

P.E.R.C. NO. 95-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and-

Docket No. SN-94-42

HOBOKEN POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL 2,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a contract proposal which Hoboken Policemen's Benevolent Association, Local 2 seeks to retain in a successor contract with the City of Hoboken. The provision permits police officers to select steady shifts by seniority, unless an employee's special skills are needed on a certain shift. The Commission finds that the proposal, as worded, is not mandatorily negotiable and encourages the parties to negotiate a shift assignment system that lawfully accommodates both their interests.

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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(Robert E. Murray, of counsel; Linda Sabat, on the brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, P.C., attorneys
(David Solomon, of counsel; Robert C. Gifford, Jr., on the
brief)

DECISION AND ORDER

On November 1, 1993, the City of Hoboken petitioned for a scope of negotiations determination. The City seeks a declaration that a contract provision that Hoboken Policemen's Benevolent Association, Local 2 seeks to retain in a successor contract is not mandatorily negotiable. The provision permits police officers to select steady shifts by seniority, unless an employee's special skills are needed on a certain shift.

The parties have filed certifications, exhibits, and briefs.^{1/} These facts appear.

^{1/} We grant Local 2's request to file a supplemental certification in response to the employer's reply brief and supplemental certification. We also find good cause for Local

Local 2 represents the City's police officers below the rank of sergeant. Article IX of the parties' just expired contract is entitled Work Day and Work Week. Section 1 provides:

Work Week. The work week shall consist of steady five days on and three days off. Detail personnel will work an alternate five/two, four/three, five/two work week. There shall be bidding for steady shifts on a seniority basis. All bids shall be received no later than September 15. The new shift assignments shall be implemented no later than forty-five (45) days thereafter. This shall not include assignments requiring special skills. [Emphasis added]

There is a similar clause in the collective negotiations agreement covering superior officers.

Local 2 has proposed retaining this clause in any successor contract. Asserting that the clause is not mandatorily negotiable, the City filed this petition.^{2/}

The City's police department is separated into nine bureaus: training, planning, and operations; anti-vice; detective; uniformed patrol; identification; transportation; emergency management; community services; and motorcycle.

^{1/} Footnote Continued From Previous Page

² not having filed that certification on time. While we accept that certification and describe its assertions, we do not base our ultimate conclusions or holding on those assertions. We accordingly deny the City's request that it be permitted to file another certification, thus triggering another round of exchanges.

^{2/} Local 2 has filed a related unfair practice charge. That charge is being held pending resolution of this petition.

Each bureau is staffed by patrol officers and supervisory officers. Officers work during these shifts or tours of duty: midnight to 8:00 a.m.; 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight; and 8:00 p.m. to 4:00 a.m.

The patrol division is staffed by 52 officers who are divided into eight squads per shift. Five squads are working and three squads are furloughed during any one shift. Each squad has from one to three officers.

The genesis of this case is that the senior officers usually select the day shift, thus relegating new or less senior officers to the night shifts. A chart submitted by the City shows the average seniority of patrol officers on each shift as of September 1993. Officers working on the 8:00 a.m. to 4:00 p.m. shift averaged about 12 years in seniority. Officers working on the 4:00 p.m. to midnight shift averaged about 10 years of seniority. Officers working on the midnight to 8:00 a.m. shift averaged about 5 years of seniority. Officers working on the 8:00 p.m. to 4:00 a.m. shift averaged less than one year of seniority. Except for the most recent class of recruits, all officers have at least four years of service.

The crime rate is higher during night shifts than during day shifts. For example, it appears that about 75% of all assaults on police officers occur between 8:00 p.m. and 8:00 a.m. Also, 36.2% of Part A crimes (murder, rape, robbery, aggravated assault,

arson, simple assault, and assault on a police officer) occur during the 8:00 p.m. to 4:00 a.m. shift; and 26% of Part A crimes occur during the midnight to 8:00 a.m. shift. By contrast, only 13.8% of Part A crimes occur during the 8:00 a.m. to 4:00 p.m. shift. According to the chief, the day shift is oriented towards providing business, bank and jail escorts; responding to false fire alarms, and detecting parking violations. The other shifts are oriented towards responding to family disputes, muggings, car thefts, robberies and assaults, with muggings decreasing and assaults and robberies increasing after midnight.

