

P.E.R.C. NO. 2020-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2019-059

PBA LOCAL 243,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Atlantic County Sheriff's Office for a restraint of binding arbitration of a grievance filed by PBA Local 243 which asserts the County violated the parties' CNA by failing to safely and adequately staff the Civil Courts Building in Atlantic City and the Criminal Courts Complex in Mays Landing, resulting in noncompliance with the minimum staffing requirements of the New Jersey Supreme Court's Model Court Security Plan. The Commission finds that minimum staffing levels are generally not mandatorily negotiable, and the PBA articulated no safety-related remedy other than an increase or alteration to the County's staffing levels, which the Commission has consistently held cannot be obtained through binding arbitration. The Commission further finds that the Model Plan's requirements, and the County's disputed compliance therewith, fall within the County's managerial prerogative to determine 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, Atlantic County Law Department
(Jennifer P. Starr, Assistant County Counsel)

For the Respondent, Crivelli & Barbati, LLC, attorneys
(Michael P. DeRose, of counsel and on the brief)

DECISION

On April 5, 2019, the Atlantic County Sheriff's Office (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 243 (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) by failing to safely and adequately staff the Civil Courts Building in Atlantic City and the Criminal Courts Complex in Mays Landing.

The County filed briefs, exhibits and the certification of Undersheriff Richard Komar, Captain James Sharkey, and its counsel Jennifer P. Starr, Esq. The PBA filed a brief, an exhibit and the certification of its President, Andrew Freeto. These facts appear.

The PBA represents all Sheriff's Officers and Sheriff's Investigators, but excluding the Sheriff, Undersheriff, Chief Sheriff's Officer, Sergeants, Captains, and Lieutenants. The County and PBA were parties to a CNA with a term of January 1, 2013 through December 31, 2017. The parties have also entered into a Memorandum of Agreement with a term of January 1, 2018 through December 31, 2022. The PBA's grievance alleges violation of CNA Articles 1.04 ("Employee Rights") and 3.01 ("Grievance Procedure"). The grievance procedure ends in binding arbitration.

Komar, the Undersheriff in charge of operations for the criminal and civil courthouses, certifies that the PBA filed a grievance on November 9, 2018 alleging that staffing shortages created unsafe conditions and that posts were not fully and properly staffed at the courthouses. The grievance also alleges that the minimum staffing requirements of the Model Court Security Plan (Plan) were not being met.^{1/} The grievance seeks

1/ The "Security Procedures in Courthouse Facilities Addenda to Model Court Security Plan" approved by New Jersey Supreme Court and issued in April 2006 provides, in pertinent part: "There should be at least one Sheriff's Officer assigned to every courtroom that is in use by a judge." Additionally, the "Administrative Determination by the Supreme Court on the Report and Recommendations of the Statewide Judiciary Security Committee" dated April 21, 2015 amended the language of the Model Security Plan as follows: "There shall be a uniformed/armed Sheriff's officer or armed special law enforcement officer present in the room of every hearing officer proceeding."

that "all positions are staffed with enough officers to safely do our job and protect the staff and the public."

Komer certifies that he asked the PBA for more specific information regarding their allegation that the County was not in compliance with the Plan. In response to Komar's request, the PBA provided a list of posts and the number of officers they believed should be assigned to each courtroom. Komar certifies that the Plan only mandates an officer in every courtroom where there is a proceeding with a judge or hearing officer. Komar asserts that the County meets and exceeds the Plan's requirement, certifying that in addition to the officer already assigned to the courtroom when it is in use by a judge, an officer is assigned per incarcerated defendant in the courtroom. Komar further certifies that when staffing levels for court security are short, the County will pull from their warrants squad and their task force officers to cover posts. Komar certifies that he denied the PBA's grievance because staffing is management's prerogative and it appeared the union was seeking to dictate to management how to staff the courthouse.

Freeto certifies that the PBA's grievance challenges the County's continuing failure to safely and adequately staff courthouses. Freeto certifies that the County's past practice was to assign a minimum of three officers per courtroom at the Mays Landing Courthouse. Freeto further certifies that Mays

Landing courtrooms are only being staffed by, in most cases, two officers and it is not uncommon for there only to be one officer assigned. Freeto certifies that the Atlantic City courthouse's past practice was to assign one Sheriff's officer per courtroom, but that it is now common for only one Sheriff's officer to be responsible for securing multiple courtrooms, which is a violation of the Plan.

Freeto asserts that the County's failure to maintain minimum staffing levels resulted in an attack on a deputy public defender in a Mays Landing courtroom on May 14, 2019. Freeto certifies that the lone Sheriff's officer assigned to that courtroom attempted to subdue the defendant and was injured. Freeto certifies that the PBA's grievance is seeking a remedy that would require the County to comply with the minimum staffing levels it has traditionally maintained (i.e. three officers per courtroom rather than just one) so incidents like the May 14 attack can be prevented.

