P.E.R.C. NO. 2010-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MONMOUTH and
MONMOUTH COUNTY SHERIFF,

Petitioner,

-and- Docket No. SN-2009-73

MONMOUTH COUNTY SHERIFF'S OFFICERS,
PBA LOCAL 314,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of contract proposals and current contract language that the Monmouth County Sheriff's Officers, PBA Local 314 seeks to submit to interest arbitration with the County of Monmouth and Monmouth County Sheriff. The County argued that current provisions and proposals regarding work rules; work schedule; officer-in-charge; assignment bidding; polygraph and voice print testing; and physical fitness training are not mandatorily negotiable. The Commission holds that portions of the work rules; work schedule; officer-in-charge; and polygraph and voice print testing provisions and proposals are mandatorily negotiable and may be submitted to interest arbitration. The Commission further holds that portions of the officer-in-charge; seniority bidding for assignments; physical fitness training; and polygraph and voice print provisions and proposals are not mandatorily negotiable.

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, Parthenopy A. Bardis, Special County Counsel

For the Respondent, Mets, Schiro & McGovern, attorneys (James M. Mets, of counsel)

DECISION

On April 29, 2009, the County of Monmouth and the Monmouth County Sheriff petitioned for a scope of negotiations determination.[1/] The employer seeks a determination that new proposals made during collective negotiations, and certain language from an expired agreement, that Monmouth County Sheriff's Officers, P.B.A. Local 314, seeks to include in a

1/ Sheriffs and counties have been found to be the joint employer of sheriff's officers. Each possesses independent, distinct and controlling authority over separate aspects of the employment relationship. See Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). We will therefore refer to the County Sheriff and the County as the employer.

successor collective negotiations agreement, are not mandatorily negotiable and cannot be submitted to interest arbitration.

The parties have filed briefs and exhibits. The employer submitted a certification with its reply brief. These facts appear.

The PBA represents all sheriff's officers. The parties' most recent collective negotiations agreement expired on December 31, 2008. The parties are currently in interest arbitration.

Our jurisdiction is narrow. We will address only the abstract issue of whether the subject matter of the proposals are within the scope of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We do not consider the wisdom of any contract proposal. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). However, we will consider only whether the proposals are mandatorily negotiable. We do not decide whether contract proposals concerning police officers are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER

594 (¶12265 1981). Paterson outlines the steps for determining whether a proposal is mandatorily negotiable:

> 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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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.
>
> [87 N.J. at 92-93; citations omitted]

PBA Proposal to amend Article 6, Handbook and Work Rules

The PBA proposes to add the underlined language to Article 6, Section 2:

> The Employer shall establish reasonable and necessary rules of work and conduct for Employees. All such rules shall be equitably applied and enforced. Except under emergent circumstances new rules or changes to existing rules shall not be implemented until the PBA has had 14 days to review them.

The employer argues that it has a right to unilaterally establish and implement rules on non-mandatorily negotiable subjects. It asserts that the 14-day delay would significantly interfere with that right.

The PBA asserts that notice of new rules is mandatorily negotiable provided that the employer's prerogative to adopt them, including in emergency situations, is unencumbered.

Both parties cite to North Hudson Regional Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184, 185 (¶31075 2000). There the disputed proposal had a 14-day implementation delay, but no exception for emergencies. We said:

> Employees have an interest in knowing what the employer's rules are and providing such notice does not generally trench on the employer's prerogative to adopt them. Further, we have held to be mandatorily negotiable clauses requiring an employer to consult or discuss actions which it has the managerial prerogative to effect, but which have an impact on employee working conditions or performance.
>
> * * *
>
> If the proposal is awarded and a new or modified rule is required to respond to an emergency, the employer may seek to restrain arbitration of any grievance protesting an alleged failure to provide the 14-day notice. Similarly, if the employer believes that the "consultation" aspect of the clause would significantly interfere with governmental policymaking in a particular instance, it may seek a restraint of binding arbitration.

For the reasons stated, and subject to the conditions described in North Hudson, the PBA's proposed addition is mandatorily negotiable. As stated above, if the language is awarded, the employer would have the right to seek to restrain arbitration where the PBA seeks to enforce the new language in a

manner that would significantly interfere with its exercise of managerial prerogatives.

