

P.E.R.C. NO. 2006-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Petitioner,

-and-

Docket No. SN-2005-075

P.B.A. LOCAL 361,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Town of West New York for a restraint of binding arbitration sought by P.B.A. Local 361. The PBA alleges that the Town violated the parties' collective negotiations agreement by assigning Urban Enterprise Zone (UEZ) police officers to perform work not covered by UEZ grants and by unilaterally changing work hours to avoid paying overtime to unit members. The Commission grants a restraint to the extent the grievance challenges the assignment of Urban Enterprise Zone officers to an August 6, 2004 paving project during their regular work hours. The Commission denies a restraint to the extent the grievance challenges the allocation of the paving detail work to those officers on an overtime basis.

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, The Murray Law Firm, LLC,
attorneys (Robert E. Murray, of counsel; Mary E.
Hennessey-Shotter, on the brief)

For the Respondent, Mets & Schiro, LLP, attorneys
(James Mets, of counsel and on the brief;
Roosevelt Porter, on the brief)

DECISION

On May 4, 2005, the Town of West New York petitioned for a scope of negotiations determination. The Town seeks a restraint of binding arbitration sought by P.B.A. Local 361. The PBA alleges that the Town violated the parties' collective negotiations agreement by assigning Urban Enterprise Zone (UEZ) police officers to perform work not covered by UEZ grants and by unilaterally changing work hours to avoid paying overtime to unit members.

The parties have filed briefs and exhibits. These facts appear.

The PBA represents all police officers and detectives below the rank of sergeant. The parties' collective negotiations agreement is effective from December 15, 2001 through July 1, 2005. The grievance procedure ends in binding arbitration.

Article V, Section 3 of the parties' agreement provides:

Employees assigned to the Urban Enterprise Zone (UEZ) unit shall work a schedule of five (5) consecutive eight (8) hour days followed by a seventy-two (72) hour leave and then shall work four (4) consecutive eight hour days followed by an eighty (80) hour leave and shall continue to work such five (5) and four (4) day cycle.

Article VI, Section 4, provides:

Employees may be required to work time in excess of an Employee's normal workweek subject to payment as follows:

- (a) For all compensated time or time worked up to and including thirty-eight (38) hours per week, payment shall be at the hourly rate except as noted in section 3 above.
- (b) For all compensated time or time worked beyond thirty-eight (38) hours per week, payment shall be made at the overtime rate; except for detailed and UEZ officers working their five (5) day week, for whom overtime shall begin after forty (40) hours.

Article XXIV provides that all terms and conditions of employment not covered by the agreement shall remain in full force and effect at their highest standards and that the employer shall not enter into any agreement with any employee or group of employees that conflicts with the terms of this agreement.

The Town is an Urban Enterprise Zone. The UEZ legislation was enacted in 1983 to revitalize the State's most distressed urban communities by creating private sector jobs and encouraging private investment in targeted areas within these communities. There were ten original zones. West New York and other zones were added in 1997.

As part of the UEZ, the Town receives funds to be used for "undertaking public improvements and in upgrading eligible municipal services in designated enterprise zones." In an application for UEZ assistance, the Town stated:

The Town of West New York seeks seventh year funding to maintain an added police presence throughout the Urban Enterprise Zone.

Funding renewal of the West New York police initiative is necessary to maintain the public's confidence in a safe environment within the town's central business district. The 10 police officers ensure that the Urban Enterprise Zone is a safe environment to conduct business. The police utilize foot and bike patrols, motorcycle and patrol cars.

The officers are dedicated solely to the zone, however, they are subject to deployment to surrounding areas as need may arise. This project is consistent with the statute as well with our (5) five year Zone Development Plan. The ten officers in the teams work seven days a week and the two teams rotate weekly (10:00 am - 6:00 pm and 3:00 pm to 11:00 pm). Additional police . . . [presence] of the UEZ squad in the Zone provide[s] the secure feeling for the shoppers and residents, maintaining and increasing the amount of people shopping in the Zone leading to positive economic activity. This project will be measured by comparison of current and

prior crime statistic[s], . . . we will also be monitoring the businesses, revenues, vacancy rate and whatever others indicate . . . that will assist us in measuring this project.

The City's request for UEZ funding was granted for the period from July 14, 2004 through July 14, 2005.

