

P.E.R.C. NO. 82-90

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Petitioner,

-and-

Docket No. SN-82-15

MIDDLETOWN P.B.A. LOCAL 124,

Respondent.

SYNOPSIS

The New Jersey Public Employment Relations Commission declines to restrain arbitration of a grievance which the Middletown PBA, Local 124 filed against the Township of Middletown. The grievance alleged that the Township violated its collective agreement with the PBA when it decided to use rotation, rather than seniority, to determine which officers will be temporarily transferred from one shift to fill in for absent officers on another shift. The subject matter of the grievance is at least permissively negotiable.

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Appearances:

For the Petitioner, Crummy, Del Deo, Dolan & Purcell  
(Frederick C. Kentz, III, of Counsel)

For the Respondent, Abramson & Liebeskind Associates  
(Arlyne K. Liebeskind, Consultant)

DECISION AND ORDER

On October 14, 1981, the Township of Middletown (the "Township") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Petition requested the Commission to restrain binding arbitration of two grievances which the Middletown P.B.A., Local 124 (the "PBA") had filed against the Township. This opinion considers the arbitrability of a grievance alleging that the Township violated its collective agreement with the PBA when it decided to use rotation, rather than seniority, to determine which officers will be temporarily transferred from one shift to fill in for absent officers on another shift.<sup>1/</sup>

<sup>1/</sup> The Commission does not address the second grievance at this time. That grievance is hereby severed.

Both parties have filed briefs and, in response to the request of the Commission's Chairman, additional statements of position. From these documents, we glean the following undisputed facts.

The Township has six squads of patrolmen in its police department. Six or seven patrolmen and a Squad Commander form a squad. Each squad rotates on a regular basis from shift to shift. There are four different shifts: (1) 8:00 a.m. to 4:00 p.m., (2) 4:00 p.m. to 12:00 midnight, (3) 12:00 midnight to 8:00 a.m., and (4) 7:00 p.m. to 3:00 a.m. If any of the first three shifts are undermanned as a result of illness or a leave of absence, the Township uses the squad assigned to the 7:00 p.m. to 3:00 a.m. shift as a pool of reserves to fill the undermanned shift because it believes that the other shifts cover "more critical higher risk hours."

The instant grievance involves a change in the method used to determine which police officers in the squad assigned to the 7:00 p.m. to 3:00 a.m. shift will fill in on the undermanned shifts. According to the PBA, the former method consisted of using seniority to determine which patrolmen on the 7:00 p.m. to 3:00 a.m. shift would be asked to work on other shifts. If the most senior patrolman declined, the process would continue according to seniority until, if necessary, the most junior officers would be assigned to the undermanned shifts.

According to the Township, the Chief of Police changed the method of transferring patrolmen among shifts in order to

solve the communications problems between Squad Commanders, eliminate confusion, and promote departmental efficiency in making these reassignments. The new system designates four patrolmen from the squad currently assigned to the 7:00 p.m. to 3:00 a.m. shift as the officers who will fill in for any absent officer on the other shifts. Two officers are designated to be available for the 8:00 a.m. to 4:00 p.m. shift and two for the 4:00 p.m. to midnight shift. The designation rotates among the officers as each squad is assigned to the 7:00 p.m. to 3:00 a.m. shift. Under this new system, a twelve month schedule exists which determines when each officer is designated as being available to be reassigned, if needed, from the 7:00 p.m. to 3:00 a.m. shift to one of the other shifts.<sup>2/</sup> Under the old system, senior officers could refuse these temporary assignments if a less senior officer was available to fill in for the absent officer on the other shift.

On July 28, 1981, the PBA filed the instant grievance which protested "[t]he scheduled transfer of Patrolmen from the fourth shift (7 P.M. to 3 A.M.) on a rotating plan to other shifts." The grievance alleged that the use of a rotating plan violated Article V of the collective agreement, entitled Seniority. This Article states, in pertinent part:

<sup>2/</sup> Each squad works the 7:00 p.m. to 3:00 a.m. shift apparently once every four weeks.

Traditional principles of seniority shall apply to employment covered by this Agreement as to selection of vacation periods, compensatory days off, transfers, reduction in force, and promotions, where the qualifications of eligible employees are equal....

The grievance also cited an alleged 14 year past practice by which seniority was used to determine "...who receives first choice of vacation time, eating time, and shift transfers on the 7 P.M. to 3 A.M. shift."

On September 4, 1981, the PBA submitted its grievance to arbitration. The submission stated, in pertinent part:

The PBA seeks to have the Chief of Police ordered to cease and desist from reassigning patrolmen from the 7 p.m. - 3 a.m. shift on a rotating basis rather than giving senior officers their choice when being transferred to cover other shifts.

