

P.E.R.C. NO. 2023-55

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2023-001

PBA LOCAL 105,

Respondent.

SYNOPSIS

The Commission grants, in part, and denies, in part, a scope of negotiations petition filed by the State of New Jersey (Corrections) seeking a restraint of binding arbitration of a grievance filed by PBA Local 105 that asserts the State violated the parties' collective negotiations agreement when it temporarily reassigned eight Senior Correctional Police Officers (Grievants) from bidded posts (assignments that involved no inmate contact) and replaced them with other officers who, while under investigation for use of force against inmates, were deemed not able to have contact with inmates. The Commission restrains arbitration of: (1) the substantive decision to make the non-disciplinary temporary reassignments to ensure operational effectiveness and inmate safety, as that was an inherent policy determination not legally arbitrable under Local 195; (2) the claim of lost shift overlap pay resulting from the reassignments, which is not arbitrable when, as here, such loss flows directly from an otherwise non-negotiable transfer or reassignment decision; and (3) the claim that the reassignment infringed on the grievants' contractual seniority rights, which the Commission finds is not arbitrable under the circumstances presented. The Commission denies restraint on the issue of whether the State provided adequate notice of the reassignment, which concerns a procedural aspect of the decision that is legally arbitrable.

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. 2023-55

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2023-001

PBA LOCAL 105,

Respondent

Appearances:

For the Petitioner, Matthew J. Platkin, Attorney General (Achchana C. Ranasinghe, Deputy Attorney General, on the brief)

For the Respondent, Crivelli & Barbati & DeRose, LLC, attorneys (Donald C. Barbati, of counsel)

DECISION

On July 8, 2022, the State of New Jersey, Department of Corrections (State or NJDOC) filed a scope of negotiations petition, as amended on September 15 and 27, 2022, seeking a restraint of binding arbitration of a grievance filed by PBA Local 105 (PBA). The grievance asserts that the State violated the parties' collective negotiations agreement (CNA) when, starting in January 2021 and through May 5, 2021, the State reassigned eight Senior Correctional Police Officers (Grievants) employed at the East Jersey State Prison (EJSP) from bidded/awarded job posts/assignments with economic incentives, and replaced them with five other Senior Correctional Police

Officers (SCPOs) under investigation.

The State filed a brief and exhibits.<sup>1/2/</sup> The PBA filed a brief, exhibits, and the certifications of PBA Institutional Vice President Michael Calandra, and its counsel, Donald C. Barbati, and requested oral argument.<sup>3/</sup> These facts appear.

The PBA exclusively represents the officers employed by the Department of Corrections, State Parole Board and the Juvenile Justice Commission, to include Senior Correctional Police Officers. The State and the PBA were parties to an expired four-year CNA for the period of July 1, 2015 through June 30, 2019. The parties most recently entered into a Memorandum of Agreement dated April 20, 2021 for the period of July 1, 2019 through June 30, 2023. The grievance procedure ends in binding arbitration.

The grievance at issue alleges, in pertinent part:

The NJDOC's action of reassigning the eight (8) Senior Correctional Police Officers, as well as those officers similarly situated at East Jersey State Prison and other institutions, cause them to suffer a decrease in the pay, namely the loss of shift overlap

---

1/ The State did not file a certification in support of its scope petition. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certification(s) based upon personal knowledge.

2/ The State filed a motion and certification of its attorney stating that "extraordinary personal circumstances" caused the late filing of its brief. The PBA did not contest the late filing of the State's brief at the time the motion was filed.

3/ We deny the PBA's request for oral argument.

pay, for extended periods of time. Additionally, the seniority rights of these officers are undoubtedly infringed upon and/or eviscerated in contravention of the collective negotiations agreement between P.B.A. #105 and the State of New Jersey as it is the officers' seniority that allowed them to obtain the awarded job posts/assignments at issue. In simple terms, these officers were punished by the NJDOC for the Department's investigation of other officers, an investigation that did not involve and/or pertain to the affected officers in any way, shape, or form. Such actions violate fundamental tenets of fairness, equity, the applicable law, and the collective negotiations agreement, most notably Articles VIII, XIII, XIV, XXVII, XXX, XXXI, XLII, and Appendix I.

As a remedy, the PBA requests that the State be prohibited from reassigning officers from their bidded and/or awarded job posts and assignments as a result of other officers being investigated; and be required to reimburse all such affected officers for all monies lost, and for shift overlap pay not received, on account of the reassignment.

The relevant CNA provisions, as identified in the grievance and/or the parties' briefs, respectively address the subjects of transfer and reassignment, seniority, salary, hours of work, maintenance of benefits, and the parties' complete agreement.

