

P.E.R.C. NO. 2002-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIRVIEW,

Petitioner,

-and-

Docket No. SN-2001-66

P.B.A. LOCAL NO. 45,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Fairview for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 45. The grievance alleges that the adoption of an ordinance concerning hiring civilian dispatchers and a clerk violated the parties' agreement. The Commission finds that the Borough civilianized primarily for the purpose of improving the department's effectiveness and performance and impairing that decision would substantially limit the employer's governmental policymaking powers. The Commission rejects the PBA's procedural claim that the employer's failure to challenge the negotiability of a replacements clause during interest arbitration bars it from challenging the arbitrability of this grievance. The Commission also rejects the PBA's agreement that the arbitrator can consider the grievance because there may be remedies for a violation that do not impair the employer's managerial prerogative to civilianize.

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, Giblin & Giblin, attorneys
(John L. Schettino, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Michael A. Bukosky, on the brief)

DECISION

On June 27, 2001, the Borough of Fairview petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 45. The grievance alleges that the adoption of Ordinance No. 00-30 concerning hiring civilian dispatchers and a clerk violated the parties' agreement.

The parties have filed briefs and exhibits. The employer did not file a reply brief. These facts appear.

The PBA represents the Borough's police officers, excluding the chief and deputy chief. The Borough and the PBA are parties to a collective negotiations agreement that expired on December 31, 1999. The parties are in interest arbitration proceedings for a successor agreement. The agreement's grievance procedure ends in binding arbitration.

Article XLV is entitled Replacements. It provides:

In accordance with present practice, no full time Employees covered by this Agreement shall be replaced by any non-Police, part time or other personnel.

No post required to be filled or presently filled by a full time Employee covered by this Agreement shall be covered by any non-Police, part time or other personnel.

On March 21, 2000, the Borough adopted a resolution authorizing the police chief to reorganize the police department by using civilian dispatchers and developing a community policing program. The resolution authorized the chief to apply for federal funding through the Cops More 2000 program, a federal grant program under the United States Department of Justice, Office of Community Oriented Policing Services.

On June 23, 2000, the chief filed a Cops More 2000 application seeking funds to hire five civilian dispatchers and one administrative assistant/records clerk to replace police officers in those positions. The application stated that the police officers would be reassigned to community policing activities such as foot patrols and face-to-face communication with businesses and residents. The application also noted that officers would be available to spend time in schools conducting anti-violence and drug resistance programs. On September 15, 2000, a \$146,412 grant was approved.

As a result of the funding, on November 28, 2000, the Borough adopted Ordinance 00-30 creating the civilian positions of

dispatcher and police records clerk and typist. The ordinance stated:

WHEREAS, the governing body desires to implement community policing and place more Officers in the field in an effort to reduce crime and increase the Police presence in the community in order to better protect the health, safety and welfare of its citizens; and

WHEREAS, in order to accomplish these objectives the governing body deems it necessary to employ civilians for radio dispatching duties and for clerical duties; and

WHEREAS, the primary purpose of hiring of civilian dispatchers and a clerk is to enable the Borough to reorganize the Police Department by placing Sergeants in the field to supervise Patrolmen, increase Police presence in the community and implement and establish community policing; and

WHEREAS, the hiring of civilian dispatchers and a clerk will better enable the Borough to utilize the Police Officers to perform job duties and responsibilities for which they have been trained in order to better protect the health, safety and welfare of its citizens; and

WHEREAS, the governing body has received a Federal Grant under the COPS More Program to assist in the reorganization of the Police Department in order to place more Officers in the field.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and Council of the Borough of Fairview, County of Bergen, State of New Jersey, that those portions of the aforesaid set forth below are hereby amended as follows and that those positions not set forth below shall remain unchanged; and

BE IT FURTHER ORDAINED that Chapter 2 Section 32.1 entitled Established be amended to include the following:

B. There are hereby created and continued the following positions which are civilian in character: Dispatcher, Police Records Clerk and Typist.

Severability

All provisions of this Ordinance are severable. If for any reason, any provision of this Ordinance is held to be invalid, the validity of the remainder of the Ordinance shall not be affected.

On December 4, 2000, the PBA filed a grievance alleging that Ordinance 00-30 violated the parties' agreement. The grievance sought "contract compliance."

On December 5, 2000, the Borough adopted Resolution No. R-00-314 and hired five civilian dispatchers. Before then, the dispatching duties had been performed by police sergeants. The sergeants also supervise patrol officers. No officers were laid off.

