P.E.R.C. NO. 2001-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket Nos. SN-2001-31
SN-2001-32

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,
PRIMARY LEVEL SUPERVISORS UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of two provisions in an expired agreement between the State of New Jersey and the New Jersey Law Enforcement Supervisors Association, Primary Level Supervisors Unit. The Commission holds that a work hours provision that includes an overlap between shifts is mandatorily negotiable. The Commission finds that this provision is not preempted by State regulations on salary and work hours and minimum work hours for certain titles. The Commission concludes that this issue may be addressed through the collective negotiations process. The Commission also holds that portions of a provision concerning assignments and job postings may remain in the contract for informational purposes only.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Respondent.

Appearances:

For the Petitioner, Grotta, Glassman & Hoffman, P.A., attorneys (Beth Hinsdale, on the brief)

For the Respondent, Kusnirik and Fornaro, attorneys (Richard D. Fornaro, on the brief)

DECISION

On December 21, 2000, the State of New Jersey filed two petitions for a scope of negotiations determination. The petitions seek determinations that work hours and reassignment/ job posting provisions in an expired agreement between the State and the New Jersey Law Enforcement Supervisors Association, Primary Level Supervisors Unit, are not mandatorily negotiable.1/

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

1/ The petitions were consolidated for processing.

The Association represents correction sergeants and other State law enforcement supervisors. The employer and the Association are parties to a collective negotiations agreement that expired on June 30, 1999. The parties are in negotiations for a successor contract and have jointly petitioned for interest arbitration.

The employer seeks to eliminate portions of Article XXVI, Hours of Work, and Article XXXI, Reassignment and Job Posting. Those articles are among the disputed issues listed in the joint petition.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the scope of negotiations analysis in cases involving 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]

To be preemptive under Paterson's first prong, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); State of New Jersey (State Colleges), P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174), aff'd 336 N.J. Super. 167 (App. Div. 2001). Under Paterson's second prong, we will consider only whether the proposals are mandatorily negotiable. We do not decide whether contract proposals concerning police employees are permissively negotiable since the employer need not negotiate over such proposals or consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).2/

Hours of Work

For over a decade, the parties' collective negotiations agreements have contained articles setting the hours of work and specifying the rates of pay for weekly work hours beyond the first

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2/ We therefore do not consider the employer's alternative arguments that the challenged portions of Articles XXVI and XXXI are only permissively negotiable.

40 hours per week. Article XXVI is entitled Hours of Work.

Section H provides:

> 1. Correction Sergeants serving in positions involving custody of inmates shall be employed on a normal work schedule of eight (8) hours and thirty (30) minutes per day (forty-two (42) hours and thirty (30) minutes per five (5) day week). Each Sergeant shall have thirty (30) minutes for meal time within each work shift which shall be duty status.
>
> The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that Correction Sergeants who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily thirty (30) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of thirty (30) minutes is in exception to the provisions of Article XXVII, Section B [Overtime].
>
> 2. Effective July 1, 1997, Correction Sergeants shall be employed on a normal work schedule of eight (8) hours and twenty-five (25) minutes per day (forty-two) (42) hours and five (5) minutes per five (5) day week). Each officer shall have thirty (30) minutes for meal time within each work shift which shall be duty status.
>
> The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that officers who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily twenty-five (25) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of twenty-five (25) minutes is in exception to the provisions of Article XXVII, Section B.

> 3. Effective July 1, 1998, Correction Sergeants shall be employed on a normal work schedule of eight (8) hours and twenty (20) minutes per day (forty-one (41) hours and forty (40) minutes per five (5) day week). Each officer shall have thirty (30) minutes per meal time within each work shift which shall be duty status.
>
> The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that officers who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily twenty (20) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of twenty (20) minutes is in exception to the provisions of Article XXVII, Section B.

