

P.E.R.C. NO. 93-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF CHERRY HILL,

Petitioner,

-and-

Docket No. SN-93-28

CHERRY HILL FRATERNAL ORDER
OF POLICE, LODGE NO. 28,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several contract proposals of the Cherry Hill Fraternal Order of Police, Lodge No. 28 in successor negotiations with the Township of Cherry Hill. The Commission finds not mandatorily negotiable proposals on shift schedules and drug testing, and portions of proposals on departmental investigations and maternity leave.

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Appearances:

For the Petitioner, DeCotiis & Pinto, attorneys
(Sheldon L. Cohen, of counsel; Judy A. Verrone, on the
brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On September 28, 1992, the Township of Cherry Hill petitioned for a scope of negotiations determination. The Township seeks a declaration that successor contract proposals of the Cherry Hill Fraternal Order of Police, Lodge No. 28 are not mandatorily negotiable. The proposals concern work schedules, departmental investigations, and maternity leave.^{1/}

The parties have filed exhibits and briefs.^{2/} These facts appear.

^{1/} The employer has withdrawn its contention that a "fully-bargained" provision is not mandatorily negotiable.

^{2/} We accept the FOP's untimely brief since the delay was short and the employer has not objected or suffered any prejudice.

The FOP represents the Township's police officers, corporals, and detectives. The parties entered into a collective negotiations agreement which expired on June 30, 1992. The parties engaged in successor contract negotiations and the FOP petitioned to initiate interest arbitration proceedings. The FOP seeks to arbitrate certain proposals which the Township contends are not mandatorily negotiable.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth the steps for analyzing the negotiability of a proposal affecting firefighters or police officers. It 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. 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]

We need only decide whether the FOP's proposals are mandatorily negotiable since a permissively negotiable subject cannot be

submitted to interest arbitration without the employer's consent.

Town of West New York, P.E.R.C. No. 82-64, 7 NJPER 594 (¶12265 1981).

The FOP has proposed this contract article entitled Shift Differential/Work Schedule:

All employees covered by this agreement shall work steady non-rotating shifts. The "5-2, 6-3" shall continue as the work day sequence.

A. No Employee covered by this Agreement shall be required to rotate.

B. Each Employee shall work a steady designated shift which shall either be day shift (7 a.m. - 3 p.m.), afternoon shift (3 p.m. - 11 p.m.) or night shift (11 p.m. - 7 a.m.).

C. Employees shall have the right to request on a seniority basis by rank for their individual choice of steady shift position.

D. The Chief of Police shall have the right to deny an Employee the selected steady shift.

E. Once an Employee has bid for and has been designated a steady shift then said Employee shall thereafter continue in said steady shift position unless said Employee elects to be placed in a different shift which exchange shall require voluntary mutual exchange with an Employee of equal rank from that other shift. All changes subject to the approval of the Chief of Police.

F. All steady shift assignments shall be subject to a review of the bidding procedure, as is defined above, on an annual basis which shall occur during the first week of December each year with the new annual steady shift designations to be effective on the next January 1st. All changes subject to the approval of the Chief of Police. This paragraph shall become effective December 1990.

G. The power of the Chief of Police to assign, transfer and reassign personnel pursuant to law is recognized.

Contractual provisions that dictate that shift placement be by seniority are not mandatorily negotiable. Teaneck Tp., P.E.R.C. No. 93-66, 19 NJPER ____ (¶____ 1993); 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); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982). Nor are clauses that permit binding arbitration of claims that non-disciplinary assignments or transfers of police officers were without just cause. Teaneck Tp.; Wayne Tp., P.E.R.C. No. 92-60, 18 NJPER 43 (¶23016 1991); State of New Jersey (Office of Employee Relations), P.E.R.C. No. 92-50, 17 NJPER 501 (¶22245 1991); Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990); City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986).

By contrast, shift selection provisions are mandatorily negotiable if they expressly preserve management's right to act unilaterally when necessary -- for example, when special qualifications are needed for particular tasks, minimum staffing levels must be met, training is required, or emergencies occur. 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 Carteret, P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). And also mandatorily negotiable are provisions that permit review of

non-disciplinary transfers or assignments through the negotiated grievance process, provided binding arbitration of non-disciplinary transfers or assignments is not authorized. Teaneck Tp. Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979).

