

P.E.R.C. NO. 2019-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RIVER EDGE,

Petitioner,

-and-

Docket No. SN-2018-050

PBA and SOA LOCAL 201,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of River Edge for a restraint of binding arbitration of a grievance filed by the PBA and SOA Local 201. The grievance challenges the Borough's removal of captain from the police department's table of organization. The Commission holds the Borough has a non-negotiable, managerial prerogative to set a table of organization, to determine staffing levels, including whether and when to fill vacancies, and to assign additional duties that are directly related to an employee's normal responsibilities.

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.

P.E.R.C. NO. 2019-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RIVER EDGE,

Petitioner,

-and-

Docket No. SN-2018-050

PBA and SOA LOCAL 201,

Respondent.

Appearances:

For the Petitioner, Cleary Giacobbe Alfieri Jacobs,
LLC, attorneys (Adam S. Abramson-Schneider, on the
brief)

For the Respondent, Law Offices of Albert H. Wunsch,
III, attorneys (Albert H. Wunsch, III, on the brief)

DECISION

On June 5, 2018, the Borough of River Edge (Borough) filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by PBA and SOA Local 201 (Local 201). The grievance asserts that the Borough violated the collective negotiations agreement (CNA) when it removed the position of captain from the police department's table of organization.

The Borough filed briefs, exhibits, and the certifications of Alan P. Negreann, Borough Administrator, and Tom Cariddi, Chief of Police. Local 201 filed a brief, exhibits, and the

certification of its counsel, Albert H. Wunsch, III. The following facts appear.

Local 201's PBA unit represents all full-time non-supervisory patrolmen and patrolwomen employed by the Borough's police department. Local 201's SOA unit represents the Borough's full-time law enforcement supervisory personnel, excluding the Chief of Police. Local 201's PBA and SOA units each are parties to a CNA with the Borough effective from January 1, 2015 through December 31, 2018. Both CNAs have grievance procedures that end in binding arbitration.

The CNA between Local 201 SOA and the Borough contains an Article 29, entitled "Annual Rate of Pay," which provides salary schedules for the ranks of sergeant, lieutenant, and captain. On June 5, 2017, the Borough passed an ordinance to remove the position of captain from the police department's table of organization. Chief Cariddi certifies that the Borough has not employed a captain since 1997. He certifies that the June 5, 2017 removal of the captain position from the table of organization did not affect the duties or responsibilities of other police officers and did not change the chain of command as the position had been vacant for 20 years.

On June 14, 2017, Local 201 filed a grievance contesting the Borough's removal of the captain position from the police department's table of organization. The grievance alleges that

"certain duties and responsibilities that were once performed by a Captain, currently being performed by two Lieutenants and a civilian secretary, are being shifted to a newly created Sergeant position" and that the Borough has violated the CNA by removing the captain position. As a remedy, the grievance requests that the captain position be placed back in the table of organization. On August 14, Local 201 filed a request for submission of a panel of arbitrators with the Commission. 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.

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 Borough asserts that its removal of the captain position from the police department's table of organization is not negotiable because it is preempted by N.J.S.A. 40A:60-6 and N.J.S.A. 40A:14-118, which grant it the power to create offices and positions and to appoint police officers by ordinance. The

Borough also argues that it has a managerial prerogative to set and configure its table of organization.

Local 201 asserts that the elimination of the captain position from the police department's table of organization is permissively negotiable. It argues that Local 201 has an interest in including a position that encompasses unique responsibilities and duties to be compensated at a specific salary level, while the Borough has not asserted any interest for the elimination of the captain position other than its right to organize the police department as it sees fit. Local 201 contends that there was no reason from a managerial standpoint why the Borough could not remove the position after the contract expires and the parties were in negotiations for the next CNA. Finally, Local 201 asserts that there is no clear cut chain of command and that there are out of rank pay issues caused by the absence of the captain position.

