

P.E.R.C. NO. 2019-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2018-049

FOP LODGE 39,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Sheriff's Office's request for a restraint of binding arbitration of a grievance filed by the FOP contesting vacation request denials to the extent the grievance challenges the Sheriff's determination of minimum staffing or its authority to deny vacation requests based on minimum staffing levels. The Commission denies the Sheriff's Office's request for a restraint of binding arbitration to the extent the grievance asserts the denials were unreasonably denied because granting them would not have conflicted with minimum staffing levels.

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, on the brief)

For the Respondent, Detzky, Hunter & DeFillippo, LLC,
attorneys (David J. DeFillippo, of counsel and on the
brief)

DECISION

On June 4, 2018, the Somerset County Sheriff's Office (Sheriff's Office) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FOP Lodge 39 (FOP). The grievance asserts that the Sheriff's Office violated the parties' collective negotiations agreement (CNA) by denying vacation leave requests submitted by certain sheriff's officers.

The Sheriff's Office filed a brief, exhibits, and the certification of Colonel Roy Gandolfe (Gandolfe). The FOP filed a brief and the certification of its President, Dominick Albanese (Albanese). The Sheriff's Office also filed a reply brief,

exhibits, and the second certification of Colonel Gandolfe. These facts appear.

The FOP represents all Sheriff's Officers employed by Somerset County (County) excluding sergeants, lieutenants, captains, majors, and the chief. The County/Sheriff's Office and the FOP are parties to a CNA in effect from January 1, 2013 through December 31, 2015 and a successor memorandum of agreement (MOA) in effect from January 1, 2016 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article 8 of the parties' CNA, entitled "Vacation," provides:

- 8.1 For the purpose hereof, the vacation accrual period will be considered the calendar year.
- 8.2 Vacation days are accrued on a graduated basis, depending on the length of service. During the first year of employment, an officer is allowed eight (8) hours per month, up to eighty (80) hours; however, those employed after July 1 do not receive vacation for the first year. Thereafter, the vacation accrual is as follows:

1-5 years	80 hours
6-10 years	96 hours
11-15 years	120 hours
16-20 years	144 hours
21-25 years	160 hours
26+ years	200 hours
- 8.3 Up to eighty (80) vacation hours may be carried over to subsequent year, with permission of the Sheriff.

Standard Operating Procedure #49 (SOP #49), entitled "Time Off," provides in pertinent part:

I. Personal, Vacation and Compensatory Time

* * *

B. During the period from September 1st thru November 1st of the preceding year for vacation, officers shall submit a maximum of two (2) full weeks' vacation for the following year. Vacations for this period shall be awarded on a seniority basis.

C. Prior to March 1st of the current year, time off requests will be considered in the following order:

1. Personal Days
2. Vacation Days or Compensatory Days shall be considered equally

D. Requests for vacation or compensatory days submitted prior to March 1st of each calendar year will be considered based upon seniority. In accordance with Fraternal Order of Police (FOP) Lodges #39 and #89.

E. Requests for vacation or compensatory days submitted after March 1st of each calendar year will be considered based on date and time submitted.

Gandolfe certifies that the Sheriff's Office is responsible for transporting inmates and providing security details for the Somerset County Courthouse. According to Gandolfe, the Sheriff's Office employs 51 officers; the officers only work one shift and

there is no pool of officers available to substitute in case of a manpower shortage due to vacation/sick leave usage.

Gandolfe certifies that sheriff's officers are required to staff the following posts each day:

- An average of 27-28 Officers are required for court security; some days as many as 33-34 Officers are required depending upon request
- 1 Officer Motor Vehicle Commission
- 2 school resource Officers (both regular school year and summer school)
- 1 Officer for Sheriff's sales every day
- 1 Officer Project Lifesaver (Monday-Thursday)
- 2 Officers for medical trips out of County Jail (most days)
- 2 Officers for remands and transportation of inmates to other County Courts
- 1 Officer for VA Hospital (Lyons) one day every other week
- 1 Officer for Carrier Clinic one day each week
- 1 Officer to cover the holding cell at the Court House if County Jail unable to provide a Corrections Officer

According to Gandolfe, these posts do not include other required assignments such as testifying in court or before a grand jury; attending assigned and/or mandatory training; and performing other various work assignments (e.g., funeral detail).

