

P.E.R.C. NO. 2002-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY BOARD OF CHOSEN
FREEHOLDERS/SOMERSET COUNTY SHERIFF,

Petitioner,

-and-

Docket No. SN-2001-59

SOMERSET COUNTY CORRECTIONS OFFICERS'
POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 177,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of four proposals made by the Somerset County Corrections Officers' Policemen's Benevolent Association, Local No. 177 for inclusion in a successor collective negotiations agreement with the Somerset County Board of Chosen Freeholders/Somerset County Sheriff. A proposal concerning replacements is not mandatorily negotiable unless it is modified to state that the clause is subject to the employer's right to civilianize for demonstrated governmental policy reasons. A proposal to modify a minimum call-in article to provide that officers will only be required to perform the duty for which they were called in is mandatorily negotiable. An article concerning shift switches is mandatorily negotiable. An article concerning notice of shift change is not mandatorily negotiable unless modified to include language that recognizes the employer's right to deviate from seniority when necessary to preserve its managerial prerogative.

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, Stanton, Hughes, Diana, Cerra,
Mariani & Margello, P.C., attorneys
(Mark Diana, on the brief)

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

DECISION

On May 14, 2001, the Somerset County Board of Chosen Freeholders/Somerset County Sheriff petitioned for a scope of negotiations determination. The petitioners seek a determination as to the negotiability of proposals that Somerset County Corrections Officers, Policemen's Benevolent Association, Local No. 177 has submitted to interest arbitration for inclusion in a successor collective negotiations agreement between the parties.^{1/}

^{1/} The scope of negotiations petition references five proposals in dispute. However, the petitioners raise only four of the proposals in its briefs. Therefore, we will consider only those issues. We assume the other issue is no longer in dispute.

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

The PBA represents all uniformed department of corrections employees from the rank of correction officer to captain of correction officers and all uniformed officers in the Identification Bureau from the rank of officer to captain. The parties' most recent agreement expired on December 31, 2000.^{2/} The PBA has petitioned for interest arbitration and proposed new articles on replacements; minimum call-in time; switching shifts; and notice of shift change.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public

^{2/} That agreement was effective from 1995 through 1997. The parties signed a Memorandum of Agreement for the period 1998-2000.

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 fire fighters, 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.
[Id. at 92-93; citations omitted]

We consider only whether a proposal is mandatorily negotiable. It is our policy not to decide whether contract proposals, as opposed to contract grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

We analyze the PBA's proposals within this framework.

Replacements

No full time employee covered by this Agreement shall be replaced by any non-correction officer. No post presently filled by a full time employee covered by this Agreement shall be covered by any non-correction officer, part time or other personnel.

Relying on City of Passaic, P.E.R.C. No. 2000-8, 25 NJPER 373 (¶30162 1999), the County asserts that this clause is not mandatorily negotiable unless modified to specify that it is subject to the employer's right to civilianize for demonstrated

governmental policy reasons. The PBA responds that this is a typical unit work provision; that the additional proposed language is too broad; and that "governmental policy reasons" can mean any number of things. It stresses that a balancing test must be applied on a case by case basis to determine whether the governmental policy decision outweighs the negotiability of replacements.

Applying the negotiability balancing test, Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), held that the employer had a managerial prerogative to reorganize its police department to combat crime by increasing the number of police officers in field positions. A work preservation clause such as that proposed by the PBA would have defeated the employer's right to civilianize the positions in that case. See also 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. denied 165 N.J. 489 (2000). However, because Jersey City stressed that the balancing test must be applied case by case, it left open the possibility that there might be a civilianization dispute where the balance tips in favor of negotiability.

Drawing on Jersey City, Passaic held that a work preservation clause such as that here was mandatorily negotiable in the abstract. However, it also ruled that, in light of Jersey City, the clause must specify that it is "subject to the employer's right to civilianize for demonstrated governmental policy reasons."

Passaic controls this dispute and the PBA proposal is mandatorily negotiable only if modified to include the above-quoted language. Contrary to the PBA's assertion, the addition would not make the clause unenforceable whenever the employer asserted any governmental policy interest in support of civilianization. The reference to "demonstrated" governmental policy reasons means that a work preservation clause is enforceable unless, in a particular civilianization context, enforcement would substantially limit governmental policymaking powers.

Minimum Call-In Time

The contract contains a minimum call-in time article pertaining to employees who report in for duty on special call for work outside their regular working hours. The article provides that employees will be paid for four hours, even if the time spent to complete the job is less than four hours. The PBA has proposed adding the following language to this proposal:

If the time spent is less than four (4) hours, no individual shall be required to remain on duty. The individual shall be paid for four (4) hours at the applicable rate regardless.

The County asserts that the first sentence of this proposal interferes with its non-negotiable managerial prerogative to determine how best to deploy the workforce. It states that if an officer is called in to perform a task, the Sheriff has a managerial prerogative to deploy the officer once that task is completed and there is additional work to do. The PBA counters

that when an officer is called in outside of his regularly scheduled working hours to perform a specific task he should only have to perform the task for which he was called in and should then be able to report off duty. If there is another task to be completed, then the four-hour minimum call-in should be re-triggered. The PBA asserts that the four-hour call-in time is designed to protect officers by providing them with an enhanced rate of pay for work assignments outside their regular duties.

