

P.E.R.C. NO. 2024-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 383,

Petitioner,

-and-

Docket No. SN-2024-015

STATE OF NEW JERSEY
(DIVISION OF CRIMINAL JUSTICE),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the PBA's scope of negotiations petition seeking a determination that its proposal regarding work schedules and overtime is mandatorily negotiable and not preempted by statute. The Commission finds that 29 U.S.C. §207(k) does not preempt the PBA's proposal to change the 28-day work schedule because the statute does not contain language requiring employers to use the 28-day work schedule. The Commission further finds that N.J.A.C. 4A:6-2.2A does not preempt the PBA's proposal to change the 28-day work schedule because that statute is discretionary, and not mandatory. The Commission concludes that the State has not established that the PBA's work schedule and overtime proposal would significantly interfere with its governmental policy need to provide police services.

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, Crivelli, Barbati & DeRose, LLC,
attorneys (Frank M. Crivelli, of counsel)

For the Respondent, DeCotiis, Fitzpatrick, Cole &
Giblin, LLP, attorneys (Arlene Quinones Perez, of
counsel and on the brief; Michael Oppici, of counsel)

DECISION

On October 10, 2023, PBA Local 383 (PBA) filed a scope of negotiations petition seeking a determination that its proposal to the State of New Jersey, Division of Criminal Justice (State) regarding work schedules and overtime is mandatorily negotiable and not preempted by statute. The PBA filed briefs and exhibits.^{1/} The State filed briefs, exhibits, and the certification of the Deputy Director for the Office of Employee Relations (Deputy Director). These facts appear.

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

The PBA is the exclusive representative of all full-time, permanent and provisional employees for the State's Department of Law and Public Safety, Division of Criminal Justice, including the titles of Detective I - State Investigator, Detective II - State Investigator, and Detective Trainee - State Investigator (Detectives or State Investigators). The State and PBA are parties to a collective negotiations agreement (CNA) with a term of July 1, 2019 through June 30, 2023, that continues in effect. The parties are currently in negotiations for a successor CNA.

Article XXVI, Overtime (Overtime Provision), of the parties' CNA provides:

Employees are compensated pursuant to a 28-day cycle in accordance with N.J.A.C. 4A:6-2.2A(b). Hours worked up to and including 160 hours in a 28-day cycle are paid at straight time. Hours worked between 160 and 171 hours in a 28-day cycle shall be compensated with compensatory time off (CTO) at the rate of one (1) CTO hour for every one (1) hour worked. Hours worked over 171 hours in a 28-day cycle shall be compensated at the overtime rate of one and one-half (1 ½) times the employee's regular hourly rate.

The PBA provides the following background. Prior to the unionization of the State Investigators represented by the PBA,^{2/} the State issued SOP #46 on July 8, 1995, establishing that investigators work at least 160 hours in a 28-day cycle. The SOP

^{2/} The State Investigators were formerly represented by Fraternal Order of Police, Lodge 91 for their first CNA with the State.

also established that hours worked greater than 171 hours in that 28-day cycle shall be paid as overtime and hours worked between 160 and 171 shall be paid as hour-for-hour compensatory time. The State Investigators unionized on December 8, 2010 and engaged in negotiations with the State for their first CNA, which included a proposal to replace the 28-day work schedule with a traditional 40-hour work week. The parties could not reach agreement and proceeded to interest arbitration. The State filed a scope of negotiations petition seeking to exclude certain proposals from interest arbitration, arguing that they were not mandatorily negotiable and were preempted by statute.^{3/} The PBA asserts that the State's scope petition did not object to the proposal regarding changing the 28-day work cycle or overtime compensation.

