

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Petitioner,

-and-

Docket No. SN-2019-067

WEST NEW YORK POLICE
SUPERVISORS ASSOCIATION, INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the request of the Town of West New York for a restraint of binding arbitration of a grievance filed by the West New York Police Supervisors Association, alleging that the Town violated the parties' collective negotiations agreement, past practice and disciplinary process when it temporarily transferred the two grievants to different shifts, pending the Town's investigation into a workplace sexual harassment complaint. The Commission grants the request as to the decision to transfer the grievant who was involved in the workplace complaint, finding that allowing arbitration over that non-disciplinary action would substantially interfere with the Town's policy of separating the employees involved. But the Commission finds that an arbitrator may determine whether the other grievant affected by the transfer, who was not involved in the workplace complaint, was entitled to an opportunity to exercise alleged seniority rights in shift selection and, if so, whether he was denied that opportunity, after the Town made the non-mandatorily negotiable decision to temporarily separate the employees involved in the workplace complaint.

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. 2021-10

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Appearances:

For the Petitioner, DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys (Andres Acebo, of counsel and on the brief; Lesley Sotolongo, on the brief)

For the Respondent, Mets, Schiro & McGovern, attorneys (Leonard C. Schiro, of counsel and on the brief)

DECISION

On May 9, 2019, the Town of West New York (Town) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the West New York Police Supervisors Association, Inc. (Association). The grievance asserts that the Town violated the parties' collective negotiations agreement (CNA), past practice and the disciplinary process when the grievants, Lieutenants W.K. and J.A., were transferred to different shifts, pursuant to an involuntary temporary transfer ordered by the Town's Police Director, Robert Antolos, on May 23, 2018.

The Town filed briefs, exhibits and the certification of Antolos. The Association filed a brief, an exhibit and the certification of its counsel, Leonard C. Schiro.^{1/} These facts appear.

The Association represents all Police Supervisors in the West New York Police Department. The Town and Association are parties to a CNA in effect from January 1, 2009 through December 31, 2014, as extended, modified and amended by a Memorandum of Agreement (MOA) effective from January 1, 2015 through December 31, 2019. The negotiated grievance procedure ends in binding arbitration.

Antolos certifies that in May 2018, the West New York Police Department received a workplace complaint involving grievant J.A. and a subordinate law enforcement officer. Upon receipt of the complaint, the Department initiated an administrative investigation of the matter, and in accordance with past practice and the Department's Standard Operating Procedure (SOP), Harassment in the Workplace, separated the employees involved.

Antolos certifies that on May 23, 2018, J.A. was informed, via a temporary transfer order (TTO), that he would be

^{1/} Schiro's certification recounts the history of an extension request and filing delay, facts that are not related to the underlying dispute or supportive of the legal arguments set forth in the Association's brief. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts recited in a party's brief be supported by certification(s) based upon personal knowledge.

temporarily transferred from the 8:00 a.m. to 4:00 p.m. shift to the 12:00 a.m. to 8:00 a.m. shift, resulting in no change to his hourly pay. The only Lieutenants affected by the TTO were J.A. and W.K., whose shifts were swapped. The TTO did not specify a reason for the temporary transfers. Antolos certifies that he ordered J.A.'s transfer after evaluating the Department's personnel needs, the nature of the complaint that prompted the internal investigation, and the Department's overall operational obligations to ensure no interference or undermining of its law enforcement activities. Antolos further certifies that the transfer was done pursuant to the Department SOP to immediately reduce work contact between the subject employees pending an investigation, and not as a form of discipline against the grievants or any other member of the Department.

Antolos also certifies that there are only three shifts as outlined in the parties' CNA: 8:00 a.m. to 4:00 p.m., 4:00 p.m. to 12:00 a.m., and 12:00 a.m. to 8:00 a.m. Before implementing the TTO, a volunteer was first requested, and "when no one stepped forward," Antolos ordered the involuntary TTO "pursuant to employee seniority." Antolos explains that W.K. was chosen to swap shifts with J.A. as a consequence of the fact that, to the best of Antolos' recollection, W.K. had bid for the day shift when the shifts were originally bid and assigned for the year, but did not get it due to J.A.'s seniority. No pay differential

resulted from the transfer since the CNA does not provide for premium pay or shift differentials. Antolos also certifies that for a "considerable period of his temporary shift reassignment," J.A. was out on sick leave.

