

P.E.R.C. NO. 2008-23

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RUTHERFORD,

Petitioner,

-and-

Docket No. SN-2007-072

RUTHERFORD PBA LOCAL NO. 300,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Borough of Rutherford for a restraint of binding arbitration of a grievance filed by Rutherford P.B.A. Local No. 300. The grievance alleges that the Borough violated the parties' collective negotiations agreement by ignoring seniority when making annual shift assignments. The Commission concludes that the PBA may not seek to arbitrate a challenge to the overall mix of officer qualifications, expertise and experience on each shift.

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. 2008-23

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RUTHERFORD,

Petitioner,

-and-

Docket No. SN-2007-072

RUTHERFORD PBA LOCAL NO. 300,

Respondent.

Appearances:

For the Petitioner, Eric M. Bernstein & Associates,  
LLC, attorneys (Deborah J. Bracaglia, on the brief)

For the Respondent, Klatsky, Sciarrabone & De Fillippo,  
attorneys (David J. De Fillippo, on the brief)

DECISION

On May 31, 2007, the Borough of Rutherford petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Rutherford P.B.A. Local No. 300. The grievance alleges that the Borough violated the parties' collective negotiations agreement by ignoring seniority when making annual shift assignments. We conclude that the PBA may not seek to arbitrate a challenge to the overall mix of officer qualifications, expertise and experience on each shift.

The parties have filed briefs and exhibits. The Borough has submitted the certification and supplemental certification of its police chief, Steven Nienstedt. The PBA has submitted the

certification of a patrol officer, Philip Nadler. These facts appear.

The PBA represents all police officers below the rank of captain. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.

Section (3) of Article XII pertains to shift assignments. It provides, in part:

All Employees covered by this Agreement shall work steady non-rotating shifts. The "5-2, 5-3" as is defined Paragraph 2 of this Article shall continue as the work day sequence.

- A. No employee covered by this Agreement shall be required to rotate.
- B. Each Employee shall work a steady designated shift which shall either be day shift (7 A.M. - 3 P.M.), afternoon (3 P.M. - 11 P.M.) shift or night shift (11 P.M. - 7 A.M.) as defined in paragraph 2 of this Article.
- C. Employees shall have the right to bid on a seniority basis by rank for their individual choice of steady shift position.
- D. The Chief of Police shall have the right to deny an Employee the selected steady shift.

According to the chief, the duties and responsibilities on the three shifts vary. He explains:

The day shift typically requires officers to handle service-related calls, interact with the business community, control traffic and

respond to bank alarms and robberies. The evening tour typically requires officers to respond to domestic disputes, crimes in progress, disputes related to alcohol consumption on public and private property and juvenile complaints. The midnight tour typically requires officers to perform "watchman" functions, respond to disturbances, domestic disputes related to alcohol consumption on private and public property, bank alarms and burglaries.

Nadler asserts that the duties and responsibilities for the three shifts are the same; officers can be assigned overtime to work different shifts; and officers can switch shifts temporarily with the chief's approval.

The shift selection/assignment process is conducted annually. Bids are submitted in late November or early December and the chief makes the assignments by late December.

In 2007, 78% of the officers (28 of 36) bid for the day shift. So did every supervisor, except one sergeant.

The chief could not honor all the requests for the day shift and still provide appropriate levels of police protection at all times of day and night. He states that he considered each officer's preference and seniority, but he also considered these other criteria when distributing officers over the three shifts:

[Q]ualifications, expertise and experience of each officer, training needs of individual officers and the Department as a whole, strength of supervision, maintaining appropriate staffing levels for each shift, ensuring that each shift includes expertise, experience and qualifications necessary to

best serve the community and exposing officers to a variety of police situations.

The chief believes that exposure to a variety of police situations makes an officer well-rounded.

At the time the chief announced the annual shift assignments, he did not explain his considerations for determining the mix of officers on each shift. Of the six most senior officers, only one received the day shift he requested. One of the disappointed officers was Nadler, who had more seniority than seven of the eight officers assigned to the day shift. Nadler asserts that the chief has a pattern of using assignments to reward officers perceived as "loyal" and to punish others. No details were given to support this assertion and the chief has denied it.

On January 3, 2007, the PBA grieved "the improper shift scheduling of its members." A captain, the chief, and the Borough Administrator denied the grievance for lack of specificity. The PBA demanded arbitration, stating in part:

Recently, the Police Department notified all members of the PBA of the shift assignments for calendar year 2007. A number of officers were inexplicably denied their shift preference despite the fact that said officers were senior to other officers assigned to their desired shift. No managerial need or specific objective was cited by the Employer as justification for said deviations from the seniority-based shift selection process. The Employer's failure to adhere to the seniority-based

shift selection process prompted the PBA to file the instant grievance.

This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park 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 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), describes the scope of negotiations analysis for police officers and firefighters. Paterson bars arbitration only if the agreement alleged to have been violated would substantially limit government's policymaking powers or is preempted. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). No statute or regulation is asserted to preempt negotiations.

Parties may negotiate agreements basing shift assignments on seniority provided all qualifications are equal and managerial

prerogatives are not otherwise compromised. Union Tp., P.E.R.C. No. 2003-81, 29 NJPER 214 (¶163 2003); City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994). However, police departments may unilaterally make or change assignments when a chief determines that qualifications are not equal or that certain assignments must be made to achieve operational, supervisory, or other governmental policy objectives. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (prerogative to rotate shift assignments to correct supervision and discipline problems on midnight shift); Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified and recon. den. 26 NJPER 16 (¶31003 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001) (proposed shift bidding clause not mandatorily negotiable to the extent it would apply to a range of assignments for which the qualifications were not equal).

The vast majority of officers and supervisors requested the day shift and it was impossible to honor all these requests. The chief has asserted a need to have a mix of officer qualifications, expertise, and experience on each shift. An arbitrator cannot second-guess that overall approach. Hoboken.

#### ORDER

\_\_\_\_\_The request of the Borough of Rutherford for a restraint of binding arbitration of the grievance challenging the overall mix

P.E.R.C. NO. 2008-23

7.

of officer qualifications, expertise and experience on each shift is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: October 25, 2007

Trenton, New Jersey