

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-99-77

ELIZABETH SUPERIOR OFFICERS  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Elizabeth for a restraint of binding arbitration of a grievance filed by the Elizabeth Superior Officers Association. The grievance alleges that the City violated the parties' collective negotiations agreement when it reorganized the Operations Bureau resulting in some junior officers being assigned preferred shifts and senior officers being assigned less desirable shifts. The Commission determines that public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular positions. Although the contract provides that employees assigned to the patrol division will be scheduled on a seniority basis, the employer needed special skills and characteristics to staff the new Community Policing/Quality of Life Task Force.

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. 2000-15

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Appearances:

For the Petitioner, Genova, Burns & Vernioia, attorneys  
(James J. McGovern III, on the brief; Courtney M.  
Gaccione, on the reply brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,  
Solomon, Leder & Montalbano, P.C., attorneys  
(James M. Mets, on the brief)

DECISION

On April 23, 1999, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Superior Officers Association. The grievance alleges that the City violated the parties' collective negotiations agreement when it reorganized the Operations Bureau resulting in some junior officers being assigned preferred shifts and senior officers being assigned less desirable shifts.

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

The SOA represents all full-time police employees in the ranks of sergeant, lieutenant and captain. The parties' collective negotiations agreement expired on December 31, 1996 and was amended for wages through June 30, 1998. The grievance procedure ends in binding arbitration.

Article V is entitled Work Week. Sections 2 and 3 provide:

2. Work schedules shall be at the discretion of the Director. However, the Police Director retains the right to assign any Police Officer to the time and places when and where police officers are most needed.

3. Employees assigned to the Patrol Division will be scheduled on a seniority basis.

The City's police department consists of three divisions commanded by the police director and police chief: Operations, Administration and Inspections, and Communications Command. A deputy chief is in charge of each division. Before February 1, 1999, the divisions were divided into 10 subdivisions. The deputy chief of Operations oversaw patrol administration, the patrol division, the traffic division and the community police. The deputy chief of Administration and Inspections oversaw the ambulance bureau, internal affairs bureau and the personnel department. The deputy chief of Communications Command oversaw the training division, services division and communications division.

Before February 1, 1999, there were four shifts in the patrol division: 6:45 a.m. to 5:45 p.m.; 9:45 a.m. to 8:45 p.m.;

5:15 p.m. to 4:15 a.m.; and 8:15 p.m. to 7:15 a.m. The work schedule was four days on, four days off. Each consisted of an "A" side and a "B" side which designated days off.

The 9:45 a.m. to 8:45 p.m. shift on both the A and B sides consisted of Patrol, Safe Net and Community Policing units. Each shift was staffed with a minimum of two sergeants. The 9:45 a.m. to 8:15 p.m. shift also had one lieutenant. On this shift, one sergeant supervised the Patrol and Safe Net units and the other sergeant supervised the Community Policing unit. Each sergeant was assigned a patrol car and drove around the City supervising the patrol units.

On January 1, 1999, the police director, James Cosgrove, issued Memo #99-1, entitled "Reorganization of Operations Bureau." That memo stated:

Effective February 1, 1999, the Operations Bureau shall be reorganized to include a Community Policing/Quality of Life Task Force.

This newly formed unit shall be under the direction of a Captain and an Executive Lieutenant.

The Task Force shall include the following units within the department:

Narcotics  
Street Crimes Unit  
Safe Net Units  
Community Police

The primary responsibility of this newly created division will be to proactively address the following quality of life issues in the city:

1. Street level narcotic sales
2. Prostitution
3. Panhandling
4. Public consumption of alcohol
5. Noise complaints
6. Graffiti
7. Illegal dumping
8. Reduce response time

In a certification, the police director states that the reason for the creation of the task force was to target "hot spots" that experienced higher rates of crime. He states that crimes such as prostitution and illegal narcotic sales were more prevalent in certain areas. He determined that instead of scheduling officers for standard patrols throughout the City, the safety of the public would be best served by targeting the problem areas.

