

P.E.R.C. NO. 2010-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-042

PBA LOCAL 75 (SUPERIORS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the Township of Edison's request for a restraint of binding arbitration of a grievance filed by PBA Local 75 (Superiors). The grievance contends that the Township violated the parties' collective negotiations agreement when it issued a policy permitting the senior sergeant on duty to serve as the Watch Commander rather than call in a lieutenant on an overtime basis to fill the post. The grievance further contends that by unilaterally changing the replacement procedure for the post, the Township has wrongfully eliminated overtime opportunities for lieutenants and acting lieutenant's pay for sergeants serving as Watch Commander. The Commission grants a partial restraint of arbitration holding that the Township has a managerial prerogative to determine the rank qualifications for the Watch Commander position, but the PBA may pursue claims that the City should first use lieutenants on overtime to fill vacant Watch Commander positions and that sergeants performing that task are entitled to lieutenants pay.

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.

P.E.R.C. NO. 2010-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-042

PBA LOCAL 75 (SUPERIORS),

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, attorneys
(John A. Boppert, of counsel)

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

DECISION

On January 13, 2009, the Township of Edison petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by PBA Local 75. The grievance contends that the Township violated the parties' collective negotiations agreement when it issued a policy permitting the senior sergeant on duty to serve as the Watch Commander rather than call in a lieutenant on an overtime basis to fill the post. The grievance further contends that by unilaterally changing the replacement procedure for the post, the Township has wrongfully eliminated overtime opportunities for lieutenants and acting lieutenant's pay for sergeants who serve as the Watch Commander. We grant a partial restraint of arbitration. The Township has a managerial prerogative to determine the rank qualifications for the Watch Commander position, but the PBA may pursue claims that the City should

first use lieutenants on overtime to fill vacant Watch Commander positions, and that sergeants performing that task are entitled to lieutenants' pay.

The parties have filed exhibits and briefs. The Township has filed the certification of Chief of Police Thomas Bryan. The PBA has filed the certification of its PBA State Delegate Keith Hahn and President Bruce Polkowitz. These facts appear.

The PBA represents the Township's sergeants, lieutenants, and captains. The parties entered into a collective negotiations agreement effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article VI is entitled Overtime. It provides:

Overtime duty shall be assigned on a rotating basis, whenever practical, with consideration given, but not limited to the following factors: 1. Qualifications of the Employee, 2. Individual expertise, 3. Seniority with rank, 4. Demands of the particular assignment.

Article XXXIV is entitled Continuation of Benefits. It provides:

All benefits, terms and conditions of employment presently enjoyed by the Employees hereunder that have not been included in this contract shall be continued in full force and effect.

For many years, the Watch Commander post has been filled by an on-duty lieutenant. If no on-duty lieutenant was available, a lieutenant was brought in on overtime. If no lieutenant was available, a sergeant filled the position and received acting lieutenant's pay.

On October 2, 2008, the department issued a memorandum stating that all the duties and responsibilities of the Watch Commander may be assigned to a lieutenant or sergeant, and that the directive superseded any rank designation for the Watch Commander. The memorandum further provided that when all members of the shift supervisory team are present, the lieutenant shall fill the Watch Commander post, and, in absence of a lieutenant, the most senior sergeant on the shift supervisory team shall serve as the Watch Commander. The memorandum cited operational flexibility, maximizing first-line supervision, and ensuring the efficient operation of the department to substantiate the change.

On October 16, 2008, the PBA filed a grievance asserting that the memorandum violated Articles VI and XXXIV of the parties' agreement. The Deputy Chief denied the grievance, relying on the reasons for the change set forth in the memorandum. The PBA demanded arbitration and 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 Township may have.

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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). 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 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. In a case involving police and firefighters, 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.

[87 N.J. at 92-93; citations omitted]

Because this dispute involves a grievance, arbitration is 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).

The Township asserts that limiting the Watch Commander post to lieutenants would require an increase in staffing levels beyond that which it deems necessary. The Township further asserts that because of a reduction in the number of lieutenants, it is operationally more efficient to have an on-duty sergeant fill-in for an absent Watch Commander, as no squad has more than two lieutenants and some squads have one lieutenant with two or more sergeants. The Township argues that the instant matter is analogous to Borough of Montvale, P.E.R.C. No. 97-62, 23 NJPER 16 (¶28015 1996), where we restrained arbitration of a grievance that would have required the employer to increase its staffing levels on a periodically recurring basis beyond that which it deemed necessary, despite the mandatory negotiability of the allocation of overtime opportunities among qualified employees. In Montvale, the police chief had issued a memorandum requiring on-duty detectives to fill-in for absent patrol officers in lieu of requiring an off-duty patrol officer to fill the vacancy on an overtime basis. The Township contends that, as in Montvale, the PBA does not claim that a sergeant serving as Watch Commander is working out of title or that the Watch Commander post has been assigned to non-unit employees.

