I.R. NO. 87-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NORTH WILDWOOD,

Respondent,

-and-

DOCKET NO. CO-87-284

NORTH WILDWOOD FMBA, LOCAL NO. 56,

Charging Party.

SYNOPSIS

A Commission Designee denies a request for an interim relief order restraining the City from implementing a new work schedule. The Commission Designee found that the Charging Party did not demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision.

The Charging Party argued that the City's intended implementation of a new work schedule would unilaterally change terms and conditions of employment during negotiations for a new contract; the Charging Party further argued that under Township of Mt. Laurel and Mt. Laurel Tp. Police Officers' Assn., App. Div. Docket No. A-2408-85T6 (1987), the work schedule issue presented herein was mandatorily negotiable. The City argues that Mt. Laurel does not say that any proposed work schedule change is madatorily negotiable. The City contended that given the change in the number of full-time firefighters in the department, its revised schedule increased efficiency and provided more effective fire coverage than did the old schedule. The City thus attempted to distinguish Mt. Laurel and argued that the instant work schedule dispute is a non-negotiable managerial prerogative.

The Commission Designee found that the City set forth a legitimate basis for its decision to change the work schedule -- under the changed circumstances in this department (the addition of a full-time firefighter to the work force), the maintenance of the existing work schedule would result in duplicate coverages on certain shifts for over 500 hours per year; further, the existing schedule would thwart the City's attempt to reduce the number of coverage gaps in the work schedule. Accordingly, the Commission Designee concluded that the City's decision to change the work schedule, under the circumstances of this case, appears to be a non-negotiable managerial prerogative and is not a mandatory subject for negotiations.

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Appearances:

For the Respondent
Gruccio, Pepper, Giovinazzi, DeSanto & Mann, Esqs.
(Lawrence A. Pepper, of counsel)

For the Charging Party
Schlesinger, Schlosser, Foy & Harrington, Esqs.
(John F. Pilles, Jr., of counsel)

INTERLOCUTORY DECISION

On March 27, 1987, North Wildwood FMBA, Local No. 56 ("Charging Party" or "FMBA") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the City of North Wildwood ("Respondent" or "City") alleging that the City had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, Local 56 alleged that the City had violated subsections 5.4(a)(1), (3), (4), (5), (6) and (7) of the Act when it refused to negotiate certain

terms and conditions of employment of firefighters and threatened to unilaterally implement a new work schedule on March 29, 1987.[1/]

Also on March 27, 1987, the FMBA submitted an Order to Show Cause with Temporary Restraints to the Commission, asking that the employer show cause why an order should not be immediately entered restraining the City from implementing its new work schedule on March 29, 1987.

On March 27, 1987, a hearing was held before me concerning the Charging Party's request for the immediate issuance of temporary restraints against the City pending a hearing on the Order to Show Cause. N.J.A.C. 19:14-9.1 et seq. At the conclusion of that hearing, I signed an Order to Show Cause with Temporary Restraints, restraining the City from implementing its new work schedule for firefighters on March 29, 1987. The Order to Show Cause was made returnable on April 2, 1987. On that date, I conducted an Order to

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of a full Commission. Both parties presented and cross-examined witnesses, submitted exhibits and briefs and argued orally at the hearing.[2/]

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.[3/]

Positions of the Parties --

The FMBA contends that on March 21, 1987, the City informed the FMBA that it (the City) would implement a new work schedule for firefighters on March 29, 1987. The FMBA states that the implementation of this new work schedule would alter existing terms

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2/ On April 13 and 16, 1987, the parties submitted several exhibits. This procedure for the submission of these exhibits was agreed to by the parties on the day of the Order to Show Cause hearing.

3/ Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); and Crowe v. DeGioia, 90 N.J. 126 (1982).

and conditions of employment. The FMBA alleges that the City refuses to negotiate concerning the formation and implementation of a revised work schedule. It notes that the parties are presently in interest arbitration. The FMBA argues that the City's intended action -- the implementation of the new work schedule -- would unilaterally change terms and conditions of employment during ongoing negotiations (and interest arbitration) for a new contract. The Charging Party argues that such conduct is violative of the Act and should be restrained.

