

P.E.R.C. NO. 85-97

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FRANKLIN,

Petitioner,

-and-

Docket No. SN-84-67

FRANKLIN TOWNSHIP P.B.A.  
LOCAL #154,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several proposals made by the Franklin Township P.B.A. Local 154 to the Township of Franklin during contract negotiations. The Commission finds the following to be mandatorily negotiable: procedures concerning the Township's training program; access to an employee's personnel file; maintenance of existing work schedule; maintenance and safety of police vehicles and procedural aspects of disciplinary process. The Commission finds the following to be not mandatorily negotiable: substantive aspects of the Town's training program; determination of the number, type and content of personnel files; minimum manning; police equipment and authority to refuse assignment when dissatisfied with police vehicle.

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Appearances:

For the Petitioner, Lanigan, O'Connell & Chazin, Esqs.  
(Daniel F. O'Connell, of Counsel; Ellen O'Connell, on the  
Brief)

For the Respondent, Abramson & Liebeskind Associates  
(Marc D. Abramson, Consultant)

DECISION AND ORDER

On February 29, 1984, the Township of Franklin ("Township") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a determination that five proposals made by the Franklin Township P.B.A. Local #154 ("PBA") during successor contract negotiations are outside the scope of negotiations.

The Township and the PBA have filed briefs and statements. The PBA is the majority representative of all members of the Township's police department excluding the chief. The parties are engaged in interest arbitration proceedings to resolve an impasse in successor contract negotiations.

This scope of negotiations determination will consider only whether the instant proposals are mandatorily negotiable. It is the

Commission's policy not to decide whether contract proposals, as opposed to contract grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Township of Bridgewater, P.E.R.C. NO. 84-63, 10 NJPER 16, 17 (Para. 15010 1983) aff'd 196 N.J. Super. 258 (App. Div. 1984); In re Township of Hillside, P.E.R.C. No. 83-132, 9 NJPER 271, 272 (Para. 14123 1983); In re Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (Para. 12265 1981).

The Township's scope of negotiations petition followed its receipt of several proposals submitted by the PBA. Subsequent to the filing of this petition, the PBA amended its proposals. We consider only these amendments since the original proposals have been withdrawn and therefore are no longer in dispute.

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters. The Court stated:

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.

(Id. at 92-93, citations omitted)

The first PBA proposal is:

I. Training Program

The Township and PBA agree to mutually establish a two-day training program per year. The contents of the program shall be developed by the Chief, or his designee; however, there shall be no unilateral changes in terms and conditions of employment. All employees who are scheduled to be off on a training day shall be required to attend said training; however, compensation shall be time and one half (1 1/2) as herein set forth in Article VI, Overtime. All procedural terms and conditions of employment shall continue in full force and effect.

The first aspect of this proposal is not a mandatory subject for negotiations because it pertains to the Township's managerial prerogative to determine the training and development of its police force. Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (Para. 13136 1982). See also Township of Millburn, P.E.R.C. No. 84-110, 10 NJPER 224 (Para. 15113 1984); Township of Bridgewater, P.E.R.C. No. 84-63, 10 NJPER 16 (Para. 15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984). Once, however, the Township unilaterally decides when and how it will train employees,

the proposal's remaining aspects, which pertain to severable procedural issues and overtime compensation, are mandatory subjects of negotiation. See, e.g., Township of Bridgewater, supra at 18; Borough of Bound Brook, P.E.R.C. No. 79-66, 5 NJPER 126 (Para. 10075 1979); Township of Maplewood, P.E.R.C. No. 78-89, 4 NJPER 258 (Para. 4132 1978). See also City of Elizabeth and Elizabeth Fire Officers, N.J. Super. \_\_\_ (App. Div. 1985).

The second PBA proposal provides:

Section A. A separate personal [sic] history file shall be established and maintained for each employee covered by this Agreement. Personal [sic] history files are confidential records and shall be maintained in the office of the Chief of Police. No other file, document, or dossier of personnel records shall be maintained, official or otherwise, by any person, for any reasons except for purposes of maintaining records for pension and retirement benefits, medical insurance benefits, records for compliance with affirmative action, records for the compliance with the requirements of the Equal Employment Opportunity Commission or other similar statutory requirements.

