

P.E.R.C. NO. 2013-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2012-056

FOP LODGE 39,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Somerset County Sheriff's Office for a restraint of binding arbitration of a grievance filed by FOP Lodge 39. The grievance asserts that the County violated the overtime and seniority clauses of the parties' agreement when it failed to assign the grievant to Firearms Instructor overtime details. The Commission holds that arbitration of the grievance would substantially limit the Township's managerial prerogative to assess qualifications and assign employees with special qualifications to perform particular overtime tasks. The Commission finds that the County's deviation from a negotiated seniority overtime allocation procedure was supported by its assertions regarding the grievant's firing range deficiencies.

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, & DeFillippo,
attorneys (David J. DeFillippo, of counsel)

DECISION

On March 27, 2012, the Somerset County Sheriff's Office (County) filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 39. The grievance asserts that the County violated the parties' collective negotiations agreement when it allegedly failed to properly allocate overtime assignments among its Firearms Instructors for the firearms qualification process, specifically by excluding the grievant, a Sheriff Officer, from such overtime assignments on various dates in September-October 2011.

The parties have filed briefs and exhibits.^{1/} These facts appear.

The FOP represents Sheriff's officers, excluding superior officers, correction officers, and members of the identification bureau. The most recent collective negotiations agreement between the FOP and the County was effective from January 1, 2008 through December 31, 2012. The grievance procedure ends in binding arbitration.

Article V of the collective negotiations agreement, entitled Overtime, states in pertinent part:

- 5.4 An overtime list based on seniority within the department shall be maintained in a central location accessible to all unit members.
- 5.5 All overtime shall be assigned on a rotational basis from the overtime list referred to in Article 5.4. It shall be indicated on the list the date, time and result of each contact or attempted contact. Notwithstanding the foregoing, the Sheriff shall not be required to assign overtime on a rotational basis from the overtime list for special service assignments (such as jail back up and riot situations).

Article XXIX of the agreement, entitled Seniority, states in pertinent part:

- 29.1 With respect to all incidents of employment, seniority shall be one of the major factors considered, provided the officer involved has the ability to perform the work involved.

^{1/} Neither party filed a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

29.2 Seniority with the Sheriff's Department shall be one of the major factors considered regarding promotional opportunities, overtime opportunities, the granting of vacation and personal day requests and longevity pay.

In June 2009, the grievant became a certified Firearms Instructor when he completed a Firearms Instructor's training course while out on vacation. His participation in the course was his own choice and not at the request of the County. After obtaining his Firearms Instructor certification, the grievant made verbal requests to lead Firearms Instructor/Range Master Lieutenant Sanders to be used on the firearms range. Following opportunities on May 17, 2010 and April 29, 2011 to practice his training on the range, the grievant was not chosen as a Firearms Instructor.

On eight dates in September and October 2011, the County conducted its firearms qualifications process which is supervised by Firearms Instructors working overtime on 6-hour overtime details. The grievant was denied the opportunity to work as a Firearms Instructor on these overtime details.

On October 25, 2011, the FOP filed a grievance asserting that the County violated Article V of the agreement by failing to properly fill Firearms Instructor overtime details by seniority when it excluded the grievant from such details in September-October 2011. On October 25, the County denied the grievance and issued the following statement:

Seniority within specialized units of the Somerset County Sheriff's Office is not a factor in making assignment, therefore your grievance is denied.

On November 18, the FOP demanded arbitration. This petition ensued.

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.

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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

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). Thus, if we conclude that the FOP grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County argues that it has a non-negotiable managerial prerogative to match the best-qualified employees to particular assignments, and to determine the criteria for selection to assignments. It asserts that, although the grievant obtained his Firearms Instructor certification, possession of such a certificate by an officer is not the sole criterion for appointment to Firearms Instructor duties. The County argues that the evidence supported a determination, notwithstanding the fact of the grievant's certification, that he failed to demonstrate proficiency as a Firearms Instructor. In support of its contention, the County cites a December 7, 2011 letter from Lt. Sanders to Colonel Gandolfe which states, in pertinent part:

