

P.E.R.C. NO. 2013-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BEDMINSTER,

Petitioner,

-and-

Docket No. SN-2013-003

PBA LOCAL 366,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Bedminster for a restraint of binding arbitration of a grievance filed by PBA Local 366. The grievance asserts that the Township violated its past practice of scheduling shifts by seniority when it changed a senior officer from the day shift to the afternoon/night shift. The Commission holds that where no issue of special qualifications is present, or where the employer has not shown how governmental policy would be impeded, grievances asserting that seniority should govern shift reassignments are legally arbitrable.

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.

P.E.R.C. NO. 2013-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BEDMINSTER,

Petitioner,

-and-

Docket No. SN-2013-003

PBA LOCAL 366,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Jonathan F. Cohen, of counsel)

For the Respondent, Alterman & Associates, LLC, attorneys (Christopher A. Gray, of counsel)

DECISION

On July 23, 2012, the Township of Bedminster (Township) filed a scope of negotiations petition. The Township seeks a restraint of binding arbitration of a grievance filed by PBA Local 366 (PBA). The grievance asserts that the Township violated the parties' past practice of scheduling officers shifts by seniority, when it changed a senior officer (grievant) from the day shift to the afternoon/night shift. The Township has filed briefs, exhibits, and the certification of Police Chief Patrick Ussery. The PBA filed a brief. These facts appear.

The PBA represents all Township Police Department Officers and Sergeants, except the Lieutenant and Chief of Police. The PBA and the Township are parties to a collective negotiations

agreement (CNA) effective from January 1, 2008 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article 3 of the CNA is entitled "Management of Township Affairs." Article 3, Section 1, paragraph 4. provides that the Township retains, among other powers, the right: "To assign duties and work shifts." Article 4 of the CNA is entitled "Seniority." Article 4, Section 1 provides that: "Seniority is defined to mean the accumulated length of continuous service with the Bedminster Police Department, computed from the last date of hire." Article 2 of the CNA is entitled "Discrimination and Coercion." Article 2, Section 1 provides:

The parties to this Agreement agree that there should be no discrimination, interference or coercion by the Township or the PBA because of an Officer's membership or non-membership or activity or non-activity in the PBA. Neither the Township nor the PBA shall discriminate against any Officer because of disability, age, race, creed, color, national origin, sexual orientation, political affiliation or gender.

The grievant is an officer with 28 years of experience, including 25 years with the Township. Effective December 9, 2011, Chief Ussery switched the grievant from the 6:00 a.m. to 5:00 p.m. shift to the 3:00 p.m. to 2:00 a.m. shift. On December 20, the PBA filed a written grievance asserting that the Township violated the parties' past practice of scheduling by seniority when it changed the grievant's shift. It further alleged

violations of Article 2 and Article 4 of the CNA. The grievance letter stated, in pertinent part:

His shift was given to an officer with almost 10 years less service. There is another junior officer who also works the same day shift (6a-5p) but his shift was not changed. This shift was switched in an attempt to force him into retirement. The administration has asked [Grievant] on several occasions if he is interested in retiring...The past practice of the department is that scheduling of officers is completed by seniority.

On December 21, 2011, Chief Ussery denied the grievance, explaining that shifts were changed due to the 2011 demotion of a sergeant and subsequent promotion of a new sergeant. The Chief determined that the demoted officer should not be placed under direct supervision of the new Sergeant, and instead should be assigned the grievant's spot on the day shift (6 a.m. - 5 p.m.) so that the Chief could observe his performance given his prior disciplinary issues. Chief Ussery stated, in pertinent part:

As is completely within my authority to assign officers, but with a nod to seniority, I decided not to simply assign [Grievant] to a particular shift, but to allow him to choose from three different shifts. It should be noted that seniority is not, and has not been, the sole determining factor in shift designation. As an administrator on this agency for the past nine years, I have assigned officers to particular shifts based on other factors such as productivity, personality issues, and talents. I have occasionally changed team assignments to provide fresh supervisory oversight. My concerns regarding shift assignments are based on the mission of the agency as a

whole, and cannot reflect the personal desires of a particular officer who has grown accustomed to a certain shift.^{1/}

On January 6, 2012, the Township Administrator denied the grievance at the next step, asserting that "there is no evidence that a practice has been established regarding shifts" and that the CNA grants management the authority to assign work shifts. On January 18, the grievance was denied by the Township Committee. The letter from the Mayor stated, in pertinent part:

Finally, the Township Committee determines that there is no evidence of a past practice and, even if there was, Article 3 grants to management the sole right to assign work shifts. Contract language trumps past practice.