On December 3, 2014, the interest arbitration award (Award), Docket No. IA-2015-003, was issued, establishing the first contract for the State Investigators effective from July 1, 2014

^{3/} The State's expedited scope petition was decided in State of New Jersey, P.E.R.C. No. 2014-78, 40 NJPER 547 (¶177 2014). In that decision, we found that proposals concerning work incurred injury, health insurance premium contributions and opt-out reimbursements, retiree benefits, and group benefits co-pays are preempted by statute and therefore not mandatorily negotiable. The order provided that these proposals could not be submitted to the interest arbitrator.

to June 30, 2019.^{4/} During the interest arbitration process, the State argued that the proposal to change the 28-day work schedule and overtime compensation was statutorily preempted by N.J.A.C. 4A:6-2.2A. The arbitrator ultimately awarded the State's proposed language, which continues in the current CNA's Article XXVI, Overtime. (Award at 85-86.) However, the arbitrator did not base her award on the State's statutory preemption arguments, but rather, her conclusion that the State demonstrated the need for flexibility in scheduling and that the union had not justified changing overtime computation to one based on a 40-hour work week. (Award at 85.)

The PBA asserts that during negotiations for the successor CNA to the 2014-2019 CNA, the union again proposed to change the overtime rate to time and one half for hours worked between 160 and 171 hours in a 28-day cycle. The parties reached an agreement for the 2019-2023 CNA, retaining the overtime provision from the prior CNA without change. The PBA asserts that in negotiating the overtime provision, the State did not file a scope petition or otherwise allege that the PBA's proposal was non-negotiable or statutorily preempted.

^{4/} The Award was appealed and reviewed by the Commission. In State of New Jersey, P.E.R.C. NO. 2015-50, 41 NJPER 382 (¶120 2015), we vacated and remanded the Award, and then, in P.E.R.C. NO. 2016-11 42 NJPER 168 (¶42 2016), aff'd, 450 N.J. Super. 586 (App. Div. 2017), the remanded Award was affirmed, in part, and modified, in part.

During negotiations for a successor CNA, on March 8, 2023, the PBA proposed the following change to the CNA's Article XXVI - Overtime (Overtime provision):

Employees will be compensated for time worked in excess of forty (40) hours per week and/or eight (8) hours per day at the rate of one and one-half (1½) times the employee's regular hourly rate of pay. Approved leave, contractual leave, sick leave and statutory leave will be considered as hours worked for the purpose of calculating overtime.

Employees shall be paid in cash or receive compensatory time at the discretion of the employee. Compensatory time off shall accumulate in the form of time earned at the rate of time and one-half (1 ½) for every hour worked.

All work performed by bargaining unit Employees on recognized holidays (as is defined in this contract at Article 15) shall be compensated at the double time rate.

The PBA represents that during ensuing negotiations, the State informed the PBA that the Overtime provision would not be negotiated because it was statutorily preempted.

The Deputy Director certifies to the following facts. The Detectives were assigned the 28-day work schedule pursuant to SOP #46 in 1995 at the direction of the Attorney General pursuant to a recommendation from the Office of the State Auditor. During negotiations for the 2014-2019 CNA, the State did not negotiate the 28-day work schedule. The predecessor union attempted to change the 28-day work schedule to a 40-hour work week and receive overtime pay at the rate of one and one-half times

regular rate for every hour worked above 40 hours. The State negotiated the discretionary aspect of overtime, but maintained that the detectives' 28-day work schedule (a.k.a. "4L" work week) was non-negotiable. The first CNA was created via the Award, supra, and the language of N.J.A.C. 4A:6-2.2A(b) was included in the CNA's Overtime provision. The PBA again attempted to change the 28-day work schedule and Overtime provision for the 2019-2023 CNA.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977). Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically, and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

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.

The PBA asserts that N.J.A.C. 4A:6-2.2A is a discretionary statute that permits the employer to assign an alternate 28-day work schedule. The PBA cites the New Jersey Register's summary of rule changes to N.J.A.C. 4A:6-2.2A, that states the adoption of the 28-day work cycle is optional for job titles. The PBA further argues that the State has previously negotiated the 28-

day work cycle and Overtime Provision. The PBA advances the longstanding principle that work schedules and overtime compensation for law enforcement employees are mandatorily negotiable.