Antolos further certifies that the decision to transfer the grievants was consistent with the Town's past practice and the Town's managerial prerogative to assign, organize, and transfer police officers to satisfy its governmental policy determinations of preserving the integrity of the Department operations and to ensure that the public safety and welfare was best served.

A formal grievance was filed on May 25, 2018, alleging an improper transfer in violation of the parties' CNA, past practice and disciplinary process. On June 5, the grievance was denied.

On June 14, 2018, the Association filed a Request for 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 merits of the grievance or any contractual defenses that the City 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.

Because this dispute involves a grievance, arbitration is permitted if the subject of the dispute 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 we conclude that the SOA's 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.

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. City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2004) (declining to restrain binding arbitration of grievances seeking to enforce alleged past practice of permitting firefighters to choose shift assignments based upon seniority when all qualifications are equal and of returning them to those assignments after extended sick leave/light duty). See also, 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 Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); 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). "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." City of Hoboken, supra; see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

Absent a showing by the public employer of a need for special skills, qualifications, or specific training or supervisory objectives in connection with a transfer or reassignment decision, or otherwise a showing that governmental policy would be significantly impeded by the application of seniority-based shift and post bidding systems to such decisions, the Commission has declined to restrain arbitration of grievances alleging deviations from such systems. See, e.g., City of Trenton, P.E.R.C. No. 2014-18, 40 NJPER 202 (¶77 2013) (schedule change and reassignment from administration unit to operations unit was arbitrable where no issue of special qualifications was present); Bedminster Tp., P.E.R.C. No. 2013-94, 40 NJPER 72 (¶28 2013) (reassignment to ensure greater supervision of officer demoted for disciplinary reasons was non-arbitrable policy decision, but seniority-based issue of which officer would fill

demoted officer's former shift was subject to binding arbitration absent evidence that grievant was the only officer available).

Here, the Town asserts that "shift transfers of police officers in response to an internal investigation is an inherent managerial prerogative and outside the scope of negotiations, so long as it does not result in loss of pay and is not a disciplinary action." We agree, and find that the Town's non-disciplinary decision to temporarily separate employees who are the subject of a workplace complaint while that complaint is being investigated is not mandatorily negotiable or legally arbitrable. The Association has not refuted Antolos' certification that J.A.'s temporary transfer was not disciplinary and resulted in no loss of pay, and that Antolos ordered the transfer after evaluating the nature of the workplace complaint involving J.A. as well as the Department's personnel needs and overall operational obligations. Under these facts, we find that allowing arbitration over J.A.'s transfer would substantially interfere with the Town's policy regarding the separation of employees involved in workplace complaints stemming from sexual harassment. Therefore, we restrain arbitration of the grievance to the extent it relates to J.A.'s transfer.

Next, we turn to the Association's contention that in effectuating that separation the Town violated a seniority shift selection provision that requires that shifts be assigned by

seniority when all qualifications are equal. We address this issue only as it relates to W.K., who was not involved in the workplace complaint that prompted J.A.'s transfer.

The parties' CNA and MOA are silent about shift allocation by seniority. But the Town appears to acknowledge the existence of a seniority-based shift-bidding and assignment practice, in that Antolos variously states in his certification that W.K. had "bid for the day shift and did not get it due to . . . J.A.'s seniority," and that an involuntary "temporary shift transfer was ordered pursuant to employee seniority."

The fact that the Town chose to swap their shifts indicates that W.K. and J.A. are equally qualified to perform the duties of either shift. But the Town has not asserted that W.K. was the only other officer, besides J.A., who was qualified to perform the duties of J.A.'s day shift; or that the decision to place W.K. onto that shift was dictated by any other requirement for special skills, qualifications, or specific training unique to W.K., or other supervisory objectives specific to W.K. The Town also fails to articulate how governmental policy would have been significantly impeded by allowing W.K. to exercise his seniority rights in shift selection, given that he was not involved in the workplace complaint.

As it relates to W.K., the remaining issue then is the Town's assertion that the transfer was done pursuant to employee

seniority, a claim the Association disputes. We find that an arbitrator may determine whether W.K. was entitled to an opportunity to exercise seniority rights in shift selection and, if so, whether he was denied that opportunity, after the non-mandatorily negotiable decision was made to separate the employees involved in the workplace complaint by means of a temporary shift transfer. The Town may raise any operational concerns to the arbitrator in response to the Association's seniority claims. Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998).

ORDER

The request of the Town of West New York for a restraint of binding arbitration is granted with respect to the decision to temporarily transfer J.A. pending the investigation of a workplace complaint involving J.A. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 14, 2020

Trenton, New Jersey