Pursuant to this article, correction sergeants now work eight hours and 20 minutes per day or 41 hours and 40 minutes per week. They receive premium pay for the regular weekly work hours beyond 40 hours and overtime pay for work hours beyond the contractual work week -- the record does not disclose the reason for the distinction between premium pay and overtime pay in the language chosen by the parties. The overlap period between each of the three daily shifts was intended to be used so that officers going off duty could exchange information with officers coming on duty. The overlap was reduced from 30 minutes in 1996 to 25 minutes in 1997 to 20 minutes in 1998.[3/]

3/ A June 2000 interest arbitration award eliminated the overlap for rank-and-file officers.

The employer asserts that N.J.A.C. 4A:6-2.1, N.J.A.C. 4A:6-2.2 and the State Compensation Plan establish a 40-hour work week for correction officers and thus preempt having employees regularly scheduled to work more than 40 hours a week. It also contends that, by increasing the number of sergeants on duty at the beginning and end of each shift, the clause significantly interferes with its right to determine work hours, set staffing levels, and decide when overtime will be worked. It maintains that the automatic overlap is inefficient and that it can require overlap as needed.

The Association responds that the regulations do not preempt Article XXVI, reasoning that while they establish the minimum work week for correction officers, they allow the employer to determine that employees will work beyond the normal workweek. It also maintains that Article XXVI is a mandatorily negotiable work hours provision; serves a critical safety function by allowing officers to exchange information about inmate behavior and other occurrences; and helps sergeants safely perform their duties. Finally, the Association states that Article XXVI has been included in the parties' agreement for the past two decades. Its president certifies that the shift overlap has not affected the number of sergeants on duty or required that additional sergeants be hired. He also states that, during negotiations, the employer stated that it wants to eliminate the shift overlap to save money.

We first consider, and reject, the preemption argument.

N.J.A.C. 4A:6-2.1 provides:

(a) In local service, appointing authorities, subject to applicable negotiations requirements, may establish the hours of work.

(b) In State service, this subchapter applies to all employees in the career, senior executive or unclassified service.

1. The number of hours comprising the normal workweek for each job title shall be indicated in the State compensation plan.

2. For State overtime and holiday pay procedures, see N.J.A.C. 4A:3-5.1 et seq.

N.J.A.C. 4A:6-2.2 provides:

(a) Job titles which meet all of the following criteria shall be assigned a fixed workweek of either 35 or 40 hours:

1. The work schedule is consistently regular, amenable to administrative control and determined by the direction of a supervisor rather than by the nature of the service and employees have minimal discretion over their work schedule;

2. The hours of work conform to a standard pattern of work time for the typical work location;

3. Employees normally work under direct supervision within a formal work program in a State office, location or place of business. Field work without direct supervision is minimal; and

4. An appointing authority can certify with assurance when an employee performs work beyond the normal workweek.

(b) Job titles which meet the criteria in (a) above are designated as 35 hours (35) or 40 hours (40), except those exempt from

> the Fair Labor Standards Act, 29 U.S.C. 20 et seq., are designated exempt 35 hours (3E) or exempt 40 hours (4E).

These regulations coordinate with the State Compensation Plan which sets a salary range for each title based on the normal workweek. They also establish the number of hours above which overtime compensation must be paid. Pursuant to N.J.A.C. 4A:6-2.1, the State Compensation Plan assigns correction sergeants a 40 hour work week. Any hours worked beyond 40 must be paid at one and one-half the hourly proration of the employee's base salary. N.J.A.C. 4A:3-5.2.

These regulations establish the minimum number of work hours in the "normal work week" for particular job titles but do not prohibit the work hours provided for by Article XXVI, Section H. Indeed, they contemplate that extra hours may be worked and cross-reference overtime payment requirements. See N.J.A.C. 4A:6-2.1(b)2; N.J.A.C. 4A:3-5.1 et seq. The fact that the regulations do not expressly authorize built-in work hours beyond 40 per week does not mean that they are proscribed. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330 (1989). Compare State of New Jersey (Dept. of Corrections), P.E.R.C. No. 89-111, 15 NJPER 275 (¶20120 1989), aff'd 240 N.J. Super. 26 (App. Div. 1990) (while Department of Personnel (DOP) regulations governing physicians allowed for overtime compensation only through flexible work patterns and hour-for-hour compensatory leave, they did not prohibit the Department of Corrections from granting physicians

ten extra vacation days because of their on-call service and unusual work schedules). We do not believe that the State's longstanding practice concerning the work hours of these and other employees is illegal, whether set by a collective negotiations agreement or by the employer unilaterally. The contract article does not conflict with these regulations that require that overtime compensation be paid after an employee works the number of hours in his or her regular workweek.

