

P.E.R.C. NO. 2004-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Petitioner,

-and-

Docket No. SN-2004-30

P.B.A. LOCAL 124,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Middletown for a restraint of binding arbitration over challenges to its decision to assign patrol officers to a swing shift based on an officers' productivity rather than seniority. The Commission concludes that public employers have a non-negotiable prerogative to match the best qualified employees to particular jobs. The parties' contract contains mandatorily negotiable language requiring that shift assignments must be based on seniority only "upon all other things being equal." The Commission concludes that, on this record, the Township's governmental policymaking powers would not be substantially limited by permitting an arbitrator to determine whether the shift denials violated the parties' negotiated seniority provision.

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, Dowd & Reilly, attorneys
(Richard C. Leahey, Jr., on the brief)

For the Respondent, Klatsky, Sciarabone & De Fillippo,
attorneys (David J. De Fillippo, on the brief)

DECISION

On December 22, 2003, the Township of Middletown petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of grievances filed by P.B.A. Local 124. The grievances challenge the employer's decision to assign patrol officers to a swing shift based on the officers' productivity rather than seniority.

The parties have filed briefs and exhibits. The PBA has submitted the certifications of its president and two patrol officers. The Township did not file any certifications or a reply brief. These facts appear.

The PBA represents all police officers below the rank of sergeant. The parties' collective negotiations agreement is

effective from January 1, 2000 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article V is entitled Seniority. Section C provides that "all other things being equal, traditional principles of seniority shall apply to employment covered by this agreement as to shift transfers."

Article X is entitled Hours. Section E provides that "Management has the right to change shifts or the hours worked but must negotiate any impact of its changes in reference to changes, wages, overtime and other compensation with the Association."

Article XXIX is entitled Management Rights Clause. Section A.2 provides, in part, that the employer retains the rights to "determine work schedules and shifts, as well as duties; . . .and to be in sole charge of the quality and quantity of the work required."

There are six squads in the Patrol Division. Each squad works five days on, two days off, and then five days on, three days off. Each squad rotates through three regular 8-hour shifts. Squad members also rotate through one of three swing or power shifts. The squad lieutenant assigns the swing shifts. The record does not indicate that any different duties are assigned to patrol officers on different swing shifts.

In December 2002, a lieutenant assigned Patrol Officer Barry Grimm to a swing shift other than his preferred assignment. The deputy chief and lieutenant told the PBA president that swing shift assignments would now be based on an officer's productivity rather than seniority. When Grimm's swing shift preference was again denied in January, the lieutenant cited the number of motor vehicle summonses written. On December 10, 2002, the PBA wrote to the chief, objecting to the change in the swing shift selection process. He asked the chief to provide the factors and criteria for evaluating each squad member in terms of shift assignments.

On December 12, 2002, the chief responded by memorandum. He wrote that Article XXIX empowers management to determine work schedules and shifts as well as duties. He added:

Shift commanders set expectations for their subordinates along with patrol supervisors. It is up to the individual supervisor and commander to manage their subordinates. As you are aware employees are evaluated formally, as well as informally on a regular basis. Informal evaluations include report writing, appearance, punctuality, self-initiated enforcement activities, as well as community relations and directed enforcement activity. Other factors that encompass police jobs and responsibility are far too numerous to enumerate in this memo. Formal evaluations, as you are aware, are reduced to writing on a semi-annual basis.

While it may be the desire of a particular employee to work a particular shift, it is the department's prerogative to assign and deploy manpower. I certainly do not object

to commanders attempting to factor in the desire of an employee on the power shift, but I will certainly not preclude commanders from deploying or assigning their subordinates to specific assignments or districts.

