

P.E.R.C. NO. 2016-50

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2015-080

PBA LOCAL 240,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Monmouth County Sheriff's request for a restraint of binding arbitration of a grievance filed by PBA Local 240. The grievance contests the Sheriff's directive prohibiting employees who use more than seven days of unverified sick leave annually from participating in post-bidding and "day-off exchanges." The Commission finds that there is insufficient evidence to support the contention that all corrections officers who use more than seven days of unverified sick leave are unqualified for all biddable posts and "day-off exchanges."

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, Steven W. Kleinman, Special County Counsel

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Robert A. Fagella, of counsel)

DECISION

On June 11, 2015, the Monmouth County Sheriff's Office (MCSO) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 240 (PBA). The grievance asserts that MCSO violated the parties' collective negotiations agreement (CNA) by issuing a directive that would prohibit employees who use more than seven days of unverified sick leave annually from participating in post-bidding and "day-off exchanges."

MCSO filed a brief, exhibits, and the certification of the Warden (Warden) of the Monmouth County Correctional Institution (MCCI), a facility operated by MCSO. The PBA filed a brief and

the certification of its President (President). MCSO also filed a reply brief. These facts appear.

The PBA represents county corrections officers employed by MCSO at MCCI. MCSO and the PBA are parties to a CNA in effect from January 1, 2009 through December 31, 2013 and have entered into a memorandum of agreement (MOA) for the period January 1, 2014 through December 31, 2017 while a successor agreement is being negotiated. The grievance procedure ends in binding arbitration.

Article 13 of the CNA, entitled "Overtime, Call-In and Court Time," Section 5, provides in pertinent part:

A preferred list of volunteers for overtime shall be developed between the MCCI Administration and PBA 240 specifying the following.

(a) Employees who wish to work beyond their shift; and

(b) Employees who wish to work on their scheduled days off;

(c) The preferred list of volunteers and the forced overtime list shall be administered by PBA 240 and distributed by PBA 240 to the scheduling supervisor. On a semi-annual basis, PBA 240 will administer post-bids and day-off bids on a seniority basis.

In the event volunteers for overtime cannot be secured, then the Warden shall require employees on the shift to be held over until the shift can be filled with qualified personnel. Employees shall be held over in the inverse order of seniority with the employee with the least seniority being first until the shift is rotated through.

As amended by the MOA, Article 16 of the CNA, entitled "Personal, Sick and Maternity Leave," Section 2, provides in pertinent part:

Sick Leave. Pursuant to County policy, the Employer will advance fifteen (15) sick leave days in accordance with Civil Service Commission regulations. This Agreement shall be subject to the County's Family Medical Leave (FML) policy and, therefore, sick days need not be utilized to care for a qualifying family member. The Employer agrees to the telephonic verification of home/place of confinement policy, attached hereto as Exhibit B, and agrees that said policy is permissibly negotiable, provided, however, that said policy will be amended effective January 1, 2015 to provide that beginning on the eleventh (11th) sick day of each calendar year an employee shall be subject to confinement checks [reduced from the sixteenth (16th) sick day].

Article 19 of the CNA, entitled "Personnel," Section 3, provides in pertinent part:

The Warden reserves the right to assign staff to any position when needed. Special assignments requiring special skills and expertise shall be assigned based upon an evaluation of the training, education and skill necessary to successfully complete the assigned tasks. However, in no case shall shift changes be used to discriminate against any employee.

In April 2015, the Warden certifies that he issued a directive regarding the eligibility of corrections officers to bid on posts or participate in "day-off exchanges" (DOE). In pertinent part, the directive provides:

As of May 1st 2015 and from that point onward the privilege of Post bids and DOEs will be awarded only to Officers whose attendance meets a minimum standard.

Beginning May 1st 2015  
Officers who use more than 5 days or 40 Hours of sick time between May 1st 2015 and December 31st 2015 will:

1. Be removed from their bid post (if applicable) for the remainder of the year.
2. Not be permitted to participate in bidding for posts in 2016.
3. Not be permitted to do Day Off Exchanges in 2016.
4. No longer be permitted to do Day Off Exchanges for the remainder of 2015.

Beginning January 1st 2016  
Officers who use more than 7 days or 56 Hours of sick time between January 1<sup>st</sup> 2016 and December 31st 2016 will:

1. Be removed from their bid post (if applicable) for the remainder of the year.
2. Not be permitted to participate in bidding for posts in 2017.
3. Will not be permitted to do Day Off Exchanges in 2017.
4. Will no longer be permitted to do Day Off Exchanges for the remainder of 2016.