The FMBA notes that in the recent decision of the Appellate Division in Township of Mount Laurel and Mount Laurel Twp. Police Officers Association, App. Div. Dkt. No. A-2408-85T6 (1987), the court rejected the public employer's argument that work schedules are per se non-negotiable because they fall within the employer's managerial prerogative and concluded that the balancing test set forth in IFPTE Local No. 195 v. State of New Jersey, 88 N.J. 393 (1982) must be used to determine the negotiability of disputed subjects.

The FMBA argues that there are no facts in this matter which would render the work schedule issue presented herein non-negotiable. It states that negotiations over this issue would not significantly interfere with the determination of governmental policy. The FMBA contends that altering the schedule would affect the number of hours worked by firefighters (decreasing hours). Further, the FMBA argues that the altered work schedule would adversely affect firefighters' present leave entitlements.

The City denies that the revised work schedule would alter existing contract benefits. The City contends that the present schedule was designed for a fire department comprised of 6 firefighters and a working chief. The schedule was designed to efficiently provide 24 hour coverage at two firehouses with a 7 employee workforce. The North Wildwood Fire Department presently consists of 8 employees -- 7 firefighters and a working chief. With an 8 employee complement, the old schedule became awkward for the employees and cumbersome for the City to administer. The City's attempts at placing the seventh full-time firefighter into the existing schedule without causing gaps in coverage or double coverage resulted in an apparent violation of the contract. The seventh firefighter has thus been forced to work hours inconsistent with those set forth in the parties' agreement. Further, the City notes that under the present schedule, part-time firefighters are used to cover gaps caused by some vacations, sick time and emergencies. Under the revised schedule, part-time firefighters would be used to cover only sick time and emergencies; the Chief would cover all vacations. The reduced use of part-time firefighters would result in a substantial savings for the City. Under the new schedule, firefighters would work one-and-one-third fewer hours per week, there would be no double coverage, there would be fewer gaps in coverage, and thus, the City's use of part-time employees would be lessened; overall, schedule planning would be more manageable. Thus, the City argues that, given the change in

the number of full-time firefighters in the department, its proposed schedule change will increase departmental efficiency and the cost effectiveness of the services provided.

The City argues that the Mount Laurel decision, supra, cannot be read to mean that any proposed change by an employer in employee work schedules is mandatorily negotiable. The City seeks to distinguish Mt. Laurel from the instant matter on its facts and contends that the North Wildwood situation is more factually analogous to Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super 71 (App. Div. 1983). The City contends that under the present circumstances, the existing schedule had become cumbersome and inefficient. It was for these reasons that it created a new schedule. Inasmuch as the revised schedule is more efficient and effective than the present schedule, the City argues that the decision to implement the new schedule is an important determination of governmental policy.

In August 1986, the City filed a Petition for Scope of Negotiations Determination. The City sought a determination from the Commission that its proposed overhaul of firefighters' shifts and work schedules was not mandatorily negotiable. In that proceeding, while maintaining that its proposed change in the work schedule was not negotiable, the City acknowledged that such potentially related issues as leave entitlements and compensation were mandatorily negotiable. The City maintains the same position in this matter. In the scope proceeding, the FMBA maintained only

that if the City implemented a new work schedule, it could not unilaterally alter compensation and leave benefits which firefighters received.

The Commission decided the matter as follows:

> We decide the case as the parties have presented it to us. Assuming it has a right to implement the new schedule, we hold that the City may not unilaterally alter the employees' leave entitlements. N.J.S.A. 34:13A-21 provides that during interest arbitration, "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other...." These subjects are all mandatorily negotiable and are severable from the decision to change scheduling. City of North Wildwood, P.E.R.C. No. 87-90, 13 NJPER 122 (¶18053 1987).

Thus, the City contends that the instant matter has been litigated and decided and asserts the Commission's January decision is res judicata of the negotiability issue raised in the instant matter.

