

P.E.R.C. NO. 2014-92

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2014-023

FOP LODGE 39,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Somerset County Sheriff's Office for a restraint of binding arbitration of a grievance filed by FOP Lodge 39. The grievance asserts the County violated the parties' collective negotiations agreement when it did not utilize the overtime seniority list when filling overtime posts for a hospital detail. The Commission holds that the County showed that the particular inmate being transferred was high risk, and therefore it had a non-negotiable managerial prerogative to deviate from the parties' negotiated overtime allocation system and use particular officers with special skills in order to protect the public interest.

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, Ruderman & Glickman, P.C.,
attorneys (John A. Boppert, of counsel)

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

DECISION

On October 9, 2013, the Somerset County Sheriff's Office filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FOP Lodge 39 (FOP). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it did not utilize the overtime seniority list when filling overtime posts for a hospital detail.

The parties have filed briefs and exhibits. The County submitted the certification of Colonel Roy Gandolfe. The FOP submitted the certification of Sheriff's Officer and FOP Lodge 39 President Dominick Albanese. These facts appear.

The FOP represents all of the County's Sheriff's Officers, excluding superior officers, corrections officers, and Identification Bureau officers. The FOP and County are parties to a CNA effective from January 1, 2002 through December 31, 2004 that has been amended and extended via a 2005-07 interest arbitration award and subsequent memoranda of agreements through the year 2015. The grievance procedure ends in binding arbitration.

Article V of the collective negotiations agreement, entitled Overtime, states in pertinent part:

- 5.4 An overtime list based on seniority within the department shall be maintained in a central location accessible to all unit members.
- 5.5 All overtime shall be assigned on a rotational basis from the overtime list referred to in Article 5.4. It shall be indicated on the list the date, time and result of each contact or attempted contact. Notwithstanding the foregoing, the Sheriff shall not be required to assign overtime on a rotational basis from the overtime list for special service assignments (such as jail back up and riot situations).

The County's tactical Special Response Team (SRT) Officers are a hybrid of Correctional and Sheriff's Officers that assist with safety/security and emergency situations, including high risk prisoner transports. The County's High Risk Prisoner Protocol (General Order 4:40), updated January 1, 2012, contains the following policies and procedures:

Any inmate or group of inmates classified as a "High Risk" inmate(s) shall be transported by Sheriff's Officers and a security escort team to ensure the safety and security of officers, the inmate(s) and the general public.

* * *

"HIGH RISK TRANSPORT" security procedures means that the Sheriff's Officer transport team will be augmented with (2) SRT/CRT operators. Team strength may be adjusted appropriate for current conditions after review by the SRT Command.

* * *

When this inmate is moved outside of the jail, he will be escorted by a minimum of (4) four officers, (2) two SRT/CRT members and two Sheriff's Officers.

On August 14, 2013, Chief Hoats issued a memorandum noting that a "High Risk" inmate was to be secured at Somerset Medical Center pending transfer to a state psychiatric facility. Chief Hoats noted that the inmate was classified as "High Risk" according to the County's High Risk Prisoner Protocol for the following reasons: he was charged with disarming and attempting to murder a police officer by discharging two rounds from the weapon; bail was set at \$1,000,000 cash only; and he was classified as dangerous and mentally unstable. Chief Hoats stated:

Effectively immediately, inmate...shall be secured and transported following High Risk Prisoner Protocol. Inmate...is an inmate currently in our custody at Somerset Medical Center pending transfer to a State

Psychiatric Facility. Inmate...has been classified as a "High Risk" inmate in accordance with our High Risk Prisoner Protocol [General Order 4:40.] The criteria considered in this evaluation are as follows:

- Charges of Attempted Murder of a Police Officer
- Disarming a Law Enforcement Officer [1st degree] [Subject discharged two rounds from the weapon]
- Bail is set at \$1,000,000.00 CASH ONLY
- Subject is dangerous and mentally unstable

In accordance with protocol, SRT Officers will be assigned from both the Law Enforcement and Corrections Division to staff this detail...Inmate...will be transported to a State Psychiatric facility by SRT Officers when the proper care facility has been confirmed.

Based on this directive, only SRT officers, rather than a combination of SRT officers and FOP Sheriff's Officers, were assigned to secure the High Risk inmate at the hospital.

Gandolfe certified that SRT officers are needed to secure inmates as dangerous as the inmate in this case because they are specially trained for high risk situations. He certified that the County Sheriff's Office assigned SRT officers to secure the inmate at Somerset Medical Center because it determined that officers with special skills and qualifications were needed to secure such a dangerous inmate.

Albanese certified that he cannot recall a time when SRT members were ever solely assigned to work hospital overtime details. He certified that FOP members have routinely performed

similar overtime details and are fully trained in arrests, maintaining custody and control of inmates, and weapon retention. Albanese certified that the SRT members participating in the hospital detail to secure the inmate were not required to wear special equipment or carry enhanced weapons, and therefore the detail did not require any special skill, knowledge, or training.