On December 6, 2000, the Borough denied the grievance. On December 13, the PBA demanded arbitration. This petition ensued.^{1/}

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

^{1/} An arbitration hearing was held on June 4, 2001. No award has been issued. The Borough states that briefs were due on July 17. The PBA states that the arbitrator has delayed the date for final briefs pending resolution of the scope proceeding.

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 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). 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. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] 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]

Because this dispute involves a grievance, arbitration is 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).

The Borough states that it hired civilian dispatchers to relieve police sergeants from having to answer telephones and allow them to be placed in the field to supervise patrol officers and to increase the number of officers in the field. The Borough asserts that its decision to hire civilian dispatchers is not mandatorily negotiable. It relies on City of Jersey City v. Jersey City POBA, 154 N.J. 555, 572-573 (1998), and Borough of Bogota and PBA Local 86, P.E.R.C. No. 99-77, 25 NJPER 129 (¶30058 1999), aff'd 26 NJPER 169 (¶31066 App. Div. 2000), certif. den. 165 N.J. 489 (2000).

The PBA points out that its grievance does not specifically request that the Borough reverse its decision to civilianize dispatching duties. The PBA asserts that it expects any remedy could be tailored so as not to infringe on any managerial prerogative.

The PBA argues that the remedy sought in a grievance arbitration must be included as a factor under Local 195's balancing

test. It states that several remedies are mandatorily negotiable, citing procedural aspects of the transfer of work, discussion of transfers for purely economical reasons, and allowing the PBA to present cost-saving measures. The PBA also argues that the impact of a civilianization decision on compensation issues, such as lost pay and lost work opportunities, is mandatorily negotiable. Finally, the PBA asserts that the Borough cannot challenge the arbitrability of this matter since it did not challenge the negotiability of the replacements clause during interest arbitration proceedings.

We begin with the PBA's procedural claim. We reject the argument that the employer's failure to challenge the negotiability of the no-replacements clause precludes the employer from challenging the legal arbitrability of a grievance seeking to enforce that clause under circumstances the employer believes would substantially limit its prerogative to civilianize. Ridgefield Park established that inclusion of a provision in a collective negotiations agreement does not make a non-negotiable claim enforceable through binding arbitration.

We next address the merits of this negotiability dispute. Jersey City applied the negotiability balancing test to a civilianization dispute and found that the employer had a managerial prerogative to augment its ability to combat crime by increasing the number of police officers in field positions. As in Jersey City, this employer civilianized primarily for the purpose of improving

the department's effectiveness and performance. Impairing the decision to civilianize would significantly interfere with the managerial prerogative to determine governmental policy. Under the facts of this case, we also hold that negotiations or arbitration that would attempt to prevent or undo this civilianization decision would substantially limit the employer's governmental policymaking powers. Accordingly, that aspect of the grievance would not be arbitrable as a permissive subject of negotiations.

Finally, we address the PBA's argument that the grievance should be permitted to proceed to arbitration to have an arbitrator determine if the contract has been breached and, if so, what should be the appropriate remedy. The PBA suggests that there may be remedies that do not impair the employer's managerial prerogative to civilianize.

The impact on terms and conditions of employment of the employer's decision to civilianize is mandatorily negotiable unless negotiations would significantly interfere with the related prerogative. Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998). The PBA has identified a number of remedies for breach of the no-replacements clause that, it claims, would not significantly interfere with the underlying decision to civilianize.

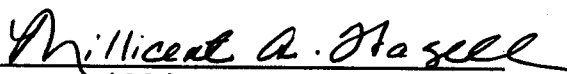
We will assume, without deciding, that the exercise of a prerogative to civilianize police officer positions could give rise to impact issues that would be within the scope of negotiations. Nevertheless, in this case, we must restrain arbitration over the

entire grievance. The PBA is not, for example, claiming that the employer violated a contractual obligation to compensate employees when it civilianized. Instead it seeks compensation as a penalty for the violation of a no replacements provision that, under the circumstances of this case, we have already held is not enforceable. The PBA is, in essence, asking us to undo decades of Commission and court case law restraining arbitration over grievances challenging the exercise of managerial prerogatives. A union cannot seek to enforce a clause barring an employer from exercising a prerogative simply by limiting its request for relief to something, like compensation, that might not unduly interfere with the exercise of the prerogative.

ORDER

The request of the Borough of Fairview for a restraint of binding arbitration is granted.

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: November 29, 2001
Trenton, New Jersey
ISSUED: November 30, 2001