P.E.R.C. NO. 88-137

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-86-68

F.O.P. LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains arbitration of a grievance filed by the Newark Fraternal Order of Police Lodge No. 12 against the City of Newark. The grievance alleges that the continuation of experimental steady shifts in the south and west police districts violated the parties' collective negotiations agreements. The Commission finds that the decision to maintain steady shifts was based upon the City's desire to increase police coverage during high crime periods.

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Appearances:

For the Petitioner, Glenn A. Grant, Corporation Counsel (Lucille LaCosta-Davino, formerly Assistant Corporation Counsel, of counsel and on the brief).

For the Respondent, Markowitz & Richman, Esqs. (Stephen C. Richman, of counsel and on the brief, William T. Josem, on the brief)

DECISION AND ORDER

On March 21, 1986, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination. The City seeks to restrain arbitration of a grievance filed by the Newark Fraternal Order of Police Lodge No. 12 ("FOP"). The grievance alleges that the continuation of experimental steady shifts in the South and West police districts violated the parties' collective negotiations agreement.

Both parties have filed briefs. The following facts appear.

The FOP is the majority representative of the City's non-supervisory police officers. Sections 1(b) and 3 of Article 5 of the parties' agreement provide:

> The hours for those employees other than [administrative and investigative employees] shall be various tours of duty worked out in schedule form and made up for no less than three (3) months in advance, but complying with the general concept of four days or nights on duty and two (2) days or nights off duty.
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> If an employee is required to work on his/her day off, time off, or vacation day, for less than four (4) hours, he/she shall be paid for four (4) hours at time and one-half (1 1/2) his/her regular rate of pay. If an employee is required to work more than four (4) hours, he/she shall be paid for all the time worked at time and one-half his/her regular rate of pay.

Before July 1983, employees other than those assigned to steady administrative or investigative shifts worked rotating eight hour shifts commencing at 8:00 a.m., 4:00 p.m. and 12 midnight. In July 1983, Captains Charles Knox and George Dickshied were the precinct commanders of the South and West Districts. After attending seminars and observing deployments in other police departments, the captains proposed that steady tours be implemented as an experiment in their districts. The Police Director, Hubert Williams, agreed on condition that FOP representatives agreed as well. A letter dated July 12, 1983 signed by Williams and FOP President Thomas Possumato recited the agreement. It provided that the program would last for one year. All three shifts in the South District would be steady shifts. In the West district only the 12 midnight to 8 a.m. shift would be steady. The other two shifts would rotate. In both districts, the shifts were staffed by volunteers. The agreement stated that the FOP agreed to the experimental program without prejudice to any of its rights under

Articles 5 (hours of work), 21 (maintenance of standards), and 22 (management rights).

After the one-year period expired, the City continued to maintain the "experimental" tours in the South and West Districts. On December 12, 1984, Possumato wrote to Williams asking for a statement of the City's intentions regarding the experimental tours. On December 24, 1984, the FOP's secretary wrote to Williams stating that absent a response the FOP would file a grievance over the continuation of the steady shifts. The grievance, relying on Article 5, Sections 1(b) and 3, seeks compensation at regular and overtime rates for all work performed by officers