PBA Proposal for a "Four On, Three Off" work schedule

Article 13 of the existing agreement provides for an eight-hour workday (inclusive of two, 15-minute breaks and one 30-minute meal) and a regular workweek of five consecutive days. During negotiations, the PBA proposed a "four on, three off" (4-3) work schedule. The employer asserts that fixing the overall work schedule is a managerial prerogative not subject to mandatory negotiations. Its initial brief asserts that the proposed 4-3 schedule would interfere with its managerial prerogative to "determine the work schedule necessary for it to address issues of adequate coverage and supervision for the proper operation of the department." The PBA responded that the employer's filing did not show a particularized need to preserve or change a work schedule to effectuate a government policy. With the filing of its reply brief, the employer submitted a certification from Michael Donovan, Chief of the Law Enforcement Division of the Sheriff's office, that addresses the proposals in dispute. He notes that 54 sheriff's officers (out of a total of 88 in the unit) are assigned to the court operations section. Donovan asserts that the majority of the 54 officers work the 8:30 a.m. to 4:30 p.m. shift, Monday through Friday, coinciding with the court hours of operation as needed. He asserts that the

proposed 4-3 schedule would not allow proper staffing of the courts on Monday through Friday including posts requiring special skills and training. He further asserts that three sheriff's officers provide security for the Ocean Township and Freehold probation offices that also operate Monday through Friday.

We cannot conclude from the employer's certification that a 4-3 work schedule would significantly interfere with the ability of the Sheriff to support a court system and probation offices that are open Monday through Friday. Absent an employer's showing of a compelling need to remove a work schedule proposal from the arena of collective negotiations, our approach, approved by Teaneck, is to have the parties present their arguments and supporting evidence to the interest arbitrator. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 114 (¶28054 1997). In issuing scope of negotiations determinations, we do not consider the wisdom of the disputed proposals. But an interest arbitrator must scrutinize the wisdom of proposed work schedule changes from both operational and financial viewpoints. Interest arbitration, if needed to resolve the parties' impasse over the terms of a successor agreement, will require the parties to provide specific evidence to support their respective positions on work schedules. Because an interest arbitrator's ruling may be appealed to us, in the event the PBA proposal is awarded, the employer may seek our review of the arbitrator's reasoning.

Article 14, §11, Overtime/Call-in/Court Time (Officer in Charge)

The employer asserts that the underlined passages are not mandatorily negotiable and should not be included in a successor agreement.[2/]

> Section 11. Officer in Charge (OIC) A department assignment of more than four Sheriff's officers shall require that a supervisory Officer be assigned.
>
> The definition of a supervisory officer for this purpose is: Undersheriff, Chief Warrant Officer, Captain Lieutenant or Sergeant.
>
> * * *
>
> A supervisory officer unavailable for more than a two-hour period shall be replaced with another supervisory Officer. In the event a replacement is unavailable, a senior, or in special situations, the most qualified Officer, shall be designated Officer-In-Charge (OIC) of the assignment.
>
> * * *
>
> The OIC shall be compensated . . . at one additional hour at the overtime rate for each [four hours] hour or part thereof assigned as OIC; each hour worked shall be rounded up [prorated].

Citing North Hudson, the employer asserts that the underlined passages are not mandatorily negotiable because they: affect the employer's staffing decisions concerning the appropriate levels of supervision; would require the assignment of employees from another negotiations unit to particular duties;

2/ Text in [brackets] represents existing contract language that the PBA seeks to replace with underlined text.

and require, in the absence of a supervisory officer, the assignment of a sheriff's officer to that vacant post.

The PBA acknowledges that a public employer has a managerial prerogative to determine whether and when it will fill vacancies. However, it asserts that the existing contract language implicates safety issues and is mandatorily negotiable even though it may be intertwined with staffing levels. It argues that the language concerning compensation paid to a sheriff's officer working as an OIC is mandatorily negotiable.

We hold that the first two challenged paragraphs are not mandatorily negotiable as they establish a staffing threshold for the assignment of an OIC. It is not sufficiently linked to employee safety to warrant mandatory negotiations.[3/]

Similarly, the third challenged paragraph is not mandatorily negotiable. It requires the assignment of a superior officer or the elevation of another officer to be officer in charge. Management has a prerogative to decide whether to replace an absent supervisor.