Gandolfe also certifies that sheriff's officers are assigned to the following divisions:

- 6 Detectives
- 3 K-9 Officers
- 2 Administration Officers
- 1 Officer for Sheriff's sales
- 2 School Resource Officers
- 1 Officer assigned to Motor Vehicle Commission
- 1 Officer assigned to Police Academy
- 1 Officer for Project Lifesaver

According to Gandolfe, 17 officers are needed to fill these division positions every day, leaving 33 out of the remaining 51 total officers available to provide court security. Gandolfe certifies that the Sheriff's Office must use detectives, K-9 officers, and administration officers to complete court security details when necessary due to staffing issues.

According to Albanese, the following vacation leave requests were denied by the Sheriff's Office:

- Albanese - June 15, 28-29
- Ader - May 25; August 30
- Joseph - February 20; March 20;
June 15, 18-22, 29; July 16, 30;
August 24, 31
- Romero - April 2
- Bialiy - July 2; August 31; December 21
- Sterlacci - August 27-31
- Olivera - June 14-15
- Crismale - No information provided
- Hartman - August 6-10; December 20-21
- Dabek - No information provided
- Kocsi - No information provided

Gandolfe certifies that almost on a daily basis, the Sheriff's Office does not have the requisite number of Officers to provide security for all County Court posts. According to Gandolfe, SOP #49 allows the Sheriff's Office to anticipate and plan for the number of sheriff's officers on duty each day. He certifies that when sheriff's officers' vacation leave is approved for the following year, there is no way to know how many court security details will be necessary. Gandolfe further certifies that when court schedules are received, additional

leave time is granted to sheriff's officers - if feasible - based upon seniority and date/time of request.

Gandolfe certifies that for 2018, the Sheriff's Office determined that only four officers would be granted leave at any one time. According to Gandolfe, this determination was based upon the number of sheriff's officers required to be on duty at any one time in order to provide services safely and efficiently. Gandolfe also certifies that this determination was based upon the average number of sick leave call-outs during 2017, which is 13 per week.

According to Gandolfe, the vacation leave requests at issue were denied in accordance with SOP #49 as follows:

- Albanese - June 15: Denied by seniority (DeRosa)
June 28-29: Denied four (4) Officers off
- Ader - May 25: Denied by seniority (DeRosa-Joseph-Albanese)
August 30: Denied four (4) Officers off
- Joseph - February 20: Denied four (4) Officers off
March 20: Denied four (4) Officers off
(used P-day adjusted to Comp-day)^{1/}
June 15: Denied by seniority (DeRosa)
June 18-22: only one day submitted-granted
June 29: Denied four (4) Officers off
July 16: Denied four (4) Officers off
July 30: Granted DeRosa rescinded
August 24: Denied by seniority (DeRosa)
August 31: Denied four (4) Officers off

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^{1/} Gandolfe concedes that this vacation leave request was an exception and therefore converted the personal day that was taken to a compensatory day.

- Romero - April 2: Denied by seniority (Figel)
- Bialiy - July 2: Denied by seniority (Albanese)
August 31: Denied four (4) Officers off
December 21: Denied by seniority (Albanese)
- Sterlacci - August 27-31: Denied four (4) Officers off
*if submitted Sept 1-Nov 1 would have
bumped DiBella
- Olivera - June 14: Denied by seniority (Albanese)
June 15: Denied by seniority (DeRosa)
*submitted full week after Sept 1-Nov 1
deadline; already granted two (2) weeks Aug
6-10 and Aug 13-17
- Crismale - No information
- Hartman - August 6-10: Denied four (4) Officers off
- Dabek - No information
- Kocsi - No information

Albanese certifies that the Sheriff's Office does not have an established minimum staffing level. According to Albanese, the Sheriff's Office employs 51 sheriff's officers and must staff 29 posts; however, most officers are assigned to perform court security. Albanese certifies that SOP #49 sets forth the parties' practice regarding the submission and approval of vacation leave requests. According to Albanese, sheriff's officers are entitled to submit, during the period of September 1st through November 1st, a maximum of two full weeks' vacation for the following year, to be approved on a seniority basis.

