

P.E.R.C. NO. 2006-59

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Petitioner,

-and-

Docket No. SN-2006-039

P.B.A. LOCAL 167,

Respondent.

Appearances:

For the Petitioner, Genova, Burns & Vernioia, attorneys  
(Brian W. Kronick, on the brief)

For the Respondent, Alterman & Associates, attorneys  
(Stuart J. Alterman, on the brief)

DECISION

On October 27, 2005, the County of Mercer petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 167. The grievance contests the closing of several posts on two days in the Mercer County Corrections Center.

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

The PBA represents rank and file correction officers. The parties' contractual grievance procedure ends in binding arbitration. Article 24 of their contract is entitled Safety and Health. It provides:

Safety and Health

24.1 The employer shall at all times maintain safe and healthful working conditions and will provide employees with wearing apparel, tools or devices deemed necessary in order to insure their safety and health. When such materials are issued, they shall be used.

24.2 The employer and the P.B.A. will participate in a safety committee in each institution. Each committee is to be comprised [sic] of one (1) member appointed by the employer and two (2) union officials.

24.3 The safety committee will confer on working conditions and, where necessary, make recommendations to the Warden and P.B.A. President.

24.4 The safety committee, with reasonable notice, is authorized to check safety equipment to ensure that it is in working order.

On June 11 and 12, 2005, several correction officers were on approved medical and other leaves and several other officers called out sick. Given the staffing shortages, the shift commander closed several posts at the Center.

On June 22, 2005, the PBA filed a grievance contesting the closings. A copy of the grievance was not submitted to us. The grievance remained unresolved and the PBA demanded arbitration. The demand for arbitration alleges that the employer violated SOP 238-7 and N.J.A.C. 10A:31-7 and 10A:31-8.12(e)<sup>1/</sup> by closing the

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<sup>1/</sup> The SOP was not submitted. N.J.A.C. 10A:31-7.1 requires that emergencies be met in a way to ensure the safety and (continued...)

posts. It also asserts that the employer has an obligation to maintain a safe, secure environment for employees and inmates. This petition ensued.

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

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,

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1/ (...continued)  
welfare of inmates and staff and that all measures be taken to maintain effective security and restore normal conditions expeditiously. N.J.A.C. 10A:31-8.12(e) provides that under no circumstances shall a custody staff member be removed from his or her post to perform another function if the post would become unmanned.

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 not be restrained 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 County does not assert that a statute or regulation preempts arbitration.

The County argues that it has a non-negotiable managerial prerogative to decrease staffing levels by closing posts. The PBA responds that an arbitrator can consider whether the closing

of the posts violated the safety and health article. But it concedes that an arbitrator cannot order the County to increase its shift staffing. The County responds that the negotiated safety provision does not apply to the situation in dispute. It also argues that a non-binding arbitral opinion would be futile since the closing of the posts was caused by employees who "excessively and abusively exercised their contractual right to sick-leave, occupational injury leave, and family leave."

\_\_\_\_\_ In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989), we held that grievances alleging that the employer violated contractual commitments to provide a safe workplace were legally arbitrable even though staffing levels continued to be non-negotiable. That application of the negotiability test applies here. As in State of New Jersey, any award could not order an increase in staffing since the determination of staffing levels is a managerial prerogative. If the grievance is sustained, challenges to any remedy should be raised in post-arbitration proceedings.<sup>2/</sup>

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2/ The parties appear to read State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998), to limit enforcement of safety provisions to advisory arbitration. That case, unlike this one, involved an advisory arbitration clause, but we have often held that disputes involving contractual safety provisions may be submitted to binding arbitration despite possible limits on an arbitrator's remedial authority. See State of New Jersey (Dept. of Human Services).

We cannot consider the County's contractual argument that the safety and health article does not apply to this dispute. Whether it does is for an arbitrator to answer. Nor will we assume that the arbitration process will be futile even if abuse of leave time contributed to staff shortages and any remedy addressed to staffing levels would be non-binding. We therefore decline to restrain arbitration.

ORDER

The request of the County of Mercer for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 23, 2006

Trenton, New Jersey