

I.R. NO. 2013-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2013-038

PASSAIC COUNTY SHERIFF'S
PROFESSIONAL ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee grants the request of the Passaic County Sheriff's Office ("Petitioner") for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the Passaic County Sheriff's Professional Association ("Respondent"). The grievance asserted that the Petitioner violated the parties' collective negotiations agreement ("CNA") when it unilaterally changed work schedules of civilian dispatchers from a 12-hour work day Pitman Schedule to an 8-hour work day.

The Petitioner asserted that the subject matter of the grievance is a managerial prerogative that is not within the scope of collective negotiations under New Jersey Employer-Employee Relations Act based on staffing level and safety concerns. The Respondent argued that the unilateral change in the work schedule was mandatorily negotiable and therefore, should proceed to arbitration.

The Petitioner's facts were un rebutted by the Respondent. The Designee found that the Petitioner had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that it had met the other elements necessary for a grant of interim relief.

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Appearances:

For the Petitioner, Genova Burns Giantomasi & Webster,
attorneys (Jennifer Paganucci, of counsel and on the
brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Sanford R. Oxfeld, of counsel; Randi Doner April, on
the brief)

INTERLOCUTORY DECISION

On January 9, 2013, the Passaic County Sheriff's Office ("County") petitioned for a scope of negotiations determination and filed an application for interim relief seeking a temporary restraint of binding arbitration pending a final determination by the Commission.^{1/} The City seeks a temporary restraint of binding arbitration of a grievance filed by the Passaic County Sheriff's Professional Association ("Association"). The grievance was filed on May 23, 2012, and asserts that the County

^{1/} The parties proceeded to arbitration on January 14, 2013, but the arbitrator is holding the issuance of the opinion and award in abeyance, pending this decision.

violated the parties' collective negotiations agreement ("CNA") when it unilaterally changed work schedules from a 12-hour work day ("Pitman Schedule") to an 8-hour work day.

The County asserts that the subject matter of the grievance is a managerial prerogative that is not within the scope of collective negotiations under New Jersey Employer-Employee Relations Act ("Act") based on staffing level and safety concerns.

The County filed a brief and a certification from Charles Meyers, Business Administrator for the Passaic County Sheriff's Office, in support of its application. The Association filed an opposition brief and a certification from John Strangeway, President of the Association.^{2/} On January 24, 2013, the parties argued orally.

FINDINGS OF FACT

The County and the Association are parties to a CNA covering the years from 2007 through 2011. The grievance procedures end in binding arbitration.

^{2/} The certification was untimely filed and faxed in the form of an email with an unsigned typed signature; counsel for the County objected to the late submission and requested that the submission be disregarded. Her objection was noted for the record. Additionally, N.J.A.C. 19:10-2.3(d) provides in pertinent part:

"Answers , certifications and affidavits may be submitted as an e-mail attachment provided that the signature page is scanned and submitted as part of the filing."

The Association is the majority representative for civilian employees employed by the County's Sheriff's Office including the civilian dispatchers. According to the Meyers certification, the Sheriff's Office is comprised of several divisions, and is responsible, in part, for Corrections, Court Services and Law Enforcement. In pertinent part, Meyers certifies that recent economic hardship forced the Sheriff's Office to conduct far reaching reductions in staff:

Following the drastic reduction staffing levels, the Sheriff's Office began carefully monitoring the effects of reduced staffing levels on continuity of operations, delivery of services, and public safety. Civilian employees provide direct support to the sworn functions of the agency. For example, a law enforcement officer working in a patrol vehicle maintains close contact with a civilian dispatcher throughout the entire shift.

The Sheriff's Office maintains around-the-clock operations. Failure to maintain appropriate staffing levels results in the failure to provide appropriate services to the public. During the early part of 2012, the Sheriff's Office determined that the current operations structure failed to meet the needs of the public. The Sheriff's Office determined that the use of a Pittman [sic] schedule, and the length of shifts, directly impacted the employees' ability to remain alert and focused, which is imperative for the performance of law enforcement services. In addition, employees working under a Pittman [sic] schedule were absent more frequently than the non-Pittman [sic] scheduled employees, creating staffing shortages, which had a direct result on the ability to perform law enforcement services.