On January 10, 2003, the PBA filed a grievance. The grievance asserted that the police department had unilaterally implemented a new swing shift selection process in violation of past practice and the collective negotiations agreement, specifically Article V, Section C and Article X, Section E. The grievance added:

As to the new work rules unilaterally implemented, this grievance shall also serve as the PBA's formal request to negotiate same. Moreover, as to the "informal" evaluation of officers, the PBA hereby demands that the Township advise as to certain procedural items; (1) by whom each officer is "informally" evaluated; (2) how often said "informal" evaluations are to take place; (3) the specific factors, criteria or other basis upon which said "informal" evaluations are predicted; (4) to whom said "informal" evaluations are being submitted; and (5) the manner which said "informal" evaluations are being documented or memorialized.

In March 2003, a lieutenant assigned a junior patrol officer to the swing shift preferred by Patrol Officer Ernest Volkland. Volkland's certification states that a lieutenant told him that he was not assigned to his preferred shift because the lieutenant had just given him a reprimand.

On April 9, 2003, the PBA filed two grievances on Volkland's behalf. The first grievance stated that he had been advised by

the lieutenant that he would not be working his shift of choice during the upcoming swing shift due to a recent letter of reprimand. As a remedy, the grievance sought assignment to swing shift by seniority and negotiation of all work rule changes. The second grievance challenged the reprimand.

All three grievances were denied. The PBA demanded arbitration and this petition ensued.^{1/} Arbitration has been postponed pending this decision.^{2/}

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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

1/ The Township does not contest the legal arbitrability of Volkland's reprimand or procedural items related to an informal evaluation process.

2/ On April 7, 2003, the PBA filed an unfair practice charge alleging that a change in the past practice of assigning swing shifts and the implementation of an informal evaluation system violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The charge was amended on May 5 to also allege that the Township had instituted an informal evaluation process by denying a police officer a swing shift assignment. Hearings have been scheduled.

by an arbitrator and/or the courts. [Id. at 154]

Thus, we do not consider the contractual merits of the grievances or any contractual defenses the Township may have.

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

The Township's argues that the assignment of swing shift duties is within its managerial prerogative so long as the reason for the assignment is not illegal. The PBA responds that the parties' contract conditions shift selection by seniority "upon all other things being equal" and thus protects the Township's prerogative to ensure that shift assignments take into account such needs as special skills, qualifications, training, and supervision as required by our case law.

The Township's argument sweeps too broadly and would grant employers per se control over employee work schedules and shift hours absent an illegal reason such as anti-union discrimination. Our courts have rejected such a per se argument. See, e.g., Teaneck Tp. v. Teaneck FMBA Local No. 42, 177 N.J. 560 (2003), aff'g 353 N.J. Super. 289 (App. Div. 2002). Public employers and unions may accordingly 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., Union Tp., P.E.R.C. No. 2003-81, 29 NJPER 214 (¶63 2003), and the cases cited therein at 215. 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. Id.

Under the parties' contract, shift assignments must be based on seniority only "upon all other things being equal." That language is mandatorily negotiable given Union Tp. and protects management against having any prerogatives compromised. Further, this record does not specify any differences in duties performed on the swing shifts or indicate that the shift assignments were based on the governmental policy goal of matching the best qualified employees to particular swing shift duties. Contrast Union Tp. (record showed that chief needed the flexibility to assign officers to particular platoons to address needs for special qualifications and effective supervision); Pemberton Tp., I.R. 99-14, 25 NJPER 191 (¶30087 1999) (Commission designee denied interim relief where issues of departmental efficiency, disciplinary problems, and continuity and consistency of supervision allegedly justified assigning employees to particular shifts). We therefore conclude that the Township's governmental policymaking powers would not be substantially limited by permitting an arbitrator to determine whether the shift denials violated the parties' negotiated seniority provision. The employer may argue to the arbitrator that it was contractually

entitled to deny the officers' shift preferences under the seniority provision and the management rights clause.

ORDER

The request of Middletown Township for a restraint of binding arbitration of these grievances is denied.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", is written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo and Katz voted in favor of this decision. Commissioners Mastriani and Sandman abstained from consideration. None opposed.

DATED: April 29, 2004
Trenton, New Jersey
ISSUED: April 30, 2004