

P.E.R.C. NO. 2019-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and-

Docket No. SN-2019-008

HUDSON COUNTY SUPERIOR OFFICERS
ASSOCIATION, PBA LOCAL 109A,

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. The grievance contests the transfer of a unit member from her bidded post in the Classification Department to a post in the Record Room. Finding that the County's certification did not demonstrate a particularized governmental policy need to deviate from an alleged agreement or past practice concerning post/assignment bidding, 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, Scarinci Hollenbeck, attorneys
(Sean D. Dias, of counsel and on the brief)

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

DECISION

On July 20, 2018, the County of Hudson (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Hudson County Superior Officers Association, PBA Local 109A (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it transferred a unit member from her bidded post in the Classification Department to a post in the Record Room.

The County has filed briefs, exhibits, and the certification of its Deputy Director of Corrections and Rehabilitation, Michael

Conrad. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The PBA represents all Superior Corrections Officers below the rank of captain who are assigned to the jail and/or penitentiary.^{1/} The County and PBA were parties to a CNA in effect from January 1, 2013 through December 31, 2017. Article X is "Rights of Parties," Article XVII is "Work Schedule and Bidding" and Article XXVII is "Past Practice." The parties subsequently executed a ratified Memorandum of Agreement (MOA) in effect from January 1, 2018 through December 31, 2022. The grievance procedure ends in binding arbitration.

The Department of Corrections and Rehabilitation is separated into 3 shifts with a tour commander (captain) supervising each shift. The tour commander supervises the Department's five different areas. Each shift has one captain and two lieutenants working in administrative roles. Sergeants are responsible for supervising assignments in each area. Sergeants in Processing and Courts work assignments at 6 a.m. to 2 p.m., 2 p.m. to 10 p.m., or 10 p.m. to 6 a.m. Three sergeants are assigned to the first shift, three sergeants to the second shift, and two sergeants to the third shift. As Deputy Director,

^{1/} The unit excludes managerial executives, professional employees, clerical employees, other police employees and all other employees.

Conrad determines assignments of these supervisors based upon the needs of the facility.

The grievant has been employed by the County since 1989 and has held the rank of sergeant since 2007. She had been assigned as a supervisor in the Jail's Classification Department, a specialty department, since 2009 when she was selected over other interested supervisors. The grievant worked Monday-Friday, 9 a.m. to 5 p.m. On or about September 20, 2017, Conrad advised the grievant that she would have to switch her hours to either 6 a.m. to 2 p.m. or 2 p.m. to 10 p.m. The grievant certifies that Conrad assured her that she would remain in the Classification Department regardless of the shift she selected. The grievant e-mailed Conrad of her preference to work the 2 p.m. to 10 p.m. shift. On September 21, 2017, the grievant met with Conrad, who had prepared a memo assigning her to the 6 a.m. to 2 p.m. tour. The grievant advised Conrad that she had sent him an e-mail with her preference for the 2 p.m. to 10 p.m. shift, but Conrad had not yet seen her e-mail. Conrad told the grievant he would review the e-mail and get back to her.

On September 26, 2017, the grievant reported back to duty after being off on vacation for a few days. Conrad advised her that, effective immediately, she was transferred from Classification to the Record Room, which is in Processing and Courts. Conrad certifies there was a need for a supervisor

during the 2 p.m. to 10 p.m. shift in the Record Room. Conrad certifies that he assigned the grievant to the Record Room based on her extensive knowledge and experience in the Department, as the position requires critical experience including, but not limited to, the preparation and review of pertinent documents associated with identification functions for intakes and discharges of inmates/detainees, and that it was necessary that the Record Room supervisor work efficiently and effectively to ensure no mistakes regarding paperwork and the imputation and maintenance of digital records in the new e-Courts system.

