

P.E.R.C. NO. 2008-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY
(ATLANTIC/CAPE MAY VICINAGE),

Petitioner,

-and-

Docket No. SN-2008-001

PROBATION ASSOCIATION OF NEW JERSEY
(CASE-RELATED PROFESSIONAL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the New Jersey State Judiciary (Atlantic/Cape May Vicinage) for a restraint of binding arbitration of grievances filed by the Probation Association of New Jersey (Case-Related Professional Unit). The grievances concern a security policy prohibiting access to court houses in the Vicinage after 5:00 p.m. and on Saturdays. The Commission restrains arbitration to the extent the grievances challenge the Judiciary's decision to restrict court house access after hours. The Commission permits arbitration of the severable employee health, safety, and compensation issues.

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, Melissa P. Marschner, Staff
Attorney, Office of Counsel to the Administrative
Director, on the brief

For the Respondent, Mark Cimino, attorney, on the brief

DECISION

On July 10, 2007, the State of New Jersey Judiciary
(Atlantic/Cape May Vicinage) petitioned for a scope of
negotiations determination. The Judiciary seeks a restraint of
binding arbitration of two grievances filed by the Probation
Association of New Jersey (Case-Related Professional
Unit) ("PANJ"). The grievances concern a security policy
prohibiting access to court houses in the Atlantic/Cape May
Vicinage after 5:00 p.m. and on Saturdays. We restrain
arbitration of the grievances to the extent they challenge the
Judiciary's decision to restrict court house access after hours.

We permit arbitration of the severable employee health, safety and compensation issues identified by PANJ.^{1/}

The parties have filed briefs and exhibits. The Judiciary has filed the certifications of Michael Shannon, division manager, and Frank Zollner, chief probation officer. PANJ has submitted the affidavit of Aidan Francis Nunan, a senior probation officer.

These facts are not disputed. PANJ represents probation officers and certain other employees. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008. The contract in effect at the time the grievances were filed was effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

The Atlantic/Cape May Vicinage has three court houses. There are 45 probation officers assigned to adult or juvenile supervision duties. Probation officers primarily work in their offices in the court house and conduct probationer visits. During office visits, the probation officers attempt to confirm that the probationers are employed and are completing any required community service or drug treatment programs, and if necessary, the officers conduct drug tests. Drug testing is

^{1/} The Judiciary asserts that its scope petition is timely under the parties' agreement. PANJ does not challenge that assertion and we need not address it further.

normally done in the office, but is sometimes done on a field visit.

The three court houses operate from approximately 8:00 a.m. to 4:30 p.m. One day per month each court house is open late (from 6:00 p.m. to 8:00 p.m.) to accommodate probationers who are not able to report for office visit requirements during regular business hours. These late hours also allow litigants to make fine and restitution payments at the finance department. Security for the court houses is provided by sheriff's officers. Each person entering the court house must pass through a metal detector, except the judges, who have a separate entrance. Sheriff's officers also provide security after hours. The court houses have never been open on weekends.

Probation officers perform field work one day per week from 1:00 p.m. to 9:00 p.m. and one Saturday per quarter. At the time the grievances were filed, Saturday field work was conducted once per month. Field work is done in pairs unless otherwise authorized by a supervisor. It consists of visiting contacts at agencies such as drug treatment programs and mental health facilities, meeting with probationers' families and friends, and going to the probationers' homes to make sure the probationers are meeting the conditions of their probation.

Probation officers on field work use a State car and are supplied with a bulletproof vest, and if certified, pepper spray. Officers also use a field bag containing a cell phone, flashlight, maps, eyewash and first aid kit. When field work has

been completed, probation officers are required to "clear the field," which means calling the on-call supervisor to let him or her know their shift was completed safely and they are going home.

Before April 2004, probation officers were allowed to enter the court house after completing field work. Since this entry was made after normal work hours, it was made without metal detector screening or sheriff's officers' being present. Probation officers would enter the court house to drop off the field bag and the keys to the State car, charge cell phones, and enter notes from the field work into the computer. Immediate entry of fieldwork case notes is not required. Any urine or saliva samples collected from probationers would be logged into evidence bags in a refrigerator in a secure room in the court house or other secure area.

