

P.E.R.C. NO. 2019-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY SHERIFF'S DEPARTMENT,

Petitioner,

-and-

Docket No. SN-2019-006

PBA LOCAL 122,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for a restraint of binding arbitration of a grievance filed by the PBA contesting the rescission of a unit member's previously granted vacation leave request. Finding that the scheduling of vacation leave is mandatorily negotiable so long as the employer can meet its staffing requirements, and that the County did not assert or demonstrate that any significant governmental policy objectives would be compromised by calling in another officer to fill in for the grievant on an overtime basis in order to meet its minimum staffing levels, the Commission declines to restrain arbitration.

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, Brown & Connery, LLP, attorneys
(Michael J. DiPiero, of counsel and on the brief; Tara
L. Humma, of counsel and on the brief)

For the Respondent, Law Offices of Spear Wilderman,
attorneys (James Katz, of counsel and on the brief)

DECISION

On July 18, 2018, the Gloucester County Sheriff's Department (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 122 (PBA). The grievance asserts that the County violated Article IX, Section J of the parties' collective negotiations agreement (CNA) when it rescinded the grievant's vacation request for December 24, 2017.

The County filed a brief, exhibits, and the certification of its Undersheriff, August Knestaunt. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The PBA represents all full-time Sheriff's Officers and Sheriff Sergeants employed by the County. The County and PBA are parties to a CNA in effect from January 1, 2014 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article IX, Section J of the CNA, entitled "Vacation," provides in pertinent part:

Vacation leave shall not be unreasonably denied and any such denials shall be subject to the grievance and arbitration provisions of this Agreement, except the Sheriff's decision to waive the twenty-four (24 hour) notice requirement.

The grievant certifies that the Sheriff's Department is divided into three units - transportation, courts and field operations. The work day consists of either an eight-hour Monday through Friday schedule or twelve-hour shifts. The vast majority of Sheriff's Officers are assigned to courts and work a Monday through Friday schedule. All Sheriff's Officers assigned to the transportation unit work twelve-hour shifts. The grievant certifies that, at the time of the grievance, there were approximately twelve employees assigned to the transportation unit. This unit consists of four squads, with two squads working 8:00 a.m. until 8:00 p.m., and the other two working from 8:00 p.m. until 8:00 a.m., seven days a week throughout the year. He was assigned as the Sergeant on D squad along with two other Sheriff's Officers, who customarily worked the night shift from 8:00 p.m. until 8:00 a.m. The grievant also certifies that he

was the most senior officer on that shift as he was hired by the County in September of 1994 and promoted to the rank of Sergeant in February of 2016.

On March 12, 2017, the grievant requested and was granted vacation leave for his December 24 Christmas Eve shift from 8:00 p.m. until 8:00 a.m. His vacation request was granted and placed on the calendar in March of 2017. In November 2017, one of the Sheriff's Officers on the grievant's shift requested a personal/administrative leave day for the same shift, which management granted. On December 21, 2017, the grievant was notified that his December 24 vacation leave had been rescinded because the Sheriff had granted administrative leave for December 24 to two junior Sheriff's Officers on his shift. The grievant was required to work on December 24 and the shift was staffed with himself and one other Sheriff's Officer who was called from an overtime list.

The grievant certifies that no specialized training is required to work in the transportation unit, therefore all Sheriff's Officers were qualified to cover absences in the unit. He certifies that the Sheriff offered no explanation for rescinding his vacation day instead of the later requested administrative leave of two junior officers. He certifies that the Sheriff offered no explanation for why it used the overtime list to cover for one of the officers out on administrative

leave, but would not use the overtime list to cover for his previously granted vacation leave. He certifies that the Sheriff has previously used the overtime list when all three officers on the grievant's shift were out on leave.

Knestaunt certifies that at the time in question, there was a minimum staffing requirement of two officers for that post on that shift. There were two officers and one sergeant scheduled to work the shift and post in question on a daily basis. He certifies that as all officers who were scheduled to work that shift had submitted leave requests, the County denied the grievant's vacation request for December 24 to maintain essential staffing levels. The grievant reported to work and was not charged for his vacation leave for that day and, in turn, was able to use it at a later time or carry it over into 2018.

On January 2, 2018, the PBA filed a level one grievance which was denied by Knestaunt on January 10. On January 11, the PBA appealed the denial to the County Administrator, which was subsequently denied on January 22. On January 26, the PBA filed a level three grievance which was denied by the Sheriff on February 9. On February 13, the PBA filed a Request for a Submission of a Panel of Arbitrators. 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.