The chief asserts that the night shifts are busier and more dangerous than the day shifts and require a greater number of officers and a greater proportion of experienced officers. He believes that the seniority clause prevents him from meeting these needs. Local 2's president agrees that more officers should be assigned to the night shifts, but he notes that the chief alone determines how many officers to use on each shift, unrestricted by Article 14. He also notes that the 8:00 p.m. to 4:00 a.m. shift is overlapped by two other shifts; experienced officers on one overlapping shift work beside less experienced officers on the other overlapping shift; and each superior officer on any one of these shifts has more than 15 years of experience. The police chief responds that he is "forced to oversaturate the night shifts with additional officers to overcome inexperience." He adds that given the superior officers' contract, the supervisors with the least

experience as supervisors end up supervising the officers with the least experience as police officers and that consistent with the unity of command principle, recruits on one shift are not supervised by superior officers assigned to overlapping shifts. He cites several incidents of supervisory problems, including one in which the least senior lieutenant was reprimanded for being in a bar with two patrol officers who were drinking on duty. Local 2's president asserts in response that the lieutenant had previously served several years as a sergeant; his lack of discretion on that one occasion was not attributable to his lack of experience as a lieutenant; and the chief only reprimanded the lieutenant and did not require further training.

The chief asserts that during the summer, staffing levels are reduced by 25% because of vacations and 5% because of sick and injury leaves. He believes that the need for experienced officers is greater when staffing levels are lower and he states that recruits sometimes work the night shift "virtually unsupervised" when the most experienced shift members are on vacation. Local 2's president responds that the chief alone determines who is allowed to take vacations at any one time and can thus ensure that there is a mixture of more and less experienced officers working at all times. The chief responds that vacation selection has been based on seniority over the last ten years and that every officer is entitled to three weeks vacation between June 11 and September 15. Local 2's president responds that the chief has not identified any specific

instances showing that the department has not been able to function adequately during the summer as a result of too few experienced officers being on duty.

The chief asserts that the seniority system results in officers lacking the diverse experiences necessary for promotion. Local 2's president responds that the chief has a right to rotate shifts for new recruits and, in any event, the last promotional examination for sergeants was in 1986.

The chief asserts that the seniority system prevents him from transferring officers out of speciality units such as the detective bureau, vice squad, and community relations bureau and placing them on shifts where their specialized skills can be used. He cites an arbitration award holding that the seniority clause was violated when an officer named Houghton was assigned to a desk position on the night tour because of alleged civil rights violations; the parties, however, had stipulated that the "special skills" exception to Article 14 did not apply and the employer did not raise any negotiability objections. Local 2's president responds that the contract expressly preserves the chief's right to base shift assignments upon special skills and he notes that only three grievances have ever been filed under the seniority bidding provisions in its contract and the contract covering superior officers.

The chief asserts that the seniority system results in too few Hispanic officers working during the day shift. Because 30.05%

of the City's population is Hispanic, the chief believes that each shift should have some Hispanic officers to interact with the public. Local 2's president responds that each shift has Spanish speaking officers and the chief has a right to assign a bilingual officer to a particular shift where that special skill is needed. The chief responds that the uniformed patrol bureau has no Hispanic or Spanish speaking officer on the day shift.

The chief asserts that the seniority system prevents him from assigning qualified officers on the midnight shift to teach DARE, an in-school program teaching middle and high school students about resisting drug abuse. Local 2's president asserts that the DARE unit is part of the community service bureau and is a "detailed" unit not covered by the seniority clause. The chief responds that the seniority clause in the superior officers' contract has been construed to apply to "detailed" units.