Applying these precedents, we hold that the proposed article, as written, is not mandatorily negotiable. In Teaneck Tp., P.E.R.C. No. 93-66, we reached the same result in a case involving an almost identical proposal. While the instant proposal does recognize the chief's power to deny a shift request or exchange and to transfer or reassign personnel pursuant to law, some features of the proposal would significantly interfere with the employer's prerogative to deploy its work force in light of employee qualifications, staffing needs, training requirements, and emergencies. For example, Section A bars the rotation of any employee no matter what the circumstances; Section B requires that each employee work steady designated shifts no matter what the circumstances; and Section E permits the officers but not the chief to initiate a shift change. We note, however, that in contrast to the provision in Teaneck Tp., the proposal does not expressly subject non-disciplinary shift assignments or transfers to binding arbitration. If the FOP seeks to submit such a personnel dispute to binding arbitration, the Township may file a petition seeking a restraint of binding arbitration.

The next proposal is entitled Departmental Investigations.

It provides:

In an effort to ensure that departmental investigations are conducted in a manner which is conducive to good order and discipline, the following rules are hereby adopted:

1. The interrogation of a member of the Union shall be at a reasonable hour, preferably when the member of the Union is on duty, unless the exigencies of the investigation dictate otherwise.
2. The interrogations shall take place at a location designated by the Employer. Usually it will be at the Office of the Employer or the location where the incident allegedly occurred.
3. The member of the Union shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the members of the allegations should be provided. If it is known that the member of the Union is being interrogated as a witness only, he should be so informed at the initial contact.
4. The questioning shall be reasonable in length. Fifteen (15) minutes time shall be provided for personal necessities, meals, telephone calls, and rest periods at the end of every two (2) hours.
5. The member of the Union 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.
6. At every [stage] of the proceedings, the Employer's Office shall afford an opportunity for a member of the Union, if he so requests, to consult with counsel and/or his Union representative before being questioned concerning a violation of the rules and regulations during the interrogation of a member of the Union, which shall not delay the interrogation beyond one (1) hour for consultation with this Union representative.

7. In cases other than departmental investigations, if a member is under arrest or if he is a suspect or the target of a criminal investigation, he shall be given his right pursuant to the current decisions of the United State Supreme Court.

8. Nothing herein shall be construed to deprive the Employer's Office or its officers of the ability to conduct the routine and daily operations of the Department.

9. No employee covered by this Agreement shall be subjected to any urinalysis or blood screening unless one of the two (2) circumstances exist: (1) There is a job-related individualized impact with respect to the specific employee being tested. (2) Where the urinalysis or blood testing is done as part of a bona fide annual physical examination which is done for the entire department.

10. Under no circumstance shall the employer offer or direct the taking of a polygraph or voice print examination by this Agreement.

11. Under no circumstance shall an employee be subject to any charge whatsoever after 45 days. The 45 day period shall be calculated consistent with N.J.S.A. 40A:14-147.

12. Employees shall not be suspended or suffer a loss in benefits until after the employee has had a departmental hearing and has been found guilty, except in cases of severe nature where the suspension of the employee is required for the safety and welfare of the public or the employer's Office. If the suspension is immediate, then a departmental hearing shall take place as soon as possible.

The negotiability of the underlined provisions is in dispute.

Paragraph 9 is not mandatorily negotiable. In Bor. of Hopatcong, P.E.R.C. No. 91-60, 17 NJPER 62 (¶22028 1990), we held that a proposal was not mandatorily negotiable because it required a showing of probable cause rather than reasonable individualized

suspicion. Compare FOP Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461 (App. Div. 1987). The FOP's proposal was identical to the provision in Hopatcong until it was amended to delete the probable cause requirement. As now worded, however, the proposal still requires the employer to meet a higher standard than "reasonable individualized suspicion." The employer must instead prove that there was in fact a job-related individualized impact for that employee. Thus, the proposal is not mandatorily negotiable under Hopatcong.

The employer contends that paragraph 11 is inconsistent with N.J.S.A. 40A:14-147. That statute provides:

Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. Said complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint.

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient

information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day time limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The employer asserts that paragraph 11 does not expressly reference the statutory exceptions to the 45-day time limit. We agree to the extent that paragraph 11 mandates that no charge be filed after 45 days and thus does not recognize that the 45-day deadline does not apply to complaints by private individuals. But we also believe that the paragraph's last sentence expressly incorporates the other statutory exceptions since these exceptions are tied to how the 45-day period is calculated. Should this provision be included in the successor agreement and should the FOP seek to arbitrate a grievance ignoring the statutory limitations, the Township may file a petition seeking a restraint of binding arbitration.