The County asserts that arbitration should be restrained because employers have the managerial prerogative to set minimum staffing levels. It cites Commission cases finding that an employer may deny a leave request if granting the request would render it unable to deploy the minimum numbers of police officers required for a particular shift. The County argues that because all three officers scheduled for the December 24, 2017 shift in question had requested leave, and the CNA requires that all avenues of coverage be exhausted for administrative leave, the administrative leave requests were granted but the grievant's

vacation leave request was not granted in order to maintain minimum staffing levels.

The PBA asserts that the grievance challenging the rescission of a previously granted vacation day is mandatorily negotiable and will not interfere with the County's ability to fulfill its minimum staffing requirements. It cites Commission cases finding that an employer may grant leave even where doing so could require it to pay overtime compensation to a different employee who is called in or temporarily reassigned in order to meet minimum staffing levels. The PBA argues that its grievance does not challenge the County's minimum staffing requirements, but only challenges the County's unreasonable rescission of the grievant's vacation leave in violation of the CNA. It contends that the employer cannot claim a staffing issue when it created the issue by granting leave for two junior officers after the grievant's leave had already been granted, and where it made no effort to use either voluntary or mandatory overtime to obtain the necessary staff so that the grievant could use his leave.

"Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Therefore, the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment, and a public 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., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016) (limits on numbers of officers per squad who could use vacation days were arbitrable, but limits on sergeant and watch commander taking vacation on same day implicated managerial prerogative to meet supervision needs); Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991) (limit of two weeks summer vacation leave was negotiable; employer may review individual vacation requests in light of its staffing requirements). "Once an employer has determined its staffing requirements, the method of allocating available vacation time among employees is mandatorily negotiable." Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989) (limits on length of vacation leave and the times of year when vacation leave could be used were arbitrable); see also Borough of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989) (holding seniority vacation preference clause negotiable and that "arbitrability of a grievance filed under this article can be assessed in light of any alleged staffing shortages when a vacation request is denied.").

Applying these principles, the Commission has consistently held that an employer may legally agree to allow an employee to

use vacation or other leave even though doing so will require it to pay overtime compensation to a replacement employee in order to meet its minimum staffing levels. See, e.g., Weehawken Tp., P.E.R.C. No. 2009-20, 34 NJPER 302 (§110 2008) (change in number of employees who can use vacation leave was arbitrable); Howell Tp., P.E.R.C. No. 2017-31, 43 NJPER 229 (§70 2016) (policy banning time off that results in overtime costs was arbitrable).

Where the employer has not demonstrated an inability to meet its staffing needs by other means, such as calling in an employee on overtime, denials of leave requests are arbitrable. See, e.g., Camden County M.U.A., P.E.R.C. No. 2007-2, 32 NJPER 268 (§110 2006) (vacation request denials were arbitrable where "the MUA could have legally agreed to permit senior operators to make last minute vacation requests that require the use of overtime to ensure coverage"); State of New Jersey (Department of Corrections), P.E.R.C. No. 2004-77, 30 NJPER 208 (§78 2004) (vacation request denials were arbitrable where employer's staffing formula did not jeopardize minimum staffing); and Rutherford Bor., P.E.R.C. No. 97-12, 22 NJPER 322 (§27163 1996) (denying vacation requests based on higher than actual minimum staffing levels was arbitrable).

In Camden Cty., P.E.R.C. No. 2005-35, 30 NJPER 468 (§156 2004), the Commission held:

Under our case law, the parties may empower an arbitrator to determine whether a request for leave was unreasonably denied given the employer's staffing needs so we have declined to restrain arbitration of such disputes. It

would not substantially limit any governmental policymaking powers if the parties agreed that the County would not deny a requested leave until it had tried to meet its staffing needs through other methods such as offering overtime compensation to a replacement employee.

[30 NJPER at 470; internal citations omitted.]

Applying these precedents to the instant case, we hold the grievance legally arbitrable. The PBA does not dispute that the County has a managerial prerogative to set minimum staffing levels per shift. Instead, it claims that the County could have met its minimum staffing level on December 24, 2017 by calling in a second officer on an overtime basis, which it had done in the past. The County did not assert or demonstrate that any significant governmental policymaking powers would be compromised by attempting to meet its minimum staffing needs by calling in another officer on an overtime basis to replace the grievant.

ORDER

The request of the Gloucester County Sheriff's Department for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 29, 2018

Trenton, New Jersey