

P.E.R.C. NO. 87-161

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket No. SN-86-66

ATLANTIC CITY POLICEMEN'S
BENEVOLENT ASSOCIATION, LOCAL
NO. 24,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance which the Atlantic City Policemen's Benevolent Association, Local 24 filed against the City of Atlantic City. The grievance alleged the City violated its collective negotiations agreement with the PBA when it reassigned a police officer from patrol duties to internal security duties. The Commission finds that the substantive decision to transfer or reassign an employee is preeminently a policy determination and beyond the scope of negotiations and binding arbitration. The Commission further finds that the transfer, under the circumstances, was not disciplinary.

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Petitioner,

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ASSOCIATION, LOCAL NO. 24,

Respondent.

Appearances:

For the Respondent, Patino-Treat & Rosen, Esqs.
(Louis C. Rosen, of counsel)

For the Charging Party, Howard Casper, Esq.

DECISION AND ORDER

On December 12, 1985, the City of Atlantic City filed a Petition for Scope of Negotiations Determination. It seeks to restrain binding arbitration of a grievance which the Atlantic City Policemen's Benevolent Association, Local No. 24 ("PBA") has filed. The grievance alleges that the City violated its collective negotiations agreement with the PBA when it reassigned a police officer from patrol duties to internal security duties.

The City has filed a brief and documents. The PBA has not.^{1/} These facts appear.

^{1/} Counsel for the PBA was afforded several opportunities to file a brief. The last deadline expired March 12, 1987.

The PBA is the majority representative of all the City's police officers. The City and the PBA have entered a collective negotiations agreement covering patrol officers effective from January 1, 1985 through December 31, 1987; the grievance procedure ends in binding arbitration. The PBA has demanded arbitration of a grievance alleging that the transfer of police officer Dennis McGee was "unjust" and constituted a disciplinary action taken "without due process" and "for no substantiated reasons."^{2/} The grievance alleges that the transfer has deprived McGee of opportunities for extra compensation assignments including muster pay, court time, casino details and overtime, which are normally available to officers assigned to patrol duties. The grievance describes the internal security assignment as "light duties" involving clerical tasks and the distribution of visitors' passes.

The City contends that the assignment was made because Officer McGee was often sick or injured when performing patrol duties. The City states that he frequently used paid sick and injury leave and was described by the police chief (in response to the grievance) as a "high risk employee for patrol." The City cited his use of sick and injury leave as a significant cost factor. The

^{2/} The grievance does not refer to any portion of the collective agreement. Article V.A. of the agreement provides that "the City shall not discipline any employee without just cause. In all investigations or conferences relating to discipline or the application of discipline, the employee shall have the right to representation."

City disclaims any intent to discipline McGee and argues, citing Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983), that since it has the right to assign an especially qualified officer to a particular duty, it may remove an unsuitable officer from a particular duty.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154]

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.^{3/}

First, it must be determined whether the particular item in dispute is controlled by a

^{3/} The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16(e)(4) provides for a permissive as well as a mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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.

[Id. at 92-93; citations omitted]

The substantive decision to transfer or reassign an employee is "preeminently a policy determination" and beyond the scope of negotiations or binding arbitration. Local 195; see also, Ridgefield Park. This is true even where a transferred employee loses negotiated shift differentials or premium pay. Warren Cty. Freeholders Bd., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985).

However, under N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a disciplinary dispute if the disciplined employee does not have an alternate statutory appeal

procedure for contesting that determination.^{4/} We have considered the arbitrability of alleged disciplinary transfers or reassignments several times.

In City of East Orange, P.E.R.C. No. 86-70, 12 NJPER 19 (¶17006 1985) we restrained arbitration of the transfer of a police captain from the day to the night shift. We concluded that the transfer was not disciplinary as it was a part of a transfer of eight superior officers made to improve departmental operations.

In Hudson Cty. ("Hudson I"), P.E.R.C. No. 86-147, 12 NJPER 531, 532 (¶17199 1986), we restrained arbitration of transfers precipitated by the County's elimination of a shift because of lack of work and supervisory personnel. Although there were statements that employees had been asleep or watching television during the shift, no reprimands had been issued or charges brought and we concluded that "[t]he evidence supplied to us does not reflect any disciplinary action taken against any one of the affected employees on either an individual or group basis."

In Cape May Bridge Comm., P.E.R.C. No 84-133, 10 NJPER 344 (¶15158 1984), aff'd App. Div. Dkt. No. 5286-83T6 (7/9/85), we restrained arbitration of a grievance contesting an employee's

^{4/} The City noted that after McGee's reassignment, Civil Service performed a desk audit and directed that McGee be reassigned to other duties consistent with the Chief's directive that he not be assigned to patrol. However, the City has not argued that arbitration of a transfer allegedly made for disciplinary reasons would be preempted.

transfer from maintenance to toll-taking. The transfer occurred because a series of safety violations and accidents demonstrated that the employee could not operate mechanical equipment safely.

In Warren, we found that a shift reassignment made to resolve security problems, increase efficiency and correct improper work habits was not arbitrable.

In Bernardsville Bd. of Ed., P.E.R.C. No. 86-47, 11 NJPER 688 (¶16237 1985), we restrained arbitration of a secretary's transfer. The transfer was not a demotion and did not involve a loss of pay, and there was no substantiation of the employer's alleged disciplinary motive.

In contrast, in Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986), we found that temporary shift changes were part of a series of disciplinary responses to misconduct and poor performance. We allowed arbitration of the reassignments, but noted that the County could argue in arbitration that the changes were justified in light of the employees' abilities and the employer's operational needs.

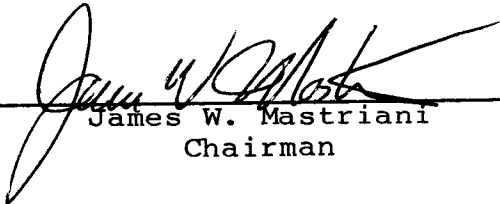
In a slightly different context, we refused to restrain arbitration in Park Ridge Bor., P.E.R.C. No. 87-55, 12 NJPER 851 (¶17328 1986), where the employer had denied the grievant the opportunity to work overtime on Saturday because of alleged excessive absenteeism. While arbitration was sought on the ground that the employer's action was disciplinary, we found that the dispute involved the arbitrable issue of overtime allocation.

Unlike Hudson I, Warren and East Orange, the reassignment in the instant case focuses on one individual. However, like Cape May and Bernardsville, the employer has advanced reasons related to the employee's lack of suitability to perform in his former assignment. The PBA's grievance merely alleges, without any further substantiation, that the motive was disciplinary. There has been no demotion or reduction in base pay. The loss of shift differentials and opportunities for premium pay do not in themselves evidence discipline. As the PBA's grievance acknowledges, McGee's disciplinary record is clean. We do not find that the City's reassignment of McGee is a sanction which would be arbitrable pursuant to N.J.S.A. 34:13A-5.3.

ORDER

The City's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
June 17, 1987
ISSUED: June 18, 1987