In re Grievance of Transportation Employees, 120 N.J. Super. 540 (App. Div. 1972), certif. denied, 62 N.J. 193 (1973), relied on by the employer, does not warrant a different result. That case upheld a directive that engineers work the 40-hour week required by the State Compensation Plan. The directive was issued once the Commissioner of Transportation became aware of the requirement. In rejecting the argument that the Commissioner breached a contract or past practice permitting employees to work only 35 hours per week, the Court stated that no Transportation official "had the legal right of contracting that employees therein work for more or less hours than established in accordance with the statutory mandate." 120 N.J. Super. at 545. However, the quoted language refers to the fixed hours for the normal workweek and does not pertain to or prohibit agreements as to overtime. The problem that gave rise to the case was that employees were working only 35 hours per week despite receiving the salary fixed by the State Compensation Plan for employees

working 40 hours per week. That problem does not exist in this case since the employees are receiving the appropriate salary under the State Compensation Plan for employees working a 40-hour week, plus the extra compensation for the extra work hours called for by the contract.

We now determine whether continued inclusion of Article XXVI, Section H in the parties' agreement would significantly interfere with the employer's policy goals, such that the clause may not be considered by an interest arbitrator. This question implicates our case law concerning work hours, overtime, minimum staffing, and employee safety. We summarize some of the key principles in these areas and then assess how those principles bear on the negotiability analysis under the particular facts of this case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Legislature has expressly designated work hours as a mandatorily negotiable term and condition of employment for police officers and firefighters. N.J.S.A. 34:13A-14 et seq.; N.J.S.A. 34:13A-16g(2) and (8). That legislative designation accords with longstanding case law holding work hours to be a mandatorily negotiable term and condition of employment. Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973); see also Hunterdon Cty. Freeholder Bd., 116 N.J. at 331; Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589, 594 (1980); State v. State Supervisory Employees Ass'n, 78

N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. of Ed. Sec'ys, 78 N.J. 1, 8 (1978); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973). Recognizing that the subject of work hours encompasses work schedules setting the hours and days employees will work, our Supreme Court has specifically held that work schedules are generally negotiable. Local 195, IFPTE v. State, 88 N.J. 393, 411-412 (1982). Accord Hardin, The Developing Labor Law, 882-883 (3d ed. 1992). The Supreme Court reaffirmed the negotiability of work schedules just last week in a decision holding that reductions in the work year of professors from calendar year appointments to academic appointments were mandatorily negotiable, even though the employees did not work during the summer. Troy v. Rutgers, the State Univ., __ N.J. __(2001).

Consistent with the Legislature's decrees and the Supreme Court's cases, the Commission and the Appellate Division have generally held that work schedules of police officers and firefighters are mandatorily negotiable. See cases cited in Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to protect 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); Borough of

Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992).

Maplewood sums up our approach when labor or management seeks to present a facially valid work schedule proposal during interest arbitration. We stated:

> When the Legislature required negotiations over terms and conditions of employment, it recognized that both management and employees would have legitimate concerns and competing arguments and it decided that the negotiations process was the best forum for addressing those concerns and arguments and the best way to improve morale and efficiency. See N.J.S.A. 34:13A-2; Woodstown-Pilesgrove at 591. When the Legislature approved interest arbitration as a means of resolving negotiations impasses over the wages, hours, and employment conditions of police officers and firefighters, it recognized that both management and employees would have legitimate concerns and competing evidence and it decided that the interest arbitration process was the best forum for presenting, considering, and reviewing those concerns and evidentiary presentations and the best way to ensure the high morale of these employees and the efficient operation of their departments. N.J.S.A. 34:13A-14 et seq. Indeed, the Legislature expressly instructed interest arbitrators to consider the public interest and welfare in determining wages, hours, and employment conditions and contemplated that such considerations would be based on a record developed by the parties in an interest arbitration proceeding. N.J.S.A. 34:13A-16g(1). See also Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994). The question, then, is not which party should prevail in negotiations or interest arbitration or whether a particular proposal raises some legitimate concerns, but whether the facts demonstrate that