The reorganization resulted in the reassignment of 13 superior officers among the Inspections, Patrol, Community Services, Communications and Detective divisions. The City asserts that the transfers reflected the placement of the best qualified officers and the officers with special skills into these assignments. The director states that he reviewed the arrest records of each officer and selected officers for the Task Force with the highest number of arrests for street level narcotic sales. He also states he chose a sergeant and a lieutenant who are bilingual because of Elizabeth's high percentage of Hispanic citizens. He states that he also took into consideration the recommendations of the commanders in the Community Policing division who were familiar with the skills and capabilities of the

officers. The skills he looked for included, but were not limited to, a propensity for being proactive, a high arrest record, an assertive personality, and the ability to interact with the public.

In a responding affidavit, Lieutenant James Heims states that sergeants are rarely the arresting officer on a narcotics arrest, but supervise the patrol officers, including the Task Force. Heims also disputes that any of the sergeants on the Task Force are bilingual or have any special skills.

In a reply certification, the director denies that patrol division sergeants supervise officers in the Safe Net, Community Policing or Street Crimes Units. The director's certification also contrasts the duties of patrol supervisors with those of the supervisors in the Street Crimes and Safe Net units of the Task Force. It states that superior officers in the patrol division assist patrol officers in responding to calls for service and supervise patrol officers who respond to such calls. They operate marked vehicles and wear uniforms. In contrast, Street Crimes Unit supervisors do not routinely respond to service calls and are heavily involved in the daily operations of their unit, which involve seeking out narcotics-related crimes as they occur. They drive unmarked cars and wear plainclothes. Safe Net supervisors oversee officers who seek out crimes such as drinking in public, public dumping, narcotics use and graffiti. They regularly attend community meetings to hear public concerns about the police department, sanitation service and safety issues.

On January 19, 1999, the SOA filed a grievance. The grievance states:

The following grievance, Number 99-1, concerns the seniority rights of superior officers in so far as they will be [a]ffected by Department Memo #99-1, the Reorganization of the Operations Bureau, which takes effect on February 1, 1999.

The present contract between the City of Elizabeth and the Elizabeth Police Superior Officer's Association calls for employees assigned to the Patrol Division to be scheduled on a seniority basis. This practice will be violated when the Operations Bureau is reorganized and incorporates units presently assigned to the Patrol Division resulting in some junior officers being assigned to a preferred shift and some senior officers to less desirable shifts.

The practice of excluding these supervisor positions from the seniority bid system is a violation of our contract, creates a hardship on our senior officers and injects an appearance of political favoritism within the police department.

The SOA points out that the only positions at issue in the grievance are the four non-Narcotics sergeants.

On February 8, 1999, the police director responded to the grievance. He wrote that "Superior Officers assigned to the Patrol Division have been selected on a seniority basis and the contract has not been violated." On February 22, the SOA demanded arbitration. This petition ensued.

The City asserts that it has a managerial prerogative to change the work schedules to provide a greater police presence and to improve public safety. The City further asserts that it has a

unilateral right to reorganize its police department and reassign officers to match the best qualified officers to the more difficult assignments. The City contends that the superior officers that have been reassigned as a result of the creation of the Task Force are no longer part of the Patrol division, but are now part of the Operations Bureau and are no longer governed by the seniority provision in Article V.

The SOA asserts that the work schedules are mandatorily negotiable and that in deciding negotiability a determination must be made that governmental policy needs required the employer's actions. It further asserts that the Commission must examine the particular facts and arguments of each case. The SOA contends that it has raised genuine issues of material fact concerning the City's motives and that the Commission cannot rule on the issue without testimony, cross-examination and the opportunity to observe the demeanor of those whose motivation is at issue. The SOA has requested an evidentiary hearing pursuant to N.J.A.C. 19:13-3.7.

