

P.E.R.C. NO. 2005-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2005-034

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance contests a directive requiring all police units to activate their overhead lights from dusk to dawn. The Commission concludes that public employers have broad discretion to manage police departments and a strong governmental policy interest in deciding how best to deliver public safety services to protect their citizens. The Commission holds that any impact on police officer safety is speculative and subordinate to the decision about how to deliver police services.

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, JoAnne Y. Watson, Corporation
Counsel (Phillip Dowdell, Assistant Corporation
Counsel, on the brief)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman and Charles F. Szymanski, on the
brief)

DECISION

On December 6, 2004, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance contests a directive requiring all police units to activate their overhead lights from dusk to dawn.

The parties have filed briefs and exhibits. The FOP has submitted the affidavits of Jim Sharrock, undersheriff in Hudson County, and John Sisto, past president of the New Jersey State FOP. The City has submitted the affidavit of a deputy police chief. These facts appear.

The FOP represents the City's police officers. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration.

On April 26 and 27 and May 14, 2004, the Communications Division issued a memorandum to all supervisors. The memorandum directed that effective immediately an alert would be broadcast on all channels every hour from dusk until dawn for all units to activate their overhead lights. The memorandum stated that the directive shall be strictly adhered to and failure to comply shall result in disciplinary action. The May 14 directive indicated that the broadcast would be every two hours.

Neither party submitted a copy of the FOP's grievance which was apparently denied by the City. On August 4, 2004, the FOP 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 do not consider the merits of the grievance or any contractual defenses the City may have.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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.

The City argues that the directive to have police officers turn on their overhead lights from dusk to dawn is part of its attempt to address the rash of violence that "has plagued Newark since 2004 to date, during which time four of its officers were shot, four civilians massacred in a city lot near a house of worship, numerous alleged gang members shot, injured or killed, etc." Noting that the tactic has been used in Washington, D.C. and other jurisdictions, the City believes that increased police visibility will deter crime.

The FOP counters that the order significantly impacts on police officer safety and therefore is mandatorily negotiable. It also asserts that the order will cause confusion and massive traffic problems because drivers will likely yield or pull over when they see a police car with overhead lights activated, believing they are obligated to comply with statutory requirements pertaining to emergency vehicles. Sisto and Sharrock surmise that over time, citizens may simply ignore the overhead lights, thereby harming citizens and endangering officers by preventing them from engaging in pursuits and delaying their progress in emergencies. Finally, the FOP

maintains that the new directive conflicts with General Orders 94-3 and 96-09, which together require officers to activate their emergency lights and sirens only in emergencies.

The City disagrees that the policy will likely cause traffic problems and stresses that officers are highly trained and experienced in driving high-performance police vehicles.

Public employers have broad discretion to manage police departments and a strong governmental policy interest in deciding how best to deliver public safety services to protect their citizens. Jersey City v. POBA and PSOA, 154 N.J. 555, 572 (1998); Town of Harrison, P.E.R.C. No. 2002-54, 28 NJPER 179 (¶33066 2002). Accordingly, we have held that grievances challenging operational orders affecting the delivery of such services were not legally arbitrable. See Harrison, P.E.R.C. No. 2002-54 (restraining arbitration of grievance protesting directive that officer respond to both EMS and fire calls when there were vacancies on his shift); City of Newark, P.E.R.C. No. 98-154, 24 NJPER 341 (¶29161 1998) (grievance protesting order that officers be sprayed with pepper mace during training was not legally arbitrable); see also Brookdale Community College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977) (college had prerogative to decide whether campus police would carry firearms).

At the same time, clauses requiring that an employer provide police with safety-related equipment are mandatorily negotiable,

and grievances seeking to enforce agreements to provide a safe work environment are legally arbitrable. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998); State of New Jersey (Greystone Park Psychiatric Hosp.), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989); Union Tp. P.E.R.C. No. 87-119, 13 NJPER 289 (¶18121 1987). In addition, we have allowed arbitration of health and safety claims arising out of governmental policy decisions, but have stressed that the policy decision itself could not be arbitrated. See, e.g., Town of Harrison, P.E.R.C. No. 2004-31, 29 NJPER 510 (¶162 2003) (Town's decision not to call in a second fire officer to cover a shift was not arbitrable, but union could seek arbitral determination that proper safety policies required two fire officers at all times); State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-66, 25 NJPER 94 (¶30041 1999) (declining to restrain arbitration of grievance seeking declaration that workplace was unsafe and unhealthful as a result of non-negotiable governmental policy decision to privatize medical services); City of Perth Amboy, P.E.R.C. No. 98-146, 24 NJPER 311 (¶29148 1998) (grievance seeking declaration that two fires were handled in ways that violated contractual health and safety clauses was legally arbitrable; union abandoned initial claims for specific remedies).

Within this framework, we conclude that arbitration over the order to use overhead lights from dusk to dawn would substantially limit the City's governmental policymaking. The order is part of the City's plan to address a recent rash of violent crimes and reflects its judgment that, consistent with the experience in some other jurisdictions, the measure could help reduce violence by enhancing police visibility and citizen access. Compare Jersey City (city had prerogative to adopt consultant's recommendation that city combat crime by civilianizing certain positions and transferring police officers in those positions to patrol positions). Thus, the order goes to the core of the City's policymaking authority to decide how best to deliver police services.

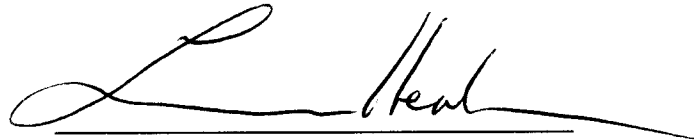
Hillside Tp., P.E.R.C. No. 83-132, 9 NJPER 271 (¶14123 1983), and related cases concerning safety-related equipment do not change this analysis. Unlike Hillside, the grievance does not seek the installation of overhead lights to promote officer safety, but challenges their use in conjunction with a plan to combat violent crime. The FOP's contentions that the order will cause drivers to ignore police cars with activated overhead lights, thereby causing traffic jams, harming citizens and police officers, and preventing or delaying officers from responding to emergencies, all center on the order's advisability, not officers' safety. Any impact on police officer safety is

speculative and subordinate to the decision about how to deliver police services. The same considerations pertain to the FOP's assertions that the order will conflict with other department protocols and cause traffic problems.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted.

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, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: June 30, 2005
Trenton, New Jersey
ISSUED: June 30, 2005