> a particular work schedule issue so involves and impedes governmental policy that it must not be addressed through the negotiations process at all despite the normal legislative desideratum that work hours be negotiated in order to improve morale and efficiency.

See also City of Long Branch, P.E.R.C. No. 2000-94, 26 NJPER 278 (¶31110 2000); Clinton Tp., P.E.R.C No. 2000-3, 25 NJPER 365 (¶30157 1999), recon. den. P.E.R.C. No. 2000-37, 26 NJPER 15 (¶31002 1999).

With respect to the often intertwined issues of minimum staffing and safety, we have recognized that the number of public safety officers assigned to a shift or post intimately affects employee safety, since the more officers on duty at any time, the safer working conditions will likely be for each officer. Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). But requiring a set number of officers on a shift may also impede a public employer's prerogatives to determine the size of its work force and how best to deploy it. Therefore, we have generally barred negotiations over, or enforcement of, clauses binding an employer to specific staffing levels. See Paterson; West Paterson; North Hudson Reg. Fire & Rescue, P.E.R.C. 2000-78, 26 NJPER 184 (¶31075 2000); Franklin Bor., P.E.R.C. No. 98-138, 24 NJPER 273 (¶29130 1998); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990). On the other hand, we have allowed

negotiations over, and arbitration to enforce, contract language protecting employee safety. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989). We have also found to be mandatorily negotiable clauses requiring premium pay for working conditions that raise safety concerns. See Franklin and Lopatcong (premium pay proposal for officers working alone mandatorily negotiable).

Consistent with our cases concerning both staffing levels and work schedules, we have found that a public employer has a prerogative to determine whether an absent officer will be replaced by an off-duty officer working overtime or whether the post will be left vacant. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). However, once an employer decides to schedule overtime hours, it must negotiate over such questions as whether overtime hours will generally be distributed according to seniority, according to a schedule, or according to who volunteers. Ibid.

We consider the parties' respective interests within this framework. The employer has proposed removing part of a contract provision that sets the number of daily and weekly work hours for individual employees and that, by establishing an eight hour and twenty minute work day, builds in one hour and forty minutes of premium pay per week for correction officers who work forty or

more hours. Similar articles have been included in the parties' collective negotiations agreements over the past decade. It is apparent that the parties have historically considered the issues addressed by these articles as involving the negotiated relationship between hours worked and pay received. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed., 81 N.J. at 591. Within that framework, the parties' have recently negotiated a series of decreases in the amount of work hours. In the rank-and-file unit, the negotiations process has resulted in reducing the weekly work hours to 40 hours, the result sought by the employer here. We thus perceive the employees' interest in having this issue addressed through the negotiations process to be substantial because it involves matters at the heart of collective negotiations -- hours worked and compensation received.

The employer does not dispute the Association's assertion that it sought to reduce the weekly work hours for fiscal reasons. That is a legitimate concern, but one that may be addressed through the collective negotiations process. See New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (denying restraint of arbitration of grievance seeking to enforce agreement to have regular weekend work performed by senior full-time employees at overtime rates rather than other employees at straight-time rates); cf. Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997) (commenting that that labor cost issue