The State's Internal Management Procedure #CUS.001.UFRC.01, dated July 6, 2021, entitled "Use of Force Review Committee", provides in part:

It is the policy of the State to protect the public by operating safe, secure and humane correctional facilities. To properly operate those facilities the State requires that employees, particularly Covered Persons [defined to include all designated Law Enforcement Officers] satisfactorily perform their duties, particularly when those staff members employ force against inmates and/or residents. An incident where a Covered Person has employed force against inmate(s) and/or residents, which results in an investigation, shall be reviewed by the Use of Force Review Committee.

The Grievants are eight Senior Correctional Police Officers who were awarded positions in the armed tower at EJSP after open job announcements for bids. Per a June 29, 2010 ESJP memorandum regarding "Shift Overlap" (Memo), the only positions approved to receive shift overlap are single officer housing units and armed posts. Per the Memo, armed posts at EJSP receive a 10-minute overlap to exchange information, equipment and weapons.

The State asserts, in its brief, that the Grievants were temporarily reassigned after five other officers - who were under investigation for use of force on an inmate by the State's Special Investigation Division (SID)- were required to be placed in posts without inmate contact pending those investigations. The State asserts that EJSP is responsible for ensuring the safety of its inmates during the course of that investigation, although it is not privy to the evidence uncovered by the SID against the officers being investigated. The State further asserts that the armed tower posts, held by the Grievants, are

among the very few positions at EJSP that provide no direct contact with inmates; and that the Grievants were reassigned to ensure EJSP's effectiveness and safety as a correctional facility, especially with regard to inmate contact, in accord with the NJDOC's Internal Management Procedure. The State further asserts: the Grievants were provided notice as to the temporary reassignment<sup>4/</sup>; the reassignments lasted for a period of less than six months; that when officers are not assigned to posts that receive automatic shift overlap pay, they would not be entitled to such pay; that while reassigned the Grievants received their normal salaries and did not have their normal hours changed; and that the Grievants were returned to their posts at the conclusion of the SID's investigation of the five other officers.

In his certification, Calandra confirms that the reassignments commenced in January 2021, and that five SCPOs under investigation were reassigned to the Grievants' positions during the pendency of the investigation. Calandra certifies that the Grievants' reassignments continued until on or about May 5, 2021, when all the Grievants were returned to their previously awarded job posts/assignments. Calandra further certifies that while reassigned the Grievants lost the shift overlap pay, an economic benefit directly tied to their awarded job

---

<sup>4/</sup> The record does not contain a copy of this notice.

posts/assignments. Additionally, Calandra certifies that one of the Grievants was required to report to work a half-hour earlier than he was in the previous position he held. Calandra certifies that none of the Grievants received prior notice of the reassignments.

Barbati certifies that on July 12, 2021, the PBA filed an unfair practice charge against the State arising out of the reassignments, Docket No. CO-2022-007, which resulted in the parties executing a settlement agreement dated January 19, 2022, whereby the parties agreed to proceed directly to binding arbitration in exchange for the PBA's withdrawal of the unfair practice charge.<sup>5/</sup> On or about February 3, 2022, the PBA filed a group grievance on behalf of the Grievants and those SCPOs similarly situated. On July 26, 2022, pursuant to the settlement agreement, the PBA filed for binding arbitration. This petition ensued.

In a scope of negotiations determination, the Commission's 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,

---

<sup>5/</sup> Public employers cannot agree to waive their managerial prerogatives. Ridgefield Park, supra.

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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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.]

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, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance 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). *Paterson* bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The State argues it has a managerial prerogative to temporarily reassign the Grievants, and the subject is not mandatorily negotiable because the reassignments were conducted to ensure the ESJP's effectiveness and safety, neither the salaries nor the normal hours of the Grievants were changed, and the Grievants have no vested right in their positions. The State further argues that the Grievants' loss of shift overlap pay as a result of the reassignments is a non-severable consequence ESJP's decision to deploy its personnel as it sees fit. The State also asserts the Grievants were provided notice of the temporary reassignment, while provisions in the CNA directly contradict the PBA's claim the reassignments infringed the Grievants' seniority rights. Lastly, the State argues that even if shift overlap pay was deemed negotiable, the CNA's silence on that subject renders that issue non-negotiable as between the parties, because the CNA provides that it is their complete agreement "inclusive of all negotiable issues whether or not discussed" and the PBA waived any right to further negotiations.

The PBA concedes that the State's decision to reassign is a managerial prerogative, but argues that procedures related to reassignments, such as providing adequate notice, and the economic effects of such reassignments which result in decreased pay are mandatorily negotiable. The PBA argues that through the reassignments the Grievants suffered a decrease in compensation

(the loss of shift overlap pay), and infringed their seniority rights as it was their seniority that allowed them to obtain the awarded job posts/assignments at issue. The PBA disputes that the reassignments were conducted with adequate notice, and contends one Grievant was further harmed when the reassignment required him to report to work a half hour earlier. The PBA also asserts that the reassignments "punished" the Grievants for the actions of other SCPOs, and that allowing this matter to proceed to arbitration would allow the parties to explore other alternative options that the State can employ when determining reassignments of this nature. Finally, the PBA asserts that the scope petition should be dismissed on procedural grounds based on: the State's failure to submit a supporting certification; and the late filing of its brief as to which, the PBA argues, the State failed to establish good cause for PERC to deem it as timely filed.