On May 17, 2010 Officer [grievant] was given an opportunity to practice his training on the range. Officer [grievant] did not [sic] come to the range with the proper equipment i.e. stop watch, whistle or course of fire to be called. At that time, Officer [grievant] was simply assigned to working the line observing for safety issues. On April 29, 2011 Officer [grievant] was asked to practice on the range and was given another opportunity to call strings of fire within the qualification course. Once again Officer [grievant] did not come to the range with the proper equipment i.e. stop watch, whistle or course of fire to be called. During Officer [grievant's] short participation in the range he had a disproportionate reaction when constructive criticism or guidance was offered by me and other instructors. Officer [grievant's] participation was less than satisfactory so the decision as to whether to have Officer [grievant] participate as a Firearms Instructor (Range Master) was not to have Officer [grievant] participate as a firearms instructor for our office.

The County asserts that it was these observed deficiencies when given opportunities on the range that prevented the grievant's selection for Firearms Instructor duty. The County argues that this decision regarding qualifications, in addition to being within its managerial prerogative, is also contemplated by Article XXIX, Subsection 29.1 of the agreement which states: "With respect to all incidents of employment, seniority shall be one of the major factors considered, provided the officer involved has the ability to perform the work involved."

The FOP responds that allocation of overtime is mandatorily negotiable, and deviation from the agreement's overtime allocation system is not within the County's managerial prerogative. The FOP acknowledges the following circumstances in which an employer may deviate from negotiated overtime allocation procedures: if emergency conditions exist; if an assignment needs a particular employee with special skills and qualifications; or if an employee is unqualified or physically incapable of doing the required work. The FOP contends that none of these exceptions apply, and that the grievant possessed whatever "special skills and qualifications" were required by the County by virtue of being a certified Firearms Instructor.

The County responds that the FOP failed to rebut the factual assertions regarding the grievant's deficiencies on the firing range. The County also notes that the FOP failed to contest that

the agreement's seniority clause is qualified with the managerial prerogative to determine qualifications and determine who is best-qualified where it states: "provided the officer involved has the ability to perform the work involved."

The allocation of overtime opportunities among qualified employees is a mandatorily negotiable subject. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88); see also Town of West New York, P.E.R.C. No. 91-52, 17 NJPER 5 (¶22003 1990), aff'd App. Div. Dkt. No. A-2259-90T1F (11/15/91). Here, the parties' contractual provisions on distribution of overtime by seniority are valid in the abstract because they set a procedure for the generally negotiable subject of overtime allocation that preserves a managerial prerogative to choose. See County of Hudson, P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992) (overtime allocation clause that does not require assignment of unqualified employees is mandatorily negotiable, subject to employer's right to deviate to protect the public interest); see also Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) (overtime allocation clause based on seniority does not limit assignment to qualified employees and is not mandatorily negotiable).

Absent proof that a negotiated agreement over overtime allocation would place substantial limitations on government's policymaking powers, grievances alleging breaches of that agreement are arbitrable. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). City of Long Branch discussed the governmental policy considerations that limit the negotiability of overtime allocation:

Even though the allocation of overtime is a generally negotiable subject, there are still specific limitations on negotiability designed to insure that the employer will obtain a sufficient number of qualified employees to perform the necessary overtime tasks. Thus, if an urgent situation necessitates that the police department meet its manpower needs without instant compliance with the negotiated allocation system, it has the reserved right to make the necessary assignments to protect the public interest. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). Also, if an employer needs a particular employee with special skills and qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus insure that its needs are met. In re Local 195 and State of New Jersey, 88 N.J. 383, 8 NJPER 13129 (1982). In addition, an employer may reject an employee's request to work overtime, despite a negotiated system distributing overtime on a voluntary basis, if that employee is unqualified or physically incapable of doing the required work. In sum, the allocation of overtime is a mandatory subject of negotiations, provided that the employer remains assured that it will be able to obtain enough qualified and physically sound employees to perform the tasks at hand. [Id. at 450].

The Commission has consistently identified a distinction between general negotiability of overtime clauses, and arbitrability of the employer's selection of employees for overtime in particular cases. In Borough of Wanaque, P.E.R.C. No. 85-17, 10 NJPER 513 (¶15235 1984) the Commission found that an overtime allocation proposal was mandatorily negotiable but that management retains the right to assign employees with special qualifications to perform particular overtime tasks, stating:

We reiterate, however, that the specific limitations identified in Long Branch must be read into any contract clause concerning overtime allocation. These limitations may form the basis for a restraint of binding arbitration in a particular case.