On January 27, the PBA demanded binding 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

^{1/} In response to the alleged violation of Article 2, Section 1, the Chief asserted that conversations regarding possible retirement were spurred by economic pressures that caused the Township to lay off a recently hired, young officer and that the grievant had initiated conversations about possible retirement.

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 that the Township may have.^{2/}

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

^{2/} We do not consider the Township's arguments that:

- contract language regarding seniority only applies to layoffs;
- it did not violate any past practice concerning seniority and shift assignments;
- prior departures from shift assignments by seniority were not grieved.
- it did not discriminate against the grievant.

All of these arguments relate to the merits of the grievance and not whether it is legally arbitrable.

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). Paterson bars arbitration only if the agreement would substantially limit government's policy-making powers.

The Township argues that particular work schedules are not mandatorily negotiable when adherence to them would significantly interfere with a governmental policy determination.^{3/} It asserts that it has a non-negotiable right to switch the grievant's shift

^{3/} The Township cites: Irvington PBA Local No. 29 v. Town of Irvington, 170 N.J.Super. 539 (App. Div. 1979), certif. den., 82 N.J. 296 (1980); and Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J.Super. (App. Div. 1983), certif. denied, 96 N.J. 293 (1984).

with that of the demoted officer because it was necessary to more closely supervise that officer. The Township contends that the Chief's decision to change shifts was within his discretion to efficiently manage the department and insure adequate supervision. The Township claims that if the Chief's decision was submitted to arbitration or to a practice of offering shifts based only on seniority, the managerial goals of the Township could not be attained.^{4/}

The PBA responds that the matter at issue is not the adoption of an overall department work schedule, but rather the use of seniority as a means of assigning shifts. Citing the negotiability balancing tests in In re IFPTE Local 195 v. State, 88 N.J. 393 and Paterson, supra, it argues that such a requirement involves the mandatorily negotiable subject of work schedules/hours as the dominant factor, and does not significantly interfere with any managerial prerogative or governmental policy. The PBA asserts that Atlantic Highlands, is distinguishable because it involved a shift-scheduling proposal that involved every officer in the department, not just two officers switching shifts with each other. Similarly, the PBA

^{4/} The Township cites: Irvington, supra; Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), recon. den. P.E.R.C. No. 85-112, 11 NJPER 310 (¶16111 1985); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982); and Borough of Franklin, P.E.R.C. No. 2006-20, 31 NJPER 305 (¶120 2005).

distinguishes Irvington because it involved a town's decision to implement a department-wide three shift work schedule that rotates around the clock on a bi-weekly basis. It asserts that unlike a change to actual shift hours as in Irvington, the present case merely changes, based on seniority, who might be assigned to work those hours. Finally, the PBA argues that the Township's concerns about supervision of the demoted officer could have been assuaged by shift-switching with a different, less senior officer than the grievant, thus preserving the seniority past practice. It cites Mt. Laurel Tp. and Mt. Laurel Police Officers Ass'n, 215 N.J. Super. 108 (App. Div. 1987) for the proposition that each dispute over the negotiability of a work schedule must be evaluated case-by-case.

The Township replies that, because of the police department's small size, any shift change between officers has the potential to impact department efficiency. The Township argues that Franklin, supra., is the most analogous case because it involved a small police department in which shifts were rearranged for supervision reasons.

The Township did not institute a new shift schedule that applied to all officers on its force. The cases cited by the Township where that occurred do not apply. And, the grievance does not challenge the department's decision to change the shift of the demoted sergeant to provide closer supervision, because of

that officer's past disciplinary issues.^{5/} Such a decision is not arbitrable. See City of Newark, P.E.R.C. No. 93-93, 18 NJPER 498 (¶23229 1992) (communications officer switched from overlapping shift to night shift to provide supervision and enhance his productivity; arbitration restrained); Cf. Township of Woodbridge, P.E.R.C. No. 99-91, 25 NJPER 176 (¶30081 1999) (reassigning a captain to different schedule to provide command presence and enhanced supervision at night not arbitrable).