In 1984, the Supreme Court adopted a Model Court Security Plan, which has been revised several times. At the time the grievances were filed, the 2001 plan was in effect. The plan is a confidential document that has not been submitted to us. It set forth several recommendations that the Supreme Court believed should be implemented by the vicinages. It also required weapons screening by sheriff's officers before any person, except a judge, enters a court house. The plan allowed vicinages to use discretion in making exceptions to the screening requirement, but

any exceptions had to be set forth in a Local Court Security Plan. A 2006 version of the Model Plan eliminates local discretion and prohibits anyone, except a judge, from entering a courthouse without being screened by a sheriff's officer.

In 2004, the Atlantic/Cape May Vicinage, through the Assignment Judge, adopted a local plan providing that there be no exception to the weapons screening requirement. To implement this change in security, Chief Probation Officer Zollner issued a memorandum advising probation officers and supervisors that all managers and staff would be prohibited from accessing any of the three court houses after 5:00 p.m.

Since March 30, 2004, there have been no reported problems with the return of State vehicles following field work and no reported problems with field bags that are locked in the State vehicles over night. Support staff members retrieve the field bags in the morning, charge the cell phones, and ready the bags for pick up. There have been no reported problems with drug testing materials and no security or disciplinary problems involving after-hours access to the court houses. Probation officers must take samples that have been collected to their residences to maintain a chain of custody. Also, upon return to the building to drop off the car, employees now have no access to a restroom. Although probation officers are barred from the building, there have been cleaning people in the building after

hours who entered without any screening.^{2/} Although the department has recently converted to swab saliva test kits, some urine screens are still conducted. The parties have not specified whether those urine tests occur in the office or in the field.

On April 20 and 21, 2004, PANJ filed two grievances asserting that the prohibition on after-hours access to the court house violated the parties' contract. The grievances allege violations of the Respect and Dignity, Health and Safety, and No Strike - No Lockout provisions.

On May 17, 2004, the grievances were denied at Step 2. On October 26, a grievance hearing was held. The hearing officer issued a decision on April 22, 2005. She found that the Assignment Judge has the discretion to restrict employee access to the court houses. On May 9, PANJ demanded arbitration. This petition ensued.

We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

^{2/} The parties have not told us whether the 2006 revision to the Model Court Security Plan has eliminated this practice.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth the traditional balancing test for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]^{3/}

3/ The parties' contract's Preamble recognizes a 1994 "Letter of Agreement between the New Jersey Judiciary and the Labor Representatives of the Employees in the New Jersey Judiciary." That agreement specifies that the scope of negotiations covering Judicial employees shall include only the following subjects, and only to the extent they are not preempted by State statute or regulation, and subject to the Judicial Employees Unification Act:

- (1) salary, wages and all other forms of economic compensation;
- (2) health benefits;
- (3) leave time (both paid and unpaid) and holidays;
- (4) the economic impact of the hours worked;
- (5) grievance procedures and disciplinary appeals, including binding arbitration, subject to the provisions of Section 8 of this Letter of Agreement;
- (6) safety and health;

(continued...)

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

PANJ cites these employee interests: avoiding exposure to potential biohazards by probation officers and their families from having to store samples in their personal vehicles and homes; ensuring that cell phones are fully charged so that the next probation officer has a way to communicate in an emergency; being able to use restroom facilities when returning from the field; and being paid for having to maintain chain of custody of urine or saliva samples overnight and transport them to the office the next morning. PANJ argues that these health, safety and compensation issues outweigh the employer's interests in

3/ (...continued)

- (7) payroll deductions including union dues and representation fees;
- (8) procedural aspects of employee performance evaluations, promotions, layoffs and subcontracting;
- (9) procedural aspects of inter-county transfers and reassignments, including superseniority for union representatives;
- (10) any other subjects which the Supreme Court may, from time-to-time, establish, upon petition of a majority representative, under rules established by the Court;
- (11) Any matter negotiated and made part of a contract which takes effect on or after January 1, 1995 that is not within the ten scope of negotiations topics set forth above shall have the same force and effect, for that contract only, and only for the life of that contract, as if it had been permitted under those topics.

closing the court houses. It also argues, in the alternative, that these issues are severable and negotiable.