alone did not make an existing work schedule not mandatorily negotiable); see also Long Branch, P.E.R.C. No. 2000-94 (arbitrator may evaluate the built-in overtime requirements of the existing and proposed schedules and consider employer's argument that proposed schedule would lead to staffing shortfalls and require too much overtime). The employer also maintains that the shift overlap is no longer needed. That reason too may be legitimate, but it has not been shown how the overlap so impedes the attainment of governmental policy goals that an interest arbitrator may not consider retaining the existing provision. For example, it has not shown that the overlap limits its ability to ensure appropriate supervision or prevent coverage gaps. Contrast Irvington; Atlantic Highlands; Jackson Tp.; Prospect Park; compare In re Mt. Laurel Tp., 215 N.J. Super. 108, 115 (App. Div. 1987) and Cumberland Cty. (employers did not show that work schedules which unions sought to retain in negotiated agreement significantly interfered with governmental policy). And while it maintains that the overlap is inefficient -- that is, results in too many officers on duty during the overlap -- we have previously held that concerns about potential overlaps in coverage do not warrant cutting off the arbitration process altogether. See Clinton, P.E.R.C. 2000-3. Indeed, by noting that it could still schedule shift overlap as needed if Article XXVI, H were removed from the agreement, the employer suggests that the overlap may sometimes serve a useful information-exchange purpose.

We recognize that maintaining the schedule in effect requires some work hours that will be paid at premium pay rates and that the employer contends this conflicts with the principle that employers have a prerogative to determine when overtime hours will be worked. Long Branch, P.E.R.C. No. 83-15. However, we have previously held, and the Appellate Division has agreed, that a weekly work schedule is not per se non-negotiable because it includes some hours that will be paid at overtime rates. See New Jersey Sports & Exposition Auth.

We also note that the Association maintains that the weekly work hours and shift overlap are essential to officer safety in a penal institution. We perceive no barrier to an interest arbitrator considering that argument. We have recognized that even clauses binding an employer to specific staffing levels intimately and directly affect the working conditions of public safety officers. West Paterson. We have restrained arbitration over such clauses because they also significantly interfere with the employer's right to set staffing levels. Here, however, the overlap does not significantly interfere with the employer's right to determine the size of the workforce or set overall staffing levels. It requires only that those officers who are on duty work an extra 20 minutes at the end of their shift coordinate with incoming officers. Indeed, the impact of the overlap on the employer appears to be primarily financial, and it is thus akin to the premium pay proposals that we have found to be mandatorily

negotiable and that also arose out of a majority representative's concern about safe working conditions. Contrast Prospect Park (work schedule not negotiable where it would cause staff shortages on 39 shifts, more coverage than needed on 20 shifts, inadequate supervision on 19 shifts, and 15 minutes of duplicative coverage between shifts).

We caution that the issue before us is not whether the present article should remain in the contract or whether the article agreed to in the rank-and-file negotiations is preferable. The issue instead is whether the negotiations processes over the issues addressed in Article XXVI should be cut off altogether at this juncture. Considering the legislative decrees and case law and balancing the parties' interests in light of the particular facts of this case, we hold that these issues may be addressed through the collective negotiations process.

We note in particular that the parties have been operating with the weekly work hours for many years; the employer suggests that the overlap may sometimes still be needed; and the employer has not shown that the overlap significantly interferes with governmental policy goals. Both parties may develop a full record and the arbitrator may then evaluate the parties' arguments in light of the public interest and the other statutory criteria. We note that we have jurisdiction to review interest arbitration awards.

Assignments and Job Postings

The employer maintains that all but the underscored portions of Article XXXI of the expired agreement are not mandatorily negotiable. Article XXXI provides:

> The following provision(s) are set forth herein for information purposes only. Those matters not already included under Article XXX shall be grievable within the provisions of the Grievance Procedure in the Agreement as defined in Article X, Section A.2 except for the provisions below that are underlined, which are grievable under Article X, Section A.1.
>
> Reassignment and Job Posting
>
> A. 1. Reassignment is the movement of an employee from one job assignment to another within his job classification and within the work unit, organizational unit or department.
>
> 2. Reassignments of employees may be made in accordance with the fiscal responsibilities of the appointing authority; to improve or maintain operational effectiveness; or to provide development and job training or a balance of employee experience in any work area. Where such assignments are not mutually agreed to, the appointing authority will make reassignments in the inverse order of the job classification seniority of the employees affected, providing the objectives stated above are met.
>
> 3. When temporary (i.e. for a period of six months or less) reassignments are made to achieve any of the objectives in A.2. above, employees to be affected will be given maximum possible notice. The consideration of seniority otherwise applicable in reassignments will not apply.
>
> B. Where the principles in A.2. above are observed, requests for voluntary reassignment within the organizational unit or department shall be given consideration. An employee

