

P.E.R.C. NO. 2019-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MULLICA,

Petitioner,

-and-

Docket No. SN-2018-052

PBA LOCAL 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township's request for a restraint of binding arbitration of a grievance filed by the PBA contesting the use of a Special Police Officer (SPO) during and after two weather-related events. Finding that arbitration over whether the Township deviated from negotiated overtime procedures by using an SPO instead of calling in PBA unit members on overtime would not significantly limit the Township's governmental interest in efficiently responding to increased call volumes from weather-related emergencies, 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, Gruccio, Pepper, De Santo & Ruth,
P.A., attorneys (Nicole J. Curio, of counsel and on the
brief)

For the Respondent, Sciarra & Catrambone, LLC,
attorneys (Christopher A. Gray, of counsel and on the
brief)

DECISION

On June 8, 2018, the Township of Mullica (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 77 (PBA). The grievance challenges the Township's use of a Class II Special Police Officer (SPO) during and subsequent to weather-related events on March 2 and March 7, 2018.^{1/}

^{1/} The Township and the PBA each incorrectly identified the second date in dispute as March 8, 2018. In a supplemental certification submitted on behalf of the Township dated July 26, 2018, Chief John Thompson certifies that the correct second date is March 7, 2018.

The Township has filed briefs, exhibits and two certifications of its Chief of Police, John Thompson (Thompson). The PBA filed a brief, exhibits and the certification of a patrol officer and former shop steward for the PBA, Anthony Lupinetti, Esq. (Lupinetti). These facts appear.

The PBA represents Patrolmen, Corporals, Investigators and Police Detectives, Sergeants, Detective Sergeants, Lieutenants and Matron/Stenographer I.^{2/} The Township and the PBA are parties to a CNA with a term of January 1, 2016 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article IX, entitled "Overtime," of the CNA provides in pertinent part:

A. Overtime

1. All time worked in excess of a regularly scheduled shift in one day shall be compensated at a rate of one and one half (1½) time the regular base salary. Compensation for overtime shall be in either pay or compensatory time at the officer's discretion at a rate on [sic] one and one half-hour for one hour worked. All time worked in excess of the regularly scheduled work period shall be compensated at a rate of one and one half (1½) the time worked and is to be computed as above and is to be compensated in pay or compensatory time, at an officer's discretion.

2/ All of whom are full-time regular police officers who have obtained a certificate from the New Jersey Police Training Commission, or are in the process of doing same, excluding the Chief of Police, Captain, Dispatchers, Records Clerks and any other employee of the Township.

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C. Overtime Scheduling

1. Distribution of overtime shall begin by seniority and rotate henceforth. If an officer refuses overtime, his name shall be skipped and proceed to the next senior man.

2. If an emergent situation arises and a shift is required to be filled (less than 24 hours notice) the officer on duty shall remain on duty to fill the vacancy for the first half of the shift and shall be compensated at the rate of 1 ½ times per Article IX, Paragraph A. If the oncoming officer refuses or cannot be contacted, the officer on duty shall remain on duty. Under no circumstances will the shift remain uncovered. If there is more than twenty-four (24) hour notice that the shift will be vacant, Section C1 shall be followed.

3. All time worked in excess of the normally scheduled workday shall be compensated at 1 ½ times the employee's salary in accordance with Article IX, Paragraph A.

[Emphasis added].

Article XX is entitled "Retention of Benefits."

Thompson certifies that on March 2, 2018, there was a weather emergency which caused the Police Department (Department) to receive an increased number of calls for assistance, starting at approximately 4:00 p.m. and lasting for a few hours. According to Thompson, four full-time officers were on duty, the normal staffing level for that time.

Thompson certifies the SPO is generally assigned as the School Resource Officer and on March 2, 2018 was working at the

time of the weather event and asked whether additional assistance was needed due to the increased call volume. Thompson further certifies that the SPO's duties at the school were almost completed and he made the decision to have the SPO stay on duty and assist during the emergency weather event for an additional 3 hours during which the SPO responded to two traffic-related calls.