Sharkey certifies that the Plan only requires one officer for each courtroom in use by a Judge or Hearing Officer, which has been the County's standard practice. Sharkey disputes Freeto's claim of one officer being assigned to multiple courtrooms in Atlantic City. Sharkey further certifies that in his fifteen years of employment with the County, there has never been a practice of assigning a minimum of three officers to each

courtroom in Mays Landing. Sharkey certifies that doing so would leave insufficient staff to cover remaining assignments.

Sharkey further disputes Freeto's claims regarding the May 14 incident in which a public defender was attacked by a defendant, certifying that the video footage showed two officers were present in the courtroom rather than only one. Sharkey asserts that having more officers in the courtroom could not have prevented the attack.

After Komar denied the grievance, the PBA submitted a request for submission of a panel of arbitrators on December 20, 2018. 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 merits of the grievance or any contractual defenses that the County 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 the government's policy-making powers.

The County argues, citing numerous Commission decisions, that it has a non-negotiable managerial prerogative to determine minimum staffing levels and that allowing the grievance to be arbitrated would significantly interfere with the County's policy making powers. The County argues that the CNA provisions the PBA claims the County violated are not safety-related and that the PBA makes only general, non-specific allegations of unsafe conditions caused by the County's staffing decisions. Moreover, the County disputes the PBA's claim that assigning three officers per courtroom was the established past practice, and disputes the feasibility of such staffing. Notwithstanding the credibility of the PBA's claim, the County argues even if there had been previously established minimums, the Commission has held that the employer's decision to change those established minimums cannot be challenged through binding arbitration. The County asserts that the only remedy the PBA seeks is to set staffing levels at the level it deems necessary, which is the County's managerial prerogative and cannot be challenged through binding arbitration.

The PBA argues that it is not seeking an increase in staffing beyond the minimum levels that the County had

traditionally maintained and those required by the Plan to ensure a safe environment at the County courthouses. Citing Commission precedent, the PBA argues that binding arbitration is permitted on safety issues only where employer staffing policies would not be changed by the arbitral remedy. The PBA argues that seeking to return staffing to traditional levels and compliance with the Plan are safety-related arbitral remedies that could prevent dangerous incidents like that of May 14, 2019.

An employer's minimum staffing levels are generally not mandatorily negotiable. See Bergen Cty. and PBA Local No. 134, Bergen Cty. Sheriff's Officers, NJPER Supp.2d 143 (¶128 App. Div. 1984), aff'g P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983) (despite impact on safety, negotiations proposal that would always require that two officers transport and guard prisoner taken to County hospital's secure ward not mandatorily negotiable); see also Paterson; Bor. of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); Bor. of Wallington, P.E.R.C. No. 2013-80, 39 NJPER 499 (¶159 2013).

However, grievances seeking to enforce alleged agreements to provide a safe work environment have been held to be legally arbitrable. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998); State of New Jersey (Greystone Park Psychiatric Hospital), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989). But these cases

also held that an arbitral award could not order an increase in staffing since the determination of staffing levels is a managerial prerogative. See Town of Harrison, P.E.R.C. No. 2004-31, 29 NJPER 510 (¶162 2003); Cty. of Mercer, P.E.R.C. No. 2006-59, 32 NJPER 39 (¶21 2006); Tp. of Livingston, P.E.R.C. No. 2008-14, 33 NJPER 229 (¶87 2007).

Where a grievance has challenged staffing decisions, but seeks no safety-related remedy that can be granted without affecting staffing levels, we have restrained arbitration. Cty. of Middlesex, P.E.R.C. No. 2013-46, 39 NJPER 269 (¶92 2012). Here, like Middlesex, the PBA's grievance seeks through binding arbitration to compel the County to increase the number of Sheriff's officers assigned to the County's facilities to conform with alleged past minimum staffing. The PBA has articulated no safety-related remedy other than an increase or alteration to the County's staffing levels, which we have consistently held cannot be sought through binding arbitration. Even if the County had deviated from an alleged past practice of staffing three Sheriff's officers per courtroom, the County had a managerial prerogative to change its staffing decision and such a decision is not legally arbitrable. We have consistently held that changes to police officer staffing levels, whether permanent or temporary, alleged to violate employer-set minimums, may not be challenged through binding grievance arbitration. Bor. of Glen

Ridge, P.E.R.C. No. 2014-16, 40 NJPER 197 (¶75 2013); see also City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012).

The PBA's claim that the County's staffing decisions violated the Plan do not make the staffing levels mandatorily negotiable. It is disputed whether the County has consistently complied with the Plan's minimum requirement of one officer per courtroom. Nevertheless, the Plan is within the employer's managerial prerogative to determine minimum staffing levels and cannot be challenged through binding arbitration. Thus, we restrain arbitration because the County's staffing decisions are neither mandatorily nor permissively negotiable.

ORDER

The request of the Atlantic County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Papero recused himself.

ISSUED: December 19, 2019

Trenton, New Jersey