

P.E.R.C. NO. 2016-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WATCHUNG,

Petitioner,

-and-

Docket No. SN-2015-071

PBA LOCAL 193,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and restrains in part, the Borough's request for a restraint of binding arbitration of a grievance filed by PBA Local 193. The grievance contests the Borough's issuance of a Special Order that allegedly unilaterally changed numerous aspects of vacation and personal leave. Finding that the Borough has a managerial prerogative to include dispatchers in its determination of minimum staffing levels and that permitting arbitration over the requirement that dispatchers select vacation with their squads would substantially limit its policy-making powers in that regard, the Commission restrains arbitration over that aspect of the Special Order. The Commission also restrains arbitration to the extent the grievance challenges the Borough's determination that a sergeant or acting watch commander must be in charge of each squad and therefore may not take vacation on the same day. The Commission denies to restrain arbitration over the Local's remaining challenges to the Special Order, finding that the Borough's submissions fall short of showing that its staffing requirements cannot be met without the Special Order's limitations on the number of officers per squad and per platoon taking vacation during specified periods or its blanket ban on using personal leave on designated days.

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, Horn & Esmerado, P.C.,
attorneys (Mark S. Ruderman, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (James M. Mets, of counsel and on the brief;
Brian J. Manetta, on the brief)

DECISION

On May 14, 2015, the Borough of Watchung (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 193 (Local 193). The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) and past practice by issuing a Special Order that unilaterally changes numerous aspects of vacation and personal leave.

The Borough has filed briefs, exhibits, and two certifications of the Chief of its Police Department. Local 193 has filed a brief, exhibits, and the certification of the President of Local 193 (PBA President). These facts appear.

Local 193 represents patrol persons, sergeants, and all other officers in the Police Department excluding the Chief. The Borough and Local 193 are parties to a CNA in effect from January 1, 2013 through December 31, 2016. The grievance procedure ends in binding arbitration.

Article XIII of the CNA, entitled "Vacation," provides in pertinent part:

C. Police Officers shall be allowed to take vacations when earned subject to the reasonable discretion of the Chief of Police to assure adequate continuous services . . .

F. Initial vacation selection shall be on a seniority basis. Additional vacation selection shall be on the basis of reserve seniority pursuant to existing practices.

Article XXV of the CNA, entitled "Personal Leave," provides in pertinent part:

A. In addition to the sick days granted herein, each employee shall be entitled to two (2) personal leave days per year which shall be non-cumulative. Employees must provide two (2) weeks advance notice to the Chief in order to utilize the personal day. If less than two (2) weeks notice is given, days may be only utilized at the discretion of the Chief. This section applies to all non-Patrol Officers only.

B. Each Patrol Officer shall be entitled to sixteen (16) hours of personal leave per year which shall be non-cumulative. Patrol Officers must provide two weeks advance notice to the Chief in order to utilize the personal day. If less than two weeks notice is given, days may be only utilized at the discretion of the Chief.

On February 18, 2015, the Chief issued Special Order No. 2015-04, entitled "2015 Vacation Selection." The Special Order, effective January 1, 2015, provides in pertinent part:

- 1) Only one member per squad may be on vacation on any given day except from June 16, 2015-September 7, 2015. From June 16th-September 7th two members per squad with a total of no more than three members per platoon are permitted to be on vacation on any given day . . .
- 3) The dispatchers will choose their vacation with their squads . . .
- 5) Sergeants and assigned acting watch commanders shall coordinate their vacation picks so they are not off on the same days. Conflicts shall be resolved at the discretion of the Chief or his designee . . .
- 7) No member will schedule a personal day on or during the following dates or events: PBA golf outing, PBA Christmas party, Far Hills Race, Thanksgiving (night shift), Black Friday, New Year's Eve (night shift), New Year's Day, or during PBA conventions.
- 8) Only one member per squad may be on vacation from December 21-December 31, 2015 and those members will be chosen by establish[ed] lottery process. Other than by lottery, no vacation or personal days shall be scheduled from December 21, 2015 through December 31, 2015 . . .

*This Special Order is subject to change at any time by order of the Chief of Police.

The Chief certifies that the limits imposed on the number of officers taking vacation during the time periods specified in paragraphs one and eight of the Special Order "are essential to ensuring that each shift will be adequately staffed and minimum

manpower will not be jeopardized." Similarly, he certifies that the use of personal leave on the occasions specified in paragraph seven - PBA golf outing, PBA Christmas party, Far Hills Race, Thanksgiving, Black Friday, New Year's Eve, New Year's Day, and PBA conventions - "hinders the Borough's ability to meet its staffing requirements." According to the Chief, these days "have been identified as having a potential for numerous time off requests."

The Chief also certifies that each squad has one sergeant and one acting watch commander (AWC) who are responsible for supervising the squad. The Department has designated four patrol officers to serve as AWCs. According to the Chief, AWC positions must be filled by experienced, knowledgeable officers proficient in policy, procedure, and reporting, and a sergeant or AWC needs to be in charge of each shift because the patrol division is relatively young and inexperienced given numerous retirements in recent years.

Lastly, the Chief certifies that dispatchers must choose their vacation time with their squads because a squad's minimum staffing takes dispatchers into consideration. Each squad's minimum staffing includes one employee assigned to perform dispatch duty. When a dispatcher is absent, a police officer from that squad is assigned dispatcher's duties that day.