The County responds that while compensation is generally mandatorily negotiable, the PBA's proposal is not because it substantially limits the County's ability to assign work.

Provisions requiring a minimum amount of overtime pay when an employee is called into work on a day off have been held to be mandatorily negotiable. Hudson Cty., P.E.R.C. No. 94-87, 20 NJPER 88 (¶25041 1994), recon. den. P.E.R.C. No. 94-112, 20 NJPER 256 (¶25126 1994); Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984); see also Kearny PBA Local 21 v. Kearny, 81 N.J. 208, 224 (1979); cf. Troy v. Rutgers, the State Univ., ___ N.J. ___ (2001) (time worked and commensurate compensation are mandatorily negotiable terms and conditions of employment). In general, such provisions protect employee interests in compensation for having their off-duty plans and personal life disrupted and do not interfere with the employer's prerogative to determine the number of employees on staff and on duty. Hudson; Edison.

Hudson articulated these principles in circumstances analogous to those here. A contract article required the County to pay employees a minimum of four hours overtime whenever they were required to appear in court during their time off. Further, it barred the employees from being retained "for purposes of attaining the minimum of four hours if the appearance requires less time." The County challenged the negotiability of the quoted language. We found that the provision concerned:

[A]n employer's ability to assign overtime work for the sole purpose of having employees work during a period -- the remainder of a four-hour minimum -- for which they would otherwise be entitled to receive compensation. That compensation issue is mandatorily negotiable because it is significantly tied to the relationship between the rate of pay and the number of hours worked. 20 NJPER at 89, citing Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980).

In denying the County's motion for reconsideration, we observed that the dispute did not arise within a specific factual context and that we had ruled on the abstract negotiability of the clause. We therefore declined the County's request to address the assignment of overtime work necessitated by emergency or staffing needs.

The Hudson analysis pertains here. The PBA's proposal that employees be released once they have completed the task for which they were called in relates to the relationship between the rate of pay and the number of hours worked. Moreover, in contrast

to Hudson, the PBA acknowledges that the County could assign the employee to another task after the first task was completed -- subject to a re-triggering of the four-hour minimum. We agree with the PBA that the re-triggering is also tied to the relationship between rate of pay and hours worked. We therefore hold that the PBA's proposal is mandatorily negotiable.

The PBA has proposed the following new article:

Switching Shifts

Employees covered by this agreement shall be allowed to switch their shifts with other employees. The following requirements shall be met:

- 1) Any officer requesting a switch of shift approval must do so by completing an application form for switch of shift.
- 2) All Correction Officers that request a switch will submit their request to a shift supervisor. Shift supervisors are only to approve requests that are no more than eight weeks apart. All other switches greater than eight weeks apart must be submitted to the Captain for him to record on the schedule board.
- 3) All Superior Officers requesting a switch will submit their request to the Captain.
- 4) All submitted switch forms must be completed and signed by both officers/supervisors requesting the switch.
- 5) All switches require 24 hour notice.
- 6) Last minute emergency switches will be approved only if the nature of the emergency is stated on the switch form.
- 7) There shall be no restriction on double shifts (i.e., 16 hour shifts) as it applies to switches.

- 8) Male officers may switch with female officers as long as the minimum staffing requirements are met.
- 9) Superior Officers are allowed to switch with Correction Officers as long as a minimum of two supervisors are still scheduled.
- 10) Superior Officers approving switches are responsible for recording the switch on the schedule board.

The County objects to the underlined portions of the proposal. It asserts that the management approval requirement in the first paragraph must be more explicit and must state that "all switches require prior management approval." The County also asserts that paragraph 9 is not mandatorily negotiable since it does not allow management to deny any switches, which would compromise its prerogative to ensure the presence of qualified personnel at all times. It also maintains that the paragraph interferes with its right to decide that a certain shift may need more than two supervisors on duty -- or fewer.

The PBA acknowledges that, in order to be mandatorily negotiable, voluntary shift exchanges must be subject to prior management approval. However, it maintains that its proposal satisfies this requirement. Similarly, it asserts that paragraph 9 sets forth additional requirements for a shift switch involving supervisors and that such a switch is subject to the same approval requirements as any other switch.

Proposals permitting voluntary shift exchanges conditioned on the employer's prior approval are mandatorily negotiable. See, e.g., Town of Kearny, P.E.R.C. No. 2001-58, 27 NJPER 189 (¶32063 2001); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); contrast Teaneck Tp., P.E.R.C. No. 85-52, 10 NJPER 644 (¶15310 1984) (holding not mandatorily negotiable a proposal requiring only prior notice, rather than prior approval, of shift exchanges). Paragraph one implies that prior management approval is required by describing the procedure for "requesting a switch of shift approval." Therefore, the proposed clause is mandatorily negotiable. The employer is, of course, free to seek more explicit protective language in the successor agreement, but we agree with the PBA that the current language protects the employer's prerogative to require approvals of shift exchanges.