The Warden certifies that if a corrections officer brings in a sick note from a doctor or other medical professional, the related absence would not be counted toward the number of days needed to trigger the directive. Further, he certifies that the directive will not impact normally scheduled work hours or days off.

According to the Warden, he issued this directive in response to a substantial attendance problem in an attempt to ensure operational efficiency and the good order and effective management of MCCI. He states that biddable posts<sup>1/</sup> allow for corrections officers to gain greater familiarity with the inmates in a particular housing unit, which in turn promotes a more harmonious relationship between inmates and staff. The Warden certifies that a corrections officer who works the same post every day can often recognize problems and take action before a matter escalates, in part because inmates will communicate problems, issues, and concerns more freely and openly as they become more comfortable with a corrections officer. Oppositely, a corrections officer who does not work the same post every day due to poor attendance may not be able to recognize the subtle signs of an impending issue on a particular unit. In addition, the Warden certifies that when a corrections officer assigned to a biddable post is absent from work, his/her replacement is akin to a less effective substitute teacher and that this defeats the purpose of having biddable posts.

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1/ A biddable post is a post at MCCI to which a corrections officer will be assigned on a day-to-day basis. MCSO has provided a list of over sixty biddable posts and the Warden certifies that "there are roughly 300 Corrections Officers presently employed at the MCCI and somewhere between 45 and 50 biddable posts per shift."

The Warden also certifies that "day-off exchanges"<sup>2/</sup> have regularly resulted in corrections officers voluntarily working double shifts and, as a result, they are not available to perform overtime duty that may be required due to minimum staffing requirements. In these instances, MCCI is required to call in other corrections officers or force a corrections officer already on duty to work an involuntary overtime assignment. The Warden certifies that when a corrections officer regularly utilizes "day-off exchanges" and also takes a large amount of unexcused sick time, it creates increased scheduling difficulties.

The PBA President certifies that the parties have had an explicit contractual agreement permitting officers to bid in order of seniority on various assignments during their shift for the past ten years. In addition, he certifies that the parties have a long-standing past practice of "day-off exchanges" that was in place at the time the most recent CNA was concluded. According to the PBA President, the Warden unilaterally set a maximum sick day usage of seven days as a prerequisite to exercising these contractual rights despite the fact that corrections officers are afforded fifteen sick days per year and

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2/ A "day-off exchange" is when one corrections officer swaps a particular shift during a workweek with another corrections officer. These exchanges are permitted up to four times per month and do not require the corrections officers involved to use any personal time. The Warden certifies that "day-off exchanges" must be approved by management and, in the absence of such approval, are not permitted.

have the right to carry them over from the prior year. He disputes the Warden's contention that an officer's absence from a particular assignment for several days interferes with the efficient operation of MCCI. Rather, the PBA President certifies that regardless of their attendance record, corrections officers have been permitted to participate in "day-off exchanges" for years and that this practice has never created any issue.

On May 13, 2015, the PBA requested that the Warden rescind his directive. The parties subsequently agreed to waive the interim steps in the grievance procedure in order to allow the PBA to file for arbitration and MCSO to file a scope of negotiations petition. The Warden agreed not to implement his directive unless and until a favorable decision was received from the Commission and/or the selected arbitrator. On May 21, the PBA demanded binding grievance 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 employer 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.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

MCSO argues that in order to ensure the operational efficiency, good order, and effective management of MCCI, the Warden has determined that reasonably consistent attendance is an eligibility requirement for holding a biddable post and requesting "day-off exchanges." MCSO maintains that permitting the PBA to negotiate over the rules and regulations for post-bidding and/or "day-off exchanges" would substantially limit the Warden's ability to set policy at MCCI. Further, MCSO contends that the Warden's directive does not eliminate the seniority-based system currently in effect or the ability of corrections officers to bid for posts. Rather, it simply establishes consistent attendance as a requirement to bid for a post and to participate in "day-off exchanges."

The PBA argues that the use of seniority for post-bidding when qualifications are identical is mandatorily negotiable. In this instance, the PBA maintains that MCSO cannot reasonably contend that attendance is a legitimate "qualification" or

"skill" for a post assignment and notes that there is no dispute that all officers equally possess the necessary qualifications for biddable posts. Moreover, the PBA contends that post-bidding based on seniority is a term and condition of employment, not "a privilege." The PBA also argues that "day-off exchanges" are a long-standing past practice between the parties that is mandatorily negotiable given that management approval is required. The PBA maintains that MCSO can negotiate a different shift exchange procedure, but cannot unilaterally eliminate the parties' past practice absent a demonstration that "day-off exchanges" would limit governmental policy.