The City argues that the FMBA has failed to set forth any proofs which would support the issuance of an interim order in this case. The City contends that no affidavit or verified petition was filed in support of the FMBA's case as is mandated by the Commission's rules. It further contends that no irreparable harm has been demonstrated by Charging Party and that based upon its (the City's) showing of the basis for the schedule change, the Charging Party has failed to demonstrate a likelihood of success on the merits. Accordingly, the City urges the denial of the Charging Party's requested interim relief.

Findings of Fact --

The parties have an expired collective negotiations agreement, covering the period from January 1, 1983 to December 31, 1985. The parties have continued to abide by that agreement during their contract negotiations and are now in interest arbitration. That matter is being held in abeyance pending the outcome of this hearing.

Prior to January 1986, the North Wildwood Fire Department was comprised of 6 full-time firefighters plus a working chief. The work schedule which is presently followed by the department was developed years ago. The City states that it was an appropriate schedule when conceived for a department comprised of 6 firefighters and a working chief. It was not established in the record whether the parties had initially negotiated the schedule or whether the City had unilaterally implemented it. In either case, the work schedule has remained unchanged for decades and was included in several of the parties' expired collective negotiations agreements.4/

The parties' most recently expired agreement (1983-85) contains a work schedule provision. Article 8, Section 1 of that agreement states:

4/ The City asserted that the schedule was included in the agreement for purposes of "clarity." I note, however, that the parties seemingly have not treated the schedule provisions differently from other parts of the contract. See discussion of schedule grievances, infra, at pp. 12-13.

ARTICLE 8
WORK SCHEDULE

Section 1. For the purpose of this Agreement, the Firemen's work shall be ten (10) hours, starting at 8:00 a.m. and ending 6:00 p.m. the same day. The night tour shall consist of fourteen (14) hours commencing at 6:00 p.m. and ending 8:00 a.m. the following morning. The work week is presently forty-nine and one-third (49 1/3) hours in a three (3) week cycle. The three (3) week cycle is as follows: Week 1 - a fireman will work 5 ten hour day tours; Week 2 - a fireman will work 3 fourteen hour night tours; Week 3 - a fireman will work 4 fourteen hour night tours. Total hours in three (3) week cycle are the 148 divided by three (3) equals an average of forty-nine and one-third (49 1/3) hours per week.

Essentially, the present schedule is comprised of "day tours" of 10 hours (8 a.m. through 6 p.m.) and "night tours" of 14 hours (6 p.m. through 8 a.m. the following morning). The three week work cycle is as follows: Week 1 -- five (5) day tours; Week 2 -- three (3) night tours; and Week 3 -- four (4) night tours. The total hours worked during the 3 week cycle is 148 hours, which averages to 49 1/3 hours per week.

The City has two fire stations -- the Anglesea Station and the 15th Street Station. The City has determined that each station shall be staffed by one firefighter per shift, 24 hours per day and 365 days per year.

The present schedule is illustrated in Charging Party's brief, Exhibit D. Each of the six non-supervisory firefighters and the seventh supervisory firefighter (the Chief) is designated by a letter, A-G. Letters A, B, and C staff the 15th Street Station;

letters D, E and F staff the Anglesea Station. The A-F schedules are essentially the same schedules and are consistent with the schedule description which appears in the parties' agreement (49 1/3 hours per week). The G schedule differs from the A-F schedules in that it is split between the two stations -- two days at Anglesea, two days at 15th Street; and the G schedule is only 40 hours per week (four 10-hour days). There was testimony from FMBA witness McGarry that all of the firefighters rotate through the G schedule during the course of the year (Tr pp. 19-20).5/

Under the present schedule, part-time firefighters are used to cover gaps in the schedule caused by some vacations, sick leaves and other emergencies.6/

5/ McGarry indicated that all the firefighters -- including the Chief -- rotate through the G slot in the schedule. The net effect of this rotation through the G slot, a 40 hour schedule, would appear to be a reduction of the total average number of hours worked by each firefighter annually.

