

P.E.R.C. NO. 2014-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF DOVER,

Petitioner,

-and-

Docket No. SN-2013-061

PBA LOCAL 107,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the Town of Dover for a restraint of binding arbitration of a grievance filed by PBA Local 107. The grievance asserts that the Town violated the parties' collective negotiations agreement and past practice when it rehired a former police officer and allowed him to retain the seniority he earned during his prior employment. The Commission holds that the establishment of a seniority date for civil service police is preempted by civil service laws and rules, and therefore restrains arbitration to the extent the grievance challenges an officer's seniority date for the purposes of layoff, demotional, and promotional rights. The Commission holds that the grievance is arbitrable to the extent it challenges calculation of seniority for purposes of vacation, shift, and assignment selection.

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 (Matthew J. Giacobbe, of counsel)

For the Respondent, Loccke, Correia, Limsky & Bukosky,
attorneys (Marcia J. Tapia, of counsel)

DECISION

On March 26, 2013, the Town of Dover petitioned for a scope of negotiations determination. The Town seeks a permanent restraint of binding arbitration of a grievance filed by Dover PBA Local No. 107. The grievance asserts that the Town's decision to rehire, with the approval of the Civil Service Commission, a former Dover police officer and allow him to retain the seniority he had earned during his prior employment with Dover, violates the parties' collective negotiations agreement and past practices.

The parties have filed briefs and exhibits. The Town has filed the certification of its public safety director. These facts appear.

The PBA represents the Town's police except those holding the rank of Sergeant and above. The most recent CNA between the parties ran from January 1, 2007, through December 31, 2011. The following factual recitation is based, in part, upon In the Matter of Justin Gabrys, Town of Dover 2012 N.J. CSC LEXIS 704.

Gabrys was appointed as a Police Officer with Dover effective January 16, 2001. On June 26, 2011, Gabrys resigned from his position with Dover and accepted an unclassified appointment to the title of County Investigator with Morris County, effective June 27.

On August 31, 2012, Dover sought the CSC's permission to re-employ Gabrys and allow him to retain the seniority he had earned before he went to work for the Prosecutor.^{1/} Dover noted that several officers had retired leaving senior-level positions vacant and that Gabrys wanted to return to Dover to serve in a senior-level position. Dover requested that it be allowed to treat the time Gabrys was employed with the Prosecutor as an authorized unpaid leave of absence from Dover, thereby entitling him to retain continuous permanent service with the Town.^{2/}

1/ Apparently, the PBA was not notified of the Town's application.

2/ N.J.A.C. 4A:6-1.1(a)2 states that, in local service, an appointing authority may grant permanent employees a leave of absence without pay for a period not to exceed one year. A leave may be extended beyond one year for exceptional circumstances upon request of the appointing authority and written approval by the CSC.

In a decision he described as non-precedential and based on the unique circumstances presented, on September 19, 2012, CSC Chairperson Robert M. Czech ruled:

Given Dover's verification that several Police Officers retired from the Police Department leaving multiple senior-level positions vacant and Gabry's expressed willingness to return to Dover, it is appropriate to permit the revision of Gabry's County and Municipal Personnel (CAMPS) record with Dover to reflect that he is on an unpaid leave of absence to accept an unclassified appointment. . . . Upon the discontinuance during this time frame of Gabry's unclassified appointment as a County Investigator with Morris County, his leave of absence without pay will be discontinued and he may return to his position as a Police Officer with Dover.^{3/}

[In the Matter of Justin Gabry, Town of Dover 2012 N.J. CSC LEXIS 704]

On October 2, 2012, the PBA filed a petition with the CSC to allow it to intervene and seek reconsideration and a stay of the September 19 decision. The PBA also filed a motion with the Appellate Division of the Superior Court. On November 21, the CSC issued a written ruling responding to the PBA's request. In the Matter of Justin Gabry, Town of Dover 2012 N.J. CSC LEXIS 938. It held that, because Gabry's return to the Dover department could affect the interests of police it represents, the PBA should be considered a party in interest. However,

^{3/} Dover also asked that Gabry be placed on a promotional list for Sergeant. The CSC ruling on that request is not pertinent to the issue before us.

noting that the jurisdiction of the Appellate Division had been invoked, the CSC held that it could not rule on the motion for reconsideration. The CSC declined to grant a stay of its prior ruling. On March 18, 2013, the PBA demanded arbitration (Docket No. AR-2013-634). This petition ensued. Then, on April 4, the Appellate Division granted the PBA's request for a stay.^{4/}

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.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

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

^{4/} On April 23, 2013, writing on behalf of the CSC, Deputy Attorney General Pamela N. Ullman wrote to Dover advising that, during the pendency of the appeal, Gabry's re-hiring would be treated as having been made from a regular re-employment list and that during the stay of the CSC's order, he would not be credited with the seniority he had earned up through his move to the Prosecutor's office.

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.

As this dispute arises in the context of a grievance alleging a violation of an existing agreement, 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.