The chief alleges that the seniority clause does not permit recruits to receive the training they need since recruits generally receive night shift assignments and training sessions are usually held during the day. He asserts that seniority bidding has resulted in not having any decibel experts on the 8:00 p.m. to 4:00 a.m. shift, when noise is the loudest, especially on weekends.^{3/} Similarly, no radar operators work at night and only one of 11 breathalyzer experts works during the midnight to 8:00 a.m. shift.

^{3/} The New Jersey Condominium Association has asked that more decibel experts be trained.

Local 2's president responds that decibel experts work the shifts overlapping the 8:00 p.m. to 4:00 a.m. shift; every officer can take the one day training program for reading decibels; and the chief has assigned a class of recruits to the 8:00 a.m. to 4:00 p.m. shift to receive in-service training to be radar operators. The chief responds that decibel training takes four days, not one.

The chief asserts that the seniority bidding clause prevents him from adequately training and protecting new recruits. He asserts that new recruits must be assigned to the 8:00 p.m. to 4:00 a.m. shift and that he fears for their safety because of their inexperience and the greater incidence of assaults at night. Local 2's president responds that Local 2 did not object when the last group of recruits was transferred to the day shift in the community services bureau for a three week training period and that it recognizes the chief's right to assign recruits to any shift he deems appropriate for training purposes and to rotate shifts for recruits but not other police officers. The chief responds that he believes in "training by emulation" -- having the least senior officers emulate more experienced officers on the same shift. The chief also responds that his inability to rotate shifts prevents him from training officers unless he is prepared to be short officers on a shift. Local 2's president responds that the chief can assign any supervisor he wants to command the recruits during their training period.

The chief asserts that seniority bidding results in lost work time since officers bumped from a shift by more senior officers are usually bumped into different squads with different days-on and days-off. Given the work schedule, an officer changing squads may be off duty for up to three days before beginning a new assignment. Local 2's president responds that the chief has the right to determine all squad assignments.

The chief asserts that the seniority system breaks up squads every year and prevents the squads from working together as cohesively as possible. Local 2's president responds that the seniority bidding provision does not apply to squad (as opposed to shift) assignments and that officers usually remain on the same shift for years. The chief responds that shifts change every time a new officer is appointed or an officer bids for another shift or is transferred into or out of the uniformed bureau.

The chief asserts that the seniority system causes morale problems for less senior officers, prohibits the development of well-rounded officers, precludes humanitarian assignments based on a reason such as a family illness, and impedes training. He cites an instance in which he had to secure Local 2's permission to change the shift of an officer whose mother was dying; Local 2's president responds that Local 2 itself asked for the change and the chief and Local 2 agreed that the change would not serve as a precedent. According to the chief, the application of the seniority system also results in unfair court time and overtime, increased burnout on the night shift, and misconduct and apathy.

The chief suggests that the employer is willing to maintain a seniority system, provided it can fulfill its staffing, supervision, and training needs. He suggests that rotating shifts every 4 1/2 months or limiting the clause to the most senior 10% of patrol officers would be acceptable. Local 2's president asserts that no such proposals have been submitted to the PBA. The chief responds that Local 2's president rejected these alternatives.

Captain Simeon N. Cumberbatch schedules tour assignments. He asserts that veteran officers invariably choose to work together and do not share their wisdom and experience with new officers. Thus, the 8:00 p.m. to 4:00 a.m. shift is composed of all new recruits while the 8:00 a.m. to 4:00 p.m. shift is composed almost exclusively of veteran officers. Few senior officers work on the 4:00 p.m. to midnight shift or the midnight to 8:00 a.m. shift. Captain Cumberbatch also states that recruits cannot learn to react to pressure at the Police Academy and thus sergeants must accompany them on assignments. Local 2's president responds that Cumberbatch does not understand the extent of the chief's authority under the seniority bidding clause and has not complained about the lack of experienced supervision before.