City witness Fuld indicated in his testimony that as originally designed, the present schedule calls for 6 non-supervisory unit firefighters to provide 148 hours coverage per week at each of the two fire stations (296 total staff hours) and the supervisory, non-union Chief to provide 20 hours coverage per week at each fire station (40 total staff hours, for a total staff-hour schedule of 336 hours per week). Thus, the G slot appears to have been originally designated for the Chief (Tr pp. 64-65). However, based upon McGarry's testimony, it appears that the Chief presently "shares" the G slot with the 6 non-supervisory firefighters. See also, Respondent's Exhibit C.

6/ Prior to January 1986.

In January 1986, the City hired an additional firefighter; the additional employee created scheduling problems almost immediately. The City asserts that had the seventh firefighter (Heightsman) been given a 49 1/3 hour per week schedule which conformed to Charging Party's brief Exhibit D (A-F schedule), it would have created considerable waste and inefficiency in the staffing of the City's fire department. More specifically, the City contends that placement of firefighter Heightsman on an A-F type schedule would create numerous instances of duplicate coverage (more than 1 firefighter per fire station per shift for 500 hours per year) and would leave numerous gaps in the schedule which would need to be covered by part-time firefighters.[7/] Thus, the City assigned firefighter Heightsman to be a "floater", who covers the schedule when other firefighters are on vacation. Sick leaves and emergencies continue to be covered by part-time firefighters. Heightsman does not appear on the present schedule (CP Exhibit D).

Also in January 1986, the union filed a grievance concerning the schedule to which firefighter Heightsman was assigned (Respondent's brief, Exhibit D). Through its grievance, the FMBA is seeking to force the City to place Heightsman on an A-F type schedule (49 1/3 hours per week) (Tr pp. 40-43). The FMBA also filed another schedule grievance in January 1986 (Respondent's Exhibit C), wherein it contested the City's right to place

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7/ This was admitted by the union (Tr pp. 44-46).

firefighters on the G-slot schedule. Through this grievance, the FMBA sought to make the G-slot schedule part of the contract schedule provision, or to eliminate its application to unit employees.

In fall, 1985, when the parties' commenced negotiations for a successor agreement, the City indicated to the FMBA that it intended to change the existing work schedule because of the problems presented by trying to incorporate an eighth full-time firefighter (7 fireifghters plus the Chief) into that schedule. Initially, the City's proposed schedule was two 24 hour shifts per firefighter, every 7 days. After several discussions with FMBA representatives wherein they expressed concerns regarding the adverse effects of this schedule on firefighters' private lives, the City changed the new schedule configuration to four 12-hour shifts per week. Upon finding, after further discussions with the FMBA, that there were objections to the four 12-hour shift schedule, the City changed its proposed schedule configuration again, this time to two 10 hour days and two 14 hour nights per firefighter per week. Under the new schedule, the seven non-supervisory firefighters would work the 2 day/2 night schedule each week and the working Chief would cover vacations. Sick leaves and emergencies would be covered by part-time firefighters.

When the department was comprised of 7 employees -- 6 non-supervisory employees and a working chief -- the present schedule (A-F and G) achieved the coverage sought by the City (1

firefighter per fire station, 24 hours per day, 365 days per year) while creating only a minimal, manageable number of gaps (due to vacations, sick leave and emergencies) to be covered by part-time (non-unit) firefighters.

However, once the City hired a seventh firefighter and thus transformed its fire department into an eight employee operation (7 non-supervisory firefighters plus a working chief), problems arose with the existing A-F and G schedule. The scheduling grievances (Respondent exhibits C & D) brought the problems into sharper focus. The purpose of these grievances, taken together, was to force the placement of newly hired firefighter Heightsman onto the existing A-F schedule.[8/] This would create several problems.