On August 6, 2004, the police director assigned certain UEZ officers to work a detail on a major paving project. This was a one-time assignment. One UEZ sergeant worked the assignment from 8:30 p.m. to 11:30 p.m. One UEZ police officer worked the assignment from 10:00 p.m. to 3:00 a.m.^{1/}

On August 30, 2004, the PBA demanded arbitration. The demand states:

The Town has violated Article V, VI, XXIV and other applicable Articles of the agreement between the parties as well as past practice by unilaterally assigning UEZ personnel to perform work not covered by UEZ grants and by unilaterally changing hours to avoid paying overtime to bargaining unit members.

This petition ensued. A May 17, 2005 arbitration date was adjourned.

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

^{1/} UEZ officers' regular shifts are 10:00 a.m. to 6:00 p.m. and 3:00 p.m. to 11:00 p.m.

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 employer 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.

The Town argues that it has a managerial prerogative to assign UEZ officers to direct traffic if the need arises and to administer the UEZ program.

The PBA responds that its grievance does not contest the Town's right to assign officers to the UEZ zone, but contests the Town's decision to assign UEZ officers to perform services that are outside the goals of the UEZ grant for the purpose of avoiding overtime for non-UEZ assigned officers. It argues that an arbitrator can consider whether the Town's deployment of UEZ police officers violated the parties' agreement and overtime arrangements and the Urban Enterprise Authority's approved project.

The Town replies that no hours of work were changed; the Director made the assignments in reaction to a traffic situation; and the parties' agreement provides that officers may be required to work in excess of their regular tour subject to payment at the

overtime rate. The Town also replies that it is unrealistic to have the Director send officers home at the end of their shift and call in other officers on overtime for what could be a trivial number of minutes.

Management has a well-established and non-negotiable prerogative to assign duties within a job description. City of Newark, P.E.R.C. No. 2005-39, 30 NJPER 481 (¶161 2005); New Jersey State Judiciary, P.E.R.C. No. 2005-16, 30 NJPER 406 (¶131 2005). Traffic control on a paving detail is within the job description of police officers and the PBA cannot challenge that assignment through binding arbitration. Any alleged external restriction on the use of police officers in the UEZ grant does not transform a non-negotiable assignment decision into a negotiable or arbitrable subject. Compare Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) (claim of discrimination in promotion not legally arbitrable). Enforcement of any such restrictions would have to take place in another forum. Accordingly, we restrain arbitration over any claim that UEZ officers should not have been assigned to the paving detail during their regular work hours. Accord Borough of Belmar, P.E.R.C. No. 2003-52, 29 NJPER 30 (¶10 2003) (restraining

arbitration over grievance challenging assignment of on-duty police officer to paving detail).^{2/}

We next address the claim that some of the detail was performed by UEZ officers on overtime and that the overtime work should have been allocated to non-UEZ officers. Allocation of overtime is negotiable and legally arbitrable, subject to the employer's right to assign a sufficient number of qualified employees to perform the necessary overtime task. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Belmar's holding does not extend to work that would have been overtime for both UEZ and non-UEZ officers and the employer has not presented any governmental policy reason why that overtime work needed to be assigned to the UEZ officers. We acknowledge that having to call in officers for a brief period of overtime may be inconvenient for the employer, but we are not persuaded that having to do so makes the alleged agreement unenforceable or that the employer's concerns cannot be addressed through the negotiations process. See Jackson Tp. Bd. of Ed., P.E.R.C. No. 2005-6, 30 NJPER 330 (¶108 2005) (burden of additional telephone calls did not make alleged overtime allocation agreement unenforceable). Accordingly, we deny a restraint of arbitration

^{2/} In light of this holding, we need not address the Town's assertion that the UEZ legislation, N.J.S.A. 52:27H-88, preempts arbitration over the deployment of police officers in the UEZ.

over the allocation of work that was performed by UEZ officers on an overtime basis.

ORDER

The request of the Town of West New York for a restraint of binding arbitration is granted to the extent the grievance challenges the assignment of Urban Enterprise Zone officers to a August 6, 2004 paving project during their regular work hours. The request for a restraint is denied to the extent the grievance challenges the allocation of the paving detail work to those officers on an overtime basis.

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

DATED: September 29, 2005
Trenton, New Jersey
ISSUED: September 29, 2005