

P.E.R.C. NO. 2013-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2012-038

PBA LOCAL 228,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Howell for a restraint of binding arbitration of a grievance filed by PBA Local 228. The grievance challenges the Township's use of special police officers during and subsequent to a snow event, and seeks lost overtime compensation for PBA officers. The Commission holds that arbitration of the grievance would significantly interfere with the Township's policymaking power to respond to an emergency.

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, Cleary Giacobbe Alfieri Jacobs,
LLC, attorneys (Robin T. McMahon, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel)

DECISION

On January 27, 2012, the Township of Howell petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by PBA Local 228. The grievance challenges the Township's use of special police officers (SPO) during and subsequent to a snow event on December 26, 2010 and seeking lost overtime for PBA members.^{1/} We grant the Township's request to restrain arbitration.

The Township has filed briefs, exhibits and the certification of Chief of Police Ronald T. Carter. The PBA has

^{1/} The PBA also filed a grievance related to a January 2011 snow storm asserting identical allegations.

filed a brief. The PBA has not filed a responding certification, but also relies on Carter's certification. The following facts appear.

The Township and PBA are parties to a collective negotiations agreement with a duration from January 1, 2010 through December 31, 2013. Article I is a Recognition clause. Article IV is a Management Rights provision and Article IX is entitled Overtime. The grievance procedure ends in binding arbitration.

Chief Carter certifies that the Police Department has a long history of occasionally using special police officers to assist regular police officers in providing services for the Township. Special police officers have historically been used to provided court security; spectator and traffic control; and to deter mischief around Halloween. The use of SPOs is authorized by the Township code. Howell Township Code, Chapter 265, provides that whenever snow has fallen and accumulated to cover the street, "an emergency shall exist," and no vehicles or equipment may be parked on or located within public streets or rights-of-way.

Prior to the January 11, 2011, snow event, Carter reorganized the Traffic Safety Division by reassigning two traffic officers to the Patrol Division. According to Carter, this was done to enhance public safety as the officers would be available to patrol rather than provide traffic enforcement. On

March 29, 2011, Carter issued an Order setting forth that the Special Law Enforcement Officer Program supplements, but does not supplant the regular police officers.

During the snow storm in January 2011, two SPOs worked to augment the Traffic Division. Carter certifies that no SPO worked during the December 26, 2010 snow event. According to Carter, summonses were issued during the January 26, 2011 storm, but they were for code violations and not traffic tickets. Most of the tickets were written by civilian employees of the Township Code Enforcement Department.^{2/}

On January 25, 2011, the PBA filed a grievance alleging that, "During and after the December 26, 2010 snow storm, the Township of Howell utilized special police officers to perform the duties of traffic safety officers ...[causing] at least two officers to lose the opportunity for overtime." On February 15, the PBA filed a second grievance alleging that the Township used SPOs on January 11 and 24 to perform duties "reserved for full-time regular police officers," causing traffic safety or other officers to lose the opportunity for overtime.^{3/} In each

2/ These facts are undisputed by the PBA. However, they relate to the merits of the grievance and therefore were not considered under our review standard.

3/ In its brief, the PBA states:

"[T]he PBA seeks to arbitrate over the loss of overtime opportunities and the transfer of a specific duty - writing
(continued...)"

grievance, the PBA alleges the Township violated Articles I, IV, and IX of the parties' collective negotiations agreement.

Carter denied the first grievance explaining that time records reflected that no SPO worked from December 25 through December 31, 2010. As to the second grievance, Carter responded by memorandum dated March 4, 2011 denying the grievance. He advised that the Township utilized SPOs only to assist regular officers during an emergency in accordance with the parties' agreement and N.J.S.A. 40A:14-146 (Special Law Enforcement Officers' Act).^{4/} The Township Manager also denied the

3/ (...continued)
traffic tickets - to non-unit members."

4/ N.J.S.A. 40A:14-146.16 "Limitations on hours" provides in pertinent part:

a. Except as provided in subsection c. of this section, no special law enforcement officer may be employed for more than 20 hours per week by the local unit except that special law enforcement officers may be employed by the local unit for those hours as the governing body may determine necessary in accordance with the limits prescribed below:

(2) In all municipalities without limitation as to hours during periods of emergency.

(3) In all municipalities in addition to not more than 20 hours per week including duties assigned pursuant to the provisions of section 7 of this act a special law enforcement officer may be assigned for not more than 20 hours per week to provide public safety and law enforcement services to a public entity.

(continued...)

grievance. On April 15, 2011, the PBA demanded binding arbitration and 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.

4/ (...continued)

(4) In municipalities, as provided in subsection b. of section 7 of this act, for hours to be determined at the discretion of the director of the municipal police force.

b. Notwithstanding any provision of this act to the contrary, special law enforcement officers may be employed only to assist the local law enforcement unit but may not be employed to replace or substitute for full-time, regular police officers or in any way diminish the number of full-time officers employed by the local unit.

c. Each municipality may designate one special law enforcement officer to whom the limitations on hours employed set forth in subsection a. of this section shall not be applicable

Thus, we do not consider the merits of these grievances 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 firefighters and police officers:

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 dispute involves a grievance, arbitration is permitted if 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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

Preemption

The Township asserts that the grievance is preempted by N.J.S.A. 40A:14-146.16 as that statute specifically permits the Township broad powers to employ SPOs subject only to the prohibition against using them to replace or substitute full-time, regular police officers. It relies on Borough of Belmar Policemen's Benevolent Ass'n Local No. 50 v. Borough of Belmar, 89 N.J. 255 (1982) and In re Special Police Officers, Borough of Keansburg, 354 N.J. Super. 269 (App. Div. 2002). Belmar recognizes that special police officers may be hired on a full-time, part-time, or continuous basis for up to a year in order to supplement a regular police force during periods of unusual demand for police services and to help with anticipated and unexpected emergencies. Belmar also holds, however, that special police employees may not be employed on a full-time annual basis as a subterfuge to avoid hiring regular police.

