

P.E.R.C. NO. 2017-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Petitioner,

-and-

Docket No. SN-2017-027

FOP LODGE 79,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the College for a restraint of binding arbitration of a grievance contesting the College's denial of the grievant's request to work an off-duty assignment because he was already scheduled for regular duty. Based upon the parties' submissions, the Commission finds no basis upon which to determine that the College's managerial prerogatives would be impaired by allowing officers who are scheduled for regular duty to request the use of compensatory time or other paid leave in order to be available for an off-duty assignment.

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, Marowitz & Richman, attorneys
(Matthew D. Areman, on the brief)

DECISION

On January 20, 2017, Brookdale Community College (College) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FOP Lodge 79 (FOP). The grievance alleges that the College violated the parties' collective negotiations agreement (CNA) when it denied the grievant's request to work an off-duty assignment because he was already scheduled for regular duty.

The College filed briefs, exhibits, and the certification of Captain Robert Kimler. The FOP filed briefs, exhibits, and the certification of its President. These facts appear.

The FOP represents all full-time police officers employed by the College except those above the rank of senior sergeant. The

College and FOP were parties to a CNA in effect from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

Captain Kimler certifies that when he began working at the College in 2001, off-duty assignments were made at the sole discretion of the Chief of Police. In 2007, a rotational board was created that included unit members and administrators. Kimler certifies that in 2009, the parties entered into a Memorandum of Understanding (MOU) addressing the rotational board that specified:

(1) off-duty police officers are first offered the chance to work off-duty assignments on a rotational basis; and

(2) police administrators, operating under their own rotational basis, are afforded the opportunity to work the off-duty assignment if there were vacancies remaining.

The parties also entered into a Memorandum of Agreement (MOA) in January 2009 that provides in pertinent part:

[T]he parties hereby agree, workload permitting, members of the [FOP] may voluntarily perform "special duty assignments" for third party vendors performing police/security related functions.

Upon receipt of "special duty assignment" request from a third party vendor, the College shall notify the Chief of Police, or his/her designee and the [FOP]. The Chief of Police or his/her designee shall immediately post the assignments separately from overtime. In the event an assignment is not completely filled, the assignment will be

offered to Local Police or Sheriff's Officers.

In a memorandum to the College Associate Vice President for Human Resources and the Chief dated April 8, 2009, the FOP President referenced a meeting with the Chief the prior month during which it was brought to the FOP's attention that there needed to be clarification between overtime and special duty assignments. The memorandum continued by offering definitions of both terms intended to end misunderstandings, stating in pertinent part:

Special duty assignments shall be defined as employment of an off-duty police officer by another department or an independent contractor, including private and public entities, for the performance of police-related duties.

The Chief of Police also issued a memorandum dated March 1, 2012 to all police officers regarding "Comp Off/O.T. Assignments." That memorandum provides in pertinent part:

Please be advised that when a special duty assignment is posted, a police officer may request to comp off from his shift in order to work the said agreement only under the following circumstances:

1. If the Chief of Police, in his sole and absolute discretion, decides that there is adequate shift coverage and that campus security will not be compromised.

2. If, and ONLY if, no other off-duty officers are available or willing to work said detail.^{1/}

On May 25, 2016, the College posted a special duty assignment seeking 3 officers to cover a private school graduation at the College. The grievant signed up for the assignment, indicating that he intended to use compensatory time so he could work the extra-duty assignment. Kimler certifies that he denied the request because the grievant was scheduled for regular duty and would have to use compensatory time or other paid leave in order to work the assignment. Kimler also certifies that he awarded himself the special duty assignment only after off-duty officers were afforded the opportunity to work the assignment.

The FOP President certifies that "[t]raditionally, and since the filing of the [underlying] grievance," off-duty police officers and sergeants were offered the first opportunity to volunteer for special duty assignments. Subsequently, on-duty police officers and sergeants who obtained permission to use compensatory time or other paid leave were offered the opportunity. If an insufficient number of unit members volunteered, lieutenants and captains were offered the opportunity followed by local municipal police or sheriff's

^{1/} By "comp off," we understand the parties to mean "use compensatory time off."

officers. In his certification, the FOP President asserts that there was no workload, staffing, or other operational reason that the College denied the grievant's request; rather, it was denied because Captain Kimler wanted to work the assignment himself.^{2/}

On May 25, 2016, the FOP filed a grievance contesting the College's refusal to allow the grievant to use compensatory time in order to work a special duty assignment. The College denied the grievance at every step of the process. On August 9, 2016, the FOP demanded binding arbitration (AR-2017-063). 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.

^{2/} The FOP President claims that Captain Kimler used paid leave in order to work the assignment and failed to arrive on time fo it.

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The College argues that it is not bound by any alleged past practice because its managerial prerogative to administer an off-duty employment program includes the right to make eligibility determinations (i.e., on-duty officers willing to use compensatory time or other paid leave do not qualify as off-duty officers eligible to work a special duty assignment). The College also argues that it has a managerial prerogative to determine minimum staffing levels and to deny requests to use compensatory time or other paid leave to ensure there is sufficient manpower on a particular shift.