The PBA counters that the Township implemented the change to avoid paying overtime to lieutenants and acting lieutenant's pay to sergeants who are working out of title, both of which are

arbitrable issues. The PBA contends that the parties' past practice requires the on-duty lieutenant to fill the post, or an off-duty lieutenant to fill the post on an overtime basis, or, if no lieutenant is available, a sergeant receiving acting lieutenant's pay. It further contends that this practice demonstrates the Township's recognition of the value of lieutenant Watch Commanders, and that lieutenants have developed an interest in filling the potential vacancy and the accompanying overtime pay. The PBA relies on Township of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999), in which we found that the employer had violated the Act when it unilaterally changed its practice of replacing an absent officer with an officer of the same rank on an overtime basis.

The Township replies that, in contrast to other general orders that specify rank, the general order creating the Watch Commander post did not specify the Watch Commander's rank. The Township further asserts that even if the Watch Commander post had been filled by a lieutenant in the past, the decision to do so was unrelated to the qualifications of lieutenants over sergeants. It states that current staffing levels require sergeants to fill the Watch Commander post.

The Township has a prerogative to determine the qualifications required for the Watch Commander post. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998) (because the city implemented reorganization primarily for the purpose of improving the police department's effectiveness and performance,

the city's actions constitute an inherent policy determination that would be impermissibly hampered by negotiations). North Bergen Tp. Bd. of Ed v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976); Byram Tp. Bd. of Ed. and Byram Tp. Ed. Ass'n, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977); Cinnaminson Tp. (Police Association), P.E.R.C. No. 79-5, 4 NJPER 310 (¶4156 1978). Here, the Township has determined that both lieutenants and sergeants are qualified to serve as Watch Commander. The decision comes within its managerial prerogative to decide which officers are qualified to perform which duties. Accordingly, arbitration of the aspect of the grievance that challenges that determination is restrained.^{1/}

As a consequence of the exercise of that prerogative, we also find that the Township has a managerial prerogative to assign sergeants to the Watch Commander position and cannot be required to negotiate over a provision that would require it to assign lieutenants in the first instance.^{2/} However, because this

1/ The SOA claims that the only motivation for the change expressed by the Township through Bryan was to save money on overtime. The Township denies that allegation. We need not resolve this dispute because municipal decisions about how to organize and deploy their police forces to comply with economic needs are unquestionably policy decisions and affect the public welfare and are therefore not negotiable. Jersey City, 55 N.J. at 571.

2/ Kearny is distinguishable. In that case, the employer was found to have violated its obligation to negotiate when it unilaterally changed the overtime practice of assigning off-duty officers to replace absent officers of the same rank and instead used lower-ranked officers in an acting capacity. The higher-ranked officers had a mandatorily negotiable interest in filling vacant positions in their own

(continued...)

case involves a grievance, we must also ask whether an agreement to require the use of indisputably qualified lieutenants in the first instance would be permissively negotiable. We believe that answer is yes. In City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), we considered a similar issue, found the grievance to be permissively, but not mandatorily negotiable, and our decision was affirmed by the Appellate Division. 20 NJPER 319 (¶25163 App. Div. 1994). In that case, firefighters were seeking to arbitrate a claim that they should fill in for absent captains rather than have other captains called in to fill vacant captains positions. The Court noted that the City had not raised any safety concerns affecting firefighters or the public, the record established that both firefighters and captains were qualified to perform the duties, and the chief's statement that the change was for the "good of the department" was only an abstract governmental policy need, not a need in fact supported by the record.

Here, the memorandum announcing the change claims "operational flexibility, maximizing first-line supervision, and ensuring the efficient operation of the department to substantiate the change. As in Camden, the reasons are abstract and do not indicate the substantial limitation on government's policymaking powers that would require invalidating an agreement

2/ (...continued)
rank. In this case, the Township has determined that the Watch Commander position can be filled either by a lieutenant or a sergeant and that sergeants who are performing the duties are not working out of title.

to bring in lieutenants on overtime to fill a vacant Watch Commander position. Thus, the PBA may arbitrate its claim that the Township is contractually required to first try to use lieutenants to fill a vacant Watch Commander post. Because the subject is only permissively negotiable, the Township would not be required to continue such an agreement in a successor contract.

Finally, the claim that sergeants who perform the duty should continue to receive acting lieutenant's pay is also legally arbitrable. We have long held that a union can negotiate acting pay for police officers who are performing the duties of a higher rank or for particular duties, even if those duties are not of a higher rank. City of Jersey City, P.E.R.C. No. 2007-7, 32 NJPER 278 (¶115 2006), recon. granted P.E.R.C. No. 2007-26, 32 NJPER 356 (¶149 2006) (parties could have legally agreed that sergeants performing Tour Command Desk Officer duties would be paid at the lieutenants' rate even though those duties have been determined to be sergeants' duties); Borough of North Arlington, P.E.R.C. No. 2009-14, 34 NJPER 287 (¶102 2008); City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 360 (¶31144 2000) (sergeant serving as tour commander); 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) (deputy chief serving as acting chief).

ORDER

The request of the Township of Edison for a restraint of binding arbitration is granted to the extent the grievance challenges the determination that Watch Commander duties can be

assigned to either sergeants or lieutenants. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself.

ISSUED: November 24, 2009

Trenton, New Jersey