

P.E.R.C. NO. 2007-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2006-089

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Jersey City for a restraint of binding arbitration of grievances filed by the Jersey City Police Superior Officers Association. The grievances concern assignment and out-of-title pay issues arising out of the reassignment of lieutenants, captains and sergeants. The Commission grants a restraint of binding arbitration to the extent the PSOA's grievances claim that the City must assign lieutenants to the day tour and to desk duty; sergeants should be reassigned from the desk to first-line supervision; sergeants at the desk are entitled to out-of-title pay; and sergeants should be paid overtime to cover first-line supervisory functions. The request for a restraint is denied to the extent the PSOA claims that lieutenants are entitled to out-of-title pay for work performed as acting captains.

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 (Stefani C. Schwartz, of counsel and on the brief; Rachel A. Davis, on the brief)

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

DECISION

On May 25, 2006, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the Jersey City Police Superior Officers Association (PSOA). The grievances concern assignment and out-of-title pay issues arising out of the reassignment of lieutenants, captains and sergeants.

The parties have filed briefs and exhibits. The City has submitted the certification of its police chief, Robert A. Troy. The PSOA has submitted the certification of its president, Joseph Delaney. These facts appear.

The PSOA represents superior officers from the rank of sergeant through inspector. The parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2005. The grievance procedure ends in binding arbitration. The parties are in interest arbitration proceedings for a successor contract.

Robert Troy has been police chief since November 2004. In his certification, he states that after his appointment, he discovered numerous problems with the staffing and deployment of sergeants and lieutenants. The chief, deputy chief, captains, and lieutenants are considered supervisors. Most of these supervisors worked the day tour and there was a shortage of supervisors on the evening and midnight tours. Because of the lack of supervisors on the night tour, sergeants often filled in for higher-ranking officers. Troy states that this situation also caused lieutenants on the day tour to perform duties that could have been performed by sergeants. For example, the desk officer position was consistently filled by a lieutenant even though this position falls within the Department of Personnel's job description for sergeant. He states that the City was underutilizing the skills of lieutenants and that there was a lack of supervision on the evening and midnight tours. Troy states that this situation interfered with the City's ability to run an efficient department and decreased the services to the citizens.

On November 1, 2005, the PSOA filed a grievance alleging that on or about October 31, the City refused to pay out-of-title pay to lieutenants temporarily working in the capacity of captains. The grievance asserts that the City eliminated captains from some tours, which caused lieutenants who would normally have worked those tours as acting captains and received acting rank pay to lose such opportunities. As a remedy, the grievance seeks the immediate assignment of a captain to City command on each tour of duty (on overtime if needed) or in lieu of a captain, a lieutenant being paid as an acting captain.

On November 2, 2005, the PSOA filed a grievance alleging that the City altered the daily assignments of patrol supervisors within the Operations Division and thereby inappropriately commingled the work of sergeants and lieutenants. As a remedy, the grievance seeks the immediate reinstatement of lieutenants on each district desk, the reinstatement of sergeants as first-line supervisors, or, in lieu of this, the payment of out-of-title pay to sergeants working desk duty and the payment of overtime to sergeants to cover first-line supervisory functions.

On November 3, 2005, the PSOA filed a grievance alleging that the City altered the daily assignments of patrol supervisors in the department by stating that all patrol lieutenants would work evenings and midnights. It asserts that the day-tour lieutenants would be replaced with sergeants. As a remedy, the

grievance seeks the reinstatement of lieutenants on each district desk for the day tour and the reinstatement of seniority-based tour bid picks for equal supervisory coverage across all three tours.

On December 16, 2005, Troy issued General Order 20-05, reorganizing the department. He assigned sergeants to the desk officer position and reassigned the lieutenants previously performing that duty to supervisory duties on the evening and midnight tours. Troy states that this reorganization provided clear and practical lines of responsibility and accountability and made rank commensurate with responsibility.^{1/} The grievances remained unresolved and on February 15, 2006, 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,

^{1/} On January 5, 2006, the PSOA filed an unfair practice charge alleging that the City violated the New Jersey Employer-Employee Relations Act when it unilaterally changed work schedules and assignments of sergeants and lieutenants. The charge was accompanied by an application for interim relief. A Commission designee denied interim relief. I.R. 2006-13, 32 NJPER 35 (¶17 2006). A Complaint and Notice of Hearing has issued and hearings are scheduled. We do not address unfair practice issues that are raised in the parties' scope of negotiations briefs.

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 might 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.