Thompson also certifies that on March 8, 2018, another weather-related emergency event occurred which triggered a significant increase in the call volume, during which the Department was at normal staffing levels. Thompson certifies that since the SPO was already on-duty, he stayed beyond his normal shift to assist for an additional four hours during which he responded to one traffic-related call. Thompson further certifies that on March 7, 2018, two patrol officers worked overtime to assist with the increased call volume due to the storm emergency. In addition, Thompson certifies that a SPO, in the past, has been utilized in emergency situations to supplement staffing levels.

In support of the PBA's position, Lupinetti certifies that on the dates in question the regular patrol shift changes occur at 4:00 p.m. and that no officers were either asked or ordered to stay for overtime. According to Lupinetti, in prior emergencies the department would order the day shift to work overtime and/or

they would order employees to come in to work the overtime, but not on the dates of the weather events in question. No communications about possible overtime were communicated to patrol officers. Lupinetti asserts that the SPO worked a total of 9 hours over the two days, and was the primary responder to multiple calls each night.

On March 12, 2018, the PBA filed a step one grievance asserting that the Township violated the overtime and retention of benefits provisions of the CNA when it used an SPO on March 2 and March 7 to respond to a weather event instead of calling in officers on overtime. The grievance was denied at all levels.

On May 16, 2018, the PBA filed a Request for Submission to 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 unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme Court stated that the unit work rule typically applies to require negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. The objective of the rule is to provide a majority representative with an opportunity to negotiate over an acceptable alternative that would avoid a loss of jobs or a reduction in union membership. Id. at 576. However, the Court also ruled that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), must be applied to the facts of each particular unit work claim, which states as follows:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the

determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Local 195, 88 N.J. at 404-405.]

This dispute centers around the third prong of the Local 195 test. Thus, the question before us is whether the Township's governmental policy making powers would be significantly limited if the PBA's allegation that the Township deviated from negotiated overtime procedures by using an SPO during two weather-related emergencies instead of calling in officers on overtime was found to be mandatorily negotiable and legally arbitrable. Under the facts of this case we find that the Township's governmental policy making powers would not be significantly limited and thus the issue is mandatorily negotiable and legally arbitrable.

The PBA has an interest in preserving opportunities to earn overtime. The Township has an interest in responding to increased call volumes from weather-related emergent events in an efficient and expeditious manner. However, the record reveals that these concerns are not mutually exclusive. The Township has not asserted that officers were unavailable to respond to the weather events. Indeed, Thompson certified that he assigned two

officers on overtime to respond to the March 8, 2018 weather event. The Township has not provided an explanation as to why it did not attempt to secure an officer instead of the SPO to respond to the weather events. Thompson asserts that the SPO was available as he came off his shift at 4:00; however, Lupinetti certifies that officers were also available as they were concluding the daytime shift at 4:00.

This grievance might be found to be not mandatorily negotiable or legally arbitrable if the officers were not readily available to respond to the weather event. Somerset Cty., P.E.R.C. No. 2015-6, 41 NJPER 97 (¶33 2014) (finding that an emergent situation did not exist warranting deviation from mandatorily negotiable overtime procedures because qualified employees were available to perform the necessary functions). Or, it might be found to be not mandatorily negotiable or legally arbitrable if the SPO had special qualifications needed to respond to the weather event. Somerset Cty. Sheriff's Office, P.E.R.C. No. 2013-69, 39 NJPER 468 (¶148 2013) (finding that deviation from a negotiated seniority overtime allocation procedure was necessary when employees with special qualifications were needed to perform overtime tasks). However, those facts are not present here.

Finally, the Township relies on Howell Twp., P.E.R.C. No. 2013-68, 39 NJPER 465 (¶147 2013). In Howell Twp., the

Commission granted the Township's request for a restraint of binding arbitration of a grievance which challenged the Township's use of SPOs during and subsequent to a snow event, seeking lost overtime compensation for PBA officers. Id.

However, Howell Twp. is distinguishable as it stated that the use of SPOs was not for economic reasons. The record in the instant matter does not reflect whether the assignment of the SPO was for economic reasons. We deny the Township's request for a restraint of binding arbitration.

ORDER

The request of the Township of Mullica for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: January 17, 2019

Trenton, New Jersey