

P.E.R.C. NO. 2013-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Petitioner,

-and-

Docket No. SN-2011-090

PBA LOCAL 167,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the County of Mercer for a restraint of binding arbitration of a grievance connected to an unfair practice charge that was deferred to arbitration by the Director of Unfair Practices. The Commission holds that the County should have been required to waive its scope of negotiations defense when it agreed to defer the case to binding arbitration in accordance with the Commission's deferral policy. The County may re-file its petition within 30 days of service of the arbitrator's award in the event the arbitrator finds a contractual violation the County asserts infringes on its managerial prerogatives.

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, Genova, Burns, Giantomasi, & Webster, attorneys (Brian W. Kronick, of counsel; Kristina E. Chubenko, on the brief)

For the Respondent, Alterman & Associates, LLC, attorneys (Christopher D'Amore, on the brief)

DECISION

On January 18, 2008, PBA Local 167 filed an unfair practice charge^{1/} alleging that the County of Mercer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a (1), (2), (3), (4) and (5) when the County hired 24 correction officers to fill posts that become vacant due to officers' absences. The unfair practice charge was deferred to grievance arbitration.^{2/}

1/ Docket No. CO-2008-203

2/ The record does not indicate that the County was required to waive the filing of a scope of negotiations petition as a condition of deferral.

On May 31, 2011, the County filed this scope of negotiations petition. The County seeks a restraint of binding arbitration of the grievance filed in connection with the deferred unfair practice charge.^{3/} The County has filed briefs, exhibits and the certification of Captain Richard Bearden. At the Commission's request, the County provided copies of the grievances the PBA seeks to arbitrate. The PBA has filed briefs, exhibits and the certification of PBA President Donald Ryland. The Commission requested that the PBA provide additional documentation referred to in the grievance. Those documents were never provided. The following facts appear from the limited record.

The PBA represents all rank and file correction officers. The parties' most recent agreement has a duration from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article 1 is the Recognition clause that provides:

The Employer recognizes the union as the sole and/or exclusive bargaining agent for the purpose of establishing salaries, wages, hours, and other conditions of employment for all of its employees covered by this Contract and represented by the Union, and for such additional classifications as the parties may later agree to include.

^{3/} The County provided a copy of a proposed settlement agreement provided by the PBA. The County argues that the proposed settlement interferes with its minimum staffing and assignments. We will not consider the settlement proposal as evidence in this matter.

Article 4 is entitled "Work Schedules/Job Assignments" and provides:

4.1 The employer has the authority to establish a proforma work schedule, work shifts, and job duties and qualification, but employees shall be able to select, based on seniority, their work schedule, days off and job assignment pursuant to the bidding procedure set forth in Article 35,

4.2 Whenever a vacancy occurs in a regular work schedule, days off, and job assignments, employees will be able to bid for that vacancy based on the job bidding procedure set forth in Article 35.

4.3 In the bid process, after officers have selected to be an "unassigned officer", then all unassigned officers in each shift shall be able to pick their job assignment based on seniority. For example, if there are five (5) unassigned officers with Monday and Tuesday off on the day shift, then those five (5) unassigned officers shall select their job assignment based on seniority. Therefore, the unassigned officers will be selecting their job assignments on the shift based on seniority, pursuant to Article 35. However, an employee should be given an opportunity to learn the special skills.

Article 35 is entitled "Bidding of Days Off, Shifts, And Assignments By Seniority." Section 10 provides:

35.10 If an employee in a bidded position will be out more than thirty (30) calendar days, then that bidded assignment shall be subject to a "temporary bid". These temporary bids will only occur when it is reasonable to assume or know that an employee will be out more than thirty (30) calendar days. Any officer may bid for this "temporary bidded position." The replacement officer who bids and obtains the temporary bidded position, will vacate another

previously bid position, which shall also be subject to a "temporary bid". For example, if Officer "A" is going to be out more than thirty (30) days, then this bid position will be subject to a "temporary bid". Assume Officer "B" selects "A"'s bid position, then Officer "B"'s bid position would now be subject to a "temporary bid" and so forth on down the line.

Article 12 provides for overtime procedures.