The City argues that it has a non-negotiable managerial prerogative to reorganize the police department and to deploy personnel as it sees fit. The City maintains that there has been no change to shift bidding and that there is still annual bidding for steady shifts on a seniority basis within all divisions. The City also maintains that it has not eliminated out-of-title pay and that only those individuals who perform out-of-title duties are paid the higher-ranking salaries.

The PSOA argues that its grievances do not challenge the reorganization, but concern the rate of pay for particular tasks and the rate of pay for work performed out of title. It states that it seeks to have the arbitrator decide if the City violated the contract by failing to pay the proper rate of pay to sergeants performing desk duties or similar duties; lieutenants performing captain duties or similar duties; sergeants working out of title; and lieutenants working out of title.

The PSOA also argues that even if the City's reorganization was bona fide and not motivated by economic concerns, all the remaining issues such as hours of work, shift selection, changes in work day, distribution of workload, seniority schedule picks, seniority shift assignments, compensation rates, loss of premium pay or out-of-title pay, and loss of overtime compensation are all severable mandatorily negotiable terms and conditions of employment that outweigh any of the efficiency concerns raised by the City.

In its reply, the City attaches a March 14, 2006 letter from the New Jersey Department of Personnel. This letter states that, after a classification review, it was determined that the duties and responsibilities of the Tour Commander/Desk Sergeant are commensurate with the job description for Police Sergeant.

We begin with the November 2, 2005 grievance seeking the immediate reinstatement of lieutenants on each district desk, the immediate reinstatement of sergeants as first-line supervisors, the payment of out-of-title pay to sergeants working desk duty, and the payment of overtime for sergeants to cover first-line supervisory functions.

The Legislature has vested municipal authorities with the discretion to determine the powers, duties, functions, and efficient operation of police departments. Jersey City v. Jersey City POBA, 154 N.J. 555, 572 (1998). Where a city implements a

reorganization primarily for the purpose of improving a police department's effectiveness and performance, the reorganization constitutes an inherent policy determination that would be impermissibly hampered by negotiations. Id. at 573.

In this case, the City determined that there were too many supervisors on the day tour and too few supervisors on the evening and midnight tours. Lieutenants on the day tour were performing duties that could have been completed by sergeants. In particular, lieutenants were performing desk officer duties that the Department of Personnel has confirmed are sergeant duties. Under these circumstances, the City had a non-negotiable managerial prerogative to reassign sergeants to desk officer positions and to reassign lieutenants to other duties. Thus, sergeants are not entitled to out-of-title pay for performing sergeant's duties. Accordingly, we restrain arbitration over the following claims: that the City must assign lieutenants to desk duty; sergeants should be reassigned from the desk to first-line supervision; sergeants at the desk are entitled to out-of-title pay; and sergeants should be paid overtime to cover first-line supervisory functions.

We next address the November 3, 2005 grievance challenging the City's decision not to assign lieutenants to the day tour. The City has a managerial prerogative to assign officers to meet the governmental policy goal of assigning the individuals best

qualified for a particular duty. See Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. This grievance is directly related to the November 2 grievance. The City had a right to reassign sergeants to the desk officer position and to free lieutenants to assume other duties. Arbitration over a claim that the City was required to assign those lieutenants to the day tour would substantially limit the City's governmental policy determination that they would be better utilized on the evening and midnight tours. Accordingly, arbitration must be restrained.

We last address the November 1, 2005 grievance alleging that the City refused to pay out-of-title pay to lieutenants temporarily working as captains. For example, it is alleged that on the midnight tour of October 31, 2005, there was no captain assigned and that therefore a lieutenant should have been reassigned and paid acting captain's pay. The City's response on this issue is to quote from the Department of Personnel job description for lieutenant and to assert that it cannot be expected to pay lieutenants additional money for performing duties outlined in their job description. There are no facts detailing the particular duties performed by the lieutenants on the days in question. Thus, there is no basis on this record to restrain arbitration of the claim that lieutenants were performing the duties of captains and are contractually entitled to captain's pay. The City may argue to an arbitrator that the

lieutenants have, in fact, been performing duties normally assigned to lieutenants and not duties distinctively assigned to captains. See Springfield Tp., P.E.R.C. No. 2006-015, 31 NJPER 294 (¶115 2005).

ORDER

The request of the City of Jersey City for a restraint of binding arbitration is granted to the extent the PSOA's grievances claim that the City must assign lieutenants to the day tour and to desk duty; reassign sergeants from the desk to first-line supervision; pay desk sergeants out-of-title pay; and pay sergeants overtime to cover first-line supervisory functions. The request for a restraint is denied to the extent the PSOA claims that lieutenants are entitled to out-of-title pay for work performed as acting captains.

BY ORDER OF THE COMMISSION

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

ISSUED: August 10, 2006

Trenton, New Jersey