Section B. No document or report shall be placed in the employee's personnel file, or otherwise acted upon without the employee receiving a copy of same. The employee shall acknowledge that he has received a copy of said material and is aware that same has been placed in his personal [sic] history file. This acknowledgement shall be attached to the filed copy by the Chief of Police, or his designee. The employee shall also have the right to submit a written response to said material and this response shall be reviewed by the Chief of Police, or his designee, and attached to the file copy.  
(Emphasis added).

The underlined portion of Section A is not a mandatory subject of negotiations. As we read the proposal, it would limit the number, type and content of personnel files that could be

maintained by the Police Department. As such, it is clearly non-negotiable. Cf. County of Hunterdon, P.E.R.C. No. 83-46, 8 NJPER 607 (Para. 13287 1982). Section B, however, is mandatorily negotiable. A police officer's right to examine his personnel file is a procedural matter which does not interfere with any substantive managerial prerogative. Town of Kearny, P.E.R.C. No. 81-23, 6 NJPER 431 (Para. 11218 1980). See also West Amwell Township Board of Education, 4 NJPER 23 (Para. 4012 1977); Fair Lawn Education Association, P.E.R.C. No. 79-88, 5 NJPER 225 (Para. 10124 1979), aff'd 174 N.J. Super. 554 (App. Div. 1980).

The PBA's third proposal is:

Section A - The Township and the Association understand and agree that the standard weekly work schedule for employees covered by this Agreement requires employee services continuously throughout the seven (7) day week and that the standard weekly work schedule shall consist of four (4) days on with two (2) days off consistently with a minimum of sixteen (16) hours off after an eight (8) hour shift.

Section B - Shift work shall consist of steady shift assignment which shall be made on the basis of choice by seniority. It is understood that the Chief could deviate from the seniority list in special cases in which special skills are required or in emergency situations.

\* \* \*

Section D - In the interest of the safety of the police officers, as well as the residents of the Township, the number of employees assigned to and working on a shift shall not be less than six (6) officers excluding all supervisory employees, traffic personnel, and detectives.

The Township, relying entirely on Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div.

1983), certif. den. 96 N.J. 293 (1984), contends that Section A is non-negotiable because it pertains to a police officer's work schedule and work schedules are per se non-negotiable. However, in Borough of Closter, P.E.R.C. No. 85-86, 10 NJPER \_\_ (Para. \_\_\_\_\_ 1985), we rejected such an expansive reading of Atlantic Highlands as inconsistent with numerous Supreme Court and Appellate Division decisions requiring a balancing approach in each case. We stated, in part:

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.

Accordingly, we reject the assertion that the entire field of "work schedules" falls within the managerial prerogative sphere. Such a per se holding would be contrary to the "weighing or balancing" approach. Therefore, we will continue

to make our work schedule scope of negotiations determinations based upon the balancing tests enunciated in Paterson, Woodstown-Pilesgrove and Local 195. 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. See Local 195, supra, 86 N.J. at 412 (1982); Woodstown-Pilesgrove, supra, 81 N.J. at 591 (1980).<sup>1/</sup> (Slip Opinion at 9-10).

The instant work schedule proposal would not alter the existing work schedule. As stated by the PBA in its brief and not disputed by the Township, "the Association is not attempting to negotiate the shift schedule but simply is seeking to codify the existing work practices." The present schedule does not appear to impose any burden on the exercise of managerial prerogatives.<sup>2/</sup> Therefore, it is a mandatory subject of negotiations since it involves hours and days of work. The Appellate Division has already held that a 4-2 work schedule proposal is mandatorily negotiable. Borough of Roselle and Roselle Borough PBA, Local No. 99, Docket No. A-3329-79 (App. Div. May 7, 1981), aff'g P.E.R.C. No. 80-137, 6

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<sup>1/</sup> We recognized, however, that certain aspects of work scheduling would be non-negotiable when the employer's interests are paramount. Closter, supra, slip opinion at 7-8.

