

P.E.R.C. NO. 2002-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2001-65

TRENTON POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the City of Trenton's request for a restraint of binding arbitration of a grievance filed by the Trenton Police Superior Officers' Association. The grievance contests the City's policy concerning the filling of temporary vacancies and payment for out-of-title work. The Commission grants a restraint to the extent the grievance implicates the City's prerogative to decide whether and when to fill a temporary vacancy. The Commission declines to restrain arbitration of the claim that the City is contractually obligated to compensate officers who have been directed formally or informally to fill in for a higher ranking officer.

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, Courter, Kobert, Laufer & Cohen, P.C.
(Stephen E. Trimboli, on the brief)

For the Respondent, Wills, O'Neill & Mellk
(G. Robert Wills, on the brief)

DECISION

On June 22, 2001, the City of Trenton petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Trenton Police Superior Officers' Association. The grievance contests the City's policy concerning the filling of temporary vacancies and payment for out-of-title work.

The parties have filed briefs and exhibits. The SOA has filed a certification of Joseph Valdora. These facts appear.

The SOA represents sergeants, lieutenants, captains and deputy chiefs. The parties' most recent collective negotiations agreement expired on June 30, 2000. The parties are in

negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article IX, Wages, Section 9.02 provides:
Superior Officers within the Police Division who are ordered to fill in at a higher position shall be compensated at the rate of pay of the higher rank, effective the first hour of acting service.

On July 31, 2000, the police director issued Memorandum Order 00-66 concerning "Working Out of Title." The Order states:

Effective August 3, 2000, requests for supervisors and commanders to work out of title will not be submitted unless the position for which the request is made will be vacant for at least fifteen (15) consecutive working days. When supervisory and command positions are temporarily vacant (15 consecutive working days or less) Bureau Commanders will ensure coverage by the ranking supervisor at the next level (e.g. Lieutenant vacancy - Sergeant will report to the Captain) or a supervisor/commander of the same rank within the same bureau will cover the position.

When a supervisory or command vacancy exceeds 15 consecutive working days the pertinent Bureau Commander (Deputy Police Chief) may submit a request for acting out of title to the Police Director for evaluation. The request must include an explanation of why the position is vacant and the length of time it will remain vacant. For example, if the vacancy is the result of an extended illness the request should include the nature of the illness, the prognosis and the estimated time the permanent supervisor or commander will return to the position.

If approved, supervisory and command positions that are temporarily vacant shall be filled by the individual ranked highest on the promotional list for the pertinent title beginning on the 16th consecutive work day since the position was vacated. If there is no list, the Bureau Commander will identify the

individual who will temporarily fill the position.

Any exceptions to this order must be reviewed and approved by the Police Director.

On August 8, 2000, the SOA filed a grievance alleging that Memorandum Order 00-66 violated both a long-standing practice of officers acting out of title and the contract clause requiring a higher rate of pay for officers filling in at a higher rank.

The grievance stated:

Please let this writing serve as the first step in the formal grievance process. This Grievance is in regard to your Memorandum Order 00-66 dated July 31, 2000 and titled "Working Out of Title". As I am sure you are aware there has been a long-standing practice of Acting Out of Title in the Trenton Police Department. This practice is a negotiated item between the city of Trenton and the Trenton Police Superior Officers Association. The contract that we are currently working under addresses the Acting Out of Title issue and it reads: Superior officers within the Police Division who are ordered to fill in at a higher position shall be compensated at the rate of pay of the higher rank effective the first hour of acting service.

I should also point out that in the second Collective Bargaining meeting between the City of Trenton and the Trenton Police Superior Officers Association one of the demands from the City of Trenton was to change the aforementioned language to ten days instead of effective the first hour. I am sure you must be aware of this fact since you were present and an active participant in this meeting.

This arbitrary change is a violation of the current contract, the negotiated policy outlined in Memorandum Order 99-74, and the Collective Bargaining Process.

On September 22, 2000, the SOA filed an unfair practice charge alleging that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by changing the terms under which officers would be paid for temporarily filling in for a higher ranking officer. On March 28, 2001, the Director of Unfair Practices refused to issue a complaint. City of Trenton, D.U.P. No. 2001-13, 27 NJPER 210 (¶32072 2001). The Director concluded:

The Commission has held that whether, and/or when to fill a permanent or temporary vacancy in superior rank positions is a management prerogative and, therefore, non-negotiable. Cherry Hill Tp., P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415, 417 (¶21172 1990). See also N.J. Sports and Exposition Authority, P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988).

The issuance of the City's July 31 memorandum was merely an exercise of its prerogative to determine if and when a temporary vacancy will be filled. In this regard, the July 31 memorandum is consistent with the language in Article IX of the parties' agreement: "officers...who are ordered to fill in at a higher position." Moreover, regardless of the asserted practice in application of Article IX, the decision whether to fill a temporary vacancy remains a management prerogative and is, therefore, non-negotiable. Additionally, while compensation is a fundamental term of employment and is a mandatory topic of negotiations, Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973), the July 31 memorandum does not change the method of payment set forth in Article IX once a temporary vacancy is filled.

On April 3, 2001, the SOA demanded arbitration of its August 8, 2000 grievance. The arbitration demand states that Memorandum Order 00-66 and the policies resulting from it violate Article IX, Section 9.02. The demand also states that superior officers who are asked to perform out-of-title duties are not being paid at the higher salary rate required by the contract. This petition ensued.