As set forth in the Meyers' certification, the schedule was changed from the 12-hour Pitman Schedule to an 8-hour per day schedule^{3/} for reasons of safety of the employees; to enhance the delivery of efficient public services; to ensure that appropriate staffing levels were available and to ensure that the County was able to properly supervise the employees.

Finally, Meyers certifies: "The absence of this type of coverage will result in a detriment to the delivery of efficient public services and the increase of risk of harm or death to the sworn officers assigned to Uniform Patrol who rely upon support services to perform their duties."

CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State

^{3/} According to Meyers' certification, the 8-hour schedule was contained in the CNA between the parties and "the terms and conditions (i.e. Accrual of leave and/or sick time) have been applied as previously negotiated"; neither party provided a copy of the CNA.

College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).^{4/}

The Commission's jurisdiction is narrow. Ridgefield Park at 154, states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations.

^{4/} The Association cited Battle v. General Cellulose Company, 23 N.J. 538 (1957), for the proposition that a judicial challenge to arbitration may occur before or after the arbitration; ergo the County could never claim irreparable harm and be successful in its application for interim relief. Battle was a private sector case that was decided before the enactment of the Act which established collective negotiations and grievance arbitrations for the public sector. Additionally, in Englewood the court held, "We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings." Id. at 125.

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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the County may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

[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.

[88 N.J. at 404-405]

Working hours are generally mandatorily negotiable. The Court held in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978):

[N]egotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. See Burlington Cty. Col. Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Lullo v. Intern. Ass'n of Fire Fighters, 55 N.J. 409, 440 (1970). In Englewood, supra, we indicated that working hours, compensation, physical arrangements and facilities and customary fringe benefits were the essential components of terms and conditions of employment. 64 N.J. 1, 6-7 (1973).

[Id. at 67]

See also Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Education Association, 88 N.J. 582 (1980); 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, 303 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003); Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 1987); Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd NJPER Supp. 2d 172 (¶152 App. Div. 1987), certif. den. 108 N.J. 198 (1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); Hamburg Boro., I.R. No. 2004-9, 30 NJPER 58 (¶172004); City of Passaic, I.R. 2004-2, 29 NJPER 310 (¶96 203); Bogota Boro., I.R. 98-23, 24 NJPER 237 (¶29112 1998).

The instant case involves the work schedules of civilian dispatchers. The decision to reduce the work hours from 12 to 8-hours was based partly on the fact that the performance of civilian dispatchers directly affects the safety of the sworn sheriff officers; thus, the schedule change has a direct impact not only on the civilian dispatchers, but also on the sheriff officers.

Where negotiations over work schedules do interfere with management's policy on staffing levels and supervision, negotiations are not required. See Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982) mot. for recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Prospect Park Boro., P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992).

The negotiability of each case must be determined individually under the balancing test set forth in Local 195, supra; 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, 303 (App. Div. 2002), aff'd o.b. 177 N.J.

560 (2003). In Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987), the court held:

The critical issue is whether a negotiated agreement will "significantly interfere" with the managerial prerogative to determine government "policy." If so, then the government interest will be "dominant" over that of the employees and the issue will not be negotiable. This is a fact intensive determination which must be fine tuned to the details of each case.

The unrebutted specific details of the instant case - that the length of shifts, directly impacted the employees' ability to remain alert and focused, which is imperative for the performance of law enforcement services and that a return to the Pitman Schedule will result in a detriment to the delivery of efficient public services and the increase of risk of harm or death to the sworn officers - demonstrates that the County's interest is dominant over that of the employees. As a result, based on the application of the Local 195 balancing test and an analysis of the unrebutted facts under the Mt. Laurel Tp., the work schedule change is not negotiable and should not proceed to arbitration as it would significantly interfere with the County's managerial prerogative to determine government policy. See City of Vineland, P.E.R.C. No. 2013-44, ___ NJPER ___ (¶____), 2012 NJ PERC LEXIS 99 (the Commission holds that City had a managerial prerogative to change the start time and to rotate the power shift to achieve its unrebutted policymaking goal of improving