desiring reassignment to any job in his organizational unit or department may submit an application through his supervisor in writing to his Personnel Officer stating the reasons for the request. Employees who are capable of performing the work and who apply for such reassignments will be considered and reassignments will be made on the basis of these requests. Where more than one request for reassignment from qualified employees deemed capable of performing the work in such a job is on record, any assignment(s) will be made on the basis of job classification seniority of employees having recorded such a request.

C. 1. When personnel changes in a work unit provide opportunities for shift or schedule changes, interested employees may apply for desired assignments to the work unit supervisor. Such changes in assignment will be made on the basis of the job classification seniority of employees having recorded such a request, except that priority is given to the assignment of individual employees as provided in A.2. above.

D. An employee may have on record no more than two (2) requests for reassignment in B. above.

E. When an employee is granted a voluntary reassignment under provisions of B or C above, he shall then be eligible for only one (1) additional voluntary reassignment in the succeeding twelve (12) month period. Consideration will be given to a request for additional reassignments where special circumstances exist.

F. Job Posting

Any new or vacant position which the appointing authority desires to fill and which is not filled by a reassignment made in accordance with the provisions of paragraphs A through E of this Article shall be posted for a period of seven (7) days. The position shall be offered to the applicant responding to the

> posting who has the most job classification seniority providing that the applicant possesses the requisite qualifications for the position. The managerial decision as to the selection or nonselection of any employee shall not be subject to the arbitration process as described in Article X.

The employer asserts that the reassignment provisions in Article XXXI are virtually identical to those considered in Local 195 and that, consistent with that decision, we must hold that only the underscored sections are mandatorily negotiable.4/ The employer also contends that only the first sentence of Paragraph F, pertaining to Job Postings, is mandatorily negotiable. It maintains that the remainder of the clause significantly interferes with the State's right to determine qualifications and fill positions.

The Association responds that Article XXXI sets out mandatorily negotiable procedural and notice requirements. It argues that in cases such as Burlington Cty., P.E.R.C. No. 2000-70, 26 NJPER 121 (¶31052 2000) and Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), app. pending,

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4/ It also asserts that because the underlined sections of Article XXXI are also included in Article XXX, they need not be retained in Article XXXI. That is not an argument concerning legal negotiability and we do not address it.

App. Div. Dkt. No. A-1509-99T3, we have stressed the need to carefully analyze proposals for shift or assignment bidding based on seniority and have not simply ruled that such proposals are foreclosed by Local 195. With respect to the posting provision in Section F, the Association asserts that this provision does not impinge on management's ability to select employees for assignment, but provides a procedure for announcing new or vacant positions.

Local 195 addressed the negotiability of contract language nearly identical to Sections A through F of Article XXXI. Presumably in response to that decision, the parties added the prefatory language that makes clear that the portions of the clause that are not underlined are for informational purposes only and that grievances arising under the provisions found not mandatorily negotiable in Local 195 are not subject to binding arbitration. Management has the unfettered right to set criteria for reassignment and to change those criteria subject to negotiated notice requirements. Placing those criteria in the contract for informational purposes only does not significantly interfere with any governmental policymaking determinations. See Borough of River Edge, P.E.R.C. No. 94-66, 20 NJPER 56 (¶25020 1993).

ORDER

Article XXVI, Section H is mandatorily negotiable and may be submitted to interest arbitration. Article XXXI may be submitted to interest arbitration for inclusion in a successor agreement consistent with the limitations in this decision.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Sandman voted in favor of this decision. None opposed. Commissioner Ricci abstained from consideration.

DATED: June 28, 2001
Trenton, New Jersey
ISSUED: June 29, 2001