

P.E.R.C. NO. 2008-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LIVINGSTON,

Petitioner,

-and-

Docket No. SN-2007-065

P.B.A. LOCAL NO. 263,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Livingston for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 263. The grievance alleges unsafe working conditions on a day when staffing levels dipped below the levels set by department directives and standard operating procedures. The Commission permits arbitration over the safety concerns, but an arbitrator may not order an increase in staffing levels.

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, Genova, Burns & Vernioia, attorneys
(Andrew P. Oddo, on the brief)

For the Respondent, Arsenault, Whipple, Farmer, Fassett
& Azzarello, LLP, attorneys (Kelly Daniels, on the
brief)

DECISION

On May 7, 2007, the Township of Livingston petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 263. The grievance alleges unsafe working conditions on a day when staffing levels dipped below the levels set by department directives and standard operating procedures. We permit arbitration over the safety concerns, but an arbitrator may not order an increase in staffing levels.

The parties have filed briefs and exhibits. The PBA has submitted a certification from its president. These facts appear.

The PBA represents police officers in the ranks of patrol officer, corporal and sergeant. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.

Article XXII is entitled Work Environment. Section 1 provides:

The Township is responsible for maintaining a healthful and safe work environment. The Township will make all reasonable efforts to maintain its facilities in accordance with health and safety objectives, including providing reasonable temperature and humidity levels in all police department facilities.

Livingston Police Department Standard Directive 07-02 establishes boundaries for the patrol division. Directive No. 18-02 sets guidelines for staffing the police department and minimum staffing levels. "Purple days" are usually associated with an event or celebration. On those days, time-off is restricted to ensure there will be enough officers on duty to handle any problems that may arise.

A June 11, 1999 directive entitled Squad Assignment provides:

Officers (Lieutenant, Sergeants, Corporals and Patrolmen) assigned to regular patrol, duty will be assigned to squads of one Lieutenant, (1 or 2) Sergeants, one corporal and a minimum of 7 Patrolmen day shift (M-F excluding Holidays) (6 Patrolmen Sat-Sun). Night Shift 6 Patrolmen (Mon-Sun).

On June 11, 2006, Police Officer Rick Howard worked the day shift from 7 a.m. to 7 p.m. He filed a grievance alleging that there were unsafe working conditions on that date with "five men working the road from 7am to 3pm and four men on the road from 3pm to 7pm." The Township acknowledges that it did not replace an officer who called in sick.^{1/} The grievance alleges that this is a violation of Directive 18-02, SOP T-12 and C-20. SOP T-12 and C-20 were not submitted.

The grievance was denied. On November 9, 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, 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.

^{1/} In its brief, the Township asserts that it paged all available officers to get a replacement, but no officers responded. However, that assertion was not supported by a certification as required by N.J.A.C. 19:13-3.5(f)1 so it cannot be considered.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Township 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. No preemption issue is present.

The employer argues that it has a non-negotiable prerogative to determine staffing levels and adds that the PBA has not stated what remedy it seeks or suggested a remedy other than one interfering with that prerogative. The PBA argues that this case concerns the unsafe and dangerous working environment when staffing levels fall below the minimum levels set by management.

Borough of West Paterson, P.E.R.C. No, 2000-62, 26 NJPER 101 (¶31041 2000), explains our application of the Paterson negotiability tests to staffing/safety issues and lists our precedents. We must consider the police officers' interest in the safer working conditions that presumably flow from having more officers on duty and the employer's interests in determining the size of its work force and how to deploy its police to best protect citizens. Balancing these competing interests, our cases generally bar negotiations over, or enforcement of, contract clauses binding employers to maintain specific staffing levels. See Bergen Cty. and PBA Local No. 134, Bergen Cty. Sheriff's Officers, NJPER Supp.2d 143 (¶128 App. Div. 1984), aff'g P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983). But they generally allow negotiations over, and enforcement of, contract language protecting employee safety. See, e.g., State of New Jersey

(Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998).

Following this case law, we will permit arbitration over the alleged violation of the contractual obligation to maintain a safe work environment. However, in the event a violation is found, an award cannot order an increase in staffing because to do so would substantially limit the employer's prerogative to set staffing levels. We will not speculate about what other remedies might or might not be lawful if a violation is proved. Any challenges to a remedy awarded can be raised in post-arbitration proceedings. State of New Jersey, P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989).

ORDER

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

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo and Fuller voted in favor of this decision. Commissioner Watkins voted against this decision.

ISSUED: September 27, 2007

Trenton, New Jersey