

P.E.R.C. NO. 2007-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Petitioner,

-and-

Docket No. SN-2007-013

P.B.A. LOCAL 127,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Old Bridge for a restraint of binding arbitration of a grievance filed by P.B.A. Local 127. The grievance alleges that a restriction against allowing more than one officer per shift to use emergency vacation leave violates the parties' agreement. The Commission holds that a limit on granting emergency vacation leave to one officer per shift, where approving two or more requests would not compromise minimum staffing levels, is at least permissively negotiable and may be submitted to binding arbitration.

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, Scarinci & Hollenbeck, LLC,
attorneys (Mitchell H. Levine, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, PC, attorneys (Robert A. Fagella, on the
brief)

DECISION

On August 28, 2006, the Township of Old Bridge petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 127. The grievance alleges that a restriction against allowing more than one officer per shift to use emergency vacation leave violates the parties' agreement.

The parties have filed briefs and exhibits and the Township has filed a certification. While the PBA's statement of facts was not supported by a certification as required by N.J.A.C. 19:13-3.5(f)(1), the parties' factual recitations do not materially differ. These facts appear.

The PBA represents all patrol officers. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008.

Article IX, Section C provides:

- C. Emergency vacation time off shall be administered as follows:
 - 1. An officer requesting such time off shall notify the Officer in Charge no later than one (1) hour prior to the commencement of the officer's shift.
 - 2. For Patrol Officers, the time off requested shall be granted, provided that there are at least five (5) other patrol officers assigned to road patrol for that tour of duty.
 - 3. The above number of patrol officers shall not be interpreted as establishing a required minimum staffing requirement.
 - 4. Said requested time off shall not be approved where there exists a bona fide police emergency.
 - 5. Once on duty, this procedure shall not preclude an employee from requesting emergency vacation time off for some time during the work shift. The same standard established in subsection 2 above shall control.

The Township's police department has 104 personnel including 52 patrol officers. Normal and minimum staffing levels are, respectively: midnight shift, seven and five; day shift, ten and six; and night shift, nine and six.

Emergency vacation leave may be taken when an emergency arises within 24 hours of an officer's starting time. General

Order 006-94 addresses leaves, including emergency vacation leave and other leaves. Initially adopted in 1976, it has been revised many times. The most recent revision occurred on July 13, 2006.

The order now provides, in part:

A. Police Officers/Patrol Division

Vacation, Emergency Vacation E.T.O. shall be granted from **January 1st to December 31st** of each year.

* * *

In the event of an emergency condition, officers may be granted emergency vacation on an individual basis if said condition arises within a twenty-four (24) hour period of the officers starting time. Emergency vacation will only be granted in quarter day increments and must meet all of the below listed conditions. **Furthermore, the emergency must be entered on the comment section of the accumulated time pass and no more than one emergency vacation will be granted per squad.**

CONDITIONS

1. Overtime is not created by the request for emergency vacation.
2. Maintain minimum manpower **per squad** at all times.
3. The emergency must be assumed reasonable by the O.I.C. and entered on the comments section of the accumulated time pass.

When an emergency vacation is used by superior officers, the emergency must be entered on the comment section of the accumulated time pass and verified by the Bureau Commander.

E.T.O. shall be granted by **central scheduling only** to all patrol personnel regardless of rank on a first come first serve basis.

E.T.O., when granted, may only be utilized in hourly increments.

Accumulated time passes for the patrol division will be submitted in the following manner.

1. Vacation and E.T.O. passes must be submitted five (5) days in advance.
2. Signed by a supervisor.
3. Signed by the division commander.
4. Submitted to and approved by police administration.

The chief states that the standard procedures for emergency vacation outlined in the General Order have been in place and used for many years. He maintains that limiting emergency vacation to one officer per shift ensures appropriate staffing levels to provide adequate police protection.