We find the question of whether the PBA's grievance is arbitrable must be determined under the third prong of the Local 195 negotiability test. That is, arbitration must be restrained if a negotiated agreement on the subject of the reassignment would significantly interfere with the determination of governmental policy. Under that standard, we find restraint of arbitration of the reassignment decision is appropriate here. In Local 195, supra, the New Jersey Supreme Court upheld the

managerial prerogative of a public employer to make transfer and reassignment decisions as it deems best. 88 N.J. at 417 (“[T]he substantive decision to transfer or reassign an employee is preeminently a policy determination. The power of the employer to make the policy decision would be significantly hampered by having to proceed through negotiation.”) See also, City of Jersey City v. Jersey City Police Officers Benevolent Ass’n, 154 N.J. 555, 573-74 (1998) (city’s implementation of police-officer transfers primarily for purpose of improving departmental effectiveness and performance constituted inherent policy determination that, under Local 195’s third prong, would be impermissibly hampered by negotiations).

There is no dispute that the Grievants held posts that involved no inmate contact, and that the State temporarily reassigned the Grievants from those posts to replace them with other officers who, while under investigation for use of force against inmates, were deemed not able to have contact with inmates. As in Jersey City, we find EJSP’s implementation of these temporary reassignments, to ensure its operational effectiveness and the safety of its inmates, was an inherent policy determination that would, under Local 195, not be legally arbitrable.

Further, while N.J.S.A. 34:13A-5.3 permits binding arbitration of disciplinary disputes in the absence of an

alternate statutory appeal procedure, the State's allegation that the reassignments at issue were not disciplinary and that the Grievants' salaries and normal hours (except as to one Grievant's starting time) were unchanged is un rebutted. The PBA, while characterizing the transfers as "punishment," has not otherwise alleged or shown that these transfers were demotions or were accompanied by any other indicia of disciplinary action. City of E. Orange, P.E.R.C. No. 86-70, 12 NJPER 19 (¶17006 1985).

We further find that the Grievants' alleged loss of shift overlap pay is not arbitrable under the circumstances presented. We have consistently held that grievances over the loss of pay differentials or premium pay flowing directly from otherwise non-negotiable transfer or reassignment decisions are not arbitrable. Bor. of Sayreville, P.E.R.C. No. 2001-28, 27 NJPER 15, n.1 (¶32008 2000). See also, Bor. of Oakland, P.E.R.C. No. 86-58, 11 NJPER 713 (¶16248 1985) ("[w]e do not believe that the mere loss of differential pay establishes that a transfer was disciplinary"); City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987) ("loss of shift differentials and opportunities for premium pay do not in themselves evidence discipline"); City of Millville, P.E.R.C. No. 90-117, 16 NJPER 391 (¶21161 1990) ("substantive decision to transfer or reassign an employee is generally neither negotiable nor arbitrable . . . even if a transferred employee loses a shift differential or

premium pay"); City of Long Branch, P.E.R.C. No. 92-53, 17 NJPER 506 (¶22248 1991) (same).

However, the issue as to whether the State provided adequate notice of the reassignment concerns a procedural aspect of the decision that is negotiable. Local 195, 88 N.J. at 410, citing, State v. State Supervisory Employees Ass'n, 78 N.J. at 90-91. Here, the PBA certifies that the Grievants did not receive notice, while the State's assertion that they did is unsupported by certified factual or documentary evidence in the record before us. We find an arbitrator may decide that dispute.

We now turn to the PBA's claim that the reassignment infringed on the Grievants' contractual seniority rights. Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. Town of West New York, P.E.R.C. No. 2021-10, 47 NJPER 197 (¶43 2020). But here, the PBA argues the Grievants' seniority rights were infringed only in relation to those that allowed them to obtain their awarded job posts/assignments in the first place. In other words, the State's decision to temporarily re-assign the Grievants from those posts did not occur until after the Grievants had already exercised those seniority rights. The reassignment was temporary and, as discussed supra, was made pursuant to a non-negotiable managerial prerogative, and the

Grievants were restored to their bidded posts. Under these circumstances, the seniority claim is not arbitrable.

ORDER

The petition of the State of New Jersey, Department of Corrections, for a restraint of binding grievance arbitration is granted on: the substantive decision to make the challenged temporary reassignments; the claim of lost shift overlap pay resulting from the reassignments; and the claimed seniority violation. The petition is denied with respect to the alleged failure to provide adequate notice of the reassignments.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, and Voos voted in favor of this decision. None opposed. Commissioner Papero recused himself.

ISSUED: June 29, 2023

Trenton, New Jersey