

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2005-066

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Jersey City for a restraint of binding arbitration of a grievance filed by the Jersey City Police Superior Officers Association. The grievance contests the transfer of a sergeant and the corresponding change in his working conditions. The Commission concludes public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. The Commission concludes that a transfer based on the assessment of an employee's skills or qualifications is not subject to binding arbitration simply because it has a concomitant effect on working conditions.

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, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Stephen J. Edelstein, of counsel; Stefani C. Schwartz and Rachel A. Davis, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Michael A. Bukosky, on the brief)

DECISION

On March 14, 2005, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Jersey City Police Superior Officers Association. The grievance contests the transfer of a sergeant and the corresponding change in his working conditions.

The parties have filed briefs and exhibits. The City has filed the certification of its police chief. These facts appear.

The PSOA represents all superior officers from the rank of sergeant through deputy chief. The PSOA and the City are parties to a collective negotiations agreement with a grievance procedure ending in binding arbitration.^{1/} Article 8, entitled "Work Day and Work Week," establishes different work schedules and hours of work for line and staff officers. The former work eight-hour days and the latter work eight and one-half hour days. Article 12, listing paid holidays, also differentiates between line and staff officers. Staff officers receive seven additional holidays.

Effective December 23, 2002, Officer Mark Cowan was promoted to sergeant. The next day he was transferred from the Support Services Division to the Operations Division. He worked an eight-hour line schedule. On January 31, 2003, Cowan was transferred from the Operations Division to the Support Services Division/Scofflaw Warrants Unit, a staff assignment. His daily shift was increased by 30 minutes to eight and one-half hours.

On August 27, 2004, the chief issued an order transferring Cowan as well as several other superior officers and two police officers effective August 30. Officers were assigned to different positions for which they were determined to be better

^{1/} The parties have reached but not yet executed an agreement covering January 1, 2002 through December 31, 2005.

qualified. Cowan was transferred from the Support Services Division/Scofflaw Warrants Unit back to the Operations Division. He was thus switched from a staff schedule back to a line schedule, with a corresponding one-half hour reduction in his work day. He no longer received the additional seven holidays. The chief states that the transfer was not a form of discipline; Cowan's personnel file contains no complaints of misconduct or poor performance; and Cowan's services would be better used in a different position.

On September 30, 2004, the PSOA filed a grievance on Cowan's behalf asserting that the reassignment violated the work schedule and holidays clause. The grievance seeks to have Cowan put back on the staff schedule and compensated for any days lost and time owed. On October 5, the PSOA 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 employer may have. We specifically do not consider the City's argument that a retaliation claim cannot be arbitrated because it was not raised in the grievance or the demand for arbitration. That argument raises questions of contractual rather than legal arbitrability. See City of Trenton, P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001).

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. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for public safety employees. When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least 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 statute or regulation is alleged to be preemptive in this case.

The City argues that it has a non-negotiable prerogative to transfer police officers under City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555 (1998). Citing Wayne Tp., P.E.R.C. No. 92-60, 18 NJPER 43 (¶23016 1991), it contends that transfers are not negotiable or arbitrable even though they may change the working conditions of the reassigned employees.

The PSOA's brief asserts that Cowan was transferred because, while he was off duty on August 25, 2004, he sought to secure voter registration and nomination forms on behalf of a political candidate opposed by the administration. The PSOA argues that the contract's Maintenance of Standards and Retention of Rights clauses prohibit retaliation for political activity. Citing South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411 (¶27225 1996), it argues that contracts may incorporate anti-discrimination protections.

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; UMDNJ, P.E.R.C. No. 95-88, 21 NJPER 179 (¶26114 1995); State of New Jersey, P.E.R.C. No. 92-50, 17 NJPER 501

(¶22245 1991). We have thus restrained arbitration of grievances challenging police transfers. City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990) (non-disciplinary reassignment from detective to patrol). Cf. also Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER 8 (¶30002 1998) (disciplinary transfer of police officer not legally arbitrable).

A transfer based on the assessment of an employee's skills or qualifications is not subject to binding arbitration simply because it has a concomitant effect on working conditions. See, e.g., Warren Cty., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985) (change in shifts and loss of shift differential did not make transfer arbitrable). The loss of seven holidays is an inseparable consequence of the grievant's transfer from a position that enjoys that negotiated benefit to one that does not but instead has a shorter work day. Finally, any claim of retaliation based on political activity cannot be raised in arbitration. See City of Trenton, P.E.R.C. No. 2004-52, 30 NJPER 70 (¶23 2004).^{2/}

^{2/} South Orange-Maplewood Bd. of Ed. held non-discrimination language to be mandatorily negotiable. But it also stated that: "a particular dispute under such a clause might not be legally arbitrable if the contested personnel action is not mandatorily negotiable." 22 NJPER at 412-413. Police transfers are not negotiable and thus not legally arbitrable.

ORDER

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

BY ORDER OF THE COMMISSION

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

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner DiNardo recused himself. Commissioner Katz was not present.

DATED: October 27, 2005
Trenton, New Jersey
ISSUED: October 27, 2005