<sup>2/</sup> If the Township agreed to the clause (or if it were awarded by the arbitrator) and then decided to change the schedule for governmental policy reasons, it could then file a scope petition and we would decide the case in a specific factual setting.



NJPER 247 (Para. 11120 1980). Indeed, just a little over two years ago, in a case involving the same parties, Township of Franklin, P.E.R.C. No. 83-38, 8 NJPER 576 (Para. 13266 1982), we found a substantially identical proposal to be mandatorily negotiable. What was said then remains applicable to these disputes:

The proposal only attempts...[to] put the existing four days on, two days off work schedule into the contract. [This] item go[es] to hours and days of work and do[es] not unduly restrict the Township's right to assign personnel to specific duties or shifts. [Id. at 577].

See also Township of Springfield, P.E.R.C. No. 80-86, 6 NJPER 35 (Para. 11018 1980).

We further hold that section B is mandatorily negotiable. The Township may legally agree that, as a general rule, it will schedule work in accordance with contractual seniority provisions where all qualifications are equal. See Borough of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (Para. 14068 1983), aff'd Docket No. A-3071-82T2 (App. Div. 1983); Middletown Township, P.E.R.C. No. 82-90, 9 NJPER 227 (Para. 13095 1982), aff'd App. Div. Docket No. A-3664-81T3 (App Div. 1983). Compare Irvington PBA v. Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980).<sup>3/</sup>

Section D, however, is a non-negotiable minimum manning clause. E.g., City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (Para. 13046 1982).

<sup>3/</sup> The Town remains free to assign employees to shifts based upon its managerial determination that such employees perform better on certain shifts. We hold only that where the Town has recognized that all qualifications are equal and no other managerial prerogatives are implicated in scheduling that the matter is then subject to negotiations. We also reiterate here the observation we made in footnote 2.

The PBA's fourth proposal is:

In the interest of safety of the uniformed police officers and the police officers in general, all police marked vehicles must be properly equipped for police work. No employee shall be assigned nor required to drive a vehicle that is not in safe operating condition. Further, no employee shall be assigned nor required to drive a vehicle that is missing equipment that is normally contained in or on said vehicle.

We hold the following sentence, in the abstract, to be a mandatory subject for negotiations: "no employee shall be assigned nor required to drive a vehicle that is not in safe operating condition." Matters which predominantly relate to employee safety have long been held to be mandatorily negotiable. e.g., In re Township of Hillside, P.E.R.C. No. 83-132, 9 NJPER 271 (Para 14123 1983); In re County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (1979), aff'd in part, App. Div. Docket No. A-3567-78 (6/9/80). However, we have recognized "the difficulty of squaring proper recognition of the exercise of managerial prerogatives by employers with the duty of public employers under our Act to negotiate safety issues." In re City of East Orange, P.E.R.C. No 81-11, 6 NJPER 378, 379 (Para 11195 1980), aff'd App. Div. Docket No. A-4851-79 (7/15/81), certif. den. 88 N.J. 476 (1981).

Thus, in East Orange, we recognized that fire fighters had an important safety interest which was implicated in the manning levels of employees called to fires and the minimum number of employees to be assigned to each piece of fire fighting apparatus. Nevertheless, we held that a proposal that would leave to a Committee composed equally of management and union representatives the decision to determine manning levels was non-negotiable since

it pertained to "the legitimate governmental policy interest of public employers in maintaining control over the type and level of the police and/or fire services they will provide." Id at 379.

In Township of Bridgewater, P.E.R.C. No. 84-63, 10 NJPER 16 (Para 15010 1983), we recognized that safety issues were implicated in the Township's decision to require physical fitness and agility tests especially in view of injuries suffered by police officers. Nevertheless, applying the Local 195 test, we held that:

the administration and content of such tests are matters predominantly relating to the establishment of criteria to determine qualifications to do the job. Thus,...the decision to test and the content of the test are not mandatorily negotiable.  
[Id. at 17].