MCSO replies that the Warden's directive is based upon his belief that reasonably consistent attendance is a bona fide job requirement to hold a biddable post because a large number of unexcused absences have a deleterious impact on facility operations. In addition, MCSO maintains that "day-off exchanges" are potentially disruptive and implicate a serious matter of governmental policy due to their impact on the Warden's ability to assign employees to mandatory overtime if needed.

The issue we must consider here is whether an employee's use of more than seven days of unverified sick leave is a "qualification" upon which a public employer may rely upon in order to prohibit post-bidding or "day-off exchanges." We find that it is not.

We have consistently held that a public employer has a managerial prerogative to use reasonable means to verify employee illness or disability. In re Township of Parsippany-Troy Hills, 419 N.J. Super. 512, 524-526 (App. Div. 2011). This includes the right to require that employees taking sick leave produce doctors' notes verifying their illness. North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000). However, "the application of a policy, the denial of sick leave pay, sick leave procedures, penalties for violating a policy, and the cost of a required doctor's note are all mandatorily negotiable" and may be challenged through contractual grievance procedures. City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992).

We find that the Warden's directive is an addendum to MCSO's existing sick leave policy that ultimately prohibits employees who utilize more than seven days of unverified sick leave from participating in post-bidding and "day-off exchanges." Although the Warden has determined that MCCI has an attendance problem, corrections officers would be permitted to take up to twenty-five days of vacation, up to three days of personal leave, and up to fifteen days of verified sick leave without any impact on their ability to engage in post-bidding or "day-off exchanges." MCSO has not articulated how these permitted absences are different from unverified sick leave absences or their effect on MCCI. In

toto, while MCSO's establishment or supplementation of a sick leave policy is a non-negotiable managerial prerogative, the application of that policy and associated penalties are mandatorily negotiable and may be challenged through the parties' grievance procedures. City of Paterson; see also, Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009). Accordingly, MCSO's request for a restraint of binding arbitration is denied.

We note that "issue[s] of shift and post bidding in a correction facility" are "factually complicated." County of Mercer, P.E.R.C. No. 2013-32, 39 NJPER 209 (¶69 2012). Public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. County of Union, P.E.R.C. No. 2010-28, 35 NJPER 389 (¶130 2009). "However, public employers and majority representatives may agree to shift bidding by seniority, as long as all qualifications are equal and the employer retains the right to deviate from the procedures where necessary to accomplish a governmental policy goal. . .such as strengthening supervision or assigning employees with special qualifications to special tasks." Burlington Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 2002-52, 28 NJPER 174 (¶33064 2002). "Seniority bidding procedures for assignments as well as work hours may also be mandatorily negotiable, provided

the procedures do not pertain to assignments that require special training, experience or other qualification beyond those possessed by all prospective bidders." Id.; see also, Camden Cty. Sheriff and P.B.A. Local No. 277, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001).

We also note that "[p]roposals permitting voluntary shift exchanges conditioned on the employer's prior approval are mandatorily negotiable." Borough of Paramus, P.E.R.C. No. 2002-19, 28 NJPER 13 (¶33002 2001). However, "[a]n employer has a right to supervise tour or shift swaps to ensure that qualified personnel are assigned." Id. An employer can also "deny shift exchanges if an officer's special skills are required on a particular shift." City of Jersey City, P.E.R.C. No. 98-96, 24 NJPER 116 (¶29058 1998).

Finally, we note that a public employer has a managerial prerogative to determine its staffing levels, including both the number and type of employees on duty. Tp. of Fairfield, P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014). Similarly, a public employer has a managerial prerogative to determine the qualifications required for a job. Borough of Madison, P.E.R.C. No. 2012-30, 38 NJPER 255 (¶86 2011).

Here, despite producing a list of more than sixty posts at MCCI that have been subject to post-bidding by seniority and the

parties' past practice permitting "day-off exchanges", MCSO has failed to demonstrate that any particular post or shift requires special training, experience or other qualification beyond those possessed by all corrections officers employed at MCCI.

Burlington Cty. Bd. of Chosen Freeholders; Camden Cty. Sheriff.

Contrary to MCSO's broad assertion in this case, we find that there is insufficient evidence to support the contention that all corrections officers who use more than seven days of unverified sick leave are unqualified for all biddable posts and "day-off exchanges." We make no finding as to whether, upon a more particularized showing on a case-by-case basis, MCSO may utilize its managerial prerogatives in this way. Moreover, as memorialized in Article 19 of the parties' CNA, MCSO retains the right to determine staffing levels and job qualifications at MCCI.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: January 28, 2016

Trenton, New Jersey