In October 2017, the PBA filed a grievance alleging that the County violated the "Rights of Parties," "Work Schedule and Bidding" and "Past Practice" provisions of the CNA by transferring the grievant from a bided post in the Classification Department to the Record Room post without just cause or considering her seniority and in retaliation for her choosing a different shift than Conrad preferred. The grievance also asserts that there are several specialty units that are not on the 6 a.m. to 2 p.m. or 2 p.m. to 10 p.m. shifts and seeks to maintain the Classification Department on the 9 a.m. to 5 p.m. schedule, or to have all other specialty units placed on the 6 a.m. to 2 p.m. or 2 p.m. to 10 p.m. shift. The grievance seeks to have the grievant placed back in the Classification Department on her bided post of 9 a.m. to 5 p.m. The grievance was not

resolved at any of the internal steps of the parties' grievance procedure. On November 16, 2017, the PBA 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:

^{2/} The County filed an application for interim relief on July 31, 2018 to restrain an arbitration hearing scheduled for August 7. By letter of August 1, a Commission Designee dismissed the interim relief application as untimely. See N.J.A.C. 19:14-9.2.

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 the Commission should restrain arbitration because a public employer has a non-negotiable managerial prerogative to make shift assignments to accomplish its government policy goals. It argues that the Commission has found that seniority bidding cannot compromise a police department's ability to determine staffing levels and strengthen supervision, and that the grievant was assigned to the Record Room to strengthen supervision based on her experience and qualifications. The County contends that the PBA's request for arbitration is barred by the doctrines of res judicata and collateral estoppel because the Commission decisions in Hudson Cty., P.E.R.C. No. 97-16, 22 NJPER 328 (¶27167 1996) and Hudson Cty., P.E.R.C. No. 2016-8, 42 NJPER 113 (¶32 2015) held that the shift bidding clause was not mandatorily negotiable because it mandated shift assignments based solely on seniority without any language preserving management's right to deviate from the system to achieve its governmental policy goals. The County also asserts that there is currently no seniority shift assignment clause in the 2013-2017 CNA or the 2018-2022 MOA because the PBA was unsuccessful in seeking it during interest arbitration (IA-2012-043). Finally, the County asserts that the PBA cannot challenge an allegedly retaliatory shift assignment through the Article X "just cause" standard of the CNA and should instead challenge it through an unfair practice charge.

The PBA asserts that grievances concerning work and shift assignments are arbitrable as long as the employer's managerial needs are preserved. It argues that res judicata and collateral estoppel do not apply because the CNA provision found to be non-negotiable in Hudson Cty., P.E.R.C. No. 97-16 and Hudson Cty., P.E.R.C. No. 2016-8 is no longer contained in the parties' CNA. The PBA contends that this case is also distinguishable because the grievance alleges that the transfer was retaliatory in violation of the "just cause" clause in Article X of the CNA.

We first address the County's res judicata and collateral estoppel arguments. Res judicata is applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits. See Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd, NJPER Supp.2d 151 (¶134 App. Div. 1985). Collateral estoppel is applicable when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally, the same two parties, regardless of whether the causes of action were identical and bars relitigation of that particular question of fact. Id. We find that res judicata and collateral estoppel are not applicable. The cases cited by the County involve the same parties and a similar but distinct issue analyzed in different contexts.

In Hudson Cty., P.E.R.C. No. 97-16, the parties were in negotiations for a successor CNA and the Commission determined

that the then existing seniority shift bidding clause, Section 17.1, "is not mandatorily negotiable because it appears to mandate that shift assignments be based solely on seniority and does not appear to preserve management's right to deviate from a seniority shift assignment system to accomplish its governmental policy goals." In Hudson Cty., P.E.R.C. No. 2016-8, the same seniority shift bidding clause was at issue (and apparently had not been removed from the CNA), so the Commission relied on P.E.R.C. No. 97-16 to restrain arbitration in a narrow holding based on the unusual circumstance of the PBA attempting to arbitrate based on a CNA clause that the Commission had previously determined was not negotiable as written.