Were firefighter Heightsman to be given a 49 1/3 hour per week schedule which conformed to the contractual schedule (five 10-hour days, three 14-hour nights and four 14-hour nights -- an A-F schedule), it would create duplicate coverages for approximately 500 hours per year (i.e., more than one firefighter per fire station on

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8/ As was noted above, the firefighters' contractual schedule consists of a three-week schedule cycle: four 10-hour days, three 14-hour nights and four 14-hour nights; this amounts to 148 hours per firefighter every three weeks and averages out to 49 1/3 hours per week. It is essentially an A-F schedule. The G-slot is not part of the contractual schedule. However, it appears that the existing schedule is being administered so that each firefighter rotates through the G-slot. Through its grievances and in accordance with the positions which it has taken in these proceedings, the FMBA seeks to keep the A-F and G schedule for its seven firefighter unit. Thus, the FMBA's position on this issue is at variance with the contractual schedule provision.

duty at the same time). Because firefighters' duty tours would thus overlap, the gaps in the schedule would largely continue unchanged.

The City's newly proposed schedule would accomplish three things: (a) it would not produce any duplicate coverages, thus enabling the City to maintain its desired level of staffing; (b) it would have fewer gaps than the present schedule has, thereby reducing the City's use of part-time firefighters; and (c) it would incorporate the seventh non-supervisory firefighter into the work schedule on an equal basis with the rest of the non-supervisory unit firefighters. Further, this schedule (2 days/2 nights) would reduce the number of hours of work per week of each firefighter from 49 1/3 hours to 48 hours.

Analysis and Conclusions --

The courts of this State and the Commission have addressed the issue of negotiability of work schedules on numerous occasions. One of the reasons that this issue has frequently been adjudicated is that these tribunals have perceived that the work schedule negotiability issue is "...a fact intensive determination which must be fine tuned to the details of each case." Township of Mt. Laurel and Mt. Laurel Twp. Police Officers' Association, App. Div. Docket No. A-2408-85T6 (1986) at 7, aff'g P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985). This case is not an exception.

The New Jersey Supreme Court set forth a general framework for the analysis of negotiability issues in IFPTE Local 195 v. State of New Jersey, 88 N.J. 393 (1982):

> To summarize, 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. [at 404-405].9/

In Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), PBA Local 233 filed a grievance challenging the implementation of a new work schedule for police officers. The new schedule required patrol officers to start and end their work day three hours earlier than they did under the previous work schedule. The change was made to conform their schedules to that of the superior officers, in order to achieve more direct supervision of the patrol officers. In Closter, the Commission reviewed the negotiability of work schedules and hours of public safety employees in light of numerous Supreme Court and Appellate Division decisions concerning these issues.

The Commission stated:

9/ This negotiability framework is essentially the same as that outlined by the Supreme Court for police and firefighters in Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981).

> It has been suggested that under Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984), the entire subject of work schedules for police officers falls within the non-negotiable sphere of managerial prerogative. We disagree. We cannot read Atlantic Highlands that broadly.
> Closter, supra, at 133.

In Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super 71 (App. Div. 1983), the Court held non-negotiable a union proposal which would have changed the existing work schedule -- from a 5 days on/2 days off weekly schedule to a 5/2, 5/2, 5/3 schedule -- to provide for an additional day off from work every three weeks.

The Borough of Atlantic Highlands asserted that its then existing schedule provided "...the most efficient utilization of its existing manpower, permitting maintenance of satisfactory around-the-clock police protection at an efficient cost level. It insures a continuous adequate level of manning, including provision for relief personnel when there is an absence due to vacation, illness or unforeseen absenteeism." Atlantic Highlands, supra, at 75. In concluding that the work schedule proposal was not mandatorily negotiable, the court stated that it is the function of the Borough to determine the most effective coverage in providing for police protection. Accordingly, the court found that negotiations concerning the work schedule would significantly interfere with the exercise of managerial prerogatives.

In Irvington Policemen's Benevolent Association Local No. 29 v. Town of Irvington, 170 N.J. Super 539 (App. Div. 1979) certif. den. 82 N.J. 296 (1980), the Appellate Division found that individual shift assignments in an established work schedule were non-negotiable where the reason for such assignments was to achieve continuity and consistency in supervision of police officers.

