

P.E.R.C. NO. 2010-81

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 denies the Township of Edison's motion for reconsideration of P.E.R.C. No. 2010-39. In that decision, the Commission granted, in part, the Township'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 and that by unilaterally changing the replacement procedure for the post, the Township wrongfully eliminated overtime opportunities for lieutenants and acting lieutenant's pay for sergeants serving as Watch Commander. The Commission reiterates that the Township has a managerial prerogative to determine the rank qualification for the Watch Commander positions and restrains arbitration of that aspect of the grievance. The Commission denies to restrain arbitration over the alleged agreement that the Township should first offer vacant Watch Commander positions to lieutenants on overtime and that sergeants performing that task are entitled to lieutenant's pay is permissively 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, DeCotiis, FitzPatrick & Cole, LLP,  
attorneys (Louis N. Rainone, of counsel)

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

DECISION

On December 2, 2009, the Township of Edison filed what it termed exceptions to P.E.R.C. No. 2010-39, 35 NJPER 442 (¶145 2009). In that decision we granted, in part, the Township'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. We granted a partial restraint of arbitration holding that the Township has a managerial prerogative to determine the rank qualifications for the Watch Commander position, but that 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 Township argues that we erred in permitting arbitration of any portion of the grievance.

On December 4, 2009, the Township asked that we consider its submission as a motion for reconsideration. On December 9, the PBA filed a response asserting that the Township's motion is untimely and that no extraordinary circumstances warrant reconsideration. We then granted the Township permission to file a reply brief and the PBA permission to file a sur-reply.

After reviewing all of the parties' submissions, we deny reconsideration.

First, the motion is untimely. N.J.A.C. 19:13-3.11 requires that a motion for reconsideration of a scope of negotiations decision be filed within five days. That time frame was adopted in 2006, after the cases cited by the Township were issued. However, the regulation states that motions for reconsideration may be filed in accordance with the provisions of N.J.A.C. 19:14-8.4. That regulation governing motions for reconsideration in

unfair practice cases requires that motions be filed within 15 days. Given the confusion that could arise from this inconsistency, we will consider the Township's motion on the merits.

Reconsideration will be granted only under extraordinary circumstances. N.J.A.C. 19:13-3.11. Such circumstances are not present here.

The Township argues that our finding that the PBA may arbitrate a claim that the City should first use lieutenants on overtime to fill vacant Watch Commander positions directly contradicts our conclusion 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. However, this apparent incongruity is explained by the difference between mandatory and permissive negotiability. The decision to assign sergeants to Watch Commander positions is not mandatorily negotiable. Therefore, the Township cannot be required to negotiate over having lieutenants assigned those positions in the first instance. However, because the assignment of qualified lieutenants to the Watch Commander position involves a permissively negotiable subject, if the Township did negotiate over that issue and agreed to first use lieutenants, that

agreement could be enforced in binding arbitration during the life of a contract.<sup>1/</sup>

The Township cites to portions of an Appellate Division decision in City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994). That decision consolidated an appeal from one of our scope of negotiations decisions and an appeal from a trial court decision vacating an arbitration award. The Court affirmed our determination that the issue of using firefighters to fill vacant captain positions was permissively negotiable. As for the review of the arbitration award itself, the Court found that the employer had not in fact reached any agreement over the permissively negotiable staffing issue and therefore the Court affirmed the trial court decision that vacated an arbitration award that had found a contractual violation. This aspect of the Township's argument may have a bearing on the merits of the grievance, but it does not speak to our decision on the negotiability and legal arbitrability of the grievance.

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<sup>1/</sup> Contrary to the Township's assertion, we did not ignore whole portions of the police chief's certification. Based on that certification, we found a managerial prerogative to assign sergeants to the Watch Commander position. However, the certification did not establish that abiding by an alleged agreement to use lieutenants first would substantially limit governmental policy. That is the standard that must be met to find that a subject is not permissively negotiable. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981).

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]

Finally, the Township argues that there is no agreement to pay sergeants acting lieutenants pay to perform Watch Commander duties. That argument also goes to the merits of the grievance, not its negotiability and legally arbitrability.

ORDER

The motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Kregel, Voos and Watkins voted in favor of this decision. None opposed. Commissioners Colligan and Fuller were not present.

ISSUED: May 27, 2010

Trenton, New Jersey