

P.E.R.C. NO. 2001-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY POLICE SUPERIORS
OFFICERS ASSOCIATION,

Petitioner,

-and-

Docket No. SN-2000-72

CITY OF JERSEY CITY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that a grievance filed by the Jersey City Police Superior Officers Association against the City of Jersey City is not legally arbitrable. The grievance alleges that the City violated the parties' collective negotiations agreement when it denied sergeants overtime; changed the work schedules of lieutenants; and assigned lieutenants to work on a regular and overtime basis to fill in for sergeants in the Bureau of Criminal Identification (BCI). An arbitrator issued an award denying the grievance on May 3, 1999.

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, Klausner, Hunter & Rosenberg,
attorneys (Stephen B. Hunter, on the brief).

For the Respondent, Martin R. Pachman, P.C., attorneys
(Robin T. McMahon, on the brief)

DECISION

On January 12, 2000, the Jersey City Police Superiors Officers Association petitioned for a scope of negotiations determination. The Association seeks a ruling that a grievance is legally arbitrable. The grievance alleges that the City violated the parties' collective negotiations agreement when it denied sergeants overtime; changed the work schedules of lieutenants; and assigned lieutenants to work on a regular and overtime basis to fill in for sergeants in the Bureau of Criminal Identification (BCI). An arbitrator issued an award denying the grievance on May 3, 1999.

On November 12, 1999, the Honorable Martin L. Greenberg, the Presiding Judge of the Chancery Division in Hudson County, granted the PSOA's motion to vacate the arbitration award. He

also remanded the case to us for a scope of negotiations determination and, if appropriate, to direct further arbitration proceedings.

On January 28, 2000, Judge Greenberg denied the City's motion to stay the November 12, 1999 remand order pending the City's appeal of the order to the Appellate Division. In view of the two court orders, we consider the PSOA's post-arbitration petition. See Town of West New York, P.E.R.C. No. 91-52, 17 NJPER 5 (¶22003 1990), aff'd NJPER Supp.2d 262 (¶217 App. Div. 1991). We reject the City's May 2, 2000 request to stay this proceeding until the disposition of the appeal.^{1/}

The parties have filed briefs and exhibits, including the arbitration award and the transcript of the oral argument and bench decision on the PSOA's motion to vacate the arbitration award. The final submission was received on October 6, 2000. These facts appear.

The PSOA represents all superior officers employed by the City, including sergeants, lieutenants, captains, inspectors and deputy chiefs.

^{1/} The City argues that the April 7, 2000 decision in Colantoni v. Long Hill Bd. of Ed., 329 N.J. Super. 545 (App. Div. 2000) supports its view that, under R. 2:9-1(a), its appeal of Judge Greenberg's order divests us of jurisdiction to consider this matter. While those arguments should be addressed to the courts, it does not appear to us that Colantoni provides a new interpretation of R. 2:9-1(a), which the City cited to Judge Greenberg in requesting a stay.

Article 8, Section 2 of the parties' agreement sets out the work schedule for employees in staff, as opposed to patrol, positions. It provides:

The staff schedule currently in effect will consist of a fourteen (14) day cycle, consisting of five (5) days on duty, followed by two (2) days off, followed by four (4) days on duty with three (3) days off, after which the cycle repeats itself. The staff work day shall consist of eight and one-half (8 1/2) hour days.

Article 14 is entitled Overtime. Sections 6 and 7 state:

Section 6. Whenever an employee is recalled to duty, he shall be entitled to a minimum of three (3) hours of overtime at time and one-half.

A. If there are no volunteers or an insufficient number of volunteers, the City, in its sole discretion, can mandate and assign one to overtime.

B. Nothing herein shall prevent a volunteer from one rank list being utilized to fill in under another rank opening absent available volunteers [on] the list in need of assignment.

