

P.E.R.C. NO. 2010-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LIVINGSTON,

Petitioner,

-and-

Docket No. SN-2010-027

LIVINGSTON PBA LOCAL 263,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a request for a restraint of binding arbitration of a grievance filed by Livingston PBA Local 263. The grievance challenges the denial of a police officer's request to use an emergency leave day to take off for a non-emergency reason. The Commission holds that the dispute involves a legally arbitrable claim that the contract mandates that the employer must grant an employee the right to take off one day each year by using an emergency leave day in a non-emergency situation, provided that a request is made at least one week in advance, and the employer is able to maintain minimum staffing by calling in an officer on an overtime basis and is therefore legally arbitrable.

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, attorneys (Joseph M. Hannon, on the brief)

For the Respondent, Klatsky, Sciarrabone & DeFillippo, attorneys (David J. DeFillippo, on the brief)

DECISION

On October 15, 2009, the Township of Livingston petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by Livingston PBA Local 263.^{1/} The grievance challenges the denial of a police officer's request to use an emergency leave day to take off for a non-emergency reason. We deny the request to restrain arbitration.

The parties have filed briefs, certifications and documents. These facts appear.

^{1/} An application for interim relief was filed and later withdrawn.

The PBA is the majority representative of the Township's police patrol officers, corporals and sergeants. The parties' collective negotiations agreement is effective from January 1, 2008 through December 31, 2012. The grievance procedure ends in binding arbitration.

Article XII, Section 3 states:

Employees may charge three (3) emergency days against accrued sick leave per year. An employee may utilize an emergency day in a non-emergency capacity; however, the employee must schedule it one week in advance. Days used per this section shall not count against an employee for perfect attendance or affect an annual evaluation.

Vacation selections are made by seniority prior to the start of the calendar year during which the vacation time is to be used. In November and December of 2007, vacation requests for 2008 were submitted. A police officer submitted a request to use vacation time on December 22, 23, 26, 27 and 28, 2008. He was approved for all dates except December 26.

On November 16, 2008, the officer submitted a written request to take December 26 off under the language in Article XII, Section 3 addressing the use of one emergency day for non-emergency reasons. The request explained that the officer was planning to visit his wife's family in Illinois during the vacation leave that had been approved before and after that date.

The Captain denied the request stating that the officer's scheduled shift for December 26 was already short of officers.

On December 3, the officer submitted a written grievance asserting that the denial of the request violated the contract. In denying the grievance for staffing reasons, the Chief suggested that the officer try to arrange a shift swap with another officer so that he could have December 26 off.^{2/} In the past, the Township has used officers on overtime to maintain minimum staffing after an officer called out sick or elected to use an emergency day. After the Township Manager denied the grievance, the PBA demanded arbitration. The demand asserts that the Township's denial of the officer's request violates Article XII, Section 3 and seeks an order "compelling the Township to refrain from future violations of the contract as well as provide the PBA with all other appropriate relief." This petition ensued.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. 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

^{2/} The officer was able to obtain a shift swap and was off on December 26.

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.

[78 N.J. at 154]

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 presented.

The Township argues that a contract cannot be construed to deprive an employer of its reserved right to deny leave requests if granting a request would prevent it from deploying the minimum number of officers it requires for a shift.

The PBA responds that if the employer must bring in officers on overtime to maintain minimum staffing levels and also comply with its contractual obligations to grant leave requests, the financial costs associated with maintaining minimum staffing do not render grievances challenging denials of leave requests non-arbitrable.

The Township replies that the PBA made no claim that the Township had an obligation to maintain minimum staffing by calling in officers on an overtime basis at any stage of the grievance procedure or in the demand for arbitration. It notes that this contention was advanced for the first time in the PBA's responding brief.

We begin with the Township's procedural defense. We decline to consider whether the grievance and demand for arbitration encompass a claim that the Township was or is contractually required to bring in officers on overtime to fill vacancies caused by the use of emergency leave in non-emergency situations. The question of whether a grievance or arbitration demand raises a particular claim presents a question of procedural arbitrability for the arbitrator rather than a legal arbitrability issue for this Commission. See Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988).

As for the legal arbitrability issue, 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 minimum staffing requirements. See 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); Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999).

The Township's reliance on Township of Livingston, P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989), is misplaced. That case held that an employer may deny requested time off to ensure that it has enough employees to cover a shift, but it does not preclude an employer from agreeing to allow an employee to take time off even though doing so will require it to pay overtime

compensation to a replacement employee. The additional labor cost of overtime payments does not make a time off scheduling dispute non-negotiable and non-arbitrable. Long Hill; Rutherford; see also Town of Secaucus, P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000); New Jersey Highway Authority, P.E.R.C. No. 2002-76, 28 NJPER 261 (¶33100 2002), *aff'd* 29 NJPER 276 (¶82 App. Div. 2003).

This dispute involves a claim that the contract mandates that the employer must grant an employee the right to take off one day each year by using an emergency leave day in a non-emergency situation, provided that a request is made at least one week in advance, and the employer is able to maintain minimum staffing by calling in an officer on an overtime basis. That claim is legally arbitrable and may be submitted to binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey