

P.E.R.C. NO. 93-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY,

Petitioner,

-and-

Docket No. SN-92-114

PERTH AMBOY SUPERIOR OFFICERS
ASSOCIATION, FOP LODGE NO. 80,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Perth Amboy Superior Officers Association, FOP Lodge No. 80 against the City of Perth Amboy. The grievance asserts that the City violated the parties' collective negotiations agreement when it changed the work schedules of two deputy chiefs. The Commission finds that the City had a non-negotiable right to require deputy chiefs serving as acting chief to work the schedule normally worked by the chief and thereafter to conform the work schedules of the chief and the deputy chiefs.

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Appearances:

For the Petitioner, Fogarty & Hara, attorneys
(Rodney T. Hara, of counsel)

For the Respondent, S.M. Bosco Associates
(Dr. Simon M. Bosco)

DECISION AND ORDER

On June 8, 1992, the City of Perth Amboy petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Perth Amboy Police Superior Officers Association, FOP Lodge No. 80. The grievance asserts that the City violated the parties' collective negotiations agreement when it changed the work schedules of two deputy chiefs.

The parties have filed exhibits and briefs. These facts appear.

Lodge No. 80 represents the City's police officers with the titles of sergeant, lieutenant, captain and deputy chief. The parties entered into a collective negotiations agreement effective

from January 1, 1990 to December 31, 1992. The grievance procedure ends in binding arbitration.

Police Chief Stephen Poloka announced his retirement effective October 1, 1991 and was permitted to use his accrued vacation leave prior to that date. Deputy Chief Patrick Fox was appointed acting chief during the period before Poloka's retirement. As a deputy chief, Fox had worked a schedule of four (ten hour) days on, three days off. When he became acting chief, effective July 8, 1991, Fox's schedule was changed to the schedule that Poloka had worked -- five (eight hour) days on, two days off. The five days on were Monday through Friday.

On September 24, 1991, Fox relinquished his assignment as acting chief and resumed his duties as deputy chief. But he continued to work a schedule of five days on, two days off.

Robert Moore, the other deputy chief, assumed the duties of acting chief, but was not formally assigned to that role. As the de facto acting chief, Moore began working a schedule of five days on, two days off instead of his previous schedule of four days on, three days off.

Within two months, James Velosin was appointed acting chief. A permanent appointment followed. Moore, like Fox, has continued to work a schedule of five days on, two days off. The City contends that the chief and the deputy chiefs must work the same schedule in order for the deputy chiefs to assist the chief; fill in for the chief when absent; and command their separate divisions.

On October 29, 1991, Lodge No. 80 filed a grievance on behalf of Fox and Moore. The grievance alleged that the City had violated Article VII, Section A by requiring the deputy chiefs to work five days on, two days off. Article VII is entitled Hours of Work and Work Schedule. Section A states:

The City shall implement a four (4) ten (10) hour days on/four (4) ten (10) hour days off work schedule for superior officers assigned to the Uniformed Patrol Division and a four (4) ten (10) hour days on/three (3) ten (10) hour days off work schedule for superior officers assigned to the Detective, Traffic and Juvenile Aid Divisions (hereinafter referred to in this Agreement as the "four and four work schedule").

After the grievance was denied, Lodge No. 80 demanded binding arbitration. It reasserted that the changed work schedule for deputy chiefs working as acting chief violated the contract and it sought an award requiring immediate and continued adherence to the contract, overtime payment for all days not in accordance with the contract, and a cease-and-desist order. This petition ensued.^{1/}

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

^{1/} The City's application for an interim restraint of arbitration was granted in part and denied in part. I.R. No. 92-21, 18 NJPER 453 (¶23204 1992). The designee restrained arbitration on the issue of the shift assignments for deputy chiefs acting as chief. The designee did not restrain arbitration on the issue of compensation because he believed that the number of hours worked had been increased.

category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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. [87 N.J. at 92-93; citations omitted]

We will not restrain arbitration of a grievance unless the alleged agreement is preempted or would substantially limit government's policymaking powers. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83).

Public employers have a managerial prerogative to determine the hours and days during which a service will be provided and to determine the staffing levels at any given time. But within those

determinations, work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982). That general rule applies in cases involving the work schedules of police officers. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd App. Div. Dkt. No. A-918-89T1 (9/25/90); Bor. of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd App. Div. Dkt. No. A-3071-82T2 (12/15/83); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd App. Div. Dkt. No. A-4143-80T3 (3/25/83); Bor. of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd App. Div. Dkt. No. A-3329-79 (5/7/81); see also Bor. of Sayreville, P.E.R.C. No. 91-35, 16 NJPER 542 (¶21244 1990) (employer could not create "power shift" unilaterally). But a particular work schedule proposal is not mandatorily negotiable if it would significantly interfere with 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) (employer proved need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training); Bor. of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposed work schedule would have eliminated relief officer system and caused coverage gaps); see also Bor. of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), recon. den., P.E.R.C. No. 85-112, 11 NJPER 310 (¶16111 1985)

(conforming shifts of supervisors and employees supervised). Each case must be decided on its own facts. Mt. Laurel; Roselle.

Under the circumstances of this case, we conclude that the City had a non-negotiable right to require deputy chiefs serving as acting chief to work the schedule normally worked by the chief and thereafter to conform the work schedules of the chief and the deputy chiefs. In particular, the City has a right to determine that it needs the commanders of its police divisions to work all five week days and to be in a position to consult with the chief and to replace the chief when absent. We further conclude that no severable compensation claim has been presented. The deputy chiefs continue to work the same number of hours each week (40). There is no alleged contractual differential for working a 5-2 schedule instead of a 4-3 schedule. And any claim for overtime compensation would require that a 5-2, not a 4-3 schedule, be viewed as the employees' regular schedule. We therefore restrain arbitration.

ORDER

The request of the City of Perth Amboy for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Smith voted in favor of this decision. None opposed. Commissioner Bertolino abstained. Commissioner Wenzler was not present.

DATED: February 22, 1993
Trenton, New Jersey
ISSUED: February 23, 1993