

P.E.R.C. NO. 2013-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX,

Petitioner,

-and-

Docket No. SN-2012-039

PBA LOCAL 165,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request fo the County of Middlesex for a restraint of binding arbitration of a grievance filed by PBA Local 165. The grievance alleges that the assignment, contrary to long standing practice and policy, of a single officer to security details guarding a hospitalized prisoner or prisoners puts the officer in danger and also creates security hazards for hospital staff, patients, and visitors. The Commission holds that the grievance concerns staffing levels that is neither mandatorily nor permissively negotiable.

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, Mets, Schiro & McGovern, LLP,
attorneys (James M. Mets, of counsel and on the brief;
Brian J. Manetta, on the brief)

For the Respondent, Thomas F. Kelso, County Counsel
(Benjamin D. Leibowitz, Deputy County Counsel on the
briefs)

DECISION

On January 27, 2012, the County of Middlesex petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by PBA Local 165. The grievance alleges that the assignment, contrary to long standing practice and policy, of a single officer to security details guarding a hospitalized prisoner or prisoners puts the officer in danger and also creates security hazards for hospital staff, patients, and visitors. While the grievance raises important employee interests, we will restrain arbitration as sustaining the PBA's claim would require the County to adhere

to a specific staffing level, a subject that we have held is neither mandatorily nor permissively negotiable.

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

The PBA represents sheriff's officers and investigators. The PBA and the County are parties to a collective negotiations agreement effective from January 1, 2005 through December 31, 2008. Article III, Section B provides:

Proposed new rules and modifications of existing rules affecting work conditions as set forth above and otherwise, which are not exclusively within the discretion of management, shall be negotiated with the PBA prior to implementation

The grievance procedure ends in binding arbitration.

PBA President Michael Ansaldo, employed as a Sheriff's Officer since 1989, certifies:

- Hospital detail requires officers to "safeguard prisoners and other patients, the general public and hospital staff."
- Since late 1995 two officers have always been deployed on hospital details, both in the emergency room and where the prisoner's condition requires admission to the hospital.
- The assignment of two officers to a hospital detail is consistent with the staffing practices in all other prisoner transport situations.
- Prisoners in Middlesex County are taken to hospitals that do not have "secure wards" and are placed in regular rooms on floors that are open to the public.
- The assigned officers must monitor the prisoner for the duration of his/her stay and are tactically positioned in the hospital room to avoid potentially dangerous situations.

- Prisoners are permitted to have visitors while in the hospital, but their visitors must be searched with a hand-held metal detector. When two officers are present, one searches the visitor while the other monitors the prisoner. If only one officer is present, the visitor and the prisoner "outnumber" the officer and during the search of the visitor, the lone officer's attention is not focused on the prisoner.^{1/}
- When only one officer is assigned, there are times, such as lavatory breaks, when the prisoner is unattended.

Middlesex County Sheriff Mildred Scott has held that position since January 2011. However, she worked as a sheriff's officer from 1968 until her retirement in 1995, when she held the position Chief Sheriff's Officer. Her certifications assert:

- Between 1968 and 1995 the practice was to assign one officer to the hospital detail "when the Sheriff or the superior officer in charge of hospital detail assignments deemed it safe to utilize a hospital detail of one. . ." ^{2/}
- That since she has become Sheriff, most hospital details have been staffed by two officers.^{3/}

1/ Ansaldo certifies that a prisoner may be handcuffed to the bed occasionally, but many cannot be restrained for medical reasons.

2/ The Sheriff's initial certification (¶5) asserts that between 1991 and 1995, hospital details of one officer were routine, "unless an inmate was determined to present a heightened security risk." Her reply certification asserts that she knows of no incidents occurring while she was a sheriff's officer, putting officers or the public at risk during any one-officer hospital detail. She acknowledges that from 1995 until her appointment as Sheriff, hospital details consisted of two officers.

3/ A log is attached to the Sheriff's reply certification showing hospital detail assignments that reflect the number of officers on each detail.

- That requiring the assignment of two officer hospital details at all times is wasteful, taxes limited staffing resources resulting from retirements and decreased funding, and undermines her prerogative to make assignments to meet the needs of the public, the judiciary and the County.

On October 26, 2011, the PBA filed a grievance asserting that one officer hospital details violated the contract and department standard operating procedures (SOPs). The grievance reads:

This change places not only the officer assigned to the prisoners watch in potential harms way but the hospital staff and visitors as well. The officer is forced to leave the prisoner unattended from time to time in order to use the bathroom contradicting again departmental policy.