The SOA notes that it is not disputing the City's right to establish a new shift, but is challenging the City's refusal to allow bidding for the shift on a seniority basis. It contends that shift bidding would place no limits on governmental policy. The SOA challenges the City's claim that officers with special skills are needed for the Task Force. The SOA argues that the



Commission should dismiss the scope petition or grant an evidentiary hearing pursuant to N.J.A.C. 19:13-3.7 or permit the issues to be decided by an arbitrator. The SOA rejects the City's assertion that the seniority provision does not apply because the reassigned officers are no longer in the Patrol division. The SOA asserts this is a contractual defense beyond the Commission's jurisdiction.

The City responds to and rejects the SOA's arguments. It objects to the SOA's request for an evidentiary hearing, asserting that the SOA has failed to raise a sufficient basis to support its request for an evidentiary hearing. It asserts that the SOA has misrepresented the facts and the police director's certification refutes the SOA's arguments concerning the qualifications and selections of officers for the Task Force.

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 City 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 policy-making 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 13 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is

preempted or would substantially limit government's policy-making powers.

The SOA does not dispute the employer's right to reorganize the police department and to create a Community Policing/Quality of Life Task Force. Nor does it dispute the employer's decision to have officers on the Task Force work a single shift, 9:45 a.m. to 8:45 p.m. The SOA's claim is limited to an argument that the parties' collective negotiations agreement required the employer to allow superior officers to bid for assignment to the Task Force.

Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular positions. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). The parties' contract recognizes that prerogative by granting the police director the right to assign any police officer to the time and places when and where police officers are most needed. At the same time, the contract provides that employees assigned to the patrol division will be scheduled on a seniority basis.

The employer sought special skills and characteristics in staffing the Task Force. An arbitrator may not second-guess those assessments. See New Jersey Transit, P.E.R.C. No. 97-127, 23

NJPER 304 (¶28139 1997). Contrast New Jersey Transit Corp.

(duration of patrol rotation cycle permissively negotiable). In addition, we will not second-guess the employer's determination that certain police officers were specially qualified to staff the Task Force. The SOA's assertion that a sergeant is rarely the arresting officer in a narcotics arrest does not undermine the employer's prerogative to assign supervisors based, in part, on their record of arrests. In addition, the SOA's assertion that no sergeants assigned to the Task Force are bilingual is not inconsistent with the director's statement that several officers on the Task Force are bilingual because presumably "officers" includes patrol officers. Under these circumstances, there is no need for an evidentiary hearing to determine if arbitration would substantially limit the City's governmental policy determinations. Even assuming that sergeants are rarely arresting officers, that sergeants on the Task Force are not bilingual, that a patrol sergeant has been assigned to replace an absent sergeant to supervise officers on the Task Force, and that none of the sergeants has any special training for their assignments, we nevertheless conclude that the City had an uncontestable right to determine that certain sergeants had special characteristics warranting inclusion in the Task Force and to staff the Task Force based on its assessment of relative qualifications.


The cases the SOA relies on are distinguishable. In Jersey City, P.E.R.C. No. 94-30, 19 NJPER 542 (¶24256 1993), the

City did not claim that officers on a new shift needed any special qualifications. In City of North Wildwood, P.E.R.C. No. 97-93, 23 NJPER 119 (¶28057 1997), the City changed the work schedule of superior officers during summer months to have high-ranking officers on duty on weekends. There was no issue of qualifications beyond the need to have officers in those ranks work weekends. In Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998), the employer did not provide any reason for reassigning two officers. Under those circumstances, we permitted an arbitrator to determine whether the employer had agreed to permit officers to pick shifts by seniority. In the instant case, the employer has asserted that assignments to the Task Force were based on specific qualifications. Under these circumstances, arbitration must be restrained.

ORDER

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

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

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

DATED: August 26, 1999  
Trenton, New Jersey  
ISSUED: August 27, 1999