

P.E.R.C. NO. 2011-63

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST CALDWELL,

Petitioner,

-and-

Docket No. SN-2011-027

WEST ESSEX PBA LOCAL 81  
(WEST CALDWELL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of West Caldwell for a restraint of binding arbitration of a grievance filed by West Essex PBA Local 81 (West Caldwell Unit). The grievance contends that the Township violated the parties' collective negotiations agreement when it denied officers' requests for out-of-rank pay. The Commission holds that the grievance involves compensation which is a mandatorily negotiable issue. The Township's defense that the officer's were not assigned to work in higher ranks relates to the merits of the grievance and may be presented to the grievance arbitrator.

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, Riker Danzig Scherer Hyland & Perretti, LLP, attorneys (James L. Lott, Jr., of counsel and on the brief; Diane N. Hickey, on the brief)

For the Respondent, Loccke, Correia, Limsky & Bukosky, attorneys (Merick H. Limsky, of counsel)

DECISION

On October 5, 2010, the Township of West Caldwell petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by West Essex PBA Local 81 (West Caldwell Unit).<sup>1/</sup> The grievance contends that the Township violated the parties' collective negotiations agreement when it denied officers requests for out-

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<sup>1/</sup> The Township filed for interim relief seeking a temporary restraint of arbitration pending a final Commission decision. Since an arbitration date had not been set at the time of filing, we did not process the interim relief application. N.J.A.C. 19:13-3.10

of-rank pay. We deny the Township's request for a restraint of this compensation issue.

The parties have filed briefs. The Township has filed certifications of its Chief of Police and exhibits. These facts appear.

The PBA represents the Township's police officers excluding the ranks of Captain and Chief of Police. The parties entered into a collective negotiations agreement effective from January 1, 2008 through December 31, 2011. The grievance procedure ends in binding arbitration.

Article II, Section H provides:

1. In the event a vacancy shall exist for any reason except as a result of a Department-assigned training or schooling and, as a result, an Officer or Superior is directed to assume, in an acting capacity, a higher rank and perform the duties and responsibilities of such higher rank for a period of at least ten (10) working days, then such Officer or Superior shall receive the salary or pay for the higher rank for any period so worked beginning with the first hour of the eleventh (11<sup>th</sup>) day.

2. Whenever an employee is assigned to work at a higher rank in a particular position and performs in that position for ten (10) working days either at one time or cumulatively during several assignments during a calendar year that Officer will be entitled to pay at the higher rank beginning on the eleventh (11<sup>th</sup>) day of such assignment(s). The provisions of this paragraph shall become effective April 10, 1997.

3. This section shall be interpreted and applied consistent with the Grievance Arbitration and Award of Grievance Arbitrator Joe Douglas (PERC Docket No.: AR-99-112/issued December 30, 1999, and affirmed by the New Jersey Superior Court, Chancery Division on July 11, 2000 (Docket No.: C-110-00).

Article VII provides:

Nothing contained in this Agreement shall in any way diminish the authority conferred by Law, Ordinance, Resolution or Administrative Code and Police Department Rules and Regulations upon any Township Official or in any way abridge or reduce such authority, and the Township reserves the full right and authority to make any additions and modifications of the foregoing as it may deem necessary and advisable from time to time. This Agreement shall be construed as requiring the Township officials to follow the terms contained herein, to the extent that they are applicable in the exercise of the powers conferred upon them by law.

Nothing contained herein shall be construed to deny or restrict to any Officer such rights as he may have under any other applicable Laws and Regulations.

The Township of West Caldwell Police Department Handbook  
Policy Number 85-18, as amended by Resolution 8437-1 provides:

In the absence of a Superior Officer (Lieutenant or Sergeant), and when directed by the Chief of Police, or by the ranking officer in charge acting for the Chief of Police, the next ranking officer in the chain of command or seniority as applied to patrolman, shall assume the position of Supervisory Officer and will be responsible for the proper performance of said duties.