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 40A:60-6 is a general statute setting forth the powers of a municipal council, including the creation of offices and positions, subject to general law. Such general law includes N.J.S.A. 40A:14-118, the law governing the establishment of municipal police departments. N.J.S.A. 40A:14-118 provides that a municipality may create a police department by ordinance, and that "[t]he ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force."

N.J.S.A. 40A:14-118 is a general authorizing statute that does not preempt negotiations or arbitration over an otherwise negotiable term and condition of employment. Borough of Roselle and Roselle Bor. PBA, Local No. 99, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd, NJPER Supp.2d 97 (¶80 App. Div. 1981); Rochelle Park Tp. and Rochelle Park PBA Local #102, P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd, NJPER Supp.2d 198 (¶176 App. Div. 1988); West Caldwell Tp., P.E.R.C. No. 2011-63, 37 NJPER 56 (¶22 2011); West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000).

Here, however, statutory preemption is not determinative as applying the Paterson balancing test, we conclude that the

Borough has a managerial prerogative to set a table of organization. The Commission has consistently held that a public employer's table of organization is non-negotiable. City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983); see also Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984); and City of Plainfield, P.E.R.C. No. 92-58, 18 NJPER 40 (¶23014 1991). Paterson itself involved a table of organization issue in which the police union sought to enforce a clause mandating that vacancies in the table of organization be filled. Rather than finding that the general authorizing statutes concerning a municipality's control of its police force preempted negotiations, the Supreme Court held that the clause was not arbitrable because it placed "substantial limitations on the City's policy-making authority" to make "decisions about how to organize and deploy [its] police force." Paterson, 87 N.J. at 96-98.

To the extent Local 201's grievance could be construed as contesting the Borough's decision not to fill the captain position, it is also non-negotiable. A public employer has a managerial prerogative to determine staffing levels, including whether and when to fill vacancies. See, e.g., Paterson, at 97-98; Borough of Paramus and PBA Local No. 186, P.E.R.C. No. 83-58, 8 NJPER 658 (¶13312 1982), aff'd, NJPER Supp.2d 139 (¶121 App. Div. 1984) (vacant traffic police position not arbitrable).

Furthermore, to the extent Local 201's brief alleges increased workloads for superior officers due to the vacancy and removal of the captain position, public employers have the prerogative to assign additional duties that are directly related to an employee's normal responsibilities. State Judiciary and Probation Association of New Jersey, P.E.R.C. No. 2013-90, 40 NJPER 65 (¶24 2013), aff'd, 41 NJPER 416 (¶129 App. Div. 2015) (decision not to fill four vacant positions, but to reallocate work among remaining staff and assign new supervisory functions within their job descriptions was not arbitrable); Springfield Tp., P.E.R.C. No. 2006-15, 31 NJPER 294 (¶115 2005) ("The Township had a managerial prerogative to eliminate the lieutenant position in the investigative division and to determine that its supervision needs in that division require the performance of sergeant-level duties.")

Local 201's brief also makes allegations of out-of-title work and requests additional compensation. However, Local 201 provided no certifications or other evidence to suggest that unit members were required to work longer hours or perform duties outside of their job descriptions. The Commission has consistently refused to allow arbitration of alleged negotiable impacts that were not supported by a certification. State Judiciary, supra (with no allegation or certification that staff were required to work longer hours or outside of job duties,

union could not arbitrate allegations of increased workload, compensation, or safety); see also Wallington Bor., P.E.R.C. No. 2013-80, 39 NJPER 499 (¶159 2013) (arbitration restrained where the PBA did not submit a certification containing facts to support its argument that the workloads of the police officers increased or that their safety was impacted). Therefore, this matter is not mandatorily negotiable or legally arbitrable.

ORDER

The request of the Borough of River Edge for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Papero recused himself. Commissioner Bonanni was not present.

ISSUED: February 28, 2019

Trenton, New Jersey