

P.E.R.C. NO. 2016-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST CALDWELL,

Petitioner,

-and-

Docket No. SN-2016-004

WEST ESSEX PBA LOCAL 81
(WEST CALDWELL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of West Caldwell for a restraint of binding arbitration of a grievance filed by West Essex PBA Local 81 (West Caldwell Unit). The grievance contends that the Township violated the parties' collective negotiations agreement when it denied officers' requests for out-of-rank pay. The Commission holds that the grievance involves compensation for alleged performance of higher rank work, which is a mandatorily negotiable issue. However, the Commission reiterates its directive in a previous case between these parties regarding out-of-title pay (P.E.R.C. No. 2012-73), that the arbitrator may not interpret the parties' out-of-title pay provision to allow for unauthorized assumption of acting duties or an automatic "double bumping" when the next ranking officers assume vacancies left by officers assigned to work out-of-title, because those concern the Township's managerial prerogative to determine the number and type/rank of officers assigned at any given time.

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, Genova Burns, LLC, attorneys
(Angelo J. Genova, of counsel; Joseph M. Hannon, on the
brief)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Richard D. Loccke, of counsel)

DECISION

On July 20, 2015, the Township of West Caldwell filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the West Essex PBA Local 81 (West Caldwell Unit). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it denied officers' requests for out-of-rank pay.

The parties have filed briefs and exhibits. The Township submitted the certification of former Chief of Police Michael Bramhall. These facts appear.

PBA Local 81 represents all Township police officers excluding the ranks of captain and chief of police. The Township

and PBA Local 81 are parties to a CNA effective from January 1, 2015 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article II of the CNA is entitled "Wages." Article II, Section I provides:

1. In the event a vacancy shall exist for any reason except as a result of a Department-assigned training or schooling and, as a result, an Officer or Superior is directed to assume, in an acting capacity, a higher rank and perform the duties and responsibilities of such higher rank for a period of at least ten (10) working days, then such Officer or Superior shall receive the salary or pay for the higher rank for any period so worked beginning with the first hour of the eleventh (11th) day.

2. Whenever an Employee is assigned to work at a higher rank in a particular position and performs in that position for ten (10) working days either at one time or cumulative during several assignments during a calendar year that Officer will be entitled to pay at the higher rank beginning on the eleventh (11th) day of such assignment(s). The provisions of this paragraph shall become effective April 10, 1997.

3. This section shall be interpreted and applied consistent with the Grievance Arbitration and Award of Grievance Arbitrator Joel Douglas (PERC Docket No.: AR-99-112/issued December 30, 1999, and affirmed by the New Jersey Superior

Court, Chancery Division on July
11, 2000 (Docket No.: C-110-00).

Chief Bramhall certifies that PBA Local 81 has submitted out-of-rank pay slips dating back to December 1, 2014 for approximately 15 police officers ranging from the rank of patrolman to sergeant. That date coincides with the retirement of Lieutenant Nemeth, which left the department with three lieutenants. The Township decided not to fill the vacancy created by the lieutenant's retirement because the 2012 revisions to the table of organization provided for only two lieutenants. No lieutenants were demoted due to the revised table of organization. Instead, the Township decided to implement the new table of organization through attrition.

Chief Bramhall also certifies that prior to December 1, 2014, each of the department's four squads was staffed with a lieutenant, a sergeant, a corporal and patrol officers/detectives. Lieutenant Nemeth had been assigned to Squad 2, which is the only squad not staffed with a lieutenant since December 1, 2014. Given that there is no longer a lieutenant on Squad 2, the sergeant is seeking lieutenant's pay, and patrolmen and/or corporals are seeking sergeant's pay for any shift worked since Lieutenant Nemeth's retirement. Requests for out-of-rank pay have also been made for other squads when there were absences.

On June 12, 2015, Captain Gerard Paris denied the requests for differential pay. On June 17, PBA Local 81 filed a grievance alleging violation of Article II Section I of the CNA for denial of differential pay for out-of-rank assignment. Chief Bramhall issued a memorandum affirming the grievance denial. On June 19, PBA Local 81 filed a request for binding arbitration (AR-2015-755). 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 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 PBA's grievances are either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievances 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 grievance infringes upon its ability to establish the table of organization; infringes upon its prerogatives to set staffing levels and determine the number and types of officers assigned to be on duty; infringes upon its prerogative to determine when out-of-rank work must be performed;

and infringes on its prerogative to decide whether to promote and fill a vacancy.

The PBA responds that the grievance relates to out-of-title pay for work already completed and is not a challenge to the Chief's decision to not assign officers to a higher rank. It further responds that the arguments of the Township are related to the merits of the grievance and not the negotiability of out-of-title compensation.

The Commission has consistently held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable. See, e.g., Passaic Valley Water Commission, P.E.R.C. No. 2005-66, 31 NJPER 121 (¶51 2005), aff'd 32 NJPER 139 (¶64 App. Div. 2006), cert. den. 188 N.J. 356 (2006); East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992); City of Newark, P.E.R.C. No. 2015-19, 41 NJPER 168 (¶59 2014). Employees have a strong interest in receiving additional pay for performing work of a higher level or different nature than that on which their standard compensation is based. In general, those compensation claims do not significantly interfere with governmental policymaking. Hamilton Tp., P.E.R.C. No. 2010-46, 35 NJPER 470 (¶156 2009).

