

P.E.R.C. NO. 2017-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF OAKLAND,

Petitioner,

-and-

Docket No. SN-2017-007

PBA LOCAL 164,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough for a restraint of binding arbitration of a grievance contesting the Borough's denial of an officer's request to take a vacation day the next day so he could work an on-the-side snow removal job. The Commission found that the Borough's ability to prepare for and respond to an impending snow storm would be substantially limited if it was required to grant the officer's request.

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 S. Abramson-Schneider, on the brief)

For the Respondent, Alterman & Associates, LLC, attorneys (Stuart J. Alterman, on the brief)

DECISION

On July 21, 2016, the Borough of Oakland (Borough) filed a scope of negotiations petition. The Borough seeks a restraint of binding arbitration of a grievance filed by PBA Local 164 (PBA). The grievance asserts that the Borough violated Article VI, Section A, Paragraph 4 (Vacation Scheduling), Article XIV and Article XXIII of the parties' collective negotiations agreement (CNA) as well as past practice when it denied the grievant's request to take a vacation day during an impending snow storm. The request was filed the day before the predicted storm. The grievant sought the time off to work a second job plowing snow.

The Borough filed briefs, exhibits, and the certification of Chief Edward Kasper. The PBA filed a brief, exhibits, and the certifications of the grievant and PBA President Mark Piercy. These facts appear.

The PBA represents all Officers, Sergeants, Lieutenants and Captains employed by the Borough of Oakland. The PBA and Borough are parties to a CNA in effect from January 1, 2011 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article VI, Section A of the CNA, entitled "Vacations and Holidays," provides in pertinent part:

4. Scheduling Vacations: Each Officer is required to submit his request for vacation. From those requests, the Chief of Police shall establish a vacation schedule in order to ensure the orderly operation and adequate continuous service of the Police Department.

The Chief of Police shall give preference to the Officers in accordance with their respective seniority when establishing the vacations schedule.

All requests for vacation by any Officer shall be approved or denied by the Chief of Police within fourteen (14) days of such request.

Article XIV of the CNA, entitled "Retention of Benefits," provides in pertinent part:

The Borough agrees that all benefits, terms and conditions of employment relating to the status of members of the Oakland Police Department not covered by this Agreement, but included in the provisions of Municipal

Ordinances or resolutions which are applicable to Officers covered by this Agreement, shall remain in full force and effect, except as modified herein, during the term of this Agreement.

Article XXIII of the CNA, entitled "Past Practice," provides in pertinent part:

A. The parties agree that all benefits, rights, duties, obligations and conditions of employment relating to the status of the Borough of Oakland Police Officers which benefits, rights, duties, obligations, terms and conditions of employment are not specifically set forth in this Agreement, shall be maintained at not less than the highest standards in effect at the commencement of Collective Bargaining Negotiations between the parties leading to the execution of this Agreement.

B. Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations of employment applicable to any rules, regulations, instructions, directive, memorandum, statute, or otherwise shall be limited, restricted, impaired, removed or abolished.

C. This provision shall not impair the ability of the parties from negotiating with respect to any terms and conditions of employment irrespective of what standard is contained in this Agreement.

Kasper certifies that on March 19, 2015, there was a winter weather warning for March 20, specifically advising of an impending snow storm with an accumulation between three to six inches of snow, which was predicted to commence midday. Kasper certifies that due to the topography of the Borough, policing during a midday snow storm becomes more difficult for officers

due to all the cars and school buses that are on the road. Some of the challenges include, but are not limited to, cars skidding off the road, accidents, cars unable to get up the steep roads in the Borough, and managing the traffic control in the Borough. Some if not all of these issues require more than one officer to respond to a call, thus requiring more officers to be on duty in order to respond to an emergency.

According to Kasper, on or about the morning of March 19, 2015, he spoke with the School Superintendent who advised that schools were not closing on March 20 even though there was an impending snow storm. Kasper certifies that on March 19, the grievant requested a last minute vacation for March 20 in order to relieve himself of his duties as a police officer for the Borough and work his side job plowing snow for his customers. While the minimum manning on the road is set at three officers, the minimum manning will increase when there are storms and/or emergencies within the Borough. There have been occasions with snow storms when there are three officers on call within the Borough, and he had to utilize additional duty manpower to assist the rest of the residents in the Borough with administrative staff on duty.

Kasper further certifies that based upon the storm predictions for March 20, the last minute vacation request by the

grievant was denied as the storm required all members of the squad to be on duty in order to protect the public.

The grievant certifies that he submitted a vacation request on March 19 seeking to utilize a vacation day on March 20, which was denied by the Chief. On this date there was a winter snowfall prediction of about two to three inches.

According to the grievant, on one occasion during a departmental meeting in December 2013 the Chief publicly told him to "check your attitude" in front of other officers in the department. The grievant has had a contentious relationship with the Chief for many years.

The grievant further certifies that it was the past practice that all vacation requests, even if submitted the night before, would be granted if no other member of the squad had requested vacation on that date. He asserts that even if other members of the squad were off duty, it was a longstanding past practice to approve one vacation request per shift.

On March 25, 2015, a grievance was filed by the PBA President asserting that the denial of the grievant's request for vacation time violated current policy and a past practice permitting granting such requests when no other officers are scheduled to be off. The grievance was denied at all steps of the grievance procedure, and on September 8 the PBA requested binding arbitration. This petition ensued.

The boundaries of our scope of negotiations jurisdiction are narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court stated:

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.

Accordingly, we do not determine the parties' contractual rights, nor do we assess the PBA's arguments as to whether the denial of the vacation request violated past practice. Nor do we pass upon the grievant's allegation on a testy relationship between himself and the chief.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), the Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters:

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 fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making 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.

[87 N.J. at 92-93; citations omitted]

The scheduling of time off is mandatorily negotiable so long as the agreed-upon system does not prevent the employer from fulfilling its staffing requirements. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984); see also City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). And, any agreed-upon system cannot prevent the employer from exercising its reserved managerial prerogatives to respond to emergencies. Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999). Cf. Howell Tp., P.E.R.C. No. 2013-68, 39 NJPER 465 (¶147 2013) (restraining arbitration of grievance challenging use of special police to supplement regular officers during snow event).

In determining whether a particular dispute is legally arbitrable, the Supreme Court, in a case involving law enforcement personnel, has directed the Commission to resolve negotiability disputes on a case-by-case basis. Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555 (1998). This involves applying the negotiability test to the unique facts of each case. Id. at 575.

Applying the Paterson test to the facts of this case, we hold that a decision sustaining the grievance challenging the denial of the vacation day would have substantially limited the Borough's ability to prepare for and respond to emergency conditions resulting from the snowstorm.^{1/} There is no showing that the Borough's action deprived the grievant of his ability to use the vacation day on another occasion. Allowing him to pursue his second job on a day when there was a heightened call to provide police services, as documented by the Chief's certification, must yield to the needs of the public employer to prepare for and respond to potential emergency conditions.

^{1/} The cases cited by the PBA regarding vacation scheduling do not include disputes with facts analogous to those of the matter before us.

ORDER

The request of the Borough of Oakland for a permanent restraint of binding arbitration is hereby granted.

BY ORDER OF THE COMMISSION

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

ISSUED: December 22, 2016

Trenton, New Jersey