

P.E.R.C. NO. 2012-51

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NUTLEY,

Petitioner,

-and-

Docket No. SN-2011-065

NUTLEY PBA LOCAL #33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Nutley for a restraint of binding arbitration of a grievance filed by Nutley PBA Local No. 33. The grievance alleges that the Township violated the parties' collective negotiations agreement when it assigned fewer than five officers to patrol shifts when an officer assigned to the shift was out on an unscheduled absence. The Commission restrains arbitration to the extent the grievance challenges the Township's staffing decision. The Commission permits arbitration of the PBA's allegations that the Township did not adhere to contractual notice deadlines.

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.,  
attorneys (John A. Boppert, of counsel)

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

DECISION

On March 10, 2011, the Township of Nutley petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Nutley PBA Local 33 alleging that the Township violated the parties' collective negotiations agreement by assigning fewer than five officers to patrol shifts when an officer assigned to the shift was out because of an unscheduled absence (e.g. an illness).<sup>1/</sup> The grievance seeks overtime compensation for officers who would

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<sup>1/</sup> In P.E.R.C. No. 2012-025, 38 NJPER 207 (¶71 2011) involving these same parties, the Commission restrained arbitration of the PBA's grievance challenging the assignment of on-duty detectives, rather than uniformed officers who would have received overtime pay, to fill patrol shift vacancies to maintain the five officer staffing level on patrol shifts.

have been called in to maintain staffing levels on all patrol shifts that operated with fewer than five officers.<sup>2/</sup> We will restrain arbitration of the challenge to the employer's decision to send out some patrol shifts with less than five officers as the setting of, and adherence to, staffing levels are issues that are not legally arbitrable.

The parties' have filed briefs certifications and exhibits. These facts appear.

The PBA represents the Township's patrol officers and sergeants. The parties' most recent agreement expired on December 31, 2008.<sup>3/</sup> The grievance procedure ends in binding arbitration.

Article IV, "Retention of Benefits" provides, in part:

1. Except as otherwise provided herein, all rights and benefits which the employees have heretofore enjoyed and are presently enjoying as contained in the Township ordinances or police rules and regulations shall be

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2/ The PBA indicates that on occasions when a shortage could occur because of an anticipated absence (e.g. vacation leave) efforts are taken to maintain at least five officers on patrol on a given shift. Those efforts could include denying requests for time off, an alleged practice that was challenged in the grievance that was discussed in P.E.R.C. No. 2012-025

3/ The contract language is from an agreement covering January 1, 2003 through December 31, 2007. A one-year extension was agreed to by the parties. After all briefs were filed in this case, an interest arbitration award was issued setting the terms of a successor contract between the Township and the PBA for the period from January 1, 2009 through December 31, 2012.

maintained and continued by the Township during the term of this Agreement at not less than the highest standards in effect at the commencement of these negotiations resulting in this Agreement.

2. The provisions of all applicable State statutes, rules and regulations of the New Jersey Public Employment Relations Commission, municipal ordinances and resolutions, except as specifically modified herein, shall remain in full force and effect during the term of this Agreement and shall be incorporated in this Agreement as if set forth at length.

Article X is entitled Shift Assignments and Manpower Allocation and provides:

5. Notification of manpower allocation. The Chief of Police shall serve written notice to the PBA, on a quarter-annual basis, setting forth the minimum manpower allocation established for uniform patrol officers assigned to patrol cars (exclusive of fixed posts) on each shift.

Article VII is entitled Salaries and Wages; Article IX is entitled Hours of Work and Overtime; Article XII is entitled Vacations; Article XIII is entitled Personal Days Off; and Article XXIV is entitled Negotiations Procedures.

As in P.E.R.C. No. 2012-025, this dispute arises from Special Order 03-10 issued on July 23, 2010 by the Chief of Police John U. Holland to address staffing requirements in the Patrol Division. Pertinent to this dispute is:

3. Hiring replacement Patrol Officers to meet minimum staffing requirements will be at the discretion of the ranking on duty commander or supervisor. In circumstances

where in the currently established 5 man minimum is not met, commanders and supervisors will consider as part of the decision making process, the duration of the shortage, the day of the week, the hour of the day, and any known or expected conditions that would impact operations. When deemed appropriate, operating below the established minimum is authorized.

These procedures will be monitored and adjusted as circumstances dictate.

PBA President Michael O'Halloran certifies that allowing patrol shifts to be staffed with less than five officers is unprecedented. He questions giving shift commanders or supervisors the discretion to decide whether to bring in additional officers to meet normal staffing minimums.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

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), permits arbitration 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 to have been violated is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

Staffing decisions are neither mandatorily nor permissively negotiable and cannot be challenged through binding grievance arbitration. A recent application of this doctrine is Hawthorne Borough, P.E.R.C. No. 2011-061, 37 NJPER 54 (¶20 2011) (arbitration restrained where grievance asserted that the employer violated the parties' agreement when it staffed a shift with four patrol officers rather than the normal complement of five; overtime claim not arbitrable because it was based on adherence to five officer per shift staffing). See also City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 1981), certif. den. 88 N.J. 476 (1981); Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000) (citing cases generally barring enforcement of contract provisions binding employers to specific staffing levels). This grievance directly challenges the employer's

staffing decision.<sup>4/</sup> Also non-arbitrable is the PBA's "concern" about leaving deployment decisions in the hands of shift commanders and supervisors. A majority representative may not challenge an employer's selection of the personnel it deems qualified to perform supervisory tasks. See Rutherford Bd. of Ed., P.E.R.C. No. 85-96, 11 NJPER 223 (¶16086 1985); Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984). The employer makes no argument about the negotiability or arbitrability of Article X, Section 5 concerning quarterly notice of manpower allocations. We do not restrain arbitration of any claim that the Township did not adhere to notice deadlines.

ORDER

The Township of Nutley's request for a restraint of binding arbitration is granted, in part. The PBA may arbitrate any claim that the Township did not adhere to notice deadlines.

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<sup>4/</sup> The PBA argues that Hawthorne is distinguishable because contract language arguably permitted that employer to go below the five officer staffing level under certain conditions. That argument goes to the merits of the grievance, not the legal arbitrability of the issues presented. The PBA also cites Nutley PBA Local 33 v. Township of Nutley, 419 N.J. Super. 160 (App. Div. 2011), examining the impact of the Fair Labor Standards Act on the accumulation and use of compensatory time accrued by Nutley police officers. The decision construing the FLSA does not bear on the negotiability issues in this dispute.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Jones, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself.

ISSUED: March 29, 2012

Trenton, New Jersey