Captain Rafael Cruz, Jr. oversees the community services bureau, the training, planning and operations bureau, and the identification bureau. He asserts that the night shift is staffed by recruits with too little experience. One sergeant supervises 14 officers and must respond to every request for assistance, a burden

that could be alleviated if one or two senior patrol officers replaced one or two recruits on the night shift. Captain Cruz also states that because no Hispanic officers work in the uniformed bureau during the day shift, he has been called to interpret at least 12 times. He also asserts that the disproportionate number of Hispanic officers on the 8:00 p.m. to 4:00 a.m. shift has caused a morale problem among the Hispanic officers who feel they are subject to disparate treatment. Further, he believes that having some Hispanic officers on the day shift would be helpful because they know the Hoboken neighborhoods they grew up in. Cruz also asserts that the seniority system has impaired training because the contract precludes rotating shifts and thus limits him to transferring only a minimum number of recruits to the day shift at any one time so as to ensure adequate coverage during the night shift. Finally, Cruz asserts that coverage and supervision problems are exacerbated during the summer when 30% of the officers under his command are on vacation. Local 2's president responds that Cruz has assigned three sergeants to work on the day shift and could assign more sergeants to work at night; the employer has not shown that the sergeant assigned to the night shift has been unable to supervise the recruits or to give them the guidance they need; experienced police officers working overlapping shifts can help guide the recruits; Hispanic officers work in the day time in the uniformed bureau and the chief has a right to assign Hispanic officers to shifts where their bilingual skills are needed; it is doubtful that morale

problems exist among Hispanic officers because of seniority bidding and, in any event, the employer's effort to eliminate seniority bidding causes more serious morale problems among all police officers; the seniority bidding clause has not precluded shift changes for training purposes and the shifts of training officers can be changed rather than transfer an entire shift of trainees; and the employer has not shown that supervision problems have arisen during the summer.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for disputes involving police officers. Paterson states:

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]

An employer need not negotiate over permissively negotiable proposals or agree to submit such proposals to interest arbitration. Thus, we consider only whether this proposal is mandatorily negotiable. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981). Preemption is not an issue so we focus on balancing the interests of the employees and the employer given the record before us.

Police officers seek to negotiate over the right to choose shift assignments based on their seniority since those assignments dictate their work hours and affect their off-duty lives. Thus, we have stated that public employers and majority representatives may agree that seniority can be a factor in shift assignment where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., 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); Borough of Carteret, P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Pennsauken Tp., P.E.R.C. No. 88-126, 14 NJPER 408 (¶19162 1988); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). However, the need to fulfill the employer's law enforcement mission means that other factors besides seniority must be allowed to come into play when management has special policy needs. Thus, contract proposals that base shift assignments solely on seniority are not mandatorily negotiable. See, e.g., Borough of Highland Park, P.E.R.C. No. 95-____, 20 NJPER ____ (¶_____ 1994); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd App. Div. Dkt. No. A-470-91T2 (12/1/92); Lacey Tp., P.E.R.C.

No. 87-120, 13 NJPER 291 (¶18122 1987); Pennsauken Tp., P.E.R.C. No. 87-101, 13 NJPER 161 (¶18071 1987); Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983). And contract proposals requiring seniority bidding must preserve management's right to deviate from a seniority system when necessary to accomplish a governmental policy goal -- for example, seniority bidding cannot compromise management's power to assign employees with special qualifications to special tasks, determine that employees with certain abilities perform better on certain shifts, train employees, strengthen supervision, determine staffing levels, or respond to emergencies. See, e.g., Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993), recon. granted, P.E.R.C. No. 93-103, 19 NJPER 267 (¶24133 1993); Teaneck Tp., P.E.R.C. No. 93-66, 19 NJPER 122 (¶24058 1993), aff'd App. Div. Dkt. No. A-3269-92 (2/8/94); Franklin Tp.; see also City of Newark, P.E.R.C. No. 93-32, 18 NJPER 498 (¶23229 1992) (restraining arbitration of grievance where employer changed employee's shift hours to improve supervision). Cf. Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983); New Jersey State PBA, Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980). Moreover, we have held not mandatorily negotiable clauses permitting binding arbitration of claims that the employer lacked just cause to transfer or reassign a police officer to a different duty assignment for a non-disciplinary reason. See, e.g., Teaneck.