The grievance seeks a return to the policy of using two officers on all hospital details. The grievance was denied and on January 9, 2012, the PBA 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 contractual merits of the grievance or any contractual defenses the County may have.

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 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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.

Arbitration will be 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). Paterson bars arbitration

only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is present.

Staffing levels are not mandatorily negotiable and an employer of public safety officers is not required to negotiate over such proposals during negotiations or interest arbitration for a successor collective negotiations agreement. See Borough of Spotswood, P.E.R.C. No. 2007-70, 33 NJPER 128 (¶47 2007); Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983); Bergen Cty., P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983), app. disp. NJPER Supp.2d 143 (¶128 App. Div. 1984); City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981).

These cases all arose during collective negotiations or interest arbitration. Absent a finding that a proposal is mandatorily negotiable, an employer has the right to refuse to negotiate or decline to permit an interest arbitrator to rule upon it.

Here, because the issue arises as a grievance, it may be submitted to binding grievance arbitration if we determine that adherence to the practice of assigning two officers to a hospital detail would not substantially limit the County's policymaking powers. That determination, as is true of all of our

negotiability rulings, must be based on the particular facts and context of this dispute. See Jersey City and POBA and PSOA, 154 N.J. 555, 574 (1998); Troy v. Rutgers, 168 N.J. 354, 383 (2001).

In West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000), we identified the critical considerations and interests present where a staffing decision is alleged to adversely affect law enforcement officer safety:

The number of police officers who are assigned to a particular shift or patrol post intimately affects the safety of police officers: the more officers, the safer working conditions will likely be for each officer. But requiring a set number of officers to patrol during a shift or in each police vehicle may also impede a public employer's prerogatives to determine the size of its work force and how to deploy its police to best protect citizens. These interests are difficult to reconcile.

[26 NJPER at 103]^{4/}

We have permitted binding arbitration on safety issues only where employer staffing policies would not be changed by a remedy that could be awarded by the arbitrator.

In Livingston Tp., P.E.R.C. No. 2008-14, 33 NJPER 229 (¶87 2007), we allowed binding arbitration of a grievance alleging that unsafe working conditions resulted when staffing dipped

^{4/} In that case, the grievances alleged violations of minimum staffing levels when temporary shift vacancies were filled by civilian dispatchers rather than police to avoid overtime payments. We allowed arbitration except to the extent the grievances sought a ruling that the Borough was required to call in and assign a third police officer to patrol duties.

below the levels set by directives and operating procedures.

But, we ruled that the arbitrator could not increase staffing.

In Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990), we allowed arbitration of a grievance seeking to enforce an alleged agreement to pay premium compensation to officers who were required to patrol alone after midnight. The possibility of paying premium compensation did not affect the employer's decision as to how many officers should occupy a single patrol car.

Where a grievance has challenged staffing decisions, but seeks no safety-related remedy that can be granted without affecting staffing levels, we have restrained arbitration. See Hawthorne Borough, P.E.R.C. No. 2011-61, 37 NJPER 54 (¶20 2011) (restraining arbitration of grievance asserting Borough's failure to replace an officer to meet the five-officer minimum staffing level deprived officer of overtime; no defined safety issues were raised).^{5/}

The remedy sought by the PBA seeks adherence to the practice of using two officers on all hospital details. While the Sheriff's reply certification indicates that one officer hospital details are the exception and two officer details are the norm,

^{5/} The grievance before us does not, unlike Hawthorne, seek economic relief. Thus, we find that the holding of Morris Cty. Sheriff's Office and Cty. of Morris and PBA Local 298, 418 N.J. Super. 64 (App. Div. 2011), an unfair practice case involving overtime practices, does not apply.

staffing levels are a matter of governmental policy and the Sheriff's flexibility would be substantially limited by an order that two officers be assigned to hospital details in all cases.^{6/} We hold that the dispute is not legally arbitrable.

ORDER

The request of the County of Middlesex for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioners Wall and Eskilson recused themselves. Commissioner Bonanni was not present.

ISSUED: December 13, 2012

Trenton, New Jersey

^{6/} The Sheriff describes a variety of cases including those where detainees are not guarded because they were released or made bail. It appears that of 43 prisoners, who remained in custody while hospitalized, 39 were guarded by two officers and four were guarded by one officer. She also refers to 21 detainees initially guarded by two officers, but in 10 of those cases the detail was later reduced to one officer.