

P.E.R.C. NO. 2009-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-012

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL #75, INC.

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Edison for a restraint of binding arbitration of a grievance filed by PBA, Local #75, Inc. The grievance contests a change in the work schedule of the Criminal Investigations Bureau in the police department. The Commission holds that the Township has not shown that the change in schedule would interfere with governmental policy so as to require an exception to the general negotiability of work schedules.

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, Ruderman & Glickman, P.C.,
attorneys (John A. Boppert, on the brief)

For the Respondent, Klatsky, Sciarrabone & De Fillippo,
attorneys (David J. De Fillippo, on the brief)

DECISION

On August 22, 2008, the Township of Edison petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration sought by Policemen's Benevolent Association, Local #75, Inc.^{1/} The PBA contests a change in the work schedule in the Criminal Investigations Bureau ("CIB"). We deny the request for a restraint.

^{1/} Neither party submitted a copy of a "grievance," although the Township filed the PBA's May 9, 2008 letter to the Chief questioning the work schedule change. The PBA's demand for arbitration alleges that the Township's action violated the parties' collective negotiations agreement.

The parties have filed briefs and exhibits.^{2/} The Township has submitted the certification of Deputy Chief Thomas Bryan. The PBA has submitted the certifications of PBA President Michael Schwarz and Alan Engel, a detective assigned to the CIB. These facts appear.

The parties' collective negotiations agreement is effective from January 1, 2005 to December 31, 2008. Article V is entitled Hours of Work and Work Schedule. Section C provides, in pertinent part:

2. The provisions of this article notwithstanding, hours of work and work schedule can be changed upon the mutual agreement of the Union and the Township.

3. All non-tour officers shall work a regular five day week or in accordance with the practice in effect as of this date. This shall also include the daytime power shift, which shall continue to work a 5-2 work schedule of eight (8) hours Monday through Friday with weekends off duty.

^{2/} On May 21, 2008, the PBA filed an unfair practice charge alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed the work schedules of certain officers assigned to the CIB from four days on and three days off ("4-3") to five days on and two days off ("5-2"). The charge was accompanied by an application for interim relief. A Commission designee denied interim relief finding that the PBA had not established a substantial likelihood of success on the merits. Edison Tp., I.R. No. 2008-20, 34 NJPER 146 (¶62 2008). Further processing of the unfair practice charge has been held in abeyance pending this scope determination.

4. On the declaration of an official emergency, as defined by N.J.S.A. 40A:14-133; 40A:14-134 and 40A:14-135 the provisions above shall not apply.

Article VI is entitled Overtime. It provides that scheduled tours of duty shall not be changed without four days' advanced notice except in emergencies. Employees not provided four days' notice receive time and one-half for the newly scheduled hours.

Article XXXIX is entitled Work Schedule Review Committee. It provides:

Recognizing that work schedules may, from time to time, need some adjustments to address certain new concerns, the parties agree to form and institute a Work Schedule Review Committee (WSRC). This WSRC shall have four (4) members, two (2) appointed by the Administration and two (2) appointed by the P.B.A. The Committee shall meet as needed to review and discuss the work schedule and any concerns or problems which may arise. The Committee shall make recommendations to their various constituents regarding these concerns and their possible solutions. It is agreed that no recommended changes concerning the schedule shall be considered unless they have been brought before this Committee and the Committee has written its findings and responses thereto and brought those written findings back to [the] Mayor and the P.B.A. President respectively and simultaneously.

Officers assigned to the CIB are classified as non-tour officers. The CIB is divided into units including: detective squad (general investigations), burglary unit, vice/narcotics unit, juvenile unit and BCI. In the past, officers in the CIB worked a 4-3 schedule consisting of 9 hour and 40 minute tours.

This 4-3 schedule was applicable primarily to the CIB squads except for the BCI.

On April 28, 2008, Bryan issued Personnel Order PA-08-038, which established a new unit within the CIB entitled the Rapid Response Unit ("RRU") effective May 8. Three officers were assigned to this unit and had their work schedule changed to a 5-2 schedule, Monday through Friday, 8:00 a.m. to 4:00 p.m.

On May 2, 2008, Bryan issued Memorandum PA-08-078, which changed the work schedule of most of the CIB to a 5-2 schedule. The investigations unit would work 8:00 a.m. to 4:00 p.m. and 3:00 p.m. to 11:00 p.m.; the juvenile unit from 8:00 a.m. to 4:00 p.m.; the narcotics unit from 5:00 p.m. to 1:00 a.m.; the burglary unit from 8:00 a.m. to 4:00 p.m.; and the RRU from 5:00 p.m. to 1:00 a.m. The memorandum also stated that "all hours will be flexible in order to meet the operational demands of the tasked assignments." The BCI technician's schedule and hours remained the same.

According to PBA President Michael Schwarz: the schedule and hour changes were not negotiated with the PBA, as had been the practice in the past; the RRU officers were not given four days' notice of their change; and the WSRC did not consider the proposed changes as required by the contract. On May 9, 2008, Schwarz sent a memorandum to Bryan demanding negotiations as to any work schedule change and requesting every reason "why the new

work schedule is being put into effect" and requesting "more specific reasons as well as a detailed explanation as to how the new work schedule change will meet this objective."