The State argues that the Overtime Provision proposal is statutorily preempted by 29 U.S.C. §207(k) and N.J.A.C. 4A:6-2.2(b) and that the PBA's proposal would significantly interfere with its policymaking powers. The State argues that 29 U.S.C. §207(k) preempts negotiations of the Overtime Provision because it exempts law enforcement agencies from the Federal Labor Standards Act's (FLSA) overtime requirements. The State further asserts that N.J.A.C. 4A:6-2.2(b) requires that the job titles that meet the criteria set forth in part (a) of that section shall be assigned the 28-day work schedule. The State argues that the 28-day work cycle is necessary for scheduling officers without incurring excessive overtime costs. In its sur-reply brief, the State asserts that the Civil Service Commission's (CSC) statutory authority to designate titles and the appropriate workweek preempts negotiations over the 28-day work cycle and overtime compensation.

The first issue before us is whether the Overtime Provision proposal is preempted by statute or regulation. The second issue before us is whether negotiations regarding the Overtime

Provision proposal would substantially limit the State's policymaking powers. See Paterson, supra.

The State's preemption claims first involve the FLSA, 29 U.S.C. §207(k). This statute provides a partial exemption from overtime compensation requirements as follows:

(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a)^{5/} with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if-

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or ...

29 U.S.C. §207(k) provides that employers who use the 28-day work schedule shall be exempted from requirements related to paying overtime. However, there is no language in this statute that requires employers to use the 28-day work schedule. This statute does not preempt the PBA's Overtime Provision proposal.

Next, the State's preemption claims raise N.J.A.C. 4A:6-2.2A

^{5/} The overtime requirements of subsection (a) are triggered when a covered employee works beyond 40 hours. See 29 U.S.C. §207(a).

(Law enforcement work schedule (4L): State service). This regulation provides:

(a) Job titles which meet all of the following criteria may be assigned an alternate work schedule consisting of a 28-day cycle, pursuant to 29 U.S.C. § 207(k):

1. Employees are uniformed or plainclothes members of a body of officers and subordinates;
2. Employees are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order, to protect life and property from accident or willful injury and to prevent and detect crimes;
3. Employees have the power to arrest; and
4. Employees have participated in a special course of instruction or study (or will undergo on-the-job training) which typically includes: self defense, physical training, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Job titles which meet the criteria in (a) above and which are assigned such an alternate work schedule shall be designated 4L. All employees who meet the criteria are considered engaged in law enforcement activities regardless of their rank or their status as trainee, probationary or permanent employees.

1. The tour of duty within the 28 day cycle shall total at least 160 hours. At the discretion of the appointing authority, employees who work more than 160 hours may be compensated through either a provision for flexible work

patterns or a grant of comparable amounts of time off to a maximum of one hour for each hour of such additional work time.

2. Within the 28 day cycle, employees can work a maximum of 171 hours. Employees may work more than 40 hours in a week without incurring overtime, so long as they do not work more than 171 hours within the 28 day cycle. Overtime begins on the 172nd hour.

3. Except for the special eligibility requirements set forth above, overtime compensation shall be paid in the same manner as employees in 40 hour workweek titles. See N.J.A.C. 4A:3-5.5(b).

[Emphasis added.]

Notably, paragraph (a) was changed from "shall" to "may" on February 22, 2005. The Rule Proposal found at 36 N.J.R. 4569(a) states:

Upon reviewing N.J.A.C. 4A:6-2.2A, Law enforcement work schedule (4L): State service, Department of Personnel staff determined that the rule needs to be revised to accurately conform it to the Federal law at 29 U.S.C. § 207(k). While the rule requires that job titles meeting the criteria listed in subsection (a) be assigned the 4L workweek, Federal law merely permits the assignment of such job titles to the 28-day work cycle in instances in which "around the clock" staff coverage is necessary...(Emphasis added.)

The Rule Adoption found at 37 N.J.R. 588(a) states,

"Specifically, the adopted amendment would conform the rule to the Federal statute by making the 28-day work cycle (known as the

4L workweek in merit system rules), optional for eligible job titles, but not mandatory." (Emphasis added).