The Judiciary argues that under the balancing test, arbitration should be restrained because matters of security and facility access are non-negotiable managerial prerogatives.^{4/} It responds that probation officers do not have to store urine samples overnight because they are no longer required to collect urine; drug testing is usually performed on office visits; and collecting samples is rarely performed in the field. With respect to cell phones, support staff retrieve the field bags in the morning and recharge the phones. In addition, there are chargers available in each State vehicle.

Under the traditional balancing test, the Judiciary's interests in restricting access to the court houses after 5:00 p.m. outweigh the employees' interests in accessing the court houses after hours. Cf. Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983) (matters of public safety are not mandatorily negotiable). The decision to close the court houses has a very

^{4/} The Judiciary cites Bergen Cty. Utilities Auth., H.E. No. 84-29, 9 NJPER 694 (¶14305 1983), to support its argument that matters of employee facility access are managerial prerogatives. This was a Hearing Examiner's recommended decision. The final decision was issued by the Chairman in the absence of exceptions and specifically declines to determine whether a public employer has a non-negotiable managerial prerogative to determine gate access questions for non-discriminatory reasons. P.E.R.C. No. 84-78, 10 NJPER 45, 46 n.3 (¶15025 1983).

minor impact on employees and implicates broader management and security concerns about when a public building will be open. Whether those security concerns are lesser at one court house than another, as alleged by PANJ, is not dispositive. When a building will be open is for management to decide. Bound Brook Bd. of Ed., P.E.R.C. No. 2003-43, 28 NJPER 592 (¶33185 2002) (management has prerogative to determine when governmental services will be delivered). We reach the same result under the Letter of Agreement. Court house hours are not included in the list of negotiable subjects. We therefore restrain arbitration to the extent the grievances challenge the Judiciary's decision to restrict access to the court houses after hours.^{5/}

However, we will permit arbitration over severable employee health, safety and compensation issues identified by PANJ that do not involve keeping the court houses open after 5:00 p.m. See Union Cty. (issues relating primarily to the safety and comfort of employees using vehicles are mandatorily negotiable); State of New Jersey (Corrections), P.E.R.C. 99-66, 25 NJPER 94 (¶30041 1999) (grievance seeking declaration of unsafe work environment is arbitrable); Fairfield Tp. Bd. of Ed., P.E.R.C. No. 98-32, 23 NJPER 541 (¶28268 1997) (whether impact of employer's exercise of

^{5/} The Judiciary also argues that its decision is preempted by the New Jersey Constitution, statutes and court rules. In light of our holding that it had a managerial prerogative to close the court houses at 5:00 p.m., we need not decide whether this issue is preempted.

prerogative on employees is de minimis is a question for the arbitrator). These issues directly impact employee work and welfare and do not interfere with the Judiciary's decision to close the court houses. In addition, compensation, safety and health are included in the negotiable subjects listed in the 1994 Letter of Agreement. Whether these issues were properly raised in the earlier steps of the grievance procedure and whether they have any merit are matters for the arbitrator. Ridgefield Park; New Jersey State Judiciary, P.E.R.C. No. 2007-050, 33 NJPER 30 (¶12 2007) (issues of contractual arbitrability are outside Commission's limited scope of negotiations jurisdiction).

ORDER

_____The request of the New Jersey State Judiciary (Atlantic/Cape May Vicinage) for a restraint of binding arbitration is granted to the extent the grievances challenge the decision to restrict access to the court houses after 5:00 p.m. and on Saturdays. The request is denied to the extent the grievances seek to arbitrate severable health, safety and compensation issues.

BY ORDER OF THE COMMISSION

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

ISSUED: January 24, 2008

Trenton, New Jersey