

P.E.R.C. NO. 2012-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NUTLEY,

Petitioner,

-and-

Docket No. SN-2011-030

NUTLEY PBA LOCAL #33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Nutley for a restraint of binding arbitration of a grievance filed by Nutley PBA Local 33. The grievance alleges the Township violated the parties' collective negotiations agreement when the Chief of Police issued a special order that permits shortages in the Patrol Division be filled with on-duty detectives and permits operating below minimum staffing levels. The grievance also contends that the order deprives officers of overtime assignments and has resulted in officers being denied requests for time off. The Commission holds that the Township has a managerial prerogative to assign on-duty detectives to patrol as well as to set minimum staffing levels. The Commission finds that the remainder of the grievance is mandatorily negotiable, but restrains arbitration as the exact same issue is pending arbitration.

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 October 11, 2010, 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. The grievance alleges that the Township violated the parties' collective negotiations agreement when the Chief of Police issued a special order that permits shortages in the Patrol Division be filled with on-duty detectives and permits dropping below minimum staffing levels at the discretion of the duty commander or supervisor. The grievance further contends that the order deprives officers of overtime assignments and has resulted in officers being denied requests for time off. We grant the Township's request for a restraint.

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 and 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 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.

On July 23, 2010, Chief Holland issued Special Order 03-10 to address staffing requirements in the Patrol Division and to preserve operational efficiency and maintain essential police services in the Township. The order provides:

It is becoming increasingly challenging to meet our staffing requirements in the Patrol Division as a result of retirements, sick and injury leave, and vacations. The Patrol Division is at the core of our operations, and services must be maintained at acceptable levels. To address these challenges new procedures have been, and will be implemented. They include the following:

1. Shortages of supervisory staff in the Patrol Division will, whenever possible, be filled by available on-duty Investigation and Services Division personnel.
2. Until further notice, a schedule shall be created to assign Detectives to the Patrol Division on an as needed basis.
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.

Chief Holland certifies that all on-duty personnel who have been re-deployed pursuant to Special Order 03-10 have been detectives who are in the same rank and negotiations unit as patrol officers.

PBA President Michael O'Halloran certifies that prior to the filing of the grievance at issue, if the department dropped below the minimum staffing levels (five patrol officers and one road sergeant), a patrol officer would be called-in for overtime. Now, if the department is short, the Chief permits the re-deployment of a detective to patrol duty; the dropping down of a lieutenant, captain or deputy chief to fill a sergeant vacancy; and/or permitting the department to operate below minimum staffing. He further states that the department will not utilize the same re-deployment plan to permit officers to schedule vacation, personal or compensation days in violation of the parties' agreement.

On August 13, 2010, the PBA filed a grievance alleging that Special Order 03-10 violates the parties' agreement in that the department will not transfer on-duty officers to cover for scheduled leaves, officers have been improperly denied overtime assignments and operating below minimum staffing violates the

parties' agreement. On September 2, the PBA demanded binding arbitration seeking as a remedy that the order be rescinded and that the officers improperly denied overtime opportunities and contractual leave time be compensated. 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), 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.

The Township argues that it has a managerial prerogative to set minimum staffing levels; deploy on-duty officers in the same rank to patrol duty; and determine whether overtime work is necessary.

The PBA responds that the Township's petition must be dismissed as the grievance concerns the mandatorily negotiable issues of: allocation of overtime opportunities; employees' interests in performing work in their title rather than having superior officers drop down to cover a road sergeant vacancy; and restrictions on employees' ability to schedule and utilize contractual leave time. It further contends that operating below minimum staffing levels violates the parties' agreement.

The Township replies that the parties' agreement does not require it to re-deploy officers to accommodate scheduled leave requests; the managerial prerogative to set minimum staffing levels permits the department to operate below those levels when necessary; and the issue of whether higher ranking officers may drop down to fill-in for the patrol sergeant has been decided by this Commission in regard to a prior grievance that is pending arbitration.

The first issue involved in this matter is whether the PBA may arbitrate a grievance that challenges the employer's decision to not call-in officers on overtime even though it will operate below minimum staffing levels.

The Township has a non-negotiable managerial prerogative to determine whether overtime will be worked. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). It also has a managerial prerogative to determine its staffing levels. See, e.g., City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); 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). Minimum staffing levels are not permissively negotiable. See 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 prerogative includes the determination that the department will operate below announced minimum staffing levels. Borough of Hawthorne, P.E.R.C. No. 2011-61, 37 NJPER 54 (¶20 2011).

Arbitration of this overtime dispute would be tantamount to permitting an arbitrator to review the Township's minimum staffing decision. West Paterson. Accordingly, the PBA is challenging a staffing determination, not a unilateral alteration of the allocation of overtime. Arbitration of that dispute would substantially limit the Township's governmental policymaking powers.

The next issue is whether the employer has a managerial prerogative to deploy detectives to patrol to avoid calling-in patrol officers on overtime. The PBA concedes that it does because the officers are of the same rank. See Borough of Montvale, P.E.R.C. No. 97-62, 23 NJPER 16 (¶28015 1996).

The remaining issues are whether the PBA may arbitrate its allegations that the Township has violated the parties' contract when it continued to require superior officers to drop down to cover for road sergeant vacancies and denied officers' requests for contractual leave time.

The doctrine of collateral estoppel, or issue preclusion, bars re-litigation of any issue that was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. For the doctrine to apply, the issue to be precluded must be identical to the issue decided in the first proceeding. Hennessey v. Winslow Tp., 368 N.J. 593 (2005).

The evidence presented by the PBA to overcome the Chief's assertion that only detectives have been re-deployed pursuant to Special Order 03-10 only involves instances where superior officers were required to drop down to cover a road sergeant vacancy. And, it argues that this practice is preventing officers from taking contractual leave time. We found these exact issues to be legally arbitrable as they relate to a

separate grievance regarding dropping down of superior officers to cover the road sergeant vacancy. See Township of Nutley, P.E.R.C. No. 2010-89, 36 NJPER 229 (¶81 2010). The only difference between the current grievance and the one that was the subject of the previous scope petition is that now the employer is re-deploying officers of the same rank and permitting the department to change minimum staffing. Both of these issues we have found not to be mandatorily negotiable. Accordingly, we will restrain arbitration of this grievance as the remaining negotiable issues are already pending before a grievance arbitrator. To permit arbitration again could lead to inconsistent results.

ORDER

The Township of Nutley's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel and Voos voted in favor of this decision. Commissioner Jones opposed. Commissioner Wall recused himself.

ISSUED: November 22, 2011

Trenton, New Jersey