The instant case does not concern the negotiability of any specific contract language, but concerns a specific instance of a unit member allegedly being transferred from a bidded post in violation of past practice and multiple CNA provisions.^{3/} Thus, the question before us is whether an alleged agreement or past practice concerning shift bidding by seniority, if made, would so substantially limit governmental policy that it cannot be allowed to be enforced through grievance arbitration. Paterson.

^{3/} The former version of Section 17.1 of the CNA that was found non-negotiable in Hudson Cty., P.E.R.C. No. 97-16 and Hudson Cty., P.E.R.C. No. 2016-8 has not been retained in the 2013-2017 CNA or 2018-2022 MOA now in effect.

Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised.

Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified, P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd, 27 NJPER 357 (¶32128 App. Div. 2001); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd, NJPER Supp.2d 245 (¶204 App. Div. 1990). However, public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. "The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any agreed-upon seniority system must be assessed case-by-case" focusing on "the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented." Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19, 20 (¶30006 1998); see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

Where public employers have demonstrated a particularized governmental policy need to deviate from contractual shift, platoon, or tour of duty/assignment bidding clauses, the Commission has restrained arbitration. See, e.g., Union Tp.,

P.E.R.C. No. 2003-81, 29 NJPER 214 (¶63 2003) (chief certified qualifications and supervision problems and specific problems with two officers demonstrating need to deviate from seniority-based bidding for supervisory platoon selection); City of New Brunswick, P.E.R.C. No. 2003-37, 28 NJPER 578 (¶33179 2002) (governmental policy decision to increase supervisory experience on either side of third shift justified deviation from assignment bidding resulting in supervisor being transferred).

On the other hand, the Commission has declined to restrain arbitration of grievances alleging deviation from shift or assignment/post bidding clauses where the public employer has failed to demonstrate a need for special skills, qualifications, or specific training or supervisory objectives and has not otherwise shown how governmental policy would be significantly impeded by adhering to the alleged contractual seniority bid system. See, e.g., City of Trenton, P.E.R.C. No. 2014-18, 40 NJPER 202 (¶77 2013) (reassignment from administration unit to operations unit in violation of seniority bidding was arbitrable where there was no issue of special qualifications, and the employer did not demonstrate how governmental policy would be impeded); Burlington Cty., P.E.R.C. No. 2012-27, 38 NJPER 211 (¶73 2012) (officers could arbitrate failure to assign to Control 9 post based on seniority bidding where employer did not

demonstrate an issue of special qualifications or how managerial prerogatives were significantly compromised).

In this case, the grievant was asked by Deputy Director Conrad to choose from among two different shift options at her Classification Department post, but after she made her selection, Conrad transferred her to the Record Room. The grievant's certification alleges an arbitrary motive for her reassignment, while Conrad's certification states that she was assigned to supervise the Record Room based on her "extensive knowledge and experience in the Department." While Conrad's certification generally recites the desired qualifications and job responsibilities of a Record Room supervisor, there is no claim that the grievant was the only unit member qualified for the post or that she was specially qualified with particular skills that necessitated her placement in that post instead of other unit members. There is nothing in the record, for example, comparing the extent of the grievant's knowledge and experience to that of other sergeants and explaining the rationale for why her particular knowledge and experience was required on that particular shift and post to meet an operational objective. The County did not submit any evidence demonstrating a managerial need for special skills, qualifications, or specific training or supervisory objectives that would justify reassigning the grievant in alleged violation of the CNA and/or past practice.

Accordingly, the County has failed to demonstrate a particularized governmental policy objective that would be significantly impeded by adherence to an alleged agreement or past practice concerning assignment bidding or transfers. Paterson.

The County's argument concerning whether the CNA's "just cause" clause and standard apply to the underlying grievance dispute is an issue of contractual interpretation appropriate for the arbitrator. We also note that to the extent the PBA's grievance alleged retaliation for the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., such allegations fall within the Commission's unfair practice jurisdiction and are not relevant to a scope of negotiations analysis.

ORDER

The request of the County of Hudson for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 20, 2018

Trenton, New Jersey