

P.E.R.C. NO. 2014-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FAIRFIELD,

Petitioner,

-and-

Docket No. SN-2013-065

WEST ESSEX PBA LOCAL 81,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Fairfield for a restraint of binding arbitration of a grievance filed by West Essex PBA Local 81. The grievance asserts that the Township violated the parties' collective negotiations agreement when the Deputy Chief issued a memorandum requiring sergeants be assigned to each shift and restricting the ability of sergeants to request, receive approval for, and utilize paid leave. The Commission finds that the Township has a managerial prerogative to determine sergeants will work on a shift and replace absent sergeants. The Commission holds that the portion of the memorandum relating to a leave bank and vacation scheduling are mandatorily negotiable. The Commission restrains arbitration of the PBA's challenge to the requirements that a sergeant be scheduled on every shift and superior officers first replace sergeants. The Commission denies to restrain arbitration as to the challenge to the new leave bank and vacation procedure.

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, Detzky, Hunter & DeFillippo,
attorneys (David J. DeFillippo, of counsel)

DECISION

On April 11, 2013, the Township of Fairfield filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by West Essex PBA Local 81 (PBA). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when the Deputy Chief issued a memorandum requiring sergeants be assigned to each shift and restricting the ability of sergeants to request, receive approval for, and utilize paid leave.

The parties have filed briefs and exhibits. The PBA submitted the certification of Police Sergeant Christopher Oswald. These facts appear.

The PBA represents all uniformed employees of the Township's Police Department, except for the Chief of Police. The PBA and the Township are parties to a CNA effective from January 1, 2012 through December 31, 2014. The grievance procedure ends in binding arbitration.

Article 6 is entitled "Overtime" and outlines in Section C the procedures for accrual and payment of compensatory time.

Section I provides:

The Employer shall have the right to change a member's scheduled shift hours on any day which is a scheduled working day for the member in order to provide necessary manpower coverage due to or caused by, absence due to illness or injury, absence due to schooling, vacations, holidays, compensatory time off, bereavement leave, unpaid leave of absence. Employer shall not change any of the member's work days unless the member is given one week's notice of such change, except in the case of unforeseen or emergent circumstances. The Employer shall order in police officers and Corporals as necessary on the basis of a list according equal opportunity to change of schedule shift hours. No member's scheduled work days shall be changed, altered or modified, without at least seven days notice, for the purpose of minimizing, reducing or eliminating overtime compensation; except in the case of unforeseen or emergent circumstances.

Article 10 is entitled "Vacation, Holidays and Terminal Leave." Section D. provides, in pertinent part:

No vacation shall be permitted when such will cause less than the minimum number of personnel necessary to properly staff the

department as determined by the Chief of Police.

Article 22 is entitled "Acting Officer" and provides:

Any Police officer acting in the capacity of a Superior Officer for a scheduled tour of duty shall be paid \$12.00 per day up to the fifth (5th) consecutive day in addition to their regular pay; provided no Superior Officer is on duty for the tour. After five (5) consecutive days the rate will increase to \$18.00 per day in addition to their regular pay, provided no Superior Officer is on duty for the tour. This Article shall not apply to the Detective Division.

On December 26, 2012, Deputy Chief Anthony G. Manna issued a memorandum to all personnel entitled "2013 Staffing and Time Off Issues". It provides, in pertinent part:

...It is the position of the Chief of Police that the effective and efficient operation of the Fairfield Police Department is better served with the continual presence of competent line supervision...To this end, in 2012, the Appropriate Authority promoted officers to the rank of sergeant so that there would be a sufficient number of officers in this rank, and on each squad, to assure critical line supervision on a continual basis....

Therefore, the following will be in effect for 2013 and onward until such time that the Chief of Police rescinds any or all of the provisions that follow:

- The mandatory minimum staffing between the hours of 7A and 3A shall be (4) officers and at least (1) sergeant.
- The Mandatory minimum staffing between the hours of 3A and 7A shall be (3) officers and at least (1) sergeant.

