

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-041

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

Respondent.

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-055

EDISON PBA LOCAL NO. 75 (SUPERIORS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Edison for restraints of binding arbitration of grievances filed by the Policemen's Benevolent Association, Local No. 75, Inc. and the Edison PBA Local 75 (Superiors). The grievances challenge the establishment of an early evening shift. The Commission finds that there are facts in dispute regarding the motivation for the creation of the new shift that the arbitrator can decide. The Commission further finds that the portion of the grievance concerning a violation of negotiated procedures for the creation of a new work schedule is legally arbitrable. The Commission retains jurisdiction over the direct challenge to the creation of the early evening shift and permits the Township to reactivate its petition within 30 days should the arbitrator find a contractual violation and the Township believe the remedy would substantially limit its policymaking powers.

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. 2010-4

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Appearances:

For the Petitioner, Ruderman & Glickman, attorneys
(John A. Boppert, on the brief)

For the Respondent - PBA, Klatsky Sciarrabone &
DeFillippo, attorneys (David J. DeFillippo, on the
brief)

For the Respondent - SOA, Mets Schiro & McGovern, LLP,
attorneys (Jordan M. Kaplan, of counsel)

DECISION

On January 13 and February 27, 2009, the Township of Edison petitioned for scope of negotiations determinations. The Township seeks restraints of binding arbitration of a grievance

jointly filed by Policemen's Benevolent Association, Local #75, Inc. and Edison PBA Local No. 75 (Superiors). The grievance challenges the establishment of an early evening shift. We deny the request for restraints, but retain jurisdiction should the arbitrator find a contractual violation.

The parties have filed briefs and exhibits. The Township has filed certifications from Police Chief Thomas Bryan. The PBA has filed a certification from its president, Police Officer Michael Schwarz. The SOA has filed a certification from its president, Lieutenant Bruce Polkowitz. These facts appear.

The PBA represents the Township's patrol officers. The SOA represents the Township's sergeants, lieutenants and captains. The Township and the unions have entered into collective negotiations agreements effective from January 1, 2005 through December 31, 2008.

Article V in both contracts is entitled "Hours of Work and Work Schedule." They provide that patrol and traffic and safety officers and their superior officers work four days on followed by four days off. Each work day is 10 hours and 40 minutes long.

Both contracts also provide that the provisions of the work schedule notwithstanding, the hours of work and work schedule can be changed upon the mutual agreement of the unions and the Township.

Article VI of both contracts is entitled "Overtime." It provides for three shifts:

Day shift	6:20 a.m. - 5:00 p.m.
Evening shift	3:50 p.m. - 2:30 a.m.
Midnight shift	8:50 p.m. - 7:30 a.m.

Article XXIII of both contracts is entitled "Employer Rights."

Article XXXIX of the PBA agreement establishes a "Work Schedule Review Committee" to review proposed work schedule changes before they are considered. It provides:

Recognizing that work schedules may, from time to time, need some adjustments to address certain 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.

On November 24, 2008, then-Deputy Chief Bryan issued memoranda addressed to the PBA president and vice-president and the SOA president. The memoranda addressed the subject of "Evening Shift-Staggered Start Times." They established a new shift for half the officers on the evening shift. The evening shifts would now include:

Early Evening	1:50 p.m. - 12:30 a.m.
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Late Evening 3:50 p.m. - 2:30 a.m.

The memoranda stated that the change was made to enhance operational efficiency in addressing peak Call For Service (CFS) times, to maximize first-line supervision, and to ensure the safe and efficient operation of the department.

On December 3, 2008, the unions filed a joint grievance alleging that the new shift violated Articles V and VI. Bryan denied the grievance on the grounds that the early evening shift was established pursuant to the Township's contractual rights under Article XXIII as well as its non-negotiable managerial prerogative to address deficiencies in coverage of peak calls for service times.

According to charts attached to Bryan's certifications, calls for service between 1:50 p.m. and 3:50 p.m., the first two hours of the new early evening shift, increased between 2006 and 2007, but decreased in 2008 to a level that was still higher than 2006.

	<u>2006</u>	<u>2007</u>	<u>2008</u>
1:50 p.m. - 3:50 p.m.	5733	6035	5898

Calls for service in the last two hours of the early evening shift increased between 2006 and 2007 and again between 2007 and 2008.

	<u>2006</u>	<u>2007</u>	<u>2008</u>
12:30 a.m. - 2:30 a.m.	2387	2470	3123

There were almost 2 1/2 times the number of calls for service in the early evening hours versus the late evening hours.

The total time officers devoted to responses to calls for service in the early evening hours increased from 2006. The number was highest in 2007 and fell in 2008, but 2008 still exceeded the 2006 levels.

	2006	2007	2008
1:50 p.m. - 3:50 p.m.	3449	3735	3504

By contrast, the total time devoted to responses during the late hours never exceeded 42% of the total committed time in the early evening hours in any given year, and was lowest in 2008

	2006	2007	2008
12:30 a.m. - 2:30 a.m.	1444	1466	1397

PBA President Schwarz states that the department provides in-service training when the early evening shift begins and that the purpose of the new shift is to reduce overtime costs for training.