On March 1, 2006, the PBA filed a grievance alleging that the General Order violates Article IX, Section C and other sections of the parties' agreement. The grievance states:

Patrol Division Commander Captain Jeffrey Robbins created and issued an order indicating that all O.I.C.s abide by the General Order relating to the approval of Emergency Vacation.

The long ignored General Order places numerous restrictions on the scheduling of Emergency Vacation that were never negotiated. It indicates that Emergency Vacation may be granted by the OIC after the applicant cites a valid emergency condition that exists warranting the "emergency vacation" to be approved. The OIC has the option to deny the emergency vacation day if he/she feels that the emergency is not compelling enough. In addition, the use of

emergency vacation is limited to one (1) officer per shift.

* * *

This negotiated procedure has been the accepted practice of the Old Bridge Police Department for the eleven (11) years of my employment here. The terms reflected in the General Order have not been negotiated and are in stark contrast to those in the collective bargaining agreement. In addition, Business Administrator Michael Jacobs attempted to negotiate a change in Article IX, Section C so that it would reflect the terms of the General Order. In doing so, he validat[ed] the PBA's stance that the terms of the CBA were legitimate and that the scheduling of Emergency Vacation was negotiable.

The PBA understands that the scheduling of vacation time is mandatorily negotiable, provided the Department can meet its minimum staffing needs. The CBA allows employees to use emergency vacation (without stating a specific emergency) as long as there are still five (5) patrol officers scheduled to work. When the Police Department changed its minimum staffing policy by increasing the minimum on day shift and afternoon shift to six (6) patrol officers, the PBA recognized that the Department's minimum staffing standard overrode the number memorialized in the CBA for those shifts. Likewise, the PBA expects the Police Department to recognize the rights of its employees and the validity of their negotiated Collective Bargaining Agreement.

The grievance seeks to have emergency vacation scheduled in accordance with the negotiated emergency vacation agreement and to have the General Order amended to reflect that procedure.

On March 8, 2006, Acting Chief Robert Bonfante denied the grievance. He asserted a managerial prerogative to maintain the appropriate staffing per squad "in order to effectively manage day to day operations of the Department and to avoid overtime that may be incurred due to the request for emergency vacation."

On May 9, 2006, the business administrator denied the grievance. He stated, in part:

N.J.S.A. 40A:14-118.b. cites that the Chief of Police shall "Prescribe the duties and assignments of all subordinates and other personnel;" The Chief of Police has and must continue to possess the ability to control the number of officers required for any assignment. While the Collective Bargaining Agreement can provide an emergency vacation benefit, staffing levels are not a permissible subject for collective bargaining. Therefore, Article IX,C.1 and 2 are not appropriate and cannot be binding upon the Chief's authority and ability to provide adequate staffing.

With that said, the Police Chief's General order regulating emergency vacation has provided a mechanism for emergency vacation time off for those officers who experience bona fide emergencies, as opposed to those officers who wish to take vacation with short notice.

The Police Chief is clearly within his authority to cause an employee to explain and document that they have a bona fide emergency prior to granting emergency vacation. Even the Collective Bargaining Agreement created a separate sub-section using the term emergency vacation, not vacation with short notice.

On June 15, 2006, the PBA demanded arbitration. 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.

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]

As this dispute arises in the context of a grievance alleging a violation of an existing agreement, 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 statute or regulation is asserted to preempt negotiations.

The Township argues that the limit of one officer per shift is a non-negotiable managerial prerogative that preserves its right to set and maintain minimum staffing levels.^{1/}

^{1/} In addition to that restriction, the PBA's grievance appears to challenge other changes in the Revised General Order. To the extent the grievance raises other issues not addressed by the Township's petition or briefs, we have no jurisdiction to restrain arbitration of those aspects of the grievance.