On May 12, 2008, Bryan responded:

In order to meet my obligation to ensure the safe and efficient operation of the Police Department, I must maximize all available resources that will enhance operational flexibility. At this point in time, employing the contractually recognized (5-2) schedule does in fact enhance the operational flexibility of the Criminal Investigations Bureau.

Bryan states that the police department is down 25 officers since January 2004 and has seen an increase in calls for service by over 20 percent. He further states that officer leave time has increased thus creating a staffing shortage that poses a challenge to the continued safe and efficient operation of the department. To address this challenge, Bryan states that he changed the work schedule to achieve greater coverage since the former 4-3 schedule required four squads to operate and the 5-2 schedule requires two squads, thus creating better coverage on the shifts and less impact on the department from staffing losses.

The PBA responds that the alleged manpower crisis is not true. The PBA agrees that staff has decreased since 2004, but the staffing shortages have been felt in the patrol bureau, not in the CIB. The PBA also maintains that the increase in calls

for service is irrelevant because there has not been a measurable increase in calls for service in the CIB; no officer in the CIB has more than 15 years of service and therefore contractual increases in leave time have not had an impact on the CIB; the 4-3 schedule did not leave gaps in coverage; there is no coverage in the CIB on weekends; the department has never had to transfer an officer from the patrol bureau to make the 4-3 schedule work; and the 4-3 schedule was more efficient.

On June 18, 2008, the PBA 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 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. Paterson, 87 N.J. 78 (1981). Because this dispute arises through 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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged to have been violated is preempted or would substantially limit government's policymaking powers. No preemption issue has been raised.

The Township argues that arbitration should be restrained because it acted pursuant to a legitimate, non-negotiable managerial prerogative. The PBA argues that the work schedules are mandatorily negotiable and that several provisions in the parties' contract address work schedule changes. The Township replies that in order to ensure the adequate delivery of governmental services, the Township must exercise reasonable discretion to determine whether and how to use or apply existing resources.

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a general rule, negotiable. See, e.g., Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd

o.b. 177 N.J. 560 (2003); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987). A grievance protesting a work schedule change is not legally arbitrable if enforcement of a particular work schedule agreement would substantially limit a governmental policy determination. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980). For example, we have restrained arbitration over work schedule changes effected to address supervision or operational problems or to adjust officers' schedules to conform to the employer's judgment about when services should be delivered. See, e.g., Springfield Tp., P.E.R.C. No. 2006-27, 31 NJPER 328 (¶131 2005); City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005). In Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236, 237 (¶28113 1997), we cited Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997), and explained that in order to be non-negotiable, a work schedule must so impede governmental policy that it must not be addressed through negotiations despite the normal legislative desire that work hours be negotiated to improve morale and efficiency.

The chief states that he changed the work schedules to improve operational efficiency. He further states that the new work schedule will improve coverage due to staffing shortages and an increase in calls for service because the new schedule requires two squads rather than four to operate. The PBA

challenges many of the chief's assertions. It states that: there are no staffing shortages in the CIB; the detective case load has remained the same; the majority of officers receiving increased leave time are not in the CIB; there is no coverage in the CIB on weekends; there was never a gap in coverage in the CIB during the 4-3 schedule; the department never filled a gap in coverage when a detective was not in during the 4-3 schedule; and the department never had to transfer an officer from the patrol bureau to make the 4-3 schedule work. Significantly, in its reply, the Township does not refute the PBA's assertion that the operational issues identified by the chief do not impact the CIB.

There are exceptions to the general negotiability of work schedules when the facts prove a particularized need to preserve or change a schedule to protect a governmental policy determination. However, on this record, we do not find that the Township has shown that the former schedule has caused or would cause the significant staffing and coverage gaps needed to remove a 5-2 schedule from the realm of negotiable work schedules. Contrast Irvington (employer proved on appeal that discipline problems caused by inadequate supervision on midnight shift necessitated a shift change); Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposal would have eliminated relief officer system used to plug coverage gaps in

small police department).^{3/} Under these circumstances, the PBA may arbitrate its claim that the schedule change violated the contract.

The PBA's grievance also alleges that the contract entitles the affected employees to overtime compensation if the contractual notice of a change in schedule is not provided and that the Township violated the contract when it did not use the Work Schedule Review Committee ("WSRC") prior to instituting the change. In response, the Township argues that all officers received their contractual notice and that the WSRC has not been used since the 4-3 work schedule was implemented in 1992 and that it cannot address non-negotiable work schedule changes. Article XXXIX establishes the WSRC and provides that it "shall meet as needed to review and discuss the work schedule" and related matters. The Township's contractual defenses can be considered by an arbitrator. As for its argument that the WSRC cannot address non-negotiable work schedule changes, we disagree. Committees to meet and discuss matters of governmental policy are mandatorily negotiable. City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. denied 88 N.J. 476 (1981); In re Commercial Tp. Bd. of Ed., P.E.R.C. No. 80-20, 5 NJPER 384 (¶10195 1979); In re

^{3/} We note that the schedule change involved changes in work hours as well as work days. The parties have not separately addressed the work hours issue and therefore neither do we.

Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶111161 1980). Our Supreme Court has affirmed that non-binding forums to consider non-negotiable subjects may induce parties to resolve disputes without formal proceedings. Bernards Tp. Bd. of Ed. v. Bernard Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979).

ORDER

The request of the Township of Edison for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Watkins was not present.

ISSUED: March 26, 2009

Trenton, New Jersey