However, in Closter, supra, the Commission noted that "Other decisions, both by the Appellate Division and Supreme Court, have recognized, under the circumstances of those cases, that work schedules for public employees, including police officers and firefighters, are mandatory subjects of negotiations." Closter, supra, at p. 133. Notable among these decisions is City of Newark and IAFF, Local 1860, AFL-CIO, Docket No. A-4143-80T3 (App. Div. 1983), where the Court stated:

> The point is that a term or condition of employment must be negotiated, but this must be balanced against the inherent managerial prerogatives of the governmental employer, about which there shall not be negotiation. As a general rule, hours of work, work schedules, shift schedules and such matters are held to be mandatorily negotiable. Newark, supra, at 3, (citations omitted).

In Closter, the Commission set forth the following framework for analysis:

> The fatal defect to the claim that work schedules are per se managerial prerogatives is that it focuses solely upon the interest of the public employer. But the Supreme Court has eschewed such a narrow approach. Woodstown-Pilesgrove recognized that:

> Logically pursued, these general principles -- managerial prerogatives and terms and conditions of employment -- lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by a public employer involve some managerial function, ending the inquiry at that point would all but eliminate the legislated authority of the union representative to negotiate with respect to "terms and conditions of employment." N.J.S.A. 34:13A-5.3. Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives. [Id. at 589].

Accordingly, the court cautioned against isolating and focusing solely upon one aspect of the test. Rather, it stressed that "[t]he nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made." Id. at 591.

...In view of this balancing test, we cannot delineate with absolute precision what proposals will be mandatorily or permissibly negotiable. We merely point out that items which have traditionally been held to be appropriate subjects of negotiation will continue to be so. For instance, matters concerning hours and days of work would, in general, be mandatorily negotiable. ... By the same token, however, other aspects of work scheduling will be non-negotiable when the employer's interests are paramount. Indeed, our case law is replete with such instances. See Warren County, P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985) (change in shift assignment made to resolve security problems, to correct improper work habits, and to increase overall efficiency of facility is not arbitrable); Tenafly Board of Education, P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983) (shift schedule change of head custodians found non-negotiable where change was direct result of board's managerial decision to reorganize its maintenance department);...City of Northfield,

> P.E.R.C. No. 82-95, 8 NJPER 277 (¶13121 1982) (new work schedule for firefighters is not arbitrable where the alteration in schedule was direct result of City's managerial decision to reduce number of full-time firemen on duty during night hours); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981) (Borough has managerial right to make emergency assignments regardless of work schedule);....

In Mt. Laurel Township, supra, the Association sought to reduce to writing the work schedule and compensation arrangement then in effect between the parties. Mt. Laurel argued that the setting of police work schedules is a managerial prerogative.

The Appellate Division disagreed with the rather broad reading which Mt. Laurel had given to Atlantic Highlands. The Court noted that, in Atlantic Highlands, the employer's "claims of diminished efficiency in its tiny police force, including projected gaps in coverage and higher expenditures for police protection established that a negotiated agreement would significantly impact on the determination of governmental policy." Mt. Laurel, supra, at p. 7.

The Court further stated:

> ....In our view, Mt. Laurel had a heavy burden in attempting to demonstrate its need to unilaterally determine police work hours given the posture of the case before PERC....Unlike the public employer in Atlantic Highlands and Irvington, Mt. Laurel expressed neither dissatisfaction with the in-place negotiated schedule nor any intention to change it. Thus,

> the burden which devolved upon Mt. Laurel to advance reasons in support of its need, from a policy making point of view, to unilaterally control police work hours was simply not met. Mt. Laurel, supra, at 9.

Accordingly, the Appellate Division concluded that the Commission had properly determined the PBA's work schedule proposal to be mandatorily negotiable.