The Township filed the instant scope petition in response.

The Township contends that it has a non-arbitrable managerial prerogative to deploy police officers as it deems best in order to insure adequate coverage of the high risk shifts. It relies upon Paterson Police PBA Local No. 101 v. City of Paterson, 87 N.J. 78, 97 (1981) ("Paterson"); Town of Irvington v. Irvington PBA Local 127, 170 N.J. Super. 532 (App. Div. 1979), pet. for certif. den. 82 N.J. 296 (1980) ("Irvington"); and In re State of New Jersey, \_\_\_ N.J. Super. \_\_\_ (App. Div.), 7 NJPER 28 (¶12012 1980) ("State of New Jersey").

In Paterson, our Supreme Court set forth the applicable scope of negotiations analysis in a case involving police or fire fighters:

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 an inconsistent term in their agreement. (Citation omitted) 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. (Citation omitted) 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.

Supra at pp. 92-93.

In the instant case, no one contends that a specific statute or regulation controls the item in dispute; thus, we pass over the first step in the Paterson analysis. Nor need we decide whether the grievance concerns a mandatory, as opposed to a permissive, subject of negotiations because under Paterson either may be submitted to arbitration in a police or fire employee context. Thus, the only question before the Commission is whether the subject matter of this grievance would be considered at least a permissive subject of negotiations under the third part of the Paterson analysis.<sup>3/</sup>

<sup>3/</sup> We also do not consider the merits of either party's position on the grievance or the wisdom of either system. As the Supreme Court noted in Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the role of the Commission in a scope proceeding is a limited one:

(continued)

In order to determine whether submitting the grievance to arbitration would necessarily place substantial limitations upon the Township's policymaking powers, we must first precisely identify the matter in dispute. In this case, what is not in dispute is as significant as what is: the PBA does not contest the Township's right to establish the current four shift structure, to rotate squads from shift to shift, to determine manning levels on each shift, or to use officers on the 7:00 p.m. to 3:00 a.m. shift to substitute for absent officers on other shifts.

Further, and perhaps most importantly, there is no issue concerning the qualifications of the officers selected to fill in temporarily on other particular shifts. Under the Township's revised system, all officers are used to fill in on the undermanned shifts on the basis of a predetermined schedule. The Township has actually limited its discretion to select a specific officer by establishing a rotating schedule which determines which officers will be picked to fill in, without regard to qualifications. Thus, the only question at issue in this scope proceeding is whether the Township has an unrestricted right, subject to

3/ (continued)

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

neither mandatory or permissive negotiations, to substitute one system - rotation - for another system - seniority - to designate which of the patrolmen assigned to the 7:00 p.m. to 3:00 a.m. shift will fill in for any absent officer on another shift.

The PBA relies on In re Town of Kearny and Kearny PBA Local 21, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd App. Div. Docket No. A-1617-79 (December 18, 1981) ("Kearny"), a case which held permissively negotiable the use of seniority to determine overtime assignments if the employees in question met the requirements for such assignments.

In Kearny, the Commission held that a contractual provision mandating that overtime be assigned on the basis of seniority was at least permissively negotiable and hence arbitrable. The Appellate Division, applying Paterson and finding no substantial limitation on the employer's policymaking authority, agreed. Kearny supports the PBA's position that the question of which police officer works at what time is at least permissively negotiable, assuming that the qualifications of all employees are equal.<sup>4/</sup>

The Commission's decision in In re Borough of Roselle and Roselle Borough PBA Local #99, P.E.R.C. No. 80-137, 6 NJPER

<sup>4/</sup> The Township cited In re State of New Jersey, supra, which held non-negotiable the removal of seniority as a substantive criterion for making temporary reassignments. The proposal found objectionable there concerned a change in job duties and might have compromised management's ability to select the most qualified employee to perform the different job duties. That case also involved non-police and fire employees and thus no permissive category came into play.



247 (¶111120 1980) aff'd App. Div. Docket No. A-3329-79 (5/7/81), also provides an appropriate framework for analyzing this case. There, holding arbitrable a grievance alleging a change in work schedule, we stated:

In numerous prior decisions, the Commission has determined that minimum manning provisions, i.e., proposals relating to the number of employees on a shift or in a department or, more generally, the level of service to be provided by a governmental agency, are not required subjects for negotiations but are permissive subjects of collective negotiations.