In 2007, the County employed 230 correction officers and maintained a minimum staffing of 211 bid positions. In or around 2008, overtime increased due to officer absences. The County then hired approximately 24 additional correction officers in order to have a group of correction officers available to fill temporary vacant posts defined in the parties' agreement as vacancies less than 30 days. These officers do not bid on posts and the County did not create additional posts for them to bid into. They receive assignments every two weeks based on which posts need to be filled due to a temporary vacancy caused by an officer on leave.^{4/}

On October 15 and 16, 2007, the PBA filed grievances alleging the County was violating the parties' agreement when it did not assign the new officers to posts by identifying them as "off unit unassigned". On January 18, 2008, the PBA filed its

^{4/} The County asserts that the 24 new officers were hired as interim appointments pursuant to N.J.A.C. 4A:4-1.6. The PBA asserts the officers are permanent employees and has submitted a letter from the Deputy County Counsel stating the new officers are permanent.

unfair practice charge alleging the County was unilaterally bidding the jail; changing job titles to effect seniority; failing to provide the formula used to determine the post trix that was unilaterally imposed; failing to provide each post for bid as required by the parties' contract; failing to negotiate the procedures used to implement the new post trix; and failing to maintain seniority. The Director of Unfair practices deferred the unfair practice charge to arbitration on February 14, 2008.^{5/} See State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). 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

^{5/} The Director's deferral provided that the "matter may be reopened upon a proper showing that (a) the dispute has not either been promptly resolved by amicable settlement in the grievance procedure or promptly submitted to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or (c) the grievance or arbitration procedures have reached a result which is repugnant to the Act."

are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual 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. 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]

Because this case involves a grievance, arbitration is permitted if its subject 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 (¶1111 App. Div. 1983).

The County argues that the PBA is seeking to increase its minimum staffing levels by demanding it create additional posts for correction officers to bid into. The County relies on the proposed agreement submitted to it by the PBA that provides for the creation of 29 additional posts for the 24 officers to bid into.^{6/}

The PBA responds it is not seeking to increase minimum staffing as the same number of officers are working. It is seeking to enforce the parties' contract that provides for the filling of temporary vacancies by seniority. It asserts the parties' agreement requires that the County provide the new officers with a biddable position. As to the proposal it

^{6/} Union Cty., P.E.R.C. No. 2010-28, 35 NJPER 389 (¶130 2009), cited by the employer, is distinguishable from this case. That case involved the temporary re-assignment of an officer from his bidded post because he was more qualified for the vacant post. The new officers that were hired by Union County to cover vacant posts had not been fully trained. The Commission did not address the County's hiring of the replacement officers as it relates to the contractual bidding procedure as it was not in issue.

submitted, the PBA asserts it was only a pilot program and was not designed to create permanent jobs for the new officers. The PBA concedes that the County has a managerial prerogative to set minimum staffing levels, but asserts its claims extend to collateral issues such as overtime, seniority, post assignment, and work hours.

The County replies that it is filling temporary vacancies as they are defined in the parties' agreement by seniority. It notes that the new officers only fill positions that the County knows or can reasonably know will be vacant less than 30 days.

This case concerns the factually complicated issue of shift and post bidding in a correction facility. See City of Camden, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), recon. den. P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd 27 NJPER 357 (¶32128 App. Div. 2001). Also, as this grievance involves police within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., who may enforce agreements over permissive subjects of negotiation, we must be able to determine from the record whether the issues in question are permissively negotiable.

This case has an unusual procedural history. We have repeatedly held that deferral to a negotiated grievance procedure culminating in binding arbitration is generally appropriate when the charge essentially alleges a contractual breach of a term and

condition of employment in violation of N.J.S.A. 34:13A-5.4(a) (5) and there are no procedural barriers to arbitration. Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). Here, the matter arose from an unfair practice proceeding that was deferred to binding arbitration. Had the County been required to and refused to waive its arbitrability defense, the Director would not have deferred the charge and the Commission would have the benefit of a full record to determine the County's negotiability defenses. We understand that the County was not aware of its scope of negotiations issue until it was presented with a proposed settlement by the PBA. However, we are cautious not to use the PBA's settlement proposal as evidence of the ultimate issue it would frame before the grievance arbitrator.

Thus, it is not appropriate for the County now to seek a restraint of arbitration after it has acquiesced to the deferral to arbitration of an unfair practice charge alleging it violated the statutory obligation to negotiate before changing terms and conditions of employment. Accordingly, we will not entertain the petition now and will permit the arbitrator to consider the factual claims initially, as well as the contractual claims and defenses raised by both parties.

We will retain jurisdiction to reassess the County's managerial prerogative defense in the event the arbitrator finds a contractual violation. The facts found by the arbitrator will

aid us in determining the validity of the County's negotiability claims. Moreover, proceeding in this manner is consistent with our policy of deferral to arbitration in unfair practice cases. See Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998).

ORDER

The request of the County of Mercer for a restraint of binding arbitration is denied. The County may re-file its scope of negotiations petition within 30 days of service of the arbitrator's award in the event the arbitrator finds a contractual violation the County asserts infringes on its managerial prerogatives.

BY ORDER OF THE COMMISSION

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

ISSUED: October 25, 2012

Trenton, New Jersey