The PBA's proposed changes in the final challenged paragraph are mandatorily negotiable as they relate to rates of pay for

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3/ Neither case cited by the PBA permitted negotiations over staffing levels despite the unions' safety concerns. See State of New Jersey, P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998) and Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000).

work in a higher pay category. See Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993).

Article 27 Seniority Bidding of Assignments (New PBA Proposal)

The PBA has proposed a new article setting forth a seniority bidding procedure and timetable. In sum, its nine sections provide that:

1. seniority will be based on badge number;
2. probationary officers are ineligible until fully trained;
3. year-long positions will be posted for bid in November;
4. officers may file bids with 4 choices a week after posting;
5. bid rights are waived if submission deadline is missed;
6. awarded bids are to be posted on unit bulletin boards;
7. certain specific positions and percentages of posts are excluded;
8. new positions are excluded until the next bid cycle;
9. the Sheriff may contest an awarded bid for just cause and that shifts/days will be made by seniority in a unit where possible.

The employer argues that the proposal is not mandatorily negotiable as written because it does not preserve the employer's right to deviate from the bidding procedure to meet its operational needs. The PBA responds that sections 7 and 9 sufficiently preserve the employer's right to match the most qualified employees with posts requiring special skills.

The proposal is not mandatorily negotiable. Public employers and majority representatives may agree that seniority can be a factor in shift selection where all qualifications are equal and managerial prerogatives are not otherwise compromised. City of Camden, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), recon. den. P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd 27 NJPER 357 (¶32128 App. Div. 2001). By naming certain positions and percentages of other positions that are not subject to bidding, the proposal would arguably limit the employer to the listed exclusions. And by specifying that seniority will apply where possible and by requiring the employer to demonstrate "just cause" before deviating from the bidding procedure, the proposal would significantly interfere with the employer's prerogative to deviate from seniority bidding because of special skills or training needs.

Article 28 Miscellaneous (New PBA Proporsal)

> Section 1. All Officers shall be allowed to use 1 hour of their regularly scheduled workday to engage in physical fitness training.
>
> Section 2. Bargaining unit members shall be assigned to all County funded work and work on County roads, property, facilities and at County functions that require or utilize uniformed law enforcement officers prior to the County using the services of law enforcement officers from other County bargaining units or personnel and/or personnel from other jurisdictions. This paragraph shall apply to County sponsored events and any property owned, leased or

> rented by or from the County. This paragraph shall not apply to outside entities that contract with the County and elect to hire private security personnel. However, if said entities are required to use the services of sworn law enforcement officers or elect to do so, PBA Local 314 bargaining unit members shall be given the first option to accept the assignment prior to offering the assignment to other law enforcement agencies.

The employer argues that Section 1 is not mandatorily negotiable as it would interfere with its right to determine the duties and assignments of sheriff's officers during work time. The PBA asserts that the training would occur on paid break time. As written, the proposal does not clearly provide that such activity would occur only on breaks. Employers of law enforcement personnel may unilaterally set physical fitness requirements and standards that personnel must satisfy. Bridgewater Tp. and PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984). But it is not obligated to negotiate that officers' training to meet those requirements occur during the normal work day in lieu of other assigned duties.[4/] The extent and type of training of public safety officers is a managerial prerogative. Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982) (employer not required to negotiate over training programs it deems most appropriate for its police department). A public

4/ While Article 13 does provide for a total of 60 minutes of paid time off during the work day, it is apportioned as two 15-minute breaks and one 30-minute meal period.

employer may decide that it is beneficial to devote part of the work day to such training, but it cannot be required to do so. However, we have held that seeking release time to conduct physical training to prepare for law enforcement fitness tests would be mandatorily negotiable. See State of New Jersey (Div. of State Police), P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996). Section 1 is not mandatorily negotiable.

The employer asserts the underlined portions of Section 2 are not mandatorily negotiable as they would interfere with the County's determination of which group of employees are best suited to perform such functions or its prerogative to subcontract. The PBA counters that the language does not interfere with subcontracting decisions and simply creates a "right of first refusal" for the employees it represents on extra work that may involve overtime pay.