supervision of officers); Roselle Park Boro., P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005) (enforcement of an agreement providing for annual non-rotating shift selections would substantially limit governmental policymaking given the chief's description of the problems experienced under that system); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence that 12-hour shift had resulted in staffing, supervision, and fatigue problems - and had compromised officer safety because of reduced number of officers on the evening shift - justified the change to an 8-hour shift); City of Orange Twp. P.E.R.C. No. 89-46, 14 NJPER 688 (¶19291 1988) (employer offered several reasons why the union's proposed work schedules would significantly interfere with its managerial prerogatives; since the employer's assertions were unrebutted by the union, the Commission held that the work schedules were not mandatorily negotiable).

The Association argues that the County is not entitled to interim relief in this matter because the "County has failed to prove it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations,^{5/} has

^{5/} The Association cites Township of Franklin v. Franklin Tp. PBA Local 154, 424 N.J. Super. 369 (App. Div. 2012) (the Appellate Division consolidated two Commission scope decisions: Franklin Tp. and Franklin Tp. PBA Local No. 154 (SOA), P.E.R.C. No. 2011-59, 37 NJPER 16 (¶6 2011), aff'd 38 NJPER 277 (¶95 2012); Franklin Tp. and Franklin Tp. PBA

(continued...)

failed in showing that irreparable harm will occur should the relief not be granted and has failed in showing the relative hardship to the County should the relief not be granted."

The County argues that:

[It] has met the burden to establish each prong of the interim relief standard. First, irreparable harm will per se result if the parties are forced to submit to arbitration prior to a determination of negotiability.^{5/}

5/ (...continued)

Local No. 154, P.E.R.C. No. 2011-48, 36 NJPER 461 (¶179 2010), aff'd 38 NJPER 277 (¶95 2012)) for the proposition that the change in work schedules is mandatorily negotiable and, therefore, subject to arbitration. Additionally, the Association referred to two related unfair practice cases: Franklin Tp., P.E.R.C. No. 2012-10, 38 NJPER 148 (¶41 2011); Franklin Tp., I.R. No. 2011-30, 37 NJPER 36 (¶12 2011). The scope cases concerned whether a potential schedule change should be submitted to an interest arbitrator; the employer's proposed schedule change was for financial reasons and resulted in an increase in work hours for the employees for the same pay. In the instant case the crux of the schedule change is for safety and for the delivery of efficient public services and not to save money. The rationale for granting relief in the unfair practice charge cases was that the Commission designee found that the employees would be irreparably harmed in collective negotiations if the work schedule changes were permitted to be made while the parties were participating in interest arbitration proceedings. Although the parties in this matter are in negotiations (and/or have an expired CNA) for a successor CNA, the scope issue is limited to whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield, supra.

6/ The County cites Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App.Div. 1994), quoting PaineWebber, Inc. v. Hartmann, 921 F.2d 507 (3d Cir. Pa. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's

(continued...)

In addition, as assignment is a matter of managerial prerogative, the Sheriff's Office can establish a likelihood of success on the merits on the underlying scope of negotiations petition. Since the County's decision was based on maintaining safety, the public interest is best served by allowing the assignment change to remain in effect until a negotiability determination is made. Finally, a balance of the equities tips in favor in preservation of assignments fundamental to the Sheriff Office's operations and outweighs any minor inconveniences that the reassignments may have created.

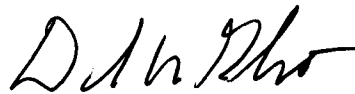
Based on the above, I find that the County has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations because proceeding to arbitration would significantly interfere with the County's ability to meet its governmental policy need to provide effective law enforcement services; that the County will suffer irreparable harm if required to further submit to arbitration; and that the relative hardship to the parties weighs in favor of the County based on the unrebutted facts submitted by the County. The application for interim relief must be granted. Accordingly,

6/ (...continued)
jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.

this case will be referred to the Commission for final disposition.

ORDER

The County's application for a restraint of binding arbitration is granted pending the final decision of the Commission.



David N. Gambert
Commission Designee

DATED: February 11, 2013

Trenton, New Jersey