The PBA President certifies that on February 2, 2015, the Chief indicated during a meeting attended by the PBA President and other PBA unit members that the Chief would be changing vacation and personal leave selection procedures because overtime had increased. The PBA President claims that the first, third, fifth, seventh, and eighth paragraphs of the Special Order change the prior practice and procedure for selecting and using vacation and personal leave and that the Borough did not negotiate the changes with the PBA. The PBA President acknowledges that dispatchers are not in the police bargaining unit.

On March 3, 2015, Local 193 filed a grievance alleging that the Special Order violated Articles XIII, XXV, and VI of the parties' CNA and past practice by limiting the number of officers that can be on vacation at a given time, prohibiting sergeants and watch commanders from taking vacation leave on the same days, requiring dispatchers to choose vacation days with their squads, and prohibiting the use of personal leave on certain days of the year. The Borough denied the grievance at each step of the process. On April 17, 2015, Local 193 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

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 Local 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. Middletown Tp. and Middletown PBA, 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 policy-making powers. Paterson, 87 N.J. at 92-93.

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).

The Borough argues that permitting arbitration of Local 193's grievance would impermissibly interfere with its managerial prerogatives to determine minimum staffing levels, the type of officers who must be on duty to provide services, and who will supervise others.

Local 193 responds that while there is no doubt that minimum staffing levels are not permissively negotiable, this case has nothing to do with staffing levels. Rather, it concerns an overly broad attempt to limit the use of leave time in order to avoid incurring overtime. Local 193 also argues that the Borough has failed to demonstrate that a staffing issue exists. With regard to the Special Order's "black out days," when no personal days may be taken, the Chief is assuming that filling shifts on those days will be difficult, and he has not alleged that a

particular shift was understaffed on any of those days. Lastly, the PBA argues that allowing sergeants and watch commanders to take vacation on the same days will not jeopardize minimum manpower requirements because any police officer can fill the watch commander position.

We have consistently held that a public employer has a managerial prerogative to determine its staffing levels. City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012); see also Township of Fairfield, P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014). Minimum staffing levels are not mandatorily or permissively negotiable. Id. (citing Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000)); see also City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994). An employer also has a managerial prerogative to determine the type of employees who will be on duty to provide services or supervise others. Fairfield.

We have also consistently held that the scheduling of vacation or other time off is negotiable and arbitrable so long as the employer can meet its staffing needs. See, e.g., City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982). An employer does not have a managerial 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. Fairfield; see also Pennsauken Tp., P.E.R.C. No.

92-39, 17 NJPER 478 (¶22232 1991). However, if an agreed upon system for scheduling time off prevents an employer from meeting its staffing requirements, the system is no longer mandatorily negotiable. Teaneck Firefighters Mutual Benevolent Ass'n, Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd, 41 NJPER 293 (¶97 App. Div. 2015).

Based upon the parties' submissions, we find that the Borough has a managerial prerogative to include dispatchers in its determination of the minimum staffing levels of the Department's squads and that permitting arbitration over the requirement that dispatchers select vacation with their squads would substantially limit the Borough's policy-making power in that regard. Accordingly, we restrain arbitration of the grievance to the extent that it challenges the Special Order's requirement that dispatchers select vacation with their squads.

We likewise restrain arbitration to the extent that the grievance challenges the Borough's determination that a sergeant or AWC must be in charge of each squad and, therefore, may not take vacation on the same days. Arbitration over that aspect of the Special Order would substantially limit the Borough's policy-making power to determine the type of employee who should be on duty and supervise others.

As for the remainder of the grievance, the Borough's submissions fall short of showing that the Department's staffing

requirements cannot be met without the Special Order's categorical limitations on the number of officers per squad and per platoon taking vacation during the specified time periods or the blanket ban on using personal leave on the designated days. The Borough has provided us only with the Chief's statement that the vacation limitations and ban on the use of personal leave are essential to ensure adequate staffing. This conclusory statement, alone, is not enough to support a finding that the Board exercised a managerial prerogative in imposing the limitations on the use of leave time. Aside from limited information concerning the AWCs and dispatchers, the Chief's certification does not describe the structure of the Department, including the number of officers by rank or special designation overall and per squad and platoon, or the number of shifts or squads and platoons, or the staffing levels of each shift and platoon. On this record, we cannot conclude that the Department's minimum staffing requirements will not be met if more than two members per squad or more than three members per platoon take vacation from June 16 to September 7, or if more than one member per squad takes vacation outside of that time frame. Likewise, without specific information as to how many officers have taken time off to attend the events and holidays listed in the Special Order, and how many officers are needed to report to duty those days, we are unable to conclude that the

Department cannot meet its manpower levels unless it bars the use of personal days on the designated days.

Accordingly, with respect to the personal leave and vacation issues raised by paragraphs one, seven and eight of the Special Order, we decline to restrain arbitration. However, we note that the Borough has a reserved prerogative to deny or revoke leave when necessary to ensure that it will have enough employees to meet its staffing needs and to deploy the specific number and type of employees required for a particular shift or respond to emergencies. See, Long Hill Tp., P.E.R.C. 2000-40, 26 NJPER 19 (¶31005 1999); see also, Township of Livingston, P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989). Whether these particular paragraphs violate the parties' CNA is a question for the arbitrator. See, Ridgefield Park Ed. Ass'n, supra, 78 N.J. 144.

ORDER

Arbitration is restrained to the extent the grievance challenges the requirements that dispatchers choose their vacation with their squads and that sergeants and acting watch commanders coordinate their vacation picks so as not to take off the same days. The request is denied as to the challenge to the

limits on the use of vacation and personal days imposed by paragraphs one, seven, and eight of the Special Order.

BY ORDER OF THE COMMISSION

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

ISSUED: January 28, 2016

Trenton, New Jersey