Section 7. To further facilitate fluctuating manpower (i.e., Christmas, vacations, etc.) five (5) separate and distinct lists shall be used for the purposes of overtime. These lists shall be Sergeants; Lieutenants; Captains; Inspectors; and Deputy Chiefs.

Article 22, governing changes in schedule, provides:

Section 1. No change in schedule of any employee covered by this Agreement shall be made unless such employee is given at least 72 hours notice prior to the time that he is regularly scheduled to work, or 72 hours prior to the changes in reporting time, whichever is greater.

Section 2. In the event 72 hours notice is not given, such employee shall be paid at time and one-half for all hours less than 72 hours notice.

Section 3. The above shall not pertain in cases of emergency.

In the event 72 hours notice is not given, such employee shall be paid at time and one-half for all hours less than 72 hours notice.

In July and August 1998, there was a shortage of sergeants in the police department's Support Services Division -- which includes BCI -- because many sergeants had recently been promoted to lieutenant. That circumstance is undisputed, although the record does not indicate the normal complement of sergeants or the number available during July and August. During July, the Division's sergeants worked an average of fifty-five hours of overtime, and one sergeant worked 120 hours.

Sometime in July, Lieutenant Charles Schuesler of the BCI unit advised Captain Andrew Brusgard, Executive Officer of the Support Services Division, that during August there would be 55 vacant supervisor tours in BCI. For the division as a whole, there would be 110 vacant tours, totaling 880 hours.

On July 27, 1998, Brusgard wrote a memorandum concerning the vacant tours to Schuesler and the lieutenants assigned to the Scofflaw Warrant, Property Room and Municipal Court units. Brusgard stated that it was impossible to cover the vacant BCI

tours by using only sergeants in the Support Services Division.^{2/} Therefore, Brusgard authorized the use of lieutenants in "some of these vacancies" and stated that he would provide ample notice to them.^{3/} Brusgard assigned each of the four lieutenants to supervise, for one week in August, the BCI evening shift. During that week, their work hours were changed from 8:00 a.m.-4:30 p.m. to 11 a.m.-11 p.m., with four hours overtime for the period between 11 a.m. and 3 p.m.

On August 5, 1998, the PSOA filed a grievance, contending that these assignments violated Articles 14 and 22 "and any other contract provisions that may apply." It sought compensation for all sergeants who were not given the opportunity to work overtime and asked that the lieutenants who had had their schedules changed "receive a benefit deemed appropriate by the arbitrator."

In an August 5, 1998 memorandum to the police chief concerning the grievance, Brusgard reiterated his view that it was impossible, during August, to cover all the vacant BCI tours with sergeants in the Support Services Division. Brusgard indicated that he had considered the sergeants' health and safety and was concerned that they would "burn out" or make serious mistakes in

^{2/} The memorandum suggests that Schuesler had so advised Brusgard.

^{3/} In submitting proposed factual findings to the arbitrator, PSOA indicated that approximately 25 of the vacant BCI tours were filled by lieutenants.

critical areas because of the amount of overtime they had already worked in July.^{4/}

The grievance was denied, and the PSOA demanded arbitration. A hearing was held on March 8, 1999, at which Brusgard and Buonocore testified. On May 3, the arbitrator issued a decision denying the grievance. He found that there was no dispute over the vacant tours, the recent promotion of sergeants, or the number of overtime hours worked by sergeants during July. He also found that the City had complied with Article 22's 72-hour notice provision. He then reasoned:

While clearly it would be more expensive to utilize lieutenants to perform the work of the sergeants, nevertheless, Captain Brusgard determined that the temporary reassignment and payment of overtime and the changing of the shifts was the only way to proceed. In reality, while the reassignment did indeed produce overtime for lieutenants, it appears to me that this was necessary in order to have those lieutenants supervise the BCI and was a natural occurrence given the shift changes. Simply put, it is my view that what Captain Brusgard [did] was consistent with the operational needs of the department and, of course, the City itself.