According to Albanese, the rule about only allowing four officers off is completely arbitrary given that during his 25-year tenure, there has never been an occasion where the Sheriff's

Office was unable to fill all mandatory posts. Albanese certifies that many officers were improperly approved for vacation leave for more than the two week maximum referenced in SOP #49.

Albanese concedes that on rare occasions, officers regularly assigned to the administration division, the detective bureau or as K-9 officers have been temporarily assigned to perform court security. However, he also certifies that there have been many occasions when the Sheriff's Office has assigned five or more officers to attend off-site training despite the fact that four other officers are already out on approved paid leave. According to Albanese, it is not uncommon for the Sheriff's Office to permit, at the last minute, more than the maximum number of officers permitted to take paid leave due to overstaffing on any particular day.

On March 16, 2018, the FOP filed a grievance asserting that the vacation leave requests at issue were denied in violation of the parties' CNA given that the Sheriff's Office does not have an established minimum staffing level and that officers were approved for leave in excess of the two week maximum. The FOP requested that the vacation leave at issue be granted and that the Sheriff's Office strictly adhere to and otherwise enforce the 2-week maximum vacation rule. The grievance was denied at every

step of the process. On April 6, the FOP filed a Request for Submission of a Panel of Arbitrators.^{2/} 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

^{2/} AR-2018-488.

(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.

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 Sheriff's Office argues that it has a managerial prerogative to determine staffing levels and a reserved right to deny leave if granting a request would prevent it from deploying the minimum number of officers required. The Sheriff's Office maintains that officers are not being prevented from taking vacation time, but must comply with leave request procedures in order to ensure that there is sufficient manpower to safely and efficiently fulfill the Sheriff's responsibilities on a daily basis.

The FOP responds that the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment and that 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. The FOP maintains that there is no basis to justify restraining arbitration with respect to the Sheriff's decision to grant certain officers' requests for more than the established two-week maximum rule set forth in SOP #49.

In reply, the Sheriff's Office reiterates that determining staffing levels is a managerial prerogative and that its vacation policy exists in order to ensure the efficient and safe provision of services to the community.

The Commission has 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). Minimum staffing levels are not mandatorily or permissively negotiable. West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). An employer also has a managerial prerogative to determine the number and type of employees who will be on duty to provide services or supervise others. Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014).

The Commission has also consistently held that "(1) scheduling of vacation leave or other time off is mandatorily negotiable, provided the employer can meet its staffing requirements; (2) the employer may deny a requested leave day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though doing so would require it to pay overtime compensation to a replacement employee; and (3) an employer does not have an inherent 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." State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2004-77, 30 NJPER 208 (¶78 2004); see also Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982). 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).

The Sheriff's Office has determined that 17 officers are needed to fill division positions every day, leaving 33 out of the remaining 51 total officers available to provide court security. When necessary, the Sheriff's Office uses officers staffing division positions to complete court security details. The Sheriff's Office has also indicated that its minimum staffing level fluctuates on a daily basis depending upon the number of officers required for court security details and other mandatory assignments. Accordingly, to the extent that the grievance challenges the Sheriff's determination regarding the number of officers that must be on duty at any given time or the Sheriff's authority to deny vacation leave requests based upon minimum staffing levels, it is not mandatorily negotiable.

However, to the extent the grievance asserts that requests for leave have been unreasonably denied because granting them would not have conflicted with minimum staffing levels, the grievance is mandatorily negotiable. Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989); see also Wayne Tp., P.E.R.C. No. 2011-9, 36 NJPER 308 (¶118 2010) (holding, in part,

that the union's assertion that officers were denied leave time due to the township's refusal to redeploy officers to cover vacancies for scheduled absences and the township's refusal to count particular officers toward minimum staffing levels relate to the negotiable and legally arbitrable issue of the use of contractual leave time).

ORDER

The request of the Somerset County Sheriff's Office for a restraint of binding arbitration is granted to the extent the grievance challenges the Sheriff's determination regarding the number of officers that must be on duty at any given time or the Sheriff's authority to deny vacation leave requests based upon minimum staffing levels but denied to the extent the grievance asserts that requests for leave have been unreasonably denied because granting them would not have conflicted with minimum staffing levels.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: November 29, 2018

Trenton, New Jersey