Section 5:1.3, as amended by Resolution 8437-2, of the Police Department Rules and Regulations provides:

During the temporary absence of a commanding officer, when no other provision is made by competent authority, the command responsibilities of the absent officer are assumed by that officer's superior in the chain of command.

In May 2010, 15 officers submitted out-of-title compensation requests to the Chief. At the Chief's request, the officers submitted updated requests through June 2010. On July 2, the Chief denied the requests because he determined that out-of-title assignments were not made; he retained a prerogative to determine whether an officer would be assigned to work out-of-title; and the parties' agreement and Police Department Rules and Regulations did not require the payment of compensation. On the same date, the PBA submitted a grievance directly to the governing body. The grievance alleges the Township violated Article II, Section H 1, 2 and 3 of the parties' collective negotiations agreement when it denied out-of-title payment to officers. On August 17, the Council denied the grievance for the same reasons expressed by the Chief. 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]

Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982). 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 argues that the subject of the grievance is preempted by N.J.S.A. 40A:14-118<sup>2/</sup>, because the police chief has the sole authority to assign or not assign officers particular duties; the employer has a managerial prerogative to set staffing levels and determine the number of officers necessary for the delivery of services; arbitration of the dispute would result in chaos; and the grievance was filed out of time.

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2/ This statute provides for the duties and responsibilities of a municipal chief of police.

The PBA responds that the grievance relates to out-of-title pay for work already completed and is not a challenge to the Chief's decision to not assign officers to a higher rank. It further responds that the arguments of the Township are related to the merits of the grievance and not the negotiability of out-of-title compensation.

The Township replies that the arbitrator could not reach the issue of compensation without passing on the Chief's decision not to assign officers to work as supervisory officers in out-of-title assignments and that no assignments have been made.

First, the Township has asserted that the grievance challenges its prerogative to deny employees acting assignments. The PBA has clearly established that its grievance does not challenge staffing levels or assignments and only seeks compensation for assignments already worked. We accept the PBA's framing of its grievance.

We reject the Borough's preemption argument. A statute or regulation will not preempt negotiations unless it speaks in the imperative and fixes an employment condition specifically, expressly, and comprehensively. See, e.g., Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Local 195 at 403-404; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); State of New Jersey (State Colleges), P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999). N.J.S.A.

40A:14-118 is a general statute providing for the creation of a municipal police department. It does not address the payment of out-of-title compensation for work performed and is not preemptive. West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); City of Newark, P.E.R.C. No. 98-108, 24 NJPER 163 (¶29080 1998); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989); Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), *aff'd* NJPER Supp.2d 198 (¶176 App. Div. 1988); Carteret Bor., P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Lacey Tp., P.E.R.C. No. 87-120, 13 NJPER 291 (¶18122 1987); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983); Franklin Tp., P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982); *see also* Paterson at 96-97.

We have consistently held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable. City of Trenton, P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001); City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 360 (¶31144 2000); City of Newark, P.E.R.C. No. 98-37, 23 NJPER 548 (¶28273 1997); Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992); 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. 1983); East Brunswick Bd. of Ed., P.E.R.C. No. 91-12,

16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992). Employees have a strong interest in receiving additional pay for performing work of a higher level or different nature than that on which their standard compensation is based. In general, those compensation claims do not significantly interfere with governmental policymaking.

As to the factual dispute of whether the officers actually were assigned to work out-of-title, the arbitrator may make a determination on that issue as well as whether out-of-title pay is required under in the parties' contract. See, e.g., Trenton Evesham Tp. Bd. of Ed., P.E.R.C. No. 98-143, 24 NJPER 293 (¶29139 1998); East Brunswick Bd. of Ed.

Whether the grievance was timely filed is an issue of procedural arbitrability that must be considered by the arbitrator. Milltown Bd. of Ed., P.E.R.C. No. 99-95, 25 NJPER 240 (¶30101 1999).

#### ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eaton, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Colligan recused himself.

ISSUED: February 24, 2011

Trenton, New Jersey