Within the broad context of the minimum manning issue, the Commission has considered a group of related issues -- work schedules, time off etc. In these decisions, the Commission has held that an employer has the right to unilaterally determine the number of employees that must be on duty at any given time. However, within the framework of these manning levels, an employer must negotiate over such matters as which employees may be off, what hours during the day employees work and the schedules employees are required to work. In light of the above, the employee work schedule provision [set forth in a collective agreement] is mandatorily negotiable.  
Supra at pp. 247-248. (footnote omitted)

The Appellate Division quoted this language in affirming the negotiability of the hours and schedule change in that case and then stated:

We agree that matters concerning the level of police protection to be afforded a community are non-negotiable; we also agree that in this case issues regarding the division of labor within the framework of the minimum manning levels are subject to mandatory negotiation.  
(Slip Opinion at p. 6)

The Court specifically considered that although the Borough had a managerial prerogative to man a post in a high crime area on a Saturday, it did not have the right to alter unilaterally officers' hours and days of work to accomplish that objective, particularly when there were other means available to ensure that the post was covered on Saturdays. The Court stated:

The police chief's decision to man Post Four on Saturday, a day when crime in the area is relatively high, is no doubt an exercise of managerial prerogative necessary to the efficient functioning of the police department in promoting public safety. Negotiation over the manner in which the post is filled, however, does not appear to interfere with the need for expanded police protection in the area.  
(Slip opinion, p. 7)

After distinguishing Irvington, the Court concluded:

Here, however, the Borough does not contend that negotiations over who is to man Post Four on Saturdays is inimical to the public welfare....  
(Slip opinion, p. 9).

The Court's analysis is equally applicable to the dispute in this case.<sup>5/</sup>

The Roselle Court distinguished Irvington by noting that in Irvington the Town changed the fundamental nature of its shift system. Previously, one third of the officers worked on a steady, nonrotating basis and all other officers worked alternating shifts biweekly; afterwards all police officers worked on

<sup>5/</sup> See also, In re City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶13110 1981); In re Borough of Montvale, P.E.R.C. No. 81-55, 6 NJPER 542 (¶11275 1980).

full rotating around the clock shifts. In Irvington, unlike Roselle and the instant case, the change in shift structure was necessitated by the Town's inability to adequately supervise police personnel on the steady midnight shift. The full rotating structure had to be implemented to accomplish this fundamental governmental policy objective. Here, the change in the system only affects temporary shift assignments; there is no suggestion that any system which enables the Township to use officers on the 7:00 p.m. to 3:00 a.m. shift to fill in on an undermanned shift would not meet the Township's governmental policy objective.<sup>6/</sup>

Reading these cases together, we conclude that the grievance is at least permissively negotiable and therefore arbitrable. The predominant issue in this case concerns the alleged unilateral alteration in the system by which officers, all of whom are equally qualified, currently working the 7:00 p.m. to 3:00 a.m. shift are selected to fill in on other shifts.

In reaching this conclusion, we note one other recent Commission decision, In re Borough of Pitman and PBA Local #178, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981), which is relevant to this dispute. There, the PBA sought to arbitrate the employer's decision to assign a patrolman, scheduled to work on the day shift, to a later shift in order to cover for an ill sergeant. While recognizing that work schedules are generally mandatorily

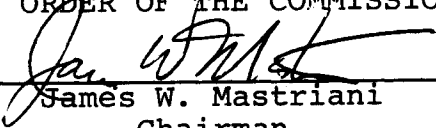
<sup>6/</sup> The Irvington case also arose during negotiations for a new contract and thus did not consider whether the shift change might be at least permissively negotiable.

negotiable, we held that the Board had a nonarbitrable right to make temporary personnel assignments in order to meet an emergent manpower requirement.<sup>7/</sup> That same caveat applies to the resolution of this dispute. Thus, while the change in the general assignment system is arbitrable, neither negotiations nor arbitration can result in a system which precludes the Township from meeting its manpower needs. It is therefore conceivable that while a change in the general assignment system is arbitrable, a particular emergency assignment, as in Pitman, may not be. This balance accommodates the interests of both the employer and the employees without placing any substantial limitations on the Township's policymaking powers: the Township can be assured that it will have a sufficient number of employees for each shift, and the employees will have some say in determining their hours of work. Accordingly, we decline to restrain arbitration.

ORDER

The Township of Middletown's request for a permanent restraint of arbitration concerning the Township's scheduled transfer of patrolmen from the 7:00 p.m. to 3:00 a.m. shift on a rotating basis to other shifts is denied.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Suskin, Hartnett, Butch, Graves, Hipp and Newbaker voted for this decision. None opposed.

DATED: Trenton, New Jersey  
March 9, 1982  
ISSUED: March 10, 1982

<sup>7/</sup> We did, however, allow arbitration to proceed over the grievant's claim, absent here, that he had performed work in a higher rank and thus deserved greater compensation.