This decision was subsequently affirmed by the Appellate Division.  
196 N.J. Super. 258 (App. Div. 1984).

Just recently, in Union County, P.E.R.C. No. 84-23, 9 NJPER 588 (Para 14248 1983) we were required to determine the negotiability of the following clause:

If an employee of the department alleges that a motor vehicle he is assigned to use is unsafe to operate then the vehicle shall be inspected by a County mechanic before it is used. If a mechanic is not available to inspect the vehicle then another vehicle shall be assigned to the employee.

If no vehicle is available then the Superior Officer shall call in a County mechanic to inspect the vehicle and the decision of the County mechanic shall be final

We found this clause to be mandatorily negotiable since it related primarily "to the safety of employees using vehicles." Id. at 590.  
We further cautioned, however:

We recognize that there may be circumstances under which an employee cannot justifiably require an inspection and refuse an assignment to operate a vehicle pursuant to paragraphs 1 and 2. Thus, for example, an employee's allegation concerning a vehicle's condition may be too speculative or unreasonable and an employer's need for a response too pressing to require exact compliance with this proposal. Generally, however, the proposal is mandatorily negotiable in the abstract.

[Id. at 591 n. 8]

We believe that the foregoing balancing approach is equally applicable here. A police officer certainly has an interest that he not be required to operate an unsafe vehicle. This interest, at least in the abstract, would certainly outweigh any purported managerial prerogative. Therefore, in the abstract, the proposal is clearly mandatorily negotiable and may be submitted to interest arbitration. It is equally clear, however, that this proposal may not be read in such a way as to interfere with the legitimate needs of the police department. Thus, for example, an employee's subjective and incorrect belief that the vehicle is unsafe would not entitle him to refuse an assignment. Nor do we read the clause to permit an officer to refuse an assignment when his dissatisfaction with the vehicle is unreasonable given the employer's need for a response. Given these limitations, however, the clause is mandatorily negotiable in the abstract.

The first and last sentences of this proposal are not mandatorily negotiable. We read the first sentence to pertain to the determination of the appropriate equipment for police functions and therefore to implicate a matter of governmental policy. See In

re County of Middlesex, App. Div. Docket No. A-3564-78, 6 NJPER 338 (Para. 11169 1980); Brookdale Community College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977), appeal dismissed, App. Div. Docket No. A-3041-76. The last sentence is not mandatorily negotiable because it would permit an officer to refuse an assignment when his dissatisfaction concerning the vehicle would be unreasonable under the circumstances. Since safety concerns might not even be implicated, on balance, we find the clause to interfere unduly with the Township's managerial prerogative.

The PBA's fifth proposal follows:

The wide ranging powers and duties given to the department and its members involve them in all manners of contacts and relationships with the public. Out of these contacts may come questions concerning the actions of the members of the force. These questions may require investigation by superior officers. In an effort to insure that these investigations are conducted in a manner which is conducive to good order and discipline, the following rules are hereby adopted:

Section A - The interrogation of an employee shall be at a reasonable hour, preferably when the employee is on duty. If it is required that the employee report to headquarters on his off-duty hours, he shall be compensated on an overtime basis as set forth in this Agreement, unless it is determined that he was remiss in his duties or found guilty of a preferred charge.

Section B - The employee shall be informed of the nature of the investigation before any interrogation commences, including the name of the complainant. The information must be sufficient to reasonably apprise the employee of the nature of the investigation. If the employee is to be questioned as a witness only, he shall be so informed at the initial contact.

Section C - The questioning shall be reasonable in length. Reasonable respites shall be allowed. Time shall also be provided for personal necessities, meals, telephone calls, and rest periods as are necessary.

Section D - The complete interrogation of the employee shall be recorded mechanically or by Department stenographer. There will be no "off the record" questions. All recesses called during the questioning shall be recorded.