Similarly, in Borough of Little Ferry, P.E.R.C. No. 88-57, 14 NJPER 67 (¶19024 1987), we found that the union's overtime allocation proposal was mandatorily negotiable, but noted: "In the event the PBA files a grievance contesting the Borough's assessment of special skills or qualifications, the Borough can seek to restrain an arbitrator from that assessment." In Burlington County College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989), we again upheld this distinction between a negotiable overtime clause versus the arbitrability of such clause as applied in a specific situation:

The College has not asserted how the sections governing overtime priority and distribution would compromise its ability to set and carry out educational policy. If in a particular case the College believes that it must

deviate from these sections because of its need for a specially qualified instructor, then the negotiability of that decision can be considered at that time. We will restrain arbitration of a grievance contesting such a decision upon a sufficient showing. (emphasis added).

Furthermore, in Town of West New York, supra, the Commission noted that proper training is a governmental policy concern that allows deviation from seniority when allocating overtime:

An employer can agree to schedule qualified employees by seniority so long as the agreement preserves the employer's right to deviate from seniority when necessary to determine governmental policy. Proper training of police officers is such a policy. City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd App. Div. Dkt. No. A-918-89T1 (9/25/90).

In the instant case, the County asserts that the grievant, although he obtained firearms instructor training and certification on his own time, was unqualified and did not actually possess the special skills required for the firearms instructor overtime detail. The County cited specific examples in support of its determination, such as the grievant's failure to come to the firing range with the proper equipment during both of his opportunities to practice his training, and his disproportionate reaction to constructive criticism from

instructors. The FOP did not rebut any of the factual assertions regarding the grievant's performance on the firing range.^{2/}

In City of Elizabeth, P.E.R.C. No. 97-115, 23 NJPER 234 (¶28112 1997), we found that the City adequately established that a narcotics detail called for officers with specialized experience, and that a challenge to that determination is not legally arbitrable. See also Town of Hammonton, P.E.R.C. No. 2011-50, 37 NJPER 43 (¶14 2010) (grievance not arbitrable based on Chief's judgment that officer was unqualified for special school detail due to incident that attracted media attention); Township of Franklin, P.E.R.C. No. 99-78, 25 NJPER 133 (¶30059 1999) (unfair practice charge dismissed because employer did not unilaterally end overtime allocation by seniority, but deviated in this one instance because of a perceived need to more closely supervise and control the assignments of one patrol officer).

Those cases are distinguishable from cases in which restraint of arbitration was denied because the employer did not assert or substantiate that the employee denied an overtime opportunity was unqualified. See, e.g., Borough of Clayton, P.E.R.C. No. 2013-47, 39 NJPER 272 (¶93 2012) (grievance arbitrable where employer neither asserted nor substantiated that

^{2/} Although the County's assertions were not in a certification, but were contained in the December 7, 2011 letter that was submitted as an exhibit, the FOP does not contest the validity of the letter.

the officers were unqualified to perform the overtime assignments); Township of Jefferson, P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998) (grievance arbitrable due to factual dispute concerning nature of overtime assignment and whether other more senior employees could have performed the work on time, but Commission retained jurisdiction to determine if employer had managerial prerogative under special circumstances to deviate from seniority overtime system); Tp. of Wayne and AFSCME Council 52, Local 2274, P.E.R.C. No. 97-74, 23 NJPER 42 (¶28029 1996), aff'd 24 NJPER 141 (¶29071 App. Div. 1998) (grievance arbitrable where dispute was over what classifications were entitled to overtime, but not whether employee was qualified to perform overtime work).

The instant case is in accord with the above-cited precedents where employers' assertions of lack of qualifications were substantiated and/or not rebutted. Therefore, the County's denial of firearms instructor overtime details to the grievant is sufficiently supported so as to fall within the Long Branch exceptions allowing for deviation from a negotiated seniority overtime allocation procedure.

ORDER

The request of the Somerset County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Wall voted in favor of this decision. None opposed. Commissioner Jones abstained from consideration. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey