P.E.R.C. NO. 2017-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and- Docket No. SN-2016-061

PBA LOCAL 228,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township's request for a restraint of binding arbitration of a grievance alleging that the Township violated the parties' negotiated agreement when it unilaterally changed its policy to ban the use of compensatory time off if it resulted in the payment of overtime to another police officer to cover a shift. The Commission holds that employee use of compensatory time off, even if it results in overtime pay to another employee, is mandatorily negotiable as long as it would not prevent the employer from fulfilling its staffing requirements or "unduly disrupt the operations of the public agency" per 29 U.S.C. § 207(o)(5).

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 (Adam Abramson-Schneider, on the brief)

For the Respondent, Mets Schiro McGovern & Paris, LLP, attorneys (James M. Mets, of counsel and on the brief; David M. Bander, on the brief)

DECISION

On March 23, 2016, the Township of Howell (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 228 (Local 228). The grievance asserts that the Township violated Articles IX and XXVII of the parties' collective negotiations agreement (CNA) when it unilaterally changed its policy to ban the use of compensatory time off if it resulted in the payment of overtime to another police officer to cover a shift.

The Township filed a brief and exhibits.[1/] Local 228 filed a brief, exhibits, and the certification of its attorney David M. Bander, Esq. These facts appear.

Local 228 represents all regular, full-time Police Officers excluding the Chief of Police, Captains, Lieutenants, Sergeants, and civilian personnel employed by the Township. The Township and Local 228 are parties to a CNA in effect from January 1, 2014 through December 31, 2016. The grievance procedure ends in binding arbitration.

Article IX, Section 3 of the CNA, entitled "Overtime," provides in pertinent part:

> In lieu of cash payment for overtime, an officer may receive compensatory time off at the rate of time and one-half (1 ½) if the officer chooses. Such time shall be taken at the discretion of the officer in accordance with a written policy established by the Chief of Police subject to the following conditions:
>
> (a). The request for time off shall be made in writing to the employee's immediate supervisor at least three (3) calendar days prior to the requested time off. The employee may request the use of compensatory time without the required notice; however, the Employer retains the right to deny such requests without a written notice or reason. Compensatory time once approved will not be canceled, unless forty-eight (48) hours' notice is given to the affected employee or there is an emergency situation requiring the

1/ The Township did not submit a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

> need for more than the normal amount of shift personnel.
>
> (b). The request will be approved or denied. Notification will be given to the employee within two (2) calendar days after the submission of the request. When the decision is to deny the request, the notification shall be returned to the employee informing the employee of the reason(s) for the denial as outlined in Article IX, Section 4(d).
>
> (c). All officers covered under this agreement shall be permitted to carry a total of two hundred and forty (240) hours of compensatory time. Said hours shall be permitted to be carried over into each year. Any hours over two hundred and forty (240) hours must be plotted and used prior to the years end.
>
> (d). It is understood by the parties that the written policy established by the Chief of Police shall attempt to calendar the rights of the employee to take compensatory time off against the need to ensure adequate levels of personnel on duty to allow for the efficient operation of the Police Department.

In March of 2015, the Township implemented a change in its policy to ban the use of compensatory time off if it resulted in the payment of overtime. This was a change from its previous policy, which allowed such usage of compensatory time off (CTO). The email announcing the change stated in pertinent part:

> Effective immediately, the practice of officers taking CTO time off contingent upon another officer working overtime to cover the shift is hereby <u>discontinued.</u> ALL time off will be taken in accordance with the manpower requirements of the shift. If the manning levels of the shift are at minimum levels, NO time off will be approved, including CTO.

On April 11, 2015, Local 228 filed a grievance alleging that the Township's unilateral change violated Articles IX and XXVII of the CNA and past practice, and requested that the prior policy be reinstated and any affected officers be made whole. The Township denied the grievance, and on October 20, Local 228 requested binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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 a 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.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Council of N.J. State College Local, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. Id.

