

P.E.R.C. NO. 2010-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NUTLEY,

Petitioner,

-and-

Docket No. SN-2009-067

PBA LOCAL 33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Nutley for a restraint of binding arbitration of a grievance filed by PBA Local 33. The grievance contends that the Township violated the parties' agreement when it issued two announcements that require a lieutenant to drop to the road sergeant position when the road sergeant is out on sick leave, but not when the sergeant is out on vacation, personal, or compensation time. The grievance further contends that the announcements deprive officers of overtime assignments and has resulted in officers being arbitrarily and improperly denied requests for time off. The Commission holds that the Township has a managerial prerogative to determine that a lieutenant is qualified to fill in for an absent road sergeant, but the PBA may arbitrate its claims that the Township violated an alleged agreement to replace an absent sergeant with another sergeant on overtime and that the employer violated the agreement by restricting unit members' ability to use contractual leave time.

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, Ruderman & Glickman, P.C. (John A. Boppert, of counsel)

For the Respondent, Klatsky, Sciarrabone & DeFillippo, attorneys (David J. DeFillippo, of counsel)

DECISION

On March 24, 2009, the Township of Nutley petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by PBA Local 33. The grievance contends that the Township violated the parties' collective negotiations agreement when the Township issued two announcements that require a lieutenant to drop to the road sergeant position when the road sergeant is out on sick leave, but not when the sergeant is out on vacation, personal, or compensation time. The grievance further contends that the announcements deprive officers of overtime assignments and has resulted in officers being arbitrarily and improperly denied

requests for time off. We decline to restrain binding arbitration.

The parties' have filed exhibits and briefs. The Township has filed the certification of Chief of Police John Holland. The PBA has filed the certification of PBA President Michael O'Halloran. These facts appear.

The PBA represents the Township's patrol officers and sergeants. The parties' current agreement expired on December 31, 2008. The grievance procedure ends in binding arbitration.

Article IV is entitled Retention of Benefits; Article VII is entitled Salaries and Wages; Article IX is entitled Hours of Work and Overtime; Article X is entitled Shift Assignments and Manpower Allocation; Article XII is entitled Vacations; Article XIII is entitled Personal Days Off; and Article XXIV is entitled Negotiations Procedures.

Pursuant to the police department's minimum staffing requirements, the Patrol Division must be staffed with five officers on the road. Before January 2009, if an officer was absent, another officer would be called in on overtime. At least one sergeant was required to be available to serve as the road supervisor. If a sergeant was absent, another sergeant would be called in on overtime to be the road supervisor, regardless of whether a lieutenant was on duty. A police officer and

dispatcher were also required to work the desk. If a dispatcher was absent, two patrol officers would work the desk.

On January 30, 2009, the police chief issued a directive that stated that the lieutenant will work as the road supervisor when needed.

Another directive was issued that required lieutenants to drop down to road sergeant to avoid overtime and that sergeants could not stay on overtime to sign reports. The chief states that he ordered no such formal directive to be issued.

The police chief certifies that an on-duty lieutenant will be assigned as the road supervisor to maximize available supervisory capacity in the event of unscheduled absences and to maintain minimum staffing levels. He states that the department recently added a new lieutenant position and changed the lieutenants' schedule to provide for a lieutenant to work every day.

The PBA president certifies that if a sergeant wants to use a paid leave day, a lieutenant will not drop down to road sergeant to permit the sergeant to have the day off.

The PBA filed a grievance asserting that the directives violated Articles IV, VII, IX, X, XII, XIII, and XXIV of the parties' agreement. 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 employer 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]

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). 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 asserts that requiring it to bring in a road sergeant on overtime when the on-duty lieutenant can act as the road supervisor would require an increase in minimum staffing levels on a recurring basis beyond that which it deems necessary. The Township further asserts that because it has the capacity to deploy lieutenants again, it is more efficient to have them drop down to sergeant; since 1990 there have been standing orders requiring lieutenants to drop down to sergeant which were re-issued in 2003; and no employee has a guaranteed right to overtime if the employer does not determine it to be necessary.

The Township relies on City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), where we distinguished between a police department's prerogative to decide that overtime must be worked and its duty to negotiate over the allocation of overtime opportunities among qualified employees.

The PBA counters that the Township issued the directives to avoid paying overtime to sergeants and patrol officers, matters that are legally arbitrable. The PBA contends that the parties' past practice requires a sergeant to be brought in on overtime pay when there is a vacancy. It 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 another officer of the same rank on overtime.

The PBA also contends that the new directives establish two minimum staffing levels - one for scheduled absences and one for unscheduled absences. It asserts that the Township must be consistent on how it will fill a sergeant vacancy and that its grievance also challenges the Township's restrictions on unit members' ability to use contractual leave time.

The Township replies that the parties' agreement does not contain an overtime rotation provision and the PBA's argument about leave denial lacks merit because the parties' agreement

protects officers from recision of time off once approved. The Township relies on 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. 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 has a managerial prerogative to determine that a lieutenant is qualified to fill in for an absent road sergeant. Edison Tp., P.E.R.C. No. 2010-39, 356 NJPER 442 (¶145 2009). However, the question in this case is whether the employer could have legally agreed to call in sergeants on overtime rather than have a lieutenant drop down to the road supervisor position. That question is similar to the one we also answered in Edison, where we permitted arbitration of a grievance that alleged that the employer violated the parties' 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. Although the employer had a prerogative to decide that sergeants were qualified to perform the Watch Commander duties, the employer could have legally entered into a binding agreement to first use lieutenants to fill in for

vacancies in that position. That kind of agreement was permissively negotiable in Edison and in this case as well. Paterson. Thus, the PBA may arbitrate its claim that the Township violated an alleged agreement to replace an absent sergeant with another sergeant on overtime.

Montvale is distinguishable because it involved the employer's decision to assign police officer duties to a detective with a police officer rank. Here, lieutenants are being assigned duties of officers in another rank and negotiations unit.

The Township's arguments about the history of the department's orders and the parties' practice involve the merits of the grievance which is outside our limited scope of negotiations jurisdiction. Ridgefield Park. The Township may argue to the arbitrator that lieutenants have been required to fill in for absent road supervisors since 1990.

Finally, contractual leave time is mandatorily negotiable and employees may arbitrate the reasonableness of denials. See City of Newark, P.E.R.C. No. 2002-040, 28 NJPER 134 () ¶33041 2002); Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989); Borough of Bradley Beach, P.E.R.C. No. 90-60, 16 NJPER 43 (¶21020 1989). Accordingly, the PBA may also arbitrate its claim that the employer violated the contract by restricting unit members' ability to use contractual leave time.

ORDER

The Township of Nutley's request 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. Commissioner Watkins voted against this decision. Commissioner Colligan recused himself.

ISSUED: June 24, 2010

Trenton, New Jersey