More specifically, a claim that a police officer has been performing the duties of a higher rank and is entitled to receive additional compensation is legally arbitrable and severable from the police department's managerial prerogative to determine whether to assign a police officer to duties of a higher rank. In other words, a majority representative cannot require a public employer to commit to a particular number of officers at each rank or to fill vacancies by automatically shifting officers up a rank on an acting basis, but can arbitrate a grievance alleging that its members were ordered to perform higher rank duties but were not paid commensurate with those different duties per an agreement or binding past practice. Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993) (allowing arbitration of claim that deputy chief was entitled to out-of-title pay for serving as acting chief); North Arlington Bor., P.E.R.C. No. 2009-14, 34 NJPER 287 (¶102 2008) (allowing arbitration of claim that sergeant was entitled to out-of-title pay for performing lieutenant's night shift tour commander duties); Springfield Tp., P.E.R.C. No. 2006-15, 31 NJPER 294 (¶115 2005) (allowing arbitration of claim that sergeants were performing lieutenants' duties); City of Trenton, P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001) (allowing arbitration of claim that sergeant was entitled to out-of-title pay for performing lieutenant duties); City of Newark, P.E.R.C.

No. 98-37, 23 NJPER 548 (¶28273 1997) (allowing arbitration of claim that detective was entitled to out-of-title pay for performing duties of higher rank legal analyst); Cherry Hill Tp., P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992) (allowing arbitration of claim that captain was entitled to out-of-title pay for performing duties of deputy chief); Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992) (allowing arbitration of claim that sergeant was entitled to out-of-title pay for performing duties lieutenant had performed as traffic coordinator).

In Township of West Caldwell, P.E.R.C. No. 2011-63, 37 NJPER 56 (¶22 2011), we addressed the arbitrability of a grievance seeking out-of-title payments to officers based upon the same contract language as that contained in the current CNA.^{1/} The Township argued that the grievance challenged its prerogative to not assign officers to work as supervisory officers in acting out-of-title assignments. In response, we said:

The PBA has clearly established that its grievance does not challenge staffing levels or assignments and only seeks compensation for assignments already worked. . . . As to the factual dispute of whether the officers actually were assigned to work out-of-title, the arbitrator may make a determination on that issue as well as whether out-of-title

^{1/} The relevant CNA clause in P.E.R.C. 2011-63 was Article II, Section H.2., which is identical to Article II, Section I.2. in the current CNA.

pay is required under in [sic] the parties' contract.

[37 NJPER at 58-59.]

Then, in Township of West Caldwell, P.E.R.C. No. 2012-73, 39 NJPER 64 (¶26 2012), we revisited the arbitrability issue after interest arbitration proceedings between the parties. During those proceedings, the Township had asked the arbitrator to remove the out-of-title provision from the CNA, stating that it interfered with its managerial prerogatives to set staffing levels and to determine when out-of-title assignments would be made, among other things. The arbitrator declined to change the provision noting that the Township's claim had to be determined in "a scope of negotiation proceeding before PERC." The Township then filed a scope petition, bringing the issue before us again.

We found that overall, the parties' out-of-title pay provision was mandatorily negotiable. However, we also determined that a portion of it was not. Specifically, we held that the paragraph compelling the provision to be interpreted consistent with an earlier grievance arbitration decision, specifically, paragraph 3 of section H, significantly infringed upon the Township's managerial prerogatives to set staffing levels and to determine the number and type of employees who must be on duty at any given time. Our holding in that regard was based, in part, upon the arbitrator's conclusion as to who could authorize an officer to assume the work of a higher rank. It was

also based upon the arbitrator's conclusion that every shift had to have both a lieutenant and sergeant on duty and that if a sergeant stepped up to fill an absent lieutenant's position, the next ranking officer had to assume the sergeant's position. This resulted in two officers putting in for out-of-title pay, what the Chief referred to as the award's "double bumping" effect. We directed the parties to interpret the provision consistent with our decision.

Consistent with our previous decisions involving this issue and these parties, we conclude that arbitration of this grievance would not substantially limit the Township's governmental policymaking powers. Like West Caldwell, P.E.R.C. No. 2011-63, this case involves a request for contractual out-of-title pay for allegedly performing higher rank work. The Township has a managerial prerogative to implement a new table of organization, to not replace a retired lieutenant, to determine whether any sergeants need to be temporarily assigned to lieutenant duties, and, if the Township exercises its prerogative to assign out-of-title work to the sergeant, to then determine whether a corporal or next lower ranking officer should assume the sergeant's work in an acting capacity. However, we again accept Local 81's representation that this grievance does not challenge the Township's staffing determinations, but only seeks differential pay for allegedly out-of-rank assignments already worked.

Therefore, an arbitrator can decide whether the Township directed officers to assume the duties of a temporarily absent higher ranking officer on the dates in question and if so, what, if any, additional compensation does the CNA entitle them to.

We also reiterate our directive in West Caldwell, P.E.R.C. No. 2012-73, 39 NJPER 64 (¶ 26 2012) that the out-of-title pay provision be interpreted in accordance with that decision. Therefore, while it appears that the parties continued to include paragraph 3 of Section H in Article II of their CNA after we issued our decision, an arbitrator may not interpret the remaining paragraphs of that section to mean that anyone other than the Chief, or an officer authorized to act on the Chief's behalf, may assign out-of-title work or that whenever a sergeant is assigned a lieutenant's duties in an acting capacity, a second officer is automatically assigned to the sergeant's position or assumes the sergeant's duties and entitled to out-of-title compensation. Nor may the provision be interpreted in any other manner that would significantly interfere with the Township's managerial prerogative to determine staffing levels and the number and type of officers who must be on duty at any given time.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Jones voted in favor of this decision. Commissioner Bonanni abstained from consideration. Commissioners Voos and Wall were not present.

ISSUED: January 28, 2016

Trenton, New Jersey