Given these provisions and the anticipated reasonable need for two sergeants on the same squad to have the ability to take off on the same days, they will be permitted to do so as follows:

- The Chief of Police and/or his designee approves personal time.
- The Chief of Police has offered to set up a bank of 36 hours per quarter for each sergeant using previously earned compensatory or STB time that can be specifically used when another sergeant is already off. This bank is not cumulative and the use of these hours is not automatic and still requires approval from a command staff officer.
(It should be noted that this provision is only being offered if the other terms relative to these provisions are uniformly accepted by the sergeants).
(emphasis supplied)
- The Chief of Police or his designee grants an exception on a case by case basis.

In the event that both sergeants are scheduled to be off under one of the aforesaid provisions, then every effort will be made to provide supervision on the shift on a voluntary basis. However, if this cannot be accomplished then a supervisor will be directed to work the shift by a command staff officer.

In the event that both sergeants are off due to an emergent condition, then every effort will be made to provide supervision on the shift on a voluntary basis. If this cannot be accomplished, then pursuant to provisions in the collective bargaining agreement, a police officer will serve as the shift commander.

Lastly, if two sergeants are working on a shift, and one is counting towards the

mandatory minimum of required officers, a sergeant wishing to take time off can do so by using time off or STB time. The sergeant will be replaced by a police officer, first on a voluntary basis and then order in to work the shift where the sergeant needs to be replaced.

Please be advised that these provisions, along with the new squad assignments, both go into effect on January 7, 2013....

...In addition, we are attempting to rectify some of the scheduling issues that we have identified as frequently occurring over the years, especially over the Thanksgiving, Christmas and New Years holidays. In the past, we have traditionally approved time off for these holidays because staffing levels on the books in January of the same year permitted such an approval, even though we had ample notice that some members of a squad might be retired when November and December rolled around, leaving us desperate to fill shifts on the holidays. This will not be the case this year. Officers will submit their time off cards and they will be processed pursuant to the collective bargaining agreement. However, the actual approval for time off on a holiday may not be received until shortly before the holiday actually takes place. This way we could assure proper staffing without impacting individuals who are actually not scheduled to work that particular holiday....

Oswald certifies that the parties' past practice was to permit Sergeants to utilize paid leave so long as such supervisor is replaced by a Patrol Officer acting as a Superior Officer (and receiving out-of-title pay pursuant to Article 22 of the CNA). Oswald certifies that the delayed approval of requests for vacation leave contained in Deputy Chief Manna's memorandum is

contrary to both Article 10 of the CNA and the parties' past practice of vacation requests being approved or denied shortly after submission.

On January 9, 2013, the PBA filed a grievance asserting that the 2013 Staffing Memorandum violated the CNA and past practice by: requiring one Sergeant to be on duty at all times; creating the special time off bank of 36 hours per quarter; mandating uniform acceptance of all terms of the memorandum in order to permit use of the newly created special time off bank; violating Article 6 of the CNA by compelling supervisors to report to work while otherwise off-duty (if both Sergeants are off due to an emergent condition); and delaying holiday leave approval/denial time to shortly before the holiday takes place. The grievance was denied. On March 19, 2013, the PBA demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the Township may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 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.

Arbitration is permitted if the subject of the grievance 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). Thus, if we conclude that the PBA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be

sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Township asserts that the Chief's staffing decision to have a sergeant available on each shift is non-negotiable because it is a policy matter to better serve the needs of the public. Citing City of Vineland, P.E.R.C. No. 2013-44, 39 NJPER 265 (¶90 2012), it argues that staffing and minimum manpower decisions made to achieve greater line supervision are non-arbitrable managerial prerogatives. As for the PBA's challenges to the Memorandum's provisions regarding requesting time off, the Township asserts that an employer may deny a requested vacation day to ensure maintenance of adequate staffing levels. Citing Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989) and Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978), the Township contends that granting and scheduling of time off is negotiable only to the extent that it does not prevent the employer from fulfilling its staffing requirements.