While that change necessarily meant that a different officer would have to move to the vacated shift, the negotiability issue before us is whether an officer other than the grievant could have been reassigned without substantially limiting the attainment of the department's governmental policy goals.^{6/}

The size of the department (the PBA represents 13 officers including sergeants) and the fact that the shift exchange had to be between patrol officers (and not sergeants) may have limited, to a certain extent, the chief's options in selecting an officer to make the involuntary switch.

^{5/} The officer was demoted for disciplinary reasons including a dispute with another officer. The department made a promotion to sergeant. The chief states that he did not want the demoted officer to be supervised by the new sergeant. He moved the former sergeant to the day shift so that the chief could help supervise him.

^{6/} The Township's petition does not assert that the grievant's discrimination claim is not legally arbitrable. Thus, we do not consider the negotiability of that aspect of the grievance.

The Chief refers to a group of officers, designated "Team A," who worked on a day shift. His certification (¶9 to ¶10) states that the demoted sergeant needed closer supervision, which required putting him on a day shift. He continues:

[I]t was not in the Township interest to alter the makeup of the "Team A" shift assignment, which works from 6:00 a.m. to 5:00 p.m., due to the productivity of that particular group of officers. In addition, the officer with whom [the demoted sergeant had a dispute] resulting in discipline worked on Team A. I therefore determined not to put those two officers together subsequent to [the discipline and demotion of the sergeant].^{7/}

With these considerations in mind, and rather than simply reassigning him, I offered [the grievant] to select from three different shifts, not including the Team A assignment.^{8/}

The Chief has explained why he found it necessary to move the demoted sergeant from a night shift to a day shift. And, it follows that a day shift officer would have to move to a night shift. However, several questions remain:

- If the officer with whom the demoted sergeant had interpersonal problems was someone other than the grievant (and

7/ The Chief's grievance response mentions an officer on Team A who had detective training, thus making his presence on a day shift useful. He does not say whether that officer is the one with whom the demoted sergeant clashed.

8/ The chief's grievance response states that he did not place the demoted sergeant with Team A. The record does not establish whether the grievant had been part of Team A or was on a different day shift before the reassignment.

thus less senior), why couldn't that officer, instead of the grievant, have been reassigned to the night shift, thus preventing any contact with the demoted sergeant?

- What were the shift assignments, before and after the reassignment of the grievant, of the demoted sergeant and the officer with whom he had interpersonal problems?
- What were the work hours of the three shifts that the Chief states were offered to the grievant.
- Although Bedminster is a small force, the Chief has not described the department's per shift staffing levels.

The Township's significant policy goal was to insure that a police sergeant, demoted for disciplinary reasons, be placed on a shift where he could receive supervision from an experienced superior officer and/or the Chief. That goal has been met and will not be undone by allowing the grievance to proceed to arbitration.

Where no issue of special skills or qualifications is present, or where the employer has not shown how governmental policy would be impeded, we have allowed arbitration of grievances asserting that seniority should govern shift reassignments. See Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998); Town of Phillipsburg, P.E.R.C. No. 89-30, 14 NJPER 640 (¶19268).

The issue of which officer would move to the demoted sergeant's former shift, is, based upon the information supplied

to us, a separate and severable issue that is at least permissively negotiable and therefore arbitrable. There has been no showing that the grievant, the most senior officer in the department, was the only officer available to make that switch. Accordingly, there would be no substantial limitation of any Township policy goal if the grievance proceeds to binding arbitration.^{9/}

ORDER

The request of the Township of Bedminster for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: June 27, 2013

Trenton, New Jersey

^{9/} Denying the Township's request for a restraint of arbitration, would not prevent it from demonstrating to the arbitrator that the grievant was the only officer it could reassign to change shifts with the demoted sergeant. Nor does our determination bar the Township from presenting its defenses to the arbitrator, including its argument that even assuming that there was a "practice" of scheduling by seniority, that practice cannot overcome the clear contract language in Article 3, Section 1, paragraph 4 which retains to itself the right to "assign duties and work shifts." West Paterson Board of Education, P.E.R.C. No. 2010-2, 35 NJPER 275 (¶95 2009). As we have noted, the validity of such arguments are beyond this Commission's jurisdiction and are for the arbitrator to determine.