^{4/} The record also includes an excerpt of an August 6 memorandum from Brusgard to Lieutenant Ronald Buonocore, the PSOA president, concerning the grievance. Before discussing its specifics, the memorandum notes that "the holding down of overtime has been stress[ed] repeatedly" by both the civilian and police chains of command."

The arbitrator continued that there was no question that the sergeants in the other units within the Division could function as BCI sergeants. However, he concluded:

[T]hat is not dispositive of this case. What is dispositive is that the City proceeded here, consistent with the operational needs of the department and consistent with the terms of the Collective Bargaining Agreement.

The PSOA moved to vacate the award, contending that the arbitrator had not analyzed the relevant contract provisions and had exceeded his authority by finding, in effect, that the City had a managerial prerogative to act as it did. The Court agreed. It noted that the arbitrator had justified arguable deviations from contract language based on "operational needs" and had thereby usurped our jurisdiction to determine whether the City had a managerial prerogative to act as it did. It therefore remanded the case to us for a scope of negotiations determination. See Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983) (Commission will not decide post-arbitration scope petition absent court referral).

The PSOA contends that both the work schedule and overtime portions of the grievance are legally arbitrable, consistent with Commission and judicial case law holding that the days and hours employees work, and overtime allocation provisions, are mandatorily negotiable. It recognizes that the City was not required to fill the vacancies in BCI but contends that, once it decided to do so, it was obligated to abide by the overtime

allocation procedures in Article 14. It disputes that there was any emergency requiring deviation from the contract, and argues that Brusgard never asked the BCI sergeants whether they had reached a "burnout level" and never offered overtime to the other sergeants in the Support Services division.

Similarly, the PSOA asserts that there was no emergency requiring a unilateral change in the lieutenants' work schedule and a four hour increase in their work days. Instead, it maintains that the work schedules were changed because this was the only mechanism by which the City could save some overtime costs vis-a-vis the costs that would have been incurred if only sergeants had been assigned to the vacant tours.

The City responds that this case implicates its managerial prerogative to temporarily reassign lieutenants to BCI -- and to adjust their schedules -- to address a staffing shortage and protect the public and police officers from the possibility of serious mistakes. It recognizes that overtime allocation procedures are generally mandatorily negotiable, but maintains that they are only triggered when an employer exercises its prerogative to determine that overtime will be worked. It urges that Article 14 cannot legally be interpreted to require it to cover BCI vacancies by using sergeants on an overtime basis. Moreover, it maintains that a public employer has a managerial prerogative to depart from overtime allocation provisions where necessary to protect the public interest.

With respect to the PSOA's contention that the lieutenants' schedules were changed to reduce overtime costs, the City maintains that the arbitrator rejected that position and that the PSOA has submitted no evidence to contradict that finding.

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. [Id. at 154]

We thus do not review the contractual merits of the grievance or any 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. 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 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).

This grievance involves two categories of employees. On behalf of the four lieutenants, it protests temporary work schedule changes as a result of their assignment as evening-shift sergeants. On behalf of sergeants in the BCI Unit and Support Services Division, it challenges the City's decision to staff the vacant tours with lieutenants, who worked on a regular and overtime basis, instead of staffing the tours with sergeants working overtime. As such, the grievance implicates three related principles and lines of case law.

The first set of principles involves work schedules. Consistent with Local 195, IFPTE v. State, 88 N.J. 393 (1982) and In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987), we have recognized that work schedules are generally negotiable in the abstract. However, we have also recognized that a particular work schedule issue involving police officers may not be mandatorily negotiable or legally arbitrable if the facts demonstrate a significant interference with governmental policy. See, e.g., Town of Irvington v. Irvington PBA, Local No. 29, 170 N.J. Super. 539 (App. Div. 1979), certif den. 82 N.J. 296 (1980) (need for supervision and improved discipline on night shift made shift change non-negotiable); Woodbridge Tp., P.E.R.C. No. 99-91, 25 NJPER 176 (¶30081 1999); City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997) (need for command presence on particular shifts made work schedule changes non-negotiable); see also City of Jersey City v. Jersey City POBA, 154 N.J. 555, 572-573 (1998) (broad discretion accorded public entities in administering police departments and making assignments for operational reasons aimed at reducing crime).

