

P.E.R.C. NO. 99-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-98-83

P.B.A. LOCAL 304,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Corporation for a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The grievance contests a special order changing schedules and overtime assignments on New Year's Eve, 1998. Since the grievance is proceeding to arbitration over the PBA's compensation claims, the Commission declines to speculate about what contractual rulings the arbitrator may make and what remedies he may order concerning a police employer's right to make scheduling changes for New Year's Day. If an arbitrator rejects the employer's contractual defense and issues an award that the employer believes substantially limits governmental policymaking powers, the employer may then assert that the award is illegal in post-arbitration proceedings.

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, Peter Verniero, Attorney General
(David S. Griffiths, Deputy Attorney General, on the
brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Joseph Licata, on the brief)

DECISION

On April 28, 1998, New Jersey Transit Corporation petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The grievance contests a special order changing schedules and overtime assignments on New Year's Eve, 1998.

The parties have filed briefs, certifications and exhibits. These facts appear.

The PBA represents all police officers below the rank of captain employed by NJ Transit. The parties entered into a collective negotiations agreement effective from July 1, 1992 to June 30, 1996. The parties are engaged in interest arbitration to establish terms of a successor agreement.

NJ Transit's petition initially questioned the negotiability of a grievance challenging a special order establishing work schedules for St Patrick's Day, 1997. That grievance had already been submitted to arbitration and an award had been issued in favor of the PBA.^{1/} Asserting that the filing of the petition, after the arbitration award issued, violated the Commission's procedures, the PBA moved for dismissal. NJ Transit responded that the petition was also filed in response to a demand for arbitration of similar claims relating to New Year's Day, 1998. On July 15, 1998, the Commission Chair denied the motion to dismiss, but held that the Commission would exercise its scope of negotiations jurisdiction only with respect to the New Year's Eve Special Order. P.E.R.C. No. 99-1, 24 NJPER 361 (¶29174 1998)^{2/}.

Article XXIII is entitled Advertisement and Selection of Positions. Section 3 provides:

- (a) The regular work week shall consist of five (5) consecutive eight (8) hour days including a 20-minute meal period with two (2) consecutive regular days off.
- (b) The starting times for regular shifts shall be as follows:

^{1/} The PBA has sought to have the award confirmed in Superior Court.

^{2/} On April 3, 1998, the PBA filed a grievance concerning a special order pertaining to work assignments for St. Patrick's Day, 1998. We are not aware of any demand for arbitration relating to this grievance and will not address it.

First Shift 7 a.m./8 a.m.
Second Shift 3 p.m./4 p.m.
Third Shift 11 p.m./12 midnight

- (c) Positions will be scheduled to begin not more than two (2) hours in advance of, or not more than two (2) hours later than the times specified in the Paragraph (b) above.

Article XXIV, entitled Overtime, provides, in part:

Section 4. When overtime is to be filled, the following shall govern in determining officer to be used:

- (a) The senior qualified officer whose name appears on the list as designated as the first to be called for overtime will be offered the opportunity to work the scheduled overtime.
- (b) If the Officer determined to work the overtime refused to, for whatever reason, the opportunity will be offered to the next qualified officer whose name appears on the list. The method will be repeated until the list of qualified officers is exhausted.
- (c) If it is not possible to fill the overtime by use of the system referred to in "A" and "B", it may be filled by on-duty holdovers and/or early call in, based on the master Revolving Overtime List.
- (d) If it is not possible to fill the overtime by use of the system referred to in "A", "B" and "C", the position may be filled without regard to the master Overtime List or rank with the permission of the unit's Commanding Officer.

Section 9. Overtime for special details, events, i.e., concerts, New Year's Eve, St. Patrick's Day, Hoboken Festival, but not limited thereto, will be excluded from this Article.

Article XLI, entitled Central Police Pool, provides for a pool, not to exceed 10% of the unit. Before the end of each work shift, pool officers receive the location and starting time of their next day's assignment.

On December 19, 1997, the employer issued Special Order No. 97-024. Entitled New Year's Eve Operational Plan, the special order became effective at 0001 hours on Wednesday, December 31, 1997. Section II, General Information/Instructions, provided, in part:

The Incident Commander may dismiss officers prior to their scheduled assignments or hold an officer beyond the schedule of this plan, providing conditions warrant same.

* * *

All officers will work their regular assigned tour of duty the day before and the day after the time covered by this Special Order (0001 December 31, 1997 to 0600 hours on January 1, 1998).

Section XI of the special order sets forth the New Year's Eve assignments for 8 lieutenants, 9 sergeants, 1 detective sergeant, 61 patrol officers and 2 dispatchers.

On January 9, 1998, the PBA filed a grievance claiming that the special order violated the parties' collective negotiations agreement. The grievance stated:

Count 1

On or about December 31, 1997, the employer ordered an employee(s) to work on their rest days. Said employees were not allowed to leave upon completion of their shift. By ordering the employee(s) to work beyond his regular tour of duty, they were unable to enjoy the full

benefit of their rest days. Further, the employer failed to adjust the employee(s) rest days for issuing such orders, as required by the Bargaining Agreement.