The employer also contends that paragraph 12 is inconsistent with N.J.S.A. 40:14-147. We do not agree. That statute does not expressly, specifically, comprehensively prohibit

an agreement requiring a hearing and a determination of guilt before an employee is suspended. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); Middlesex Cty. The proposal would provide additional disciplinary safeguards which are mandatorily negotiable under the discipline amendment to N.J.S.A. 34:13A-5.3.

The last proposal is entitled Maternity Leave. It provides:

Female police officers shall advise the employer in writing of a pregnancy. The rights of a female police officer shall include but not be limited to the following provisions:

1. The female police officer shall be permitted to work as a police officer so long as such work is permitted by a doctor's note. The female police officer's assignments shall be at the discretion of the chief of police. The doctor shall be a physician of the female police officer's own choosing.
2. In addition to the other provisions of this Article, the female police officer shall be permitted to use accumulated sick time, compensatory time off and any other accumulated time benefits which she may have during the period of her pregnancy and the period following childbirth.
3. In addition, a female employee with one (1) year or more of service shall be granted, on 30 days written notice, maternity leave without pay for up to six (6) months duration and shall be returned to work without loss of prior seniority, or prior benefits, provided that she notifies the chief of police in writing no later than after three (3) months of leave that she intends to return to work.
4. The female police officer shall at all times be kept at full benefits and shall be considered as on active duty for all computation purposes.

5. Upon return to active duty status, the female police officer shall be entitled to be placed in the same position which she held before departing on maternity leave.

Male police officers shall be permitted ten (10) working days with full pay and benefits following the birth of their child.

The negotiability of the underlined provisions is in dispute.

The employer asserts that this proposal is preempted by the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., which prohibits discrimination in employment conditions based on sex. N.J.S.A. 10:5-12(a). See also Castellano v. Linden Bd. of Ed., 158 N.J. Super. 350 (App. Div. 1978), aff'd in part, 79 N.J. 407 (1979). The FOP, however, has amended paragraph 5 of its proposal to replace the phrase "male police officers" with the phrase "all police officers." This change appears to cure any problem of discriminatory treatment in the second part of paragraph 5 and that provision is thus mandatorily negotiable. However, the problem of discriminatory treatment remains in paragraphs 3 and 4 and the first part of paragraph 5. The Third Circuit Court of Appeals has held that collective bargaining agreements may give limited favorable treatment to female employees disabled because of pregnancy, childbirth, or related medical conditions; but such agreements may not restrict broader childrearing or maternity leaves to female employees. Schafer v. Pittsburgh School Dist. Bd. of Ed., 903 F.2d 243, 52 FEP Cases 1492 (3d Cir. 1990). We further note that the Family Leave Act, N.J.S.A. 34:11B-1 et seq., guarantees employees, male or female, up to 12 weeks of unpaid leave upon the birth or

adoption of a child. N.J.S.A. 34:11B-4. We therefore hold that paragraphs 3 and 4 and the first part of paragraph 5 are not mandatorily negotiable.

ORDER

The following proposals are mandatorily negotiable:

Paragraphs 11 and 12 of the proposed article entitled Departmental Investigations except to the extent that paragraph 11 would prohibit the filing of the complaints by private individuals after 45 days.

As worded to apply to all police officers, the second part of paragraph 5 of the proposed article entitled Maternity Leave.

The following proposals are not mandatorily negotiable:

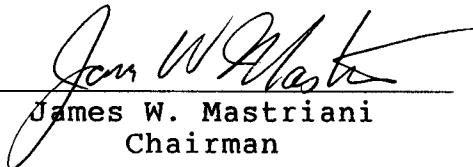
Paragraphs A, B, and E of the proposed article entitled Shift Differential/Work Schedule

Paragraph 9 of the proposed article entitled Departmental Investigations

Paragraph 11 of the proposed article entitled Departmental Investigations to the extent that it would prohibit the filing of the complaints by private individuals after 45 days

Paragraphs 3 and 4 and the first part of paragraph 5 of the proposed article entitled Maternity Leave.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

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