Section E - The employee shall not be subject to any offensive language, nor shall he be threatened with transfer, dismissal, or other disciplinary punishment. No promise of reward shall be made as an inducement to answering questions.

Section F - If an employee is under arrest or is the subject of an investigation, he shall be so advised that he is under investigation, and shall be given his rights pursuant to current decisions of the U.S. Supreme Court.

Section G - In all cases and at every stage of the proceedings the Department shall afford an opportunity for the employee, if he so requests, to consult with counsel, consultant, and/or his PBA representative(s) before being questioned concerning any violation or complaint of any type, which may result in any action being taken against said employee.

Section H - No complaint against a law enforcement officer shall be investigated unless the complaint be duly sworn to before an official authorized to administer oaths.

The Township contends that this proposal is non-negotiable because it would interfere with the Township's prerogative to investigate instances of employee misconduct, is so broad that it would intrude into the management of the police force and is preempted by N.J.S.A. 40A:14-147.

We hold that the instant proposal is mandatorily negotiable in the abstract since we read the proposal to pertain to procedural aspects of the disciplinary process affecting employees. Under N.J.S.A. 34:13A-5.3, as amended, such items are mandatorily

negotiable. Borough of Sayreville, P.E.R.C. NO. 84-142, 10 NJPER 362 (Para. 15167 1984). See also Township of Maplewood, P.E.R.C. No. 78-92, 4 NJPER 265 (Para. 4135 1978)<sup>4/</sup>; Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (Para. 12006 1980). In reaching this result, we specifically note that we do not read the clause to limit substantively the Township's ability to investigate instances of misconduct.<sup>5/</sup> Such a reading would render it non-negotiable. See City of Trenton, 1 NJPER 58, 59 (1975). We also note that the clause may only be applied to investigations of employee misconduct which may lead to internal disciplinary charges as opposed to investigations of possible criminal conduct which may lead to criminal charges; a police officer may not negotiate for greater protections as a citizen during criminal investigations than other citizens would be accorded. In this regard, we agree with the holding of the New York Public Employment Relations Board in Police Association of New Rochelle, 10 PERB Para. 3042 (1977), finding a demand pertaining to criminal investigations to be non-negotiable because it:

...is directed to an investigation of a violation of rules and regulations "which could constitute a criminal charge." It is the inherent governmental function of the City's police department to investigate all possible criminal acts that may have occurred within its

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<sup>4/</sup> In Maplewood, we also rejected the claim that N.J.S.A. 40A:14-147 to 151 preempted negotiations.

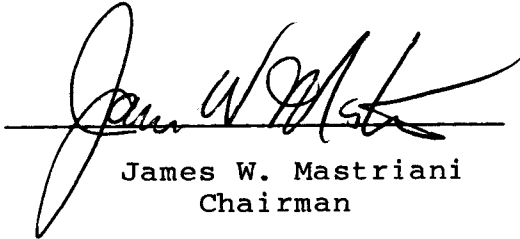
<sup>5/</sup> Thus, Section H cannot be read to substantively limit the Township's ability to initiate an investigation based on an anonymous complaint. Rather, we read it only to limit the Township's right to proceed at formal disciplinary proceedings based on an anonymous complaint.

jurisdiction, including those criminal violations that may have been perpetrated by policemen. Even if the duty to negotiate were deemed to extend to investigations of departmental misconduct by policemen, it could not embrace conduct that might constitute the subject of a criminal investigation. The City cannot be compelled to relinquish its essential responsibility by negotiating over a demand to insulate its police officers from such an investigation.

ORDER

The PBA proposal on Training Program is mandatorily negotiable with the exception of the establishment and length of the program. Section A of "Personnel Files" is not mandatorily negotiable. Section B is. Section A and B of the work schedule proposal are mandatorily negotiable. Section D is not. The PBA proposal on equipment is mandatorily negotiable to the extent consistent with this opinion. The final PBA proposal is mandatorily negotiable to the extent consistent with this opinion..

BY ORDER OF THE COMMISSION



James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Suskin and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey  
March 15, 1985  
ISSUED: March 18, 1985