The PBA argues that Article IX makes emergency vacation time subject to minimum staffing levels, including the current minimum staffing level of six officers on the day shift, and it agrees that any emergency request could be denied if granting it would result in abridging the minimum staffing levels. The PBA asserts that the Township is seeking to impose its one officer per shift rule even when not necessary to maintain minimum staffing levels.

Relying on a Hearing Examiner's decision in Marlboro Tp., H.E. No. 87-6, 12 NJPER 592 (¶17222 1986), the Township replies that it has a managerial prerogative to restrict vacation leave for purposes of maintaining a "buffer" above minimum staffing levels.

We have decided many cases involving the interplay between employees seeking to take negotiated leave time and employers seeking to staff shifts. Our cases establish the following principles relevant to analyzing these negotiability disputes. A public employer has a non-negotiable right to determine the minimum staffing for each shift. See, e.g., South Brunswick Tp., P.E.R.C. No. 94-100, 20 NJPER 199 (¶25094 1994); Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989). But the scheduling of vacation days and other time off is mandatorily negotiable so long as an agreed-upon system does not prevent an employer from fulfilling its staffing requirements. See, e.g., Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999);

Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996), recon. den., P.E.R.C. No. 97-95, 23 NJPER 163 (¶28080 1997); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). An employer may legally agree to allow an employee to take time off even though doing so could, for example, require it to pay overtime compensation to a replacement employee or temporarily reassign another employee to maintain its staffing levels. See, e.g., New Jersey Highway Auth., P.E.R.C. No. 2001-77, 27 NJPER 292 (¶32106 2001); Town of Secaucus, P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987). The additional cost of overtime payments does not make a vacation scheduling dispute non-negotiable. See, e.g., Hillsborough Tp., P.E.R.C. No. 2001-53, 27 NJPER 180 (¶32058 2001); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Borough of Garwood, P.E.R.C. No., 90-50, 16 NJPER 11 (¶21006 1989); Livingston. Nevertheless, an employer has a reserved right to deny a leave if granting a request would prevent it from deploying the minimum number of officers required for a shift. A contract cannot be construed to provide an automatic right to take leave under such circumstances. Livingston.

We now apply these precedents to this case to determine whether the grievance, if sustained, would substantially limit the Township's governmental policymaking powers.^{2/}

Article IX.C.2 provides that emergency vacation leave requests "shall" be granted when the resulting absence would leave a minimum of five other officers on a patrol shift. However, the PBA's grievance acknowledges:

When the Police Department changed its minimum staffing policy by increasing the minimum on day shift and afternoon shift to six (6) patrol officers, the PBA recognized that the Department's minimum staffing standard overrode the number memorialized in the CBA for those shifts.

Given the PBA's acknowledgment of the Township's right to determine minimum staffing levels, the imposition of a restriction against granting more than one request for emergency vacation leave per shift is at least permissively negotiable.

Our final decision in Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301, 302 (¶18126 1987), reviewed the Hearing Examiner's decision cited by the Township. After noting the normal and minimum staffing levels for each shift, we found that an "only one officer on leave per shift" restriction was over broad because it would prohibit an employee from taking time off even

^{2/} Absent a dispute involving the denial of a specific request for emergency leave, we must base our decision on the contract language and the revisions made in the general order, in light of the parties' arguments and our cases.

absent interference with the Township's minimum staffing requirements. We stated:

[W]hile the "only one officer off at a time" policy is consistent with its minimum manning requirements on the midnight to 8:00 a.m. shift, it is over broad with respect to the other two shifts. Therefore, with respect to those affected shifts, the Township was required to negotiate with the PBA before implementing the change because it pertained to the mandatorily negotiable issue of granting and scheduling time off.

This dispute is analogous to Marlboro. Accordingly, we hold that a limit on granting emergency vacation leave to one officer per shift, where approving two or more requests would not compromise minimum staffing levels, is at least permissively negotiable and may be submitted to binding arbitration.

ORDER

The request of the Township of Old Bridge for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 21, 2006

Trenton, New Jersey