. Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990); City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986); City of East Orange, P.E.R.C. No. 86-70, 12 NJPER 19 (¶17006 1985); see also Kearny PBA Local 21, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982) (restraining arbitration over reassignment of police sergeant as night commander of detective bureau).

The portion of General Order 89-04 which reassigned command of the detective bureau from Gervato to a police captain constitutes a decision to reorganize Garfield's police services and to redeploy its supervisory police personnel rather than a decision to discipline an officer it had just promoted. Cf. Cape May Cty. Bridge Comm. and Loc. No. 196, IFPTE, P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984), aff'd App. Div. Dkt. No. 5186-83T6 (7/9/85).<sup>5/</sup>

---

5/ The PBA's claims that the personnel moves made by the City violated DOP laws and regulations and the Law Against Discrimination are being litigated in appropriate forums and cannot be arbitrated. See N.J.S.A. 34:13A-5.3; Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

We must restrain arbitration over this decision. Cf. City of Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (¶14043 1982).<sup>6/</sup>

On the other hand, that aspect of the grievance which asserts that Gervato had greater seniority than Amos and should have been given a shift selection preference is arbitrable. See City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989); City of Newark, P.E.R.C. No. 88-106, 14 NJPER 336 (¶19126 1988). Gervato and Amos have the same rank and assignments. No showing has been alleged or made that Gervato is particularly suited to the midnight shift and that Amos is particularly suited to the day shift. As we did in Hoboken, we hold permissively negotiable a provision requiring an employer to observe seniority among qualified officers in making a shift assignment absent any need to fill a position with a specially skilled or experienced officer.

---

<sup>6/</sup> The loss of an investigators' pay differential is not a severable claim. See City of Atlantic City, P.E.R.C. No. 87-161; Warren Cty. Freeholder Bd., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985).

ORDER

The City's request for a permanent restraint of arbitration is granted to the extent the grievance asserts that Gervato was improperly reassigned from the investigative bureau to the patrol division.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 14, 1990  
Trenton, New Jersey  
ISSUED: May 15, 1990