The second set of principles involves overtime and its relationship to an employer's prerogative to set staffing levels. Public employers have a prerogative to determine staffing levels for the police department as a whole and for each position to be filled and each duty to be performed. Paterson at 97; Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd NJPER Supp.2d 97 (¶80 App. Div. 1981). In City of Long Branch, we observed that

staffing levels may dictate the amount of overtime that will be worked because the prerogative to set staffing levels encompasses the right to determine whether an absent officer will be replaced on a shift. However, we distinguished between a police department's prerogative to decide when overtime must be worked -- and to require employees to work overtime -- and its duty to negotiate over the allocation of overtime opportunities among employees. We added:

Even though the allocation of overtime is a generally negotiable subject, there are still specific limitations on negotiability designed to insure that the employer will obtain a sufficient number of qualified employees to perform the necessary overtime tasks. Thus, if an urgent situation necessitates that the police department meet its manpower needs without instant compliance with the negotiated allocation system, it has the reserved right to make the necessary assignments to protect the public interest. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). Also, if an employer needs a particular employee with special skills and qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus insure that its needs are met. In re Local 195 and State of New Jersey, 88 N.J. 383, 8 NJPER 13129 (1982). In addition, an employer may reject an employee's request to work overtime, despite a negotiated system distributing overtime on a voluntary basis, if that employee is unqualified or physically incapable of doing the required work. In sum, the allocation of overtime is a mandatory subject of negotiations, provided that the employer remains assured that it will be able to obtain enough qualified and physically sound employees to perform the tasks at hand. [Id. at 450]

Accord Washington Tp., P.E.R.C. No. 2000-18, 25 NJPER 415 (¶30180 1999); Wayne Tp., P.E.R.C. No. 97-74, 23 NJPER 42 (¶28029 1996), aff'd 24 NJPER 141 (¶29071 App. Div. 1998); Borough of Wallington, P.E.R.C. No. 98-162, 24 NJPER 355 (¶29169 1998).

A third set of principles concerns temporary assignments and whether, once an employer decides to replace an absent officer, that replacement is an employee of the same or different rank. These cases also touch on overtime issues, since replacement of an officer with an employee of a different rank at acting pay rates may obviate the need to pay overtime to an officer of equal rank.

Provisions to replace absent officers with officers of the same rank at overtime pay rates are mandatorily negotiable and legally arbitrable. City of Newark, P.E.R.C. No. 98-102, 24 NJPER 126 (¶29064 1998); Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999); Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992). The rationale of these cases is that employees have a negotiable interest in receiving compensation for work performed in their own job titles, and that overtime compensation is often a significant part of an employee's earnings. Kearny, 23 NJPER at 503. The employer's interest in using lower-ranked employees in an acting capacity is primarily in saving money -- a concern that can be addressed through the negotiations process. Kearny; N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988).

By contrast, proposals and grievances seeking to replace absent officers with lower-ranked officers at acting pay rates are at best permissively negotiable. See City of Camden, P.E.R.C. No.

93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994). They may be non-negotiable if the employer demonstrates a governmental policy need to have officers of the same rank replace absent officers. See, e.g., Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990).

Against this backdrop, we turn first to that part of the grievance alleging that sergeants should have been assigned to fill all vacant tours on a overtime basis. The PSOA contends that Article 14 requires that temporary sergeant vacancies be filled, if at all, with other sergeants on an overtime basis. We do not decide whether the contract so provides, Ridgefield Park, but such a provision is mandatorily negotiable, subject to the employer's right to deviate from it where necessary to protect the public interest. Long Branch. We therefore reject the City's argument that the grievance cannot be arbitrated because Article 14 cannot be legally interpreted in the manner urged by the PSOA.