Count 2

On or about December 31, 1997, the employer changed the starting times of an employee(s) beyond that which is allowed by the bargaining agreement.

The grievance sought these remedies:

- 1) The employer be made to make the grievant(s) whole by compensating them for their travel time, travel expenses and meals.
- 2) The employer be made to make the grievant(s) whole by compensating those grievant(s) who were ordered to work on their rest days an additional day off with pay.
- 3) The employer be made to make the grievant(s) whole by compensating those grievant(s) who were ordered to report to duty outside their regular start time, at a rate of pay of time and one-half, for every hour they were delayed from or reported earlier than their regular start time.
- 4) Any and all other remedies deemed appropriate.

The employer denied the grievance. It appears from the employer's response that the PBA is contesting schedule changes for three officers. NJ Transit stated that Adele Daniels worked her regular tour, but came in 30 minutes early and worked three hours and thirty minutes after her normal sign-off time. She was compensated with four additional hours of overtime. Mark Lewandowski had been on light duty working 0700 to 1500 hours at

the Broad Street Station. On New Year's Day, there was no work available at Broad Street Station and he was reassigned to a vacancy from 2200 to 0600 hours on the radio desk. He received eight hours of overtime pay and holiday pay. Albert Hoffman's regular assignment was 1400 to 2200 hours with Thursday and Friday as his regular days off. The special order extended his time "until completion" which became 0600 hours. The employer asserted that under the contract, an assignment in advance of midnight that includes time after midnight will be considered work performed on the day the assignment begins. The PBA demanded arbitration (Dkt. No. AR-98-526). 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 contractual merits of this grievance or any contractual defenses the employer may have.

N.J.S.A. 27:25-15.1 established the NJ Transit police department. Subsection (a) grants NJ Transit police officers "general authority, without limitation, to exercise police powers

and duties, as provided by law for police officers and law enforcement officers, in all criminal and traffic matters at all times throughout the State...." Subsection (b) specifies that the "terms and conditions of ... labor contracts [must be] within the scope of negotiations as defined by the Public Employment Relations Commission under the New Jersey Employer-Employee Relations Act."

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 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 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). Preemption is not an issue so Paterson bars arbitration only if enforcement of the alleged agreement would substantially limit governmental policymaking powers.

The employer asserts that "despite the general negotiability of shifts and assignments, police department management has the prerogative to reorganize such regular schedules and assignments when the service needs of the department warrant it." Brief at 7. It seeks to have us declare that it has a managerial prerogative to alter regular established schedules to meet the department's service needs.

The PBA asserts that the employer has had sufficient experience in dealing with recurring events such as St. Patrick's Day and New Year's Day celebrations to abide by the negotiated provisions of the contract. Those provisions appear to allow for additional staffing for special events to be secured from a mandatory overtime list and central police pool that provides 100 officers to be assigned on a non-overtime basis. It asserts that its grievance does not interfere with NJ Transit's managerial prerogatives and that the employer has failed to demonstrate why it had to abrogate the provisions of the agreement.

This case does not present the question of whether the employer may assign overtime on an involuntary basis and the employer does not seek a restraint on that issue. Nor does the employer contest the PBA's right to seek compensation or other monetary remedies for overtime or schedule changes. Accordingly, the PBA's compensation claims will be proceeding to arbitration.

The only remaining question is one that arose from a grievance arbitration award that is not before us. In deciding a grievance challenging work schedule changes on St. Patrick's Day, 1997, an arbitrator found that NJ Transit violated the contract and ordered the employer to cease and desist from changing the starting time of officers. In that 1997 case, the employer had argued that a number of contract provisions authorized its action, including one that excludes overtime for special details such as New Year's Day and St. Patrick's Day from the contractual overtime article. The arbitrator rejected the employer's argument. That award is currently under review in Superior Court confirmation proceedings and not before us.

Under the circumstances of the case before us, where the grievance will be proceeding to arbitration, we decline to speculate about what contractual rulings the arbitrator may make and what remedies the arbitrator may order. Whether a police employer may deviate from a contractual work schedule provision depends on the particular facts. If, as the employer suggests, the parties' contract recognizes the employer's right to make scheduling changes

for New Year's Day, there would be no need for a scope of negotiations determination. If the arbitrator rejects the employer's contractual defense and issues an award that the employer believes substantially limits governmental policymaking powers, the employer may then assert that the award is illegal in post-arbitration proceedings.

ORDER

The request of the New Jersey Transit for a restraint of binding arbitration of the New Year's Day 1998 grievance is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioners Klagholz and Wenzler were not present.

DATED: October 26, 1998
Trenton, New Jersey
ISSUED: October 27, 1998