The City asserts that it has a managerial prerogative to determine when and under what circumstances it will allow vacant superior officer positions to remain unfilled. It states that it has not modified the compensation of officers assigned to work in higher titles. It therefore states that the subject of Memorandum Order 00-66 is not mandatorily negotiable and arbitration must be restrained.

The SOA counters that the issue is not whether the City has a managerial prerogative to promote officers on a temporary or permanent basis. Instead, the SOA states that it seeks to arbitrate its claim that the City is obligated to compensate the officers when it directs them, either formally or informally, to perform their own duties as well as those of a higher-ranking officer. The SOA also contends that the police director's memorandum changes the method of payment set forth in the parties' agreement because now the City no longer pays out-of-title compensation where officers fill in for superiors.

The SOA has submitted the certification of its vice-president, Lt. Joseph Valdora. He states that his subordinate, Sgt. Michael Flaherty, performed Valdora's lieutenant duties on numerous dates in 2000 and 2001 when Valdora was not at work. Valdora maintains that the lieutenant duties needed to be performed daily and adds that when Flaherty filled in for him, Flaherty also performed all of his own regular job functions but was not compensated for the additional work. Finally, Valdora certifies that, because of his position as administrative lieutenant and SOA vice-president, he is aware of other superior officers who are not being paid for performing the duties of titles above their own.

The City responds that the SOA is seeking to circumvent the determination in D.U.P. No. 2001-13 by rewriting its grievance as one allegedly concerning the assignment of officers to out of title work without compensation. The City argues that the grievance documents define the issues, not assertions raised for the first time in a party's brief in a scope proceeding. In this vein, it maintains that the grievance and arbitration documents challenge Memorandum Order 00-66 itself.

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 contractual arbitrability or merits of this grievance or any contractual defenses the employer may have. We specifically do not consider the City's argument that the out-of-title pay claim cannot be arbitrated because it was not raised in the grievance or the demand for arbitration. That argument raises questions of contractual rather than legal arbitrability. See City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326, 327 n.1 (¶25168 1994). The decisions cited by the City were issued before we clarified our case law on this point. Compare Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988) and New Jersey Inst. of Tech., P.E.R.C. No. 86-63, 11 NJPER 721, 722 n.2 (¶10164 1979).

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 Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) outlines the steps of a scope of negotiations analysis for issues involving 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.

[87 N.J. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be allowed if 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).

This case implicates two principles. The first is that a public employer has a managerial prerogative to decide whether and when to fill vacancies. Paterson; Cherry Hill; City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001); City of Clifton, P.E.R.C. No. 92-25, 17 NJPER 426 (¶22205 1991). An agreement that forces an employer to fill a vacant position substantially limits that governmental policymaking determination. Atlantic City, P.E.R.C. No. 2001-56.

The second principle is that compensation for temporary assignments to replace absent officers of higher rank is mandatorily negotiable. See Atlantic City, P.E.R.C. No. 2001-56; North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 108 (¶31044 2000); City of Hoboken, P.E.R.C. No. 96-7, 21 NJPER 280 (¶26179 1995). And claims or proposals relating to out-of-title pay do not negate an employer's ability to decide whether or not to temporarily fill a vacancy. Instead, they come into play once the vacancy has been filled.

Within this framework, we restrain arbitration of the grievance to the extent it challenges the first paragraph, first sentence of Memorandum Order 00-66, which states that commanders may not submit out-of-title work requests unless a vacancy will last for at least 15 consecutive days. We also restrain arbitration over the second paragraph of Memorandum Order 00-66, which sets forth the process for commanders to submit out-of-title requests for longer-term vacancies. Those provisions implicate the City's non-negotiable prerogative to decide whether and when to fill a temporary vacancy.

However, we decline to restrain arbitration of the SOA's claim that the City is contractually obligated to compensate officers who have been directed "formally or informally" to fill in for a higher ranking officer. The gravamen of its claim is that officers have, on a de facto basis, temporarily filled in for absent superiors while still performing their own work, despite Memorandum

Order 00-66. An arbitrator may determine whether that has occurred and, if so, whether the contract requires out-of-title pay in those circumstances. See, e.g., Evesham Tp. Bd. of Ed., P.E.R.C. No. 98-143, 24 NJPER 293 (¶29139 1998); East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992).


Arbitration of the grievance is consistent with the Director's decision in D.U.P. No. 2001-13. The Director determined that the City had a prerogative to issue Memorandum Order 00-66 and, therefore, concluded that the Complaint issuance standard was not met where the charge alleged that the City's issuing the order violated N.J.S.A. 34:13A-5.4(a)(5). The Director observed that the charge did not allege that officers were performing out-of-title work without being paid and that, if it had, that would be at most a contract dispute subject to the parties' negotiated grievance procedure. 27 NJPER at 211 n.3. The SOA's grievance raises the issue highlighted by the Director. For the reasons discussed earlier, we find to be legally arbitrable the SOA's claim that the City violated contract requirements concerning payment for out-of-title work.

ORDER

The request of the City of Trenton for a restraint of binding arbitration is granted to the extent the grievance challenges the first paragraph, first sentence of Memorandum Order 00-66 or the second paragraph of Memorandum Order 00-66.

The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: October 25, 2001
Trenton, New Jersey
ISSUED: October 26, 2001