On August 28, 2013, the FOP filed a grievance asserting that the County violated Article V of the CNA by failing to properly utilize the overtime list when assigning the overtime hospital detail to secure a High Risk inmate. On September 3 and September 23, respectively, Col. Gandolfe and Sheriff Provenzano denied the grievance with the following identical statement:

Inmate...was classified as high risk in accordance with the Somerset County jail Protocol (General Order 4:40), as in the past SRT officers were utilized.

On September 26, the FOP demanded 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 County 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 FOP'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 County asserts that its determination that the security detail for the High Risk inmate required the assignment of SRT officers with special skills and qualifications constitutes a non-negotiable managerial prerogative. Citing City of Camden, P.E.R.C. No. 94-63, 20 NJPER 50 (¶25017 1993), the County argues that although the allocation of overtime is generally negotiable, the Commission has found that a public employer has a non-negotiable managerial prerogative to determine that certain overtime positions require special skills and qualifications. The County further asserts that where a task involves specialized skills not possessed by unit members, an employer may assign the task to qualified non-unit employees. Atlantic County Superintendent of Elections, P.E.R.C. No. 2007-6, 32 NJPER 275 (¶114 2006).

The FOP asserts that the County did not have a managerial prerogative to deviate from the parties' negotiated overtime allocation system for the inmate security detail because it did not require special skills, knowledge, or training. Citing City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), the FOP argues that the County has not shown that any

circumstances existed under which the Commission would allow deviation from a negotiated overtime allocation procedure. The FOP asserts that unit members typically do perform such High Risk inmate security along with SRT officers,^{1/} and that the County has not shown how the overtime detail in question required any special skills that the SRT officers possessed but the FOP officers lacked. It argues that an arbitrator may consider any evidence the County may have for its special skills defense.

Contract provisions allocating overtime opportunities among qualified employees are mandatorily negotiable. Wayne Tp., P.E.R.C. No. 97-74, 23 NJPER 42 (¶28029 1996), aff'd 24 NJPER 141 (¶29071 App. Div. 1998); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88); see also Town of West New York, P.E.R.C. No. 91-52, 17 NJPER 5 (¶22003 1990), aff'd App. Div. Dkt. No. A-2259-90T1F (11/15/91); City of Long Branch, supra.

But a public employer has a managerial prerogative to assign overtime to particular employees if special skills and qualifications are needed to perform particular tasks. Id.; Somerset Cty. Sheriff, P.E.R.C. No. 2013-69, 39 NJPER 468 (¶148 2013); Passaic Bd. of Ed., P.E.R.C. No. 90-3, 15 NJPER 490

^{1/} The FOP provided an exhibit to its brief which set forth the "Team Capabilities" of the SRT officers. Among the numerous capabilities was listed "High Risk Prisoner Transports."

(¶20200 1989); cf. UMDNJ, P.E.R.C. NO. 89-109, 15 NJPER 272 (¶20118 1989) (requiring dispatchers to have EMT certification is a prerogative). See also Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) (overtime allocation clause based solely on seniority that does not limit assignment to qualified employees is not mandatorily negotiable).

In Bor. of Wanaque, P.E.R.C. No. 85-17, 10 NJPER 513 (¶15235 1984) the Commission found that an overtime allocation proposal was mandatorily negotiable but that management retains the right to assign employees with special qualifications to perform particular overtime tasks, stating:

We reiterate, however, that the specific limitations identified in Long Branch must be read into any contract clause concerning overtime allocation. These limitations may form the basis for a restraint of binding arbitration in a particular case.

Additionally, a public employer has a right to deviate from a negotiated overtime allocation system when necessary to protect the public interest. Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992)

Similarly, in Little Ferry Bor., P.E.R.C. No. 88-57, 14 NJPER 67 (¶19024 1987), we found that the union's overtime allocation proposal was mandatorily negotiable, but noted: "In the event the PBA files a grievance contesting the Borough's assessment of special skills or qualifications, the Borough can seek to restrain an arbitrator from that assessment." In

Burlington Cty. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989), we again upheld this distinction between a negotiable overtime clause versus the arbitrability of such clause as applied in a specific situation:

The College has not asserted how the sections governing overtime priority and distribution would compromise its ability to set and carry out educational policy. If in a particular case the College believes that it must deviate from these sections because of its need for a specially qualified instructor, then the negotiability of that decision can be considered at that time. We will restrain arbitration of a grievance contesting such a decision upon a sufficient showing. (emphasis added).

In the instant case, it is clear from the facts that the County has made a sufficient showing that this particular inmate was "High Risk." As a result, the County had a non-negotiable managerial prerogative to deviate from the parties negotiated overtime allocation system and use the SRT officers, who possessed special skills, in order to protect the officers and the public. Accordingly, arbitration of the grievance would substantially limit attainment of the County's governmental policy goals.

ORDER

The request of the Somerset County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: June 26, 2014

Trenton, New Jersey