P.E.R.C. NO. 2005-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX,

Petitioner,

-and- Docket No. SN-2005-022

MIDDLESEX COUNTY CORRECTION OFFICERS, P.B.A. LOCAL 152,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the County of Middlesex for a restraint of binding arbitration of a grievance filed by Middlesex County Correction Officers, P.B.A. Local 152. The PBA alleges that the County violated the parties' collective negotiations agreement when it required a correction officer who could not work overtime due to a medical condition to go on medical leave. On the facts of this case, the Commission holds that the County had a right to determine that an employee could not remain on active duty unless physically capable of working more than eight hours when needed to do so. The Commission restrains arbitration over the claim that the County should have allowed the employee to work her regular eight-hour shift with no overtime responsibility.

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, Thomas F. Kelso, County Counsel (Benjamin D. Leibowitz, Deputy County Counsel, on the brief)

For the Respondent, Tara Auciello, attorney

DECISION

On October 5, 2004, the County of Middlesex petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by Middlesex County Correction Officers, P.B.A. Local 152. The PBA alleges that the County violated the parties' collective negotiations agreement when it required a correction officer who could not work overtime due to a medical condition to go on medical leave.

The County has filed a brief, exhibits and a certification. The PBA did not file a brief.[1/] These facts appear.

The PBA represents correction officers at the Middlesex County Adult Corrections Center. The parties' collective negotiations agreement is effective from January 1, 2000 through December 31, 2004. Article 11.03 sets the compensation rate for non-voluntary overtime. The grievance procedure ends in binding arbitration.

The County employs 198 correction officers. If more than six officers are absent on a shift, overtime assignments are made to maintain minimum staffing levels.

Aracelys Millet is a correction officer. On April 27, 2004, she submitted a doctor's note advising that she should work no more than eight hours per day because she was pregnant and had migraine headaches. On May 17, the warden issued a notice to all security staff. It stated:

> Due to some recent inquiries concerning limitations for working overtime I would like to take a moment to clarify what the Department's expectations are for being a uniformed officer.
>
> During the interview and hiring process, all prospective applicants were made aware of the many diverse aspects of becoming an officer. Part of that criteria included working

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1/ The officer's own attorney advised the employer that she was representing the officer with the permission of the PBA. That attorney indicated that the respondent would not be filing a brief.

> mandatory overtime when the need presented itself. Should an officer, when ordered to work overtime, have an issue they feel excludes them from working, they are to bring this to either the Captain's attention or myself and it will be reviewed on a case by case basis. If it is decided that, in fact, a medical issue prevents that person from working mandatory overtime, that individual will be provided with a FMLA (Family Medical Leave Act) packet to read over and complete requesting a medical leave until such time they are able to fulfill all required obligations of the position of Correction Officer.
>
> Again, I must reiterate that it is the expectation of this Department that all uniformed personnel meet the requirements of their sworn position which includes working overtime whenever this Department needs to meet the required staff minimum to ensure the safety of both the inmate population as well as the State.

On May 27, 2004, Millet was placed on leave pursuant to the federal Family and Medical Leave Act, 29 U.S.C. §2601 et seq. Her 12 weeks of FMLA leave expired on or about August 20, 2004. On August 21, Millet was placed on up to three months of additional unpaid County medical leave. That leave was to expire on November 21, 2004.

On October 11, 2004, Millet gave birth. According to the County's brief, she could then take a month of maternity leave and up to 12 weeks of leave under the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq. to bond with her child. Alternatively, she could return to work when she wants if she is

cleared by her doctor and the clearance specifies that she is able to work overtime.

Meanwhile, the PBA had filed a grievance. Neither the original grievance nor the denial has been submitted. The PBA demanded arbitration. The demand stated that the warden notified Millet that if she was not able to work mandatory overtime, she was to leave work under the FMLA or disability leave. The demand further stated that the policy set forth in the warden's notice is not part of Millet's contract and constitutes a change in her terms and conditions of employment and a violation of the contract. As a remedy, the PBA seeks to have Millet returned to her employment and to be compensated (including pay, vacation time, and other benefits) for all time missed as a result of being told to leave work.

On September 24, 2004, the County personnel director denied the grievance. He wrote:

> Your grievance consisted of two points, one being that you were never informed that overtime was mandatory. Prior to the start of your employment you were informed by Senior Staff members that under certain circumstances overtime would be mandatory. When questioned "Are you willing to work double shifts (16 consecutive hours) and scheduled days off with little or no advanced warning?" you answered "yes." It is widely known through your department by all officers that under certain circumstances, overtime is mandatory, due to the fact that there cannot be a shortage of officers on duty for a shift. When those circumstances occur, there is a procedure in place as to who will be

> assigned to stay for the next shift to cover, first by seniority, then by a list kept by the Center.
>
> It has been shown via records received from the Correction Center that on February 29, 2004, and April 8, 2004, that you were ordered to stay to work overtime and you did so.
>
> The second point you cited in your grievance was that you were never informed of the Family and Medical Leave Act policy. The "FMLA" policy is a federal law followed by the County. Copies of the "FMLA" policy are posted throughout the Corrections Center, as I have been informed of by the Warden. The policy can also be found in the County Personnel Policy. I have enclosed a copy of the citation in the County Personnel Policy covering the Unpaid Leave-FMLA/FLA policy, for your information.
>
> Thirdly, I understand that it has been a longstanding precedent at Adult Corrections that working overtime is an essential function of the job and if a Corrections Officer is unable to perform overtime, then they can either take an authorized leave of absence, such as "FMLA" or if all available leave has been exhausted, then they are subject to discipline for inability to perform their job.
>
> Finally, your apparent expectation that overtime requirements should have been included in the labor agreement in this instance is unfounded. The overtime policy in issue is a managerial prerogative and is not negotiable.

The warden's certification supports the assertions in this grievance denial concerning mandatory overtime and FMLA leave. 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 County 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 (¶111 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.

A public employer has a managerial prerogative to set staffing levels necessary for the efficient delivery of government services. That prerogative extends to unilaterally mandating overtime to ensure staffing levels are met. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The allocation of overtime among qualified unit employees, however, is generally mandatorily negotiable. Ibid.

On these facts, we agree with the County that it had a right to determine that Millet could not remain on active duty unless she was physically capable of working more than eight hours when needed to do so. Cf. Union Cty., P.E.R.C. No. 2002-5, 27 NJPER

325 (¶32116 2001) (proposal that would mandate the creation of light duty positions for pregnant correction officers not mandatorily negotiable).[2/] Thus, we will restrain arbitration over the claim that the County should have allowed Millet to work her regular eight-hour shift with no overtime responsibility.

ORDER

The request of Middlesex County for a restraint of binding arbitration is granted over the claim that the County should have allowed Millet to work her regular eight-hour shift with no overtime responsibility.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: December 16, 2004
Trenton, New Jersey
ISSUED: December 16, 2004

2/ Union Cty. also noted that the argument that such an accommodation was required by disability or anti-discrimination laws had no bearing on the negotiability of the proposal. Accordingly, we need not consider the recent federal district court case cited to us by the County.