

P.E.R.C. NO. 2003-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF UNION,

Petitioner,

-and-

Docket No. SN-2003-31

UNION TOWNSHIP SUPERIOR
OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Union for a restraint of binding arbitration of a grievance filed by the Union Township Superior Officers' Association. The grievance alleges that the chief's order that patrol supervisors could no longer bid for platoons by seniority violates the parties' contract. The Commission concludes that, under all the circumstances, the enforcement of an alleged right to have platoon assignments determined by seniority would substantially limit government's policymaking powers.

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, Stanton, Hughes, Diana, Cerra,
Mariani, Margello, P.C., attorneys
(Mark Diana, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, P.C. (Paul Kleinbaum, on the brief)

DECISION

On December 23, 2002, the Township of Union petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Union Township Superior Officers' Association. The grievance alleges that the chief's order that patrol supervisors could no longer bid for platoons by seniority violates the parties' contract.

The parties have filed briefs and exhibits. The Township has filed the certification and supplemental certification of Police Chief Thomas Kraemer. The Association has submitted the

certification of Lieutenant David R. Parducci. These facts appear.

The Association represents sergeants, lieutenants and captains. The parties' collective negotiations agreement is effective from January 1, 2000 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article V of the parties' agreement is entitled Hours of Work and Overtime. Section E provides:

All lieutenants and all sergeants assigned to the Basic Patrol Force shall select shifts, tours of duty, days off, and vacations based upon a seniority basis. The selection of the aforementioned shall be based upon the actual work scheduled for the upcoming year. The work schedule shall be posted no later than the first day of November of the year preceding the year that selections are to be effective for.

Article XIX is a retention of benefits clause. It requires that all conditions of employment and other benefits in existence which are not specifically mentioned in the contract shall be continued at the same level until the execution of a new agreement.

Article XVIII is entitled Management Responsibility. It provides, among other things, that the Township maintains the right to select and direct the working forces, to assign or transfer, to determine the schedules of work, and to make reasonable and binding rules which shall not be inconsistent with the Agreement.

Patrol officers work a 4/4 work schedule consisting of four consecutive 11 1/2 hour days or nights on, followed by four consecutive days or nights off. There are two tours of duty in the patrol bureau. Tour 1 is the night tour and Tour 2 is the day tour. Each tour has a Platoon A and B and each platoon has an early and late shift, as follows:

<u>Platoon</u>	<u>Early Shift</u>	<u>Late Shift</u>
1A(night)	5:30 PM - 5:00 AM	6:30 PM - 6:00 AM
1B(night)	5:30 PM - 5:00 AM	6:30 PM - 6:00 AM
2A(day)	6:00 AM - 5:30 PM	7:00 AM - 6:30 PM
2B (day)	6:00 AM - 5:30 PM	7:00 AM - 6:30 PM

Therefore, the platoon which an officer works determines whether the officer works days or nights and also which particular pattern of days on and days off the officer works throughout the year.

There are four patrol supervisors (one lieutenant and three sergeants) and 16 patrol officers assigned to each platoon. The lieutenant and one sergeant are assigned to the early shift, and the two other sergeants are assigned to the late shift.

In July 2002, a lieutenant and two sergeants retired. In November 2002, a sergeant and two patrol officers were promoted to fill the vacancies. Patrol supervisors had been permitted to select both a desired tour and a desired platoon according to seniority bidding. For calendar year 2003, the chief permitted seniority bidding for patrol supervisors for tour assignments

(nights vs. days) but not platoons (pattern of days or nights off).

On October 1, 2002, the Association filed a grievance contesting the decision not to permit seniority bidding for platoon assignments. The grievance was denied and on November 6, 2002, the Association demanded arbitration. 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 cannot consider the contractual merits of this 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. Paterson Police PBA No. 1 v. 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 arises through a grievance, arbitration will be 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. Neither party asserts that any statute or regulation preempts negotiations so we will focus on applying the balancing test in light of relevant precedents and the facts of

this case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998).

The Township argued that it has a managerial prerogative to make platoon assignments that ensure effective supervision and an appropriate distribution of officers with special qualifications. The Township relied on the chief's certification. He stated that he did not allow bidding on platoons for 2003 to ensure that each platoon was evenly balanced with senior and junior supervisors; the patrol supervisors with special qualifications were distributed among the platoons, and the most effective supervisor-subordinate match-ups were made on each platoon.

The Association responded that the chief did not cite any particular problems with allowing officers to select their platoons by seniority, but only stated that he needed to have flexibility to make such assignments for several reasons. It relied on the certification of its president. He stated that he was not aware of any particular problems that arose during 2002. He asserted that the chief's concerns are more generalized about his flexibility to make platoon assignments. He further stated that the chief should have allowed the selections to proceed based on the contract and past practice and that if particular problems arose after the selections, the chief could have addressed them as the particular situations arose. The Association argued that the Township retains the right to

challenge the arbitrability of any grievance that contests the chief's decision to make platoon assignments in particular cases and that the Township would have the right to reactivate this petition in the event an arbitrator issues an award that substantially limits its governmental policymaking powers.

The Township replies that it has articulated a sufficient particularized need to deviate from the seniority bidding for platoon assignments. It argues that the chief's original certification explains in detail his rationale for restricting the bidding. The Township also relies on the chief's supplemental certification. The chief states that there were only two patrol supervisors (two sergeants) who did not receive the same seniority-based platoon selections in 2003 that they had in 2002. The chief explains that one sergeant was assigned to Platoon 1A despite his preference for Platoon 1B because the chief wanted to separate him from a particular lieutenant. Both have recently been disciplined for poor supervisory decision-making and the chief concluded that he could improve supervision on Platoon 1B and improve the sergeant's oversight if he were transferred to Platoon 1A. The Township states that it did not include the supervisory details in its original submission or the chief's certification in order to keep from making these disciplinary matters a part of a public record. Another sergeant was therefore assigned to Platoon 1B despite his seniority-based

preference for Platoon 1A in order to fill the gap created by that first sergeant's transfer.

Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd 27 NJPER 357 (¶32128 App. Div. 2001); City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990). However, 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. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park Ed Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). In Camden, we drew a distinction between shift selections and job assignments. A change in shifts changes the hours an employee works; a change in an assignment within a shift may change an employee's duties but not his or her work hours. See Burlington Cty., P.E.R.C. No. 2000-70, 26 NJPER 121 (¶31052 2000).

In this case, employees are permitted to use their seniority to select shifts, tours of duty, days off, and vacations. The dispute is over whether they can enforce an alleged right to bid

over platoon selection, i.e., whether they will work four days on beginning on day one or beginning on day five. The employer has speculated that the employees' interest in that selection is to work the shift pattern with the least number of workdays falling on holidays. The SOA president certifies that SOA members do not typically switch platoons to get a more favorable holiday schedule.


The decision not to permit seniority bidding for platoons resulted from a governmental policymaking decision to match the best qualified employees to particular jobs. The chief certifies that he needed the flexibility to assign officers to platoons to address general problems of supervision and qualifications and a specific problem involving two officers. The PBA cannot use a seniority bidding clause to effectively secondguess those determinations. See City of New Brunswick, P.E.R.C. No. 2003-37, 28 NJPER 578 (A33179 2002) (restraining arbitration of grievance challenging transfers to different squads within same shift)

Under all the circumstances, we conclude that enforcement of an alleged right to have platoon assignments determined by seniority would substantially limit government's policymaking powers. We therefore restrain binding arbitration.

ORDER

The request of the Township of Union for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: May 29, 2003
Trenton, New Jersey
ISSUED: May 30, 2003