In this vein, the City's reliance on Long Branch is misplaced. It cites language in that decision to the effect that an employer may determine when overtime should be worked. But, read in context, that statement intended to convey that an employer may decide that an absent officer will not be replaced -- thus eliminating the need for overtime. It did not mean that an allocation clause intended to protect the employees' interest in overtime earnings was mandatorily negotiable only when the employer decided to address staffing shortfalls by paying

overtime. Under temporary assignment cases such as Kearny, P.E.R.C. No. 98-22, provisions requiring that staffing shortfalls be addressed through overtime as opposed to acting pay assignments are mandatorily negotiable.

Nevertheless, we agree with the City that, even if Article 14 is interpreted as urged by PSOA, the City had a right to deviate from the provision. During August 1998, the City had what it termed a "drastic shortage" of sergeants in both the BCI Unit and the Support Services Division as a whole. Brusgard made a policy determination that given the amount of overtime sergeants had worked in July, temporarily filling all of the BCI vacancies with sergeants working overtime could affect the sergeants' health and safety and could lead to their "burning out" or making serious mistakes in critical areas. While the PSOA contends that Brusgard could have offered overtime to other Support Services sergeants if he determined that BCI sergeants had worked too much overtime, Brusgard's decision to assign lieutenants to act as sergeants in BCI was based on his judgment that all Support Services sergeants had worked substantial overtime in July. Allowing an arbitrator to second-guess a police official's judgment as to the potential effects of such overtime on the quality of supervision in the BCI unit would substantially limit governmental policymaking. Stated another way, the City's actions were consistent with Long Branch's proviso that overtime allocation provisions are mandatorily negotiable as long as the employer remains assured that it may

obtain qualified and physically sound employees to perform the assignment.

We reach this conclusion regardless of whether, as the PSOA contends, the City's course of action entailed lower salary costs than would have been incurred if the City had filled the vacant tours with sergeants working overtime.^{5/} Compare Borough of Bogota, P.E.R.C. No. 99-77, 25 NJPER 129 (¶30058 1999), aff'd 26 NJPER 169 (¶31066 App. Div. 2000), certif. den. ___ N.J. ___ (2000) (City's proposal to hire civilian dispatchers involved governmental policy determination as to how to best manage department resources and assign police officers, even though cost savings were one concern). In any case, the arbitrator appears to have accepted Brusgard's statements as to why he acted as he did and, unlike cases where a lower-ranked officer replaces an absent higher-ranked officer, lower costs are not the only or most obvious reason why the City would chose to use higher-ranked officers to replace lower-ranked absent employees. The assignment of lieutenants was consistent with the City's stated desire to have more effective supervision than would, in its judgment, be provided by having overworked sergeants fill all vacant tours. Further, the City's alleged deviation from Article 14 was

^{5/} We make no findings in this regard. The arbitrator appears to have concluded that the assignment of lieutenants was more expensive and the PSOA has submitted no information on comparative costs.

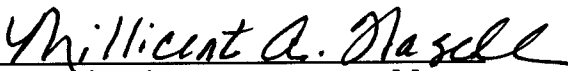
temporary and partial: 30 of the 55 tours were still covered by sergeants working overtime.

We turn now to the portion of the grievance protesting the one-week schedule and assignment change for the four lieutenants. We conclude that arbitration of that portion of the grievance would also substantially limit governmental policymaking. Management's judgment that there was a shortage of "qualified and physically sound" sergeants to fill all BCI sergeant vacancies triggered the assignment of lieutenants to temporarily fill those vacancies on a regular and overtime basis. Therefore, the work schedule changes are not mandatorily negotiable or legally arbitrable. See Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981) (Borough had prerogative to temporarily reassign patrol officer from day to night shift to fill in for ill sergeant).

ORDER

The PSOA's grievance is not legally arbitrable.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Buchanan opposed.

DATED: November 30, 2000
Trenton, New Jersey
ISSUED: December 1, 2000