Citing Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996), recon. den. P.E.R.C. No. 97-95, 23 NJPER 163 (¶28080 1997) and Borough of Lodi, I.R. No. 2006-14, 32 NJPER 65 (¶33 2006), the PBA asserts that while an employer cannot be prevented from fulfilling minimum staffing requirements, the scheduling of vacation is mandatorily negotiable even if it would

require paying overtime compensation to a replacement employee. It argues that the Township's 2013 Staffing Memorandum attempts to have it both ways by requiring that a Sergeant be on duty at all times, but then granting two types of exceptions to such staffing requirement based on the Chief's discretion. The PBA contends that the parties' past practice of permitting patrol officers to serve as acting superiors while Sergeants are out on paid leave is mandatorily negotiable. It also asserts that the special time off bank that the Township unilaterally created in the Memorandum is a mandatorily negotiable issue.

We have consistently held that a public employer has a managerial prerogative to determine its staffing levels. See, e.g., City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 1981), certif. den. 88 N.J. 476 (1981). Minimum staffing levels are not permissively negotiable. See Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000) (citing cases generally barring enforcement of contract provisions binding employers to specific staffing levels). Thus, the Township has a managerial prerogative to determine the number and type of officers to be on duty to provide police services. Accordingly, we restrain

arbitration to the extend the grievance challenges that determination that one sergeant must be on duty at all times.

The grievance also challenges the portion of the memorandum that requires another supervisor be directed to work in the event that both sergeants are off due to an emergent condition. Procedures to choose among qualified employees for temporary assignments to a higher-ranked position and the compensation to be paid an employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions and to determine whether such positions should be filled. Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981). Here, the Township has determined to first require a supervisor to work the required sergeant position on a shift before having an officer act as a shift commander. The memorandum asserts that the Township promoted officers to the rank of sergeant to provide sufficient shift supervision. The Township's determination that supervisors are most qualified to fill in for an absent sergeant is an exercise of its managerial prerogative. See e.g. Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990) (holding non-negotiable determination that captains rather than firefighters should supervise shifts operating at minimum staffing levels).

Accordingly, we restrain arbitration to the extent the grievance challenges the decision as to what rank will supervise a shift.

The remainder of the grievance concerns the unilateral creation of a compensatory time leave bank and procedures for scheduling leave. The leave bank was offered to sergeants to use if another sergeant is also off - subject to approval by the command staff officer and the agreement by the sergeants to the terms of the memorandum. The change in leave procedures proposes a delay in approving vacation requests until shortly before a holiday that officers requested off.

Scheduling of vacation leave or other time off is negotiable and arbitrable, provided the employer can meet its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); Town of West New York; City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987). An employer may deny a requested leave day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford; Town of Secaucus, P.E.R.C. No. 2000-73, 23 NJPER 174 (¶31070 2000). An employer does not have a prerogative to unilaterally limit the number of employees on leave or the amount

of leave time absent a showing that minimum staffing requirements would be jeopardized. Pennsauken.

We permit the portions of the grievance relating to the leave bank and new leave procedures to proceed to arbitration. We note that the Township has a reserved prerogative to deny or revoke leaves when necessary to ensure that it will have enough employees to meet its staffing needs and respond to emergencies. Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999). Whether the new bank and procedures violate the contract or the parties' past practice is a question for the arbitrator. Ridgefield Park.

ORDER

The request of the Township of Fairfield for a restraint of binding arbitration is granted as to the PBA's challenge to the requirements that a sergeant be scheduled on every shift and superior officers first replace absent sergeants. The request is denied as to the challenge to the new leave bank and vacation procedure.

BY ORDER OF THE COMMISSION

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

ISSUED: April 24, 2014

Trenton, New Jersey