The clear language of N.J.A.C. 4A:6-2.2A(a) makes assignment of the 28-day work cycle discretionary, and not mandatory. The "shall" in paragraph (b) requires employees to be designated "4L" after the adoption of the 28-day work cycle. The rule in paragraph (a) was expressly changed from "shall" to "may" for the purpose of making the adoption of the 28-day work cycle optional for eligible job titles. The courts and the Commission have regularly found that statutes and regulations providing that a public employer "may" take a particular action are not imperative but confer discretion that may be exercised through collective negotiations. Local 195, supra, 88 N.J. at 406; Hunterdon Cty., 116 N.J. 322, 331 (1989); Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006). This regulation does not preempt the PBA's Overtime Provision proposal.

Finding that the Overtime Provision proposal is not preempted, we turn to the State's argument that negotiations would significantly interfere with its governmental policy making. The Commission and courts have consistently held that work schedules are mandatorily negotiable except where the employer has demonstrated that maintaining a particular schedule would substantially limit a governmental policy determination. Local 195, IFPTE v. State, 88 N.J. 393, 411-413 (1982); Franklin

Tp., 424 N.J. Super. 369 (App. Div. 2012) (despite employer's alleged efficiencies from changing work schedules, it did not demonstrate that the previous work schedule significantly interfered with its governmental policy need to provide police services); Mount Laurel Tp., 215 N.J. Super. 108, 115 (App. Div. 1987) (where employer did not meet its "burden . . . to advance reasons in support of its need, from a policy making point of view, to unilaterally control police work hours[,] " the union's proposal to memorialize existing work schedule was mandatorily negotiable); Maple Shade Tp., P.E.R.C. No. 2012-72, 39 NJPER 61 (¶25 2012) (finding that a PBA's proposal seeking to change the work schedules of Detectives was mandatorily negotiable where the employer's arguments regarding the size of the detective division and that crimes were committed at hours outside of the specified schedules of the detectives did not rise to the level of a significant interference with the ability of the Township to provide effective police service to its citizens).

The State does not establish in this record that the PBA's Overtime Provision proposal would significantly interfere with its governmental policy need to provide police services. The State asserts in its briefs that the 28-day work schedule is necessary for flexibility in responding to emergent situations and to reduce overtime costs. This assertion is not supported by the State's certification and no evidence is presented further

explaining or expanding upon its asserted justification for the 28-day work schedule. The Commission has held that “[r]educing overtime costs is a legitimate concern, but not one that outweighs the employees’ interest in enforcing an alleged agreement to preserve work schedules.” City of Atlantic City, P.E.R.C. No. 2004-25, 29 NJPER 490 (¶154 2003). “[A] desire to reduce labor costs does not make a work schedule issue non-negotiable.” Union Beach Bor., P.E.R.C. No. 92-129, 18 NJPER 366 (¶23160 1992). The State’s concerns may be legitimate and must be considered by an arbitrator if negotiations reach impasse. See Teaneck Tp. and FMBA Loc. No. 42, P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff’d in pt., rev’d in pt. and rem’d, 353 N.J. Super. 289 (App. Div. 2002), aff’d o.b., 177 N.J. 560 (2003).

Lastly, we address the State’s argument in its sur-reply brief that the CSC’s statutory authority “to establish, consolidate, abolish, reassign titles, which includes the designation of compensation and the workweek” renders the Overtime Provision non-negotiable. We reject the argument as it is contradicted by decades of Commission and court precedent regarding the negotiability of work schedules and overtime compensation for law enforcement officers in CSC jurisdictions. Additionally, the State’s argument is belied by the interest arbitration statutes, N.J.S.A. 34:13A-16 et seq., which provide a

process for establishing the terms and conditions of employment for police and fire employees.

For all the foregoing reasons, we find that the PBA's Overtime Provision proposal is not statutorily preempted and is mandatorily negotiable.

ORDER

The PBA's Overtime Provision proposal is not statutorily preempted and is mandatorily negotiable.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Eaton, Ford, Higgins, and Kushnir voted in favor of this decision. None opposed. Commissioner Papero recused himself. Commissioner Bolandi was not present.

ISSUE: March 28, 2024

Trenton, New Jersey