The FOP argues that the College's managerial prerogatives do not entitle it to unilaterally preclude an otherwise eligible employee from applying for an outside job simply because the officer might be out on approved leave. The FOP also argues that although the College retains the prerogative to assess and determine minimum staffing levels and the propriety of a leave request, it may not unilaterally and universally deny the opportunity to work special duty assignments for those officers who request leave.

Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the

best qualified employees to particular jobs. See, e.g., Norwood Bor., P.E.R.C. No. 2017-57, 43 NJPER 378 (¶108 2017); Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982); Ridgefield Park Ed. Ass'n, v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

They also have a managerial prerogative to determine the qualifications required for a job and to assess the relative fitness and qualifications of employees/candidates. See, e.g., Madison Bor., P.E.R.C. No. 2016-68, 42 NJPER 497 (¶138 2016); Madison Bor., P.E.R.C. No. 2012-30, 38 NJPER 255 (¶86 2011); City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986).

Further, public employers have a managerial prerogative to determine staffing levels, including both the number and type of employees on duty. Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014).

Clauses concerning outside employment are generally mandatorily negotiable. See, e.g., City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985). But public employers have a managerial prerogative to administer such systems where officers may be called upon to perform law enforcement functions and to require approval by a designated representative before the work is performed. City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003); City of Trenton, I.R. No. 2011-46, 41 NJPER 109 (¶39 2011). Indeed, a contract provision, or a past practice for that matter, that would allow the initial

determination concerning approval for outside employment to be made jointly by a public employer and the majority representative of its employees is not mandatorily negotiable but rather amounts to an illegal delegation of managerial authority. City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985).

In a different but somewhat analogous context, we declined in part to restrain arbitration of a grievance contesting the issuance of a special order that restricted the number of specific unit members that could be out on vacation or personal leave on certain days and during certain periods of the year. Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016). The employer had issued the special order due to the potential for numerous time off requests for these days and periods and to ensure that each shift would be adequately staffed and minimum manpower would not be jeopardized. We noted that the employer had not shown why its staffing requirements could not be met without the special order's categorical limitations or blanket ban. However, we also noted that the employer had a reserved prerogative to deny or revoke leave when necessary to ensure that it would have enough employees to meet its staffing needs and to deploy the specific number and type of employees required for a particular shift or to respond to emergencies. Cf. Monmouth County Sheriff's Office, P.E.R.C. No. 2016-50, 42 NJPER 354 (¶100 2016).

We have consistently held that the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment. Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016); see also, Rutherford Bor., 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); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982). And therefore, 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 or other managerial prerogatives would be jeopardized. Watchung Bor.; see also, Fairfield Tp.; 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. Watchung Bor.; see also, Teaneck FMBA Local No. 42 and Tp. of Teaneck, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd 41 NJPER 293 (¶97 App. Div. 2015).

Within this context, and based upon the parties' submissions, we have no basis to find that the College's managerial prerogatives in the areas of staffing, deployment, or the administration of special duty assignments would necessarily be impaired by allowing officers who are scheduled for regular duty to request the use of compensatory or other paid leave in

order to be available for a special duty assignment. The College has not provided any evidence showing that the grievant's regular or special duty assignment in May 2016, or other officers' regular or special duty assignments, required special training, experience, or other qualifications that they or their replacements failed to possess.^{3/} Nor did the College establish that minimum staffing or manpower needs went unmet or that operational efficiency has been compromised because employees are using paid leave in order to work special duty assignments. The Commission has declined to restrain binding arbitration where "[t]here are no facts in the record" supporting a public employer's asserted policy determination. See, e.g., City of Trenton, P.E.R.C. No. 2014-17, 40 NJPER 200 (¶76 2013); City of Trenton, P.E.R.C. No. 2014-18, 40 NJPER 202 (¶77 2013); City of Trenton, P.E.R.C. No. 2014-19, 40 NJPER 204 (¶78 2013).

Therefore, an arbitrator may determine if there is a past practice of allowing officers to use paid leave in order to work special duty assignments and if so, whether Captain Kimler altered the practice. However, if such a practice is found to exist, it cannot be enforced by the arbitrator, and the grievance must be denied, to the extent the practice entails officers using paid leave without notifying and obtaining the approval of the

^{3/} Neither party has raised any issue pertaining to associated overtime costs.

Chief. We disagree with the College that public employers have the right to manage all aspects of extra duty assignments. Nevertheless, since we have held that a contract clause allowing the initial determination of approval for side jobs to be made jointly by the employer and employee representative is an undue delegation of managerial authority, City of Orange Tp., supra, it follows that a past practice allowing the same determination to be made by the employee alone is likewise not negotiable. An "alleged past practice cannot transform a non-negotiable prerogative into a negotiable issue." Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2017-36, 43 NJPER 243 (¶75 2016). Moreover, the Chief's case-by-case invocation of the prerogative to withhold approval of an officer's request to use paid leave in order to work a special duty assignment rather than regular duty should address the College's operational concerns about staffing and manpower.

ORDER

The request of Brookdale Community College for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: May 25, 2017

Trenton, New Jersey