The Town asserts that the grievance challenges a determination already made by the CSC and argues that the PBA may not challenge that decision by filing a grievance. It notes that the jurisdiction of the Superior Court, Appellate Division, to review the CSC ruling has been invoked. The Town, citing Hackensack v. Winner, 82 N.J. 1 (1980), asserts that, as the proceeding before the CSC and the PBA's grievance involve the same facts and issues, arbitration must be restrained to prevent dual proceedings with possibly conflicting outcomes.

The PBA disagrees with the Town's framing of the issues before the CSC and those raised by the grievance. It asserts that at no time has it disputed or interfered with the Town's right to rehire Gabrys. It contends that the dispute is over whether Gabrys has superior seniority to other officers, as it impacts working conditions such as vacation selection, overtime, officer-in-charge pay, shift selection, promotions, demotions and layoffs. The PBA relies on City of Newark, P.E.R.C. No. 88-106, 14 NJPER 336 (¶19126 1988).

The Town notes that in City of Newark, the CSC had re-established the affected employee's appointment date, but the City had used a later one affecting the employee's seniority. And, the grievance was limited to establishing the correct seniority date for the purpose of determining vacation and

longevity benefits, working conditions that did not conflict with any limits set by civil service laws and regulations.^{5/}

The PBA's grievance differs from that presented in Newark in two material aspects. First, in Newark, the seniority date asserted in the grievance was consistent with the appointment date ultimately established by the CSC. See also Township of West Orange, P.E.R.C. No. 89-72 15 NJPER 72 (¶20028 1988) (employer set seniority date based on working test period rather than appointment date set by civil service; grievance seeking seniority date for contract benefits to be the same as CSC-set seniority date for layoffs and promotions was arbitrable). Second; while the PBA's demand for arbitration filed identifies the issue as the affect on "benefits and seniority arising out of the rehiring of Justin Gabrys," its submissions argue that it may grieve the proper seniority date regarding "layoffs/demotions, promotions, vacation picks and officer-in-charge pay." Its filing with civil service also identified seniority as it affects shift selection. 2013 NJ CSC LEXIS 938 at 2.

We hold that the establishment of a seniority date for civil service police as it affects layoffs, demotions and promotion

^{5/} N.J.A.C. 4A:6-1.1(e) provides:

(e) Where leave procedures are not set by this subchapter, appointing authorities shall establish such procedures subject to applicable negotiations requirements.

eligibility, is preempted by civil service laws and rules.^{6/} See generally, State v. State Supervisory Employees Association, 78 N.J. 54, 91-96 (1978). We are not aware of, and have not been referred to, any case that would allow a challenge that would alter a seniority date established by civil service on these subjects. Civil service regulations would preempt those aspects of the PBA's grievance.^{7/}

6/ City of Hackensack, which involved dual agency proceedings involving the same operative facts and similar issues is not applicable to a civil service proceeding determining the rights of an individual under civil service law, and to a scope of negotiations proceeding determining, without passing on the merits, only whether a grievance presented by a majority representative, is legally arbitrable. In Hackensack, the individuals initiating both the civil service appeals and filing the unfair practice charges were the same. 82 N.J. at 11. Here, the Civil Service proceeding was initiated by Dover while the grievance was filed by the PBA.

7/ See for example, the following provision of N.J.A.C. 4A:8-2.4 "Seniority":

(b) For police and fire titles in State and local service, seniority for purposes of [layoffs] is the amount of continuous permanent service in an employee's current permanent title and other titles that have (or would have had) lateral or demotional rights to the current permanent title. . . Seniority shall be based on total calendar years, months and days in title regardless of work week, work year or part-time status.

See also N.J.A.C. 4A:4-2.15 (seniority in rating of examinations)

But civil service laws and regulations do not set, and therefore do not preempt, agreements reached by a public employer and the majority representative of its police, to use seniority to determine vacation selection, shift selection, and senior assignments (e.g. "officer-in-charge"). A grievance asserting that seniority was miscalculated would, present an issue that is normally at least permissively negotiable and arbitrable.^{8/}

ORDER

The request of the Town of Dover for a restraint of binding arbitration is granted to the extent the grievance challenges Gabry's seniority date for the purposes of determining layoff rights, demotional rights and eligibility for promotional examinations. The request is otherwise denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 27, 2014

Trenton, New Jersey

^{8/} Using seniority can sometimes be limited by operational needs. Vacation picks might be subject to staffing needs. See Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996). Shift picks by seniority might yield to experience, supervision and skills issues. City of Vineland, P.E.R.C. NO. 2013-44, 39 NJPER 265 (¶90 2012) And, filling a senior post by seniority could be subject to qualifications. See Borough of Sayreville, P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986). Here, the grievance seeks a determination of Gabry's seniority date vis-a-vis the other officers in the unit. While the Town wants Gabry's in a senior post, we do not know if he has been assigned to such a job and whether the grievance challenges that personnel action.