The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any agreed-upon seniority system must be assessed case-by-case. The assessment in each case must focus on the specific wording of a contract proposal or the specific nature of an arbitration dispute given the specific facts contained in the record and the specific arguments presented to us. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

Local 2 asserts that we have already held that the seniority clause in dispute is mandatorily negotiable. It cites City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989). But Hoboken did not consider the negotiability of the seniority clause per se and held only that a grievance contesting a particular shift assignment was legally arbitrable. That grievance asserted that the assignment was determined by a "flip of the coin" and management did not submit countervailing facts or arguments showing that the assignment was necessary to accomplish a governmental policy objective. Compare City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990) (declining to restrain arbitration where employer did not claim that lieutenant had special skills for a particular shift); Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd App. Div. Dkt. No. A-1398-87T8 (12/12/88) (declining to restrain arbitration where employer did not allege that shift changes were based on special skills). By contrast, the present case focuses on the question of whether the seniority

clause is mandatorily negotiable and the answer turns on different facts and arguments than those presented in the prior Hoboken case.

Given the facts and arguments presented to us, we conclude that Section 1 of Article IX, as worded, is not mandatorily negotiable. The only exception in that clause is too narrow to protect the City's well-established right to act unilaterally when necessary to meet its demonstrated governmental policy needs.

The clause does not dictate that all shift assignments be made by seniority. Instead, the clause exempts "assignments requiring special skills." We believe, as Local 2 asserts, that this exclusion can be applied to alleviate many of the concerns that the chief identifies in his certifications. Thus, the chief has a right, under this exclusion and under our case law, to assign Spanish speaking officers, decibel experts, radar operators, qualified DARE presenters, and breathalyzer analysts to whatever shifts need their services, regardless of the seniority bidding requirement.

The clause does not, however, permit changes in shift assignments necessitated by training needs. Contrast Asbury Park; Carteret. Local 2 recognizes that the employer must be able to rotate shifts when necessary to train recruits. The employer may determine that training includes exposure to the diverse experiences and problems faced by police during the day and at night as well as exposure to more experienced police officers. We add that in order to assign recruits to a shift for training, more senior officers may have to be reassigned to other shifts to accommodate this purpose.

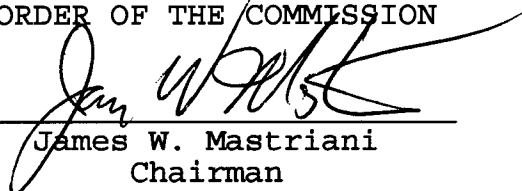
In addition, consistent with Mt. Laurel, Irvington and Atlantic Highlands, we have held that seniority bidding systems cannot compromise a police department's ability to determine staffing levels and strengthen supervision. This employer has demonstrated a need to ensure that its busiest and most dangerous shift will not be composed solely of recruits or the least senior officers under the command of the least senior supervisors.

The PBA appears to recognize that the City has a need and a right to make certain adjustments from a seniority bidding system to meet its obligation to ensure the public safety. The City appears to recognize that its employees have an interest in having seniority be a factor in shift assignments and is willing to negotiate over the use of seniority so long as any negotiated agreement does not significantly interfere with managerial prerogatives. We encourage the parties to negotiate a shift assignment system that lawfully accommodates both interests.

ORDER

Article IX, Section 1, as worded, is not mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: September 29, 1994
Trenton, New Jersey
ISSUED: September 30, 1994