

P.E.R.C. NO. 2003-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEW BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2002-56

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 23A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of New Brunswick for a restraint of binding arbitration of a grievance filed by Policemen's Benevolent Association, Local No. 23A. The grievance alleges that the City violated a contract provision on job assignments. The Commission concludes that 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. However, public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. The Commission holds that, under all the circumstances, enforcing an alleged agreement to base supervisory transfers on seniority rather than experience would substantially limit the City's policymaking power.

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, Schenck, Price, Smith & King, L.L.P.,
attorneys (Kathryn V. Hatfield, on the brief)

For the Respondent, Abramson & Liebeskind Associates
(Marc Abramson, on the brief)

DECISION

On May 13, 2002, the City of New Brunswick petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Policemen's Benevolent Association, Local No. 23A. The grievance alleges that the City violated a contract provision on job assignments.

The parties have filed briefs and exhibits. The City has filed the certification of its police director. These facts appear.

The PBA represents sergeants, lieutenants and captains. The parties' last contract was effective from January 1, 1998 through December 31, 2001. The parties have agreed upon, but not

executed, a successor contract. The grievance procedure ends in binding arbitration.

Article XXVIII recognizes management's right to transfer employees for good cause and to determine employee qualifications.

Article XXXI states that patrol division positions shall be selected or assigned by seniority except where special skills and/or qualifications are required or emergency dictates a deviation from seniority.

Each patrol officer works a schedule of four days on duty followed by four days off duty. Each of the four shifts in the patrol division has two Sides -- Side A and Side B -- and each Side has approximately 10 officers and two sergeants.

On November 27, 2001, the police director issued Special Order 01-48, announcing 10 transfers effective January 13, 2002. Sergeant Andrew Weiss was to be transferred from Side A, Squad 3 to Side B, Squad 7. He was to remain on the third shift; that shift runs from 4:45 p.m. to 3:00 a.m.

According to the police director's certification, Weiss was transferred to even out the mix of supervisory experience on Sides A and B. Before the transfer, the two most experienced sergeants (Weiss and Burns) were assigned as the shift supervisors on Side A and the two sergeants with the least supervisory experience (Sabo and Milligan) were assigned as the shift supervisors on Side B. The transfers of Weiss to Side B and Milligan to Side A changed that mix of experience. The police

director further certified that the department tries to honor each officer's first choice in shift assignments, but it does not permit an officer to choose which Side he or she will work on.

The PBA has not filed a certification, but it does dispute some of the facts in the police director's certification. Its brief asserts that Milligan was not reassigned to Side A, third shift, and that this position remains unfilled. The brief also asserts that there was no effort to even out the mix of supervisory experience since the differences in the sergeants' years of experience were minimal as evidenced by the dates each one became a sergeant -- Burns (1996), Weiss (1998), Milligan (1999), and Sabo (1999) -- and since Sabo became a lieutenant in 2002. We note these factual assertions, but do not consider them further absent a certification countering the police director's certification.

On December 11, 2001, the PBA filed a grievance. The grievance alleges that Weiss' transfer violated Article XXXI and seeks to have that transfer rescinded.

On December 12, 2001, the police director responded to the grievance. He wrote that Weiss' transfer was determined by assessing his skill and experience and the department's staffing needs for the position of shift supervisor on both Sides of Weiss' chosen shift. The director denied the grievance.

On January 22, 2002, the PBA demanded arbitration. Its demand identified the grievance as: "[v]iolation of shift selection and seniority (positions)." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

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 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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.... 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]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least 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 policymaking powers.

The City argues that it has a managerial prerogative to make assignments within a shift to improve supervision, efficiency, and accountability. The PBA responds that the differences in supervisory experience are minimal and that enforcing the seniority provision with respect to Weiss would not substantially limit the City's policymaking powers. The City replies that the employees' right to negotiate over selection of shifts and changes in hours differs from the employer's right to make assignments within the same shift to meet the governmental policy goal of matching the best qualified employees to particular jobs.

In 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), we reviewed the case law concerning shift bidding systems. 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. See, e.g., 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). However, public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park Ed Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).

As we said in Camden, the interplay between these principles must be assessed case by case by focusing on the wording of a contract proposal or the nature of an arbitration dispute given the facts and arguments presented. 25 NJPER at 435; Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998); see also City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

In Camden, we drew a distinction that is especially relevant to the facts in this case: the distinction between shift selections and job assignments. A change in shifts changes the

hours an employee works; a change in an assignment within a shift may change an employee's duties but not his or her work hours.

See Burlington Cty., P.E.R.C. No. 2000-70, 26 NJPER 121 (¶31052 2000).

In this case, the transferred sergeant's shift and work hours have not changed. Nor have the sergeant's position or job duties changed. The only apparent change is that the sergeant supervises different officers. That change resulted from a governmental policymaking decision to rebalance the mix of supervisory experience for each side on the third shift. We will not secondguess the wisdom of that decision or its necessity.

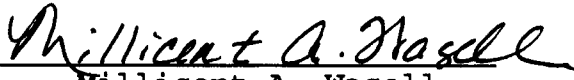
Rutgers and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1990).

Under all the circumstances, we believe that enforcing an alleged agreement to base such supervisory transfers on seniority rather than experience would substantially limit the City's policymaking power. We therefore restrain arbitration.

ORDER

The request of the City of New Brunswick for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002