With respect to paragraph 9, we read it as allowing consideration of a superior officer's request to voluntarily exchange shifts with a corrections officer as long as, if granted, two superior officers would still be scheduled on his or her original shift. We agree with the PBA that the paragraph sets out additional requirements for supervisor-corrections officer exchanges and that the approval requirement in paragraph one pertains to this section.

Further, paragraph 9 does not significantly interfere with the County's prerogative to set staffing levels. See West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); North Hudson Reg. Fire & Rescue, P.E.R.C. 2000-78, 26 NJPER 184 (¶31075 2000); Franklin Bor., P.E.R.C. No. 98-138, 24 NJPER 273 (¶29130 1998); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990). In allowing exchange requests to be considered in the circumstances it specifies, paragraph 9 permits the County to deny requests for staffing or other reasons.

Notice of Shift Change

The notice of shift change article provides:

Whenever the County, through its authorized agents, seeks to change the shift of any employee covered by this Agreement, then, in those cases where the employment on the new shift will be for one (1) week or more, the County will give two (2) weeks notice of the change of shift to the employee.

The PBA proposes adding the following:

Additionally, the County will base all shift changes on seniority. The Shift and RDO Preference Sheet submitted each year by all employees in November will be followed. The most senior employee eligible for a shift change will be given the first opportunity and so on down the seniority.

The 1998-2000 Memorandum of Agreement contains a seniority bidding process clause. It provides:

The employer agrees to implement a shift selection and days off annual bidding process. The following conditions shall be included:

- a. The employer shall post a seniority list by November 1st of the preceding year.
- b. Seniority bidding shall commence November 1st.
- c. Bids shall be in writing.
- d. A new schedule shall be posted by December 1 based upon the bids.
- e. The new schedule which is the result of the seniority bidding process shall be effective in the first week of January.
- f. Seniority shall be defined as follows:
 - Officer's date of continuous employment as a Correction Officer at Somerset County Jail;
 - Supervisor's time in rank
- g. The employer shall have the right to deviate from the procedure in special needs circumstances including, but not limited to, ensuring appropriate staffing levels.

The County asserts that the PBA's proposed addition to the Notice of Shift Change article is non-negotiable because it fails to preserve management's right to deviate from seniority to accomplish governmental policy goals, including the ability to ensure that an adequate number of qualified personnel is assigned to each shift.

The PBA points to Section g of the shift bidding clause in the Memorandum of Agreement which gives the employer the right to deviate from the procedure in special needs circumstances. The

PBA contends that "special needs circumstances" clearly encompasses the employer's right to deviate to accomplish governmental policy goals including qualifications, special abilities, training, supervision, staffing levels, and emergencies. The PBA states that its proposal merely incorporates and expands on the shift bidding proposal agreed to by the parties in the Memorandum of Agreement.

The County responds that the existing shift selection procedure in the Memorandum of Agreement applies only to annual shift selection and does not cover mid-year shift changes due to vacancies. The County thus concludes that the mid-year shift assignments, like the annual shift assignment procedure, must preserve management's right to deviate from seniority when necessary to preserve managerial prerogatives.

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. See, e.g., Burlington Cty., P.E.R.C. No. 2000-70, 26 NJPER 121 (¶31052 2000); Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified and recon. den., P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd ___ NJPER ___ (¶____ 2001), App. Div. Dkt. No. A-1509-99T3 (9/4/01); Somerset Cty. Sheriff, P.E.R.C. No. 2000-20, 25 NJPER 419 (¶30182 1999), recon. den. P.E.R.C. No. 2000-38, 26 NJPER 16 (¶31003 1999), aff'd ___ NJPER ___ (¶____ 2001), App. Div. Dkt. No. A-1635-99T5 (8/29/01);

City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); contrast Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶25196 1994) (clauses that base shift assignment solely on seniority are not mandatorily negotiable). Shift bidding clauses must contain language safeguarding the employer's right to deviate from seniority when necessary to preserve its managerial prerogatives. Asbury Park, 15 NJPER at 511.

The PBA's proposal does not contain such language. It is proposed to be added to a contract article governing shift changes that also does not contain such language. Subsection g of the shift bidding procedure is a separate provision and does not appear to provide the required clarification for shift changes. Accordingly, we hold that the PBA proposal on shift changes is not mandatorily negotiable unless modified to include language that recognizes the employer's right to deviate from seniority when necessary to preserve its managerial prerogatives.

ORDER

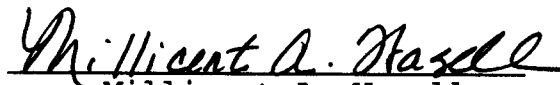
The proposed Replacements article is not mandatorily negotiable unless modified to state that the clause is subject to the employer's right to civilianize for demonstrated governmental policy reasons.

The proposed Minimum Call-in Time article is mandatorily negotiable.

The proposed Shift Switching article is mandatorily negotiable.

The proposed addition to the Notice of Shift change article is not mandatorily negotiable unless modified to include language that recognizes the employer's right to deviate from seniority when necessary to preserve its managerial prerogatives.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: September 26, 2001
Trenton, New Jersey
ISSUED: September 27, 2001