SOA President Polkowitz states that before 2009, in order to avoid generating unnecessary overtime caused by in-service training, the department provided schedule adjustments. A group of officers would be required to come into work on their regular day off for in-service training. To compensate them, the officers would be provided with another day off. The department

attempted to stagger those days off to avoid a situation where too many officers on a particular shift were scheduled for the same day off. In 2008, on several occasions, the department was understaffed because schedule adjustments resulting from in-service training gave too many officers days off during the same shift. To meet its staffing needs on those days, the department was compelled to fill posts with overtime. As a result, the Township paid a substantial amount of overtime in 2008 resulting from those schedule adjustments due to in-service training. On several occasions since implementation of the early evening shift, the Township has scheduled a substantial number of officers for in-service training between 1:50 p.m. and 3:50 p.m., thereby taking them off their patrol duties. Since January 2009, in light of the new shift, the department has not provided schedule adjustments when scheduling patrol squads for in-service training; nor has the Township been compelled to schedule any officers on overtime to fill vacant posts created by schedule adjustments resulting from in-service training. As watch commander, Polkowitz states that he believes that there is no discernible difference in response times between 1:50 p.m. and 3:50 p.m. and the rest of the day.

Bryan replies that no officer has ever received overtime for mandatory in-service training. All training has occurred either during regularly scheduled shifts, at the normal rate of pay, or through schedule adjustments. Bryan also asserts that there was

in-service training during the 70-minute overlap between the day and evening shifts, as well as during other shifts, even before implementation of the disputed early evening shift.

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 (¶111 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 it has a non-negotiable managerial prerogative to manage the police department for purposes of operational efficiency. It asserts that this includes the creation of a new shift to address deficiencies in coverage for peak call for service times. The Township argues that the schedule change stems from a general increase in calls for service in the hours that coincide with the new early evening shift. In addition to an increase in call volume, the Township asserts that under the three-shift schedule, fewer officers are available to respond to calls for service during the early evening hours due to the increase in call volume, despite a 70-minute overlap between the evening and day shifts. In contrast, there was often a surplus of officers available in the late evening and early morning hours due to comparatively fewer calls for service. As for the WSRC, the Township argues that it cannot address non-negotiable unilateral changes that are necessary to increase operational efficiency and ensure public safety.

The PBA asserts that in the past, the parties have met and negotiated a change in the work schedule for the traffic bureau. It further asserts that the contract requires that work schedules be discussed and negotiated prior to any implementation. It asserts that the new schedule was not reviewed nor considered by the WSRC. The PBA disputes the Township's justification for the

change noting that calls for service during the peak hours decreased in 2008. In addition, the PBA states that the department is not using the extra officers to answer calls, but instead to provide in-service training. The PBA argues that police work schedules are, in general, mandatorily negotiable. It contends that unilateral changes have been permitted only when an employer has demonstrated a specific, tangible, documented need or operational objective and that no such showing has been made in this case. Finally, the PBA argues that the Township's petition should be rejected in light of the creation of the WSRC.

The SOA agrees with the PBA that work schedules are, in general, mandatorily negotiable. It contends that an employer may not alter work schedules to avoid overtime costs. It further contends that the Township has not satisfied its burden of establishing a particularized need for this additional shift. The SOA points to the decrease in mid-afternoon calls for service in 2008 and an increase in overtime attributable to in-service training in 2008. It argues that an increase in calls for service is not evidence of a problem in providing services to the public or that the schedule change will address such a problem.

Police work schedules 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). However, 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). Thus, we have restrained arbitration over work schedule changes implemented 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.

Under the particular facts of this case, we will not restrain binding arbitration. First, the PBA contract provides a procedure to address work schedule changes. We addressed the Township's argument that the WSRC cannot address non-negotiable work schedule changes in a recent case involving these same parties:

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 Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325(¶11161 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).

[Edison Tp., P.E.R.C. No. 2009-51, 35 NJPER 72 (¶29 2009)]

The Township has not established that it had an emergent need to create an early evening shift without first fulfilling any alleged contractual obligation to first bring its proposal to the WSRC. Accordingly, the WSRC aspect of the PBA grievance may proceed to binding arbitration.

As for the direct challenge to the creation of the early evening shift, there are competing claims: the Township asserts that the work schedule was changed to provide better police services; the PBA and SOA assert that the schedule was changed to save overtime costs associated with in-service training.^{1/} Under these circumstances, we will permit this aspect of the grievance to proceed to arbitration. The arbitrator may make a threshold determination on the motivation for the new shift, subject to our further consideration in the event the arbitrator finds a

^{1/} That labor cost motivation, while legitimate, would not make the subject of a work schedule non-negotiable. See, e.g., New Jersey 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).

contractual violation. We will thus ultimately determine the facts necessary to issue the scope of negotiations determination. See Atlantic Cty. Superintendent of Elections, P.E.R.C. No. 2007-6, 32 NJPER 275 (¶114 2006); Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998).

We note again that the parties' contracts have expired and that this work schedule dispute can also be addressed as part of their successor contract negotiations.

ORDER

The request of the Township of Edison for restraints of binding arbitration are denied. We retain jurisdiction over the direct challenge to the creation of the early evening shift and will permit the Township to reactivate its petition within 30 days should the arbitrator find a contractual violation and the Township believe that the remedy would substantially limit its policymaking powers.

BY ORDER OF THE COMMISSION

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

ISSUED: August 13, 2009

Trenton, New Jersey