We find the disputed portions of proposed Section 2 to be not mandatorily negotiable. The provision would require unit employees to be assigned to all County-funded work and work on all County property where law enforcement officers are required or used. This is more than a provision that protects negotiations unit work. It would significantly interfere with the County's ability to assign work based on employee qualifications. It could also permit unit employees to acquire work for this negotiations unit that may historically have been

performed by other negotiations units. Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985), a case cited by the PBA, is distinguishable. That case involved a work preservation clause designed to prevent overtime opportunities from being assigned to other non-unit employees of the same public employer. Here, the PBA seeks work that may have been regularly performed by County employees not jointly employed by the Sheriff. In addition, we have held that a police department is not required to assign off-duty law enforcement personnel to the types of projects addressed in Section 2 in order to provide overtime opportunities, where it decides that an on-duty officer shall be assigned. See Borough of Belmar, P.E.R.C. No. 2003-52, 29 NJPER 10 (¶8 2003).

Article 29 Officer's Rights (New PBA Proposal)

Section 1. Departmental investigations

i. Under no circumstances shall the County offer or direct the taking of a polygraph or voice print examination for any employee covered by the Agreement.

j. A targeted officer shall be notified of the findings and the results of the investigation in writing within fifteen (15) days of the conclusion of the internal affairs investigation.

k. Alleged violations of these procedures, the Department's Internal Affairs Policy and/or the Attorney General Guidelines, may be addressed by the PBA through the

> contractual grievance and arbitration procedure. If an arbitrator finds a violation, any disciplinary charges filed against the officer may be dismissed.

The employer alleges that the underlined passages in "i" and "j" are not mandatorily negotiable as they are either in conflict with, or not mandated by, the Attorney General's Guidelines on Internal Affairs Investigations. It argues that the disputed portion of "k" is not negotiable because any major disciplinary sanctions must be reviewed by the Civil Service Commission and not by a grievance arbitrator.

The PBA asserts that in Passaic Cty., P.E.R.C. No. 2003-96, 29 NJPER 297, 300 (¶91 2003), we held that language identical to Section 1.i of its proposal was mandatorily negotiable and consistent with the Attorney General's Guidelines on Internal Affairs Investigations. In Passaic, also involving a unit of sheriff's officers, we stated that the same language barring both polygraph and voice print tests:

> [I]s part of a policy that applies to departmental, not criminal investigations, and it provides procedural protections during those investigations consistent with a State statute.[5/]

5/ The PBA filed copies of §11-22 and §11-29 of the Guidelines. The employer cites §11-28 but has not quoted it.

That same reasoning applies here and we hold that the disputed portion of Section 1.i of proposed Article 29 is mandatorily negotiable.

The employer argues that because the Attorney General's guidelines do not state that the written results of the investigation must be given to the employee within 15 days after the investigation is complete, that time limit is not mandatorily negotiable. We disagree. The 15-day limit applies after the investigation is complete. Requiring that the results be delivered to the employee in writing within 15 days does not interfere with the conduct of the investigation as the deadline applies only after a probe is complete. The employer concedes the guidelines do not set a date for delivery of the report, so Section 1.j is an investigation procedure that has not been preempted and is mandatorily negotiable.

Finally we agree with the employer that to the extent Section 1.k applies to major disciplinary charges, those cases must be heard by the Civil Service Commission and are not subject to binding arbitration. The challenged language, as applied to minor discipline, is mandatorily negotiable.

ORDER

A. The disputed language in the following provisions and proposals are mandatorily negotiable and may be submitted to interest arbitration:

Article 6, §2 (Proposed Addition);

Article 13, PBA's Proposed Four On/Three Off work schedule;

Article 14, §11 4th ¶ disputed language;

Proposed Article 29, §1, disputed language in ¶i & ¶j;

Proposed Article 29, §1, ¶k as applied to minor discipline.

B. The following provisions and proposals are not mandatorily negotiable:

Article 14, §11 1st, 2nd and 3rd paragraphs ¶s;

Proposed Article 27;

Proposed Article 28, disputed language in §1 and §2;

Proposed Article 29, §1, ¶k as applied to major discipline.

BY ORDER OF THE COMMISSION

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

ISSUED: October 29, 2009

Trenton, New Jersey