In this matter, the Respondent has raised several defenses in seeking to have Charging Party's relief denied. The City asserts that Charging Party has failed to support its application for temporary restraints by affidavit or verified petition. I disagree. The Charging Party has submitted to the Commission an unfair practice charge verified by its attorney. 10/

The City also contends that the Commission's decision in City of North Wildwood, P.E.R.C. No. 87-90, supra, is res judicata of the negotiability issue raised herein. I disagree. I note that the lines of argument advanced by the parties in P.E.R.C. No. 87-90 barely clashed. The decision issued by the Commission in that

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10/ The FMBA submitted an original and four copies of the charge; the charge was initially certified by one of its attorneys and subsequently, the original was verified by another of its attorneys. Through inadvertence, one of the copies was marked in evidence. However, the original, certified charge was properly docketed on March 27, 1987. I have annexed the original charge to Exhibit C-1.

matter reflects the positions taken by the parties. See City of North Wildwood, supra, at p. 7 herein. After the issuance of that decision in January 1987, the parties resumed their contract negotiations. On March 21, 1987, the City announced its intention to alter firefighters' work schedules on March 29, 1987. This charge, accompanied by an Order to Show Cause, was filed on March 27, 1987 by the FMBA.

The FMBA has now broadened and extended its lines of argument, relying principally on Mt. Laurel, supra. The FMBA contends that the City's intention to unilaterally change the work schedule is an unfair labor practice because the work schedule issue is a mandatory subject for collective negotiations.

The City argues that Mt. Laurel did not change the essential law which had existed in this area and that in any case, the City has met its burden under Mt. Laurel. The City determined that its level of staffing shall be no more than 1 firefighter per fire station per shift. The City also determined that its firefighter workforce shall be 8 employees (7 firefighters and 1 working Chief). Given these decisions, in order to efficiently provide fire protection on a 24 hours per day, 365 days per year basis, it became necessary to alter the work schedule.

Under the changed circumstances in the North Wildwood Fire Department -- i.e., the addition of 1 full-time firefighter to the department, thereby raising the number of employees from a total of 6 firefighters plus 1 working chief to 7 firefighters plus 1 working

chief -- the maintenance of the present contractual schedule of 49 1/3 hours per week would result in duplicate coverages on certain shifts for over 500 hours per year.[11/] Additionally, the existing schedule would prevent the City from achieving one of the goals which initially prompted the hiring of the additional firefighter -- the reduction of the number of gaps in the work schedule which must be covered by part-time firefighters.

While the FMBA has indicated a desire to retain the A-F plus G schedule (i.e., a work schedule consisting of six, 49 1/3 hour weekly schedules and a 40-hour weekly schedule), it has advanced no legitimate argument in support of that position. The present contract provides only for 49 1/3 hour schedules for firefighters.

The City has set forth a basis for its decision to change the work schedule. The City is seeking to maintain its present level of staffing on each shift and to deploy its fire protection resources in a more efficient manner. These appear to be managerial prerogative determinations.

Accordingly, under the circumstances of this case, it appears that the City's decision to change the work schedule is a

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11/ The filing of grievances on the scheduling issues (Respondent's Exhibits C and D) by the FMBA indicates an intention and ability to enforce the contractual scheduling provisions.

managerial prerogative and is not a mandatory subject for negotiations.12/

Based upon the entire record in this matter and the foregoing, I conclude that the FMBA has failed to demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision. Accordingly, the FMBA's application for an interim relief order restraining the City from implementing a new work schedule is denied. The order temporarily restraining the City from implementing its new work schedule, which was issued on March 27, 1987, is now dissolved.

Charles A. Tadduni
Commission Designee

DATED: April 23, 1987
Trenton, New Jersey

12/ I note that while it has maintained the position that the work schedule in this matter is a managerial prerogative and therefore is not a mandatory subject for negotiations, the City has conferred with the FMBA on several occasions about concerns which the FMBA has about the proposed work schedule. After several of these discussions, the City modified, not insubstantially, its proposed work schedule. Further, the City has maintained from the outset that it is prepared to negotiate issues of compensation and time off which may be implicated by a new schedule. I note that there may be other issues implicated by a new work schedule about which the FMBA may properly seek to negotiate -- although, proposals concerning such matters may be circumscribed by the City's staffing level determinations. See City of Northfield, P.E.R.C. No. 82-95, 8 NJPER 277 (¶13123 1982) and P.E.R.C. No. 78-82, 4 NJPER 247 (¶4125 1978).