In Old Bridge Tp., P.E.R.C. No. 2007-32, 32 NJPER 368 (¶155 2006) the Commission held that overtime costs for employers when employees request time off does not make a matter non-negotiable if it does not prevent an employer from fulfilling its staffing requirements:

> We have decided many cases involving the interplay between employees seeking to take negotiated leave time and employers seeking to staff shifts. Our cases establish the following principles relevant to analyzing these negotiability disputes. A public employer has a non-negotiable right to determine the minimum staffing for each shift. See, e.g., South Brunswick Tp., P.E.R.C. No. 94-100, 20 NJPER 199 (¶25094 1994); Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989). But the scheduling of vacation days and other time off is mandatorily negotiable so long as an

> agreed-upon system does not prevent an employer from fulfilling its staffing requirements. See, e.g., Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999); 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); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). An employer may legally agree to allow an employee to take time off even though doing so could, for example, require it to pay overtime compensation to a replacement employee or temporarily reassign another employee to maintain its staffing levels. See, e.g., New Jersey Highway Auth., P.E.R.C. No. 2001-77, 27 NJPER 292 (¶32106 2001); Town of Secaucus, P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987). The additional cost of overtime payments does not make a vacation scheduling dispute non-negotiable. See, e.g., Hillsborough Tp., P.E.R.C. No. 2001-53, 27 NJPER 180 (¶32058 2001); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Borough of Garwood, P.E.R.C. No., 90-50, 16 NJPER 11 (¶21006 1989); Livingston. Nevertheless, an employer has a reserved right to deny a leave if granting a request would prevent it from deploying the minimum number of officers required for a shift. A contract cannot be construed to provide an automatic right to take leave under such circumstances. Livingston.

The Township argues in its brief that it "[H]as the unfettered right to deny the use of compensatory time, including but not limited to, if such use of compensatory time is going to create additional overtime" and that 29 U.S.C. § 207(o)(5) preempts negotiation of this matter since "the discretion in

scheduling of compensatory time is specifically and comprehensively controlled by federal statute."

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, requires a public employer to allow an employee awarded compensatory time off in lieu of overtime pay "to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5).

The issue in this matter is whether the use of CTO can be denied solely on the basis if the time off results in the requirement for the employer to pay overtime to another employee under the "unduly disrupt" aspect of the statute.

In support of its argument, the Township primarily relies on language from Mortensen v. County of Sacramento, 368 F.3d 1082 (9th Cir. 2004), (a case involving a sheriff's deputy who was denied the use of CTO because there were no open slots on the day requested and he argued that the employer had to demonstrate that the use of the CTO on the date requested would unduly disrupt its operations in order to be in compliance with the FLSA) where the Court stated:

> If Mortensen could force the county to pay another deputy overtime so that he could use his CTO, then the purpose for § 207(o) would be eviscerated. This requirement would burden the county considerably by increasing the overtime that it must pay to employees. If implemented, Mortensen's proposed construction would remove the flexibility and

> control from the county that is clearly contemplated by the FLSA.
> [Id. at 1090].

The court in Mortensen found that the statutory language was unambiguous, and, as a result, did not defer to the regulations and opinion letter of the Secretary of the federal Department of Labor (Secretary); specifically, the 1994 DOL Wage and Hour Division Opinion Letter.

However, in Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004), a case directly on point with respect to the unduly disrupt/overtime issue, the court did rely on the regulations and opinion letter of the Secretary:

> Under the FLSA, the Secretary possesses the authority to issue rules and regulations to implement the Act. 29 U.S.C. §§ 202, 203. As to section 207(o)(5), the Secretary promulgated 29 C.F.R. § 553.25, which defines the "unduly disrupt" phrase as follows:
> (d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) *For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public* during the time requested without the use of the employee's services. 29 C.F.R. 553.25(d).
> [Id. at 918].

The court continued:

> The Secretary's preamble to this regulation states: "The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time. However, such a situation, in and of itself, would not be sufficient for the employer to claim that it is unduly disruptive." 52 Fed. Reg. 2012, 2017 (1987). In an August 19, 1994, opinion letter, the DOL's Wage and Hour Administrator similarly opined that:
>
> *It is our position, notwithstanding [a collective bargaining agreement to the contrary]*, that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee's services. *The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.*
> [Ibid.].

In the instant matter, there is no evidence in the record that the granting of CTO time would prevent the Township from fulfilling its staffing requirements.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: December 22, 2016

Trenton, New Jersey