Keansburg found that whether the hiring of special police officers for the summer season after the layoff of regular police officers is a violation of the Special Law Enforcement Officers' Act must be determined on a case-by-case basis.^{5/}

The PBA responds that the grievance is not preempted as the statute does not specifically and comprehensively address the issue as to whether a SPO has been used to replace or substitute for a full time officer.

As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Coun. of N.J. State Coll. Locals, NJSFT-AFT/AFL-CIO v. State Bd. Of Higher Ed., 91 N.J. 18, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04,

^{5/} The Township also relies on Borough of Fort Lee, I.R. No. 2005-3, 39 NJPER 489 (¶164 2004). In that unfair practice case, a Commission designee denied the PBA's request to restrain the employer from hiring SPOs. We note that case was not a final Commission decision and that while the PBA did not meet the interim relief standard, the designee found the application may be re-filed based upon how the employer actually implemented the SPOs.

(1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80. [Id. at 44].

Here, the statute does not set the terms and conditions of employment of SPOs or police officers as they relate to each other. The employer has the discretion to determine if and when they will hire and use SPOs within the proscriptions of the statute. Thus, we do not find that N.J.S.A. 40A:14-146 preempts the PBA grievance.

Negotiability of the Grievance and the Unit Work Rule

In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), the New Jersey Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. That test provides:

[A] subject is negotiable between public employers and employees when (1) the item

intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405]

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," and not primarily for economic reasons, the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Jersey City at 573.

In this case the Township reorganized the Traffic Safety Division by reassigning two regular officers attached to the Division to the Patrol Division to enhance the safety of its citizens; economic issues were not a factor.

Additionally, since the reassignment of the two regular officers attached to the Patrol Division was not primarily for economic reasons based on these facts, under Jersey City, the unit work rule may not be applicable. Id. at 573. See Bogota Boro., P.E.R.C. No. 99-77, 25 NJPER 129 (¶30058 1999). However, under the facts of this case we need not determine whether the unit work rule applies.

Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000).

The Township asserts that arbitration of the grievance would substantially limit the Township's governmental policymaking powers. It asserts a non-negotiable managerial prerogative to determine whether overtime is necessary. Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Citing Jersey City, the Township argues that the unit work doctrine does not apply as traffic work is not reserved only for regular officers and even if it were, requiring the Township to call regular officers in on overtime rather than use SPOs to respond to an emergency would significantly interfere with its policymaking powers.

The PBA responds that the grievance concerns entitlement to overtime compensation which is a mandatorily negotiable subject. It asserts that this Commission has repeatedly held that the use of SPOs in lieu of regular members on overtime is a negotiable subject. Egg Harbor City, P.E.R.C. No. 98-95, 24 NJPER 114

(¶29057 1998). In Egg Harbor, the grievance alleged that the employer violated the parties' agreement by assigning SPOs to maintain staffing levels, rather than using regular officers on overtime. The Commission held that grievance did not contest the employer's power to employ SPOs, but asserted that the employer changed its past practice and violated the contract by having SPOs fill in for regular officers' absences. Here the facts are different.

Under Jersey City we must balance the parties' interests to make a determination as to whether permitting arbitration of the grievance would significantly interfere with a determination of governmental policy. There is no dispute that the matter intimately and directly affects employee work and welfare and we have determined that the grievance is not preempted. Accordingly, we apply the Local 195 balancing test.

The Township has a legitimate interest in responding to a snow storm with the personnel it deems appropriate. It also has an interest in determining when and if overtime will be worked. Long Branch. The PBA has an interest in ensuring that its police work and contract will not be infringed upon by the use of SPOs. Since this case involves a police unit, the ultimate question we must answer is whether permitting arbitration of the grievance would substantially limit government policymaking power. We believe it does.

The facts in this case indicate that the SPO's were employed during a snow storm that constituted an emergency. If emergency conditions exist, a public employer may deploy its workforce to respond, even if doing so may deviate from normal employee assignments or overtime allocation. See Hunterdon Cty, P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982). (Public employer has a reserved right to make emergency assignments to protect the public interest and to assign employees with special skills and qualifications to perform a specific overtime task). If the assignment is temporary in nature, it may not be mandatorily negotiable if "any erosion of unit work would be temporary and minimal." State-Operated School Dist. Of the City of Newark, P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), *aff'd in part*, 28 NJPER 154 (¶33054 App. Div. 2001); Ocean Tp., P.E.R.C. No. 2011-90, 38 NJPER 72 (¶15 2011); Plainsboro Tp., P.E.R.C. No. 2012-64, 39 NJPER 25 (¶7 2012).

This case differs from Egg Harbor because in that case, SPOs were replacing regular officers on their regular tours in lieu of overtime. Here, the Township police force was staffed, but there was a need for a greater force due to a snow emergency. To require the Township to call in additional officers on overtime rather than respond to the emergency with SPOs it had available to supplement rather than supplant the normal staffing on the force, would substantially limit the Township's power to respond

to an emergency in the most expeditious and efficient manner. As set forth above, we need not decide the unit work issue, and based on our prior decisions, acting in an emergency is a managerial prerogative. It is the Township's sole decision to determine if additional staffing is required and who is qualified to provide that support. Accordingly, we restrain arbitration.

ORDER

The request of the Township of Howell for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni and Boudreau voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Wall recused himself. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey