P.E.R.C. NO. 99-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and- Docket No. SN-98-105

STATE LAW ENFORCEMENT CONFERENCE
OF THE NEW JERSEY STATE POLICEMEN'S
BENEVOLENT ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey (Department of Corrections) for a restraint of binding arbitration of a grievance filed by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association. The grievance asserts that the employer violated a contractual safety clause by not assigning at least two corrections officers to each housing unit wing at South Woods State Prison. The Commission finds that disputes under contractual safety clauses are legally arbitrable, but that an arbitrator cannot order an increase in staffing since the determination of staffing levels is a managerial prerogative. The Commission further finds that to the extent all or portions of this arbitration are advisory only, arbitration will not be restrained.

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 (Stephan M. Schwartz, Deputy Attorney General, on the brief)

For the Respondent, Zazzali, Zazzali, Fagella & Nowak, P.C., attorneys (Robert A. Fagella, on the brief)

DECISION

On June 25, 1998, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association (SLEC). The grievance asserts that the employer violated a contractual safety clause by not assigning at least two corrections officers to each housing unit wing at South Woods State Prison.

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

SLEC represents corrections officers, senior corrections officers and other employees at South Woods State Prison. The agreement between the Employer and SLEC is effective from July 1, 1995 through June 30, 1999. The grievance procedure ends in binding arbitration unless otherwise specified in the Agreement.

Article XXXVII is entitled Safety. Sections A and D provide:

> A. The State shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment and will continue to provide appropriate safety devices for their protection and to provide a reasonably safe and healthful place of employment.
>
> D. Employees shall not be required to work under conditions of work which are determined to present an imminent hazard to safety or health. An employee whose work is temporarily eliminated as a result of the foregoing may be assigned on an interim basis to other work which the employee is deemed to be qualified to perform.

Section H provides:

> H. Any arbitrator's decision or award interpreting or applying section A of this Article shall be advisory and non-binding as specifically noted in Article XI, Section H.5, Grievance Procedure.

On September 19, 1997, SLEC filed a grievance. The grievance states:

> Due to the incident of 7/30/97 at Bayside there should be two officers assigned to each housing unit wing. The inmates at SWSP are considered medium custody the same as Bayside. For this reason we should also have two officers per housing unit wing.

As a remedy, the grievance seeks:

> Assign two officers to each housing unit wing as follows, H11L, H11R, H12L, H12R. Also H-2 housing unit and all others as they come on line, unless agreed by this local otherwise.

The employer denied the grievance at Step One. The union appealed to Step Two, but the employer refused to honor the appeal on the ground that it was untimely filed. On January 19, 1998, SLEC demanded arbitration. 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 cannot consider the merits of the grievance or any contractual defenses the employer might have.

The scope of negotiations for police and fire employees 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 Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson sets forth these negotiability tests:

> 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 arises as 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).

The employer asserts that it is not required to negotiate over staffing levels, that the parties have not negotiated a provision in the agreement establishing minimum staffing levels, and that it has a managerial prerogative to set and maintain staffing levels at the prison.

SLEC asserts that the agreement contains a negotiated safety provision and that while the grievance seeks additional staffing as a remedy, it also seeks a declaration that current staffing levels are unsafe. It asserts that the only scope of negotiations question is whether there is any conceivable lawful remedy on the safety issue and that the answer to that question is yes. SLEC further asserts that since any arbitrator's decision or award interpreting or applying Section A of the safety provision would be advisory and non-binding, the petition should be dismissed.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Applying the Local 195 balancing test, we have held that disputes under contractual safety clauses are legally arbitrable, but that an award could not order an increase in staffing since

the determination of staffing levels is a managerial prerogative. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989). We have also held that challenges to any remedy awarded should be raised in post-arbitration proceedings. State of New Jersey, 15 NJPER at 154. Finally, to the extent all or portions of this arbitration are advisory only, we would not restrain arbitration. Rutgers, the State Univ., P.E.R.C. No. 98-23, 23 NJPER 504 (¶28244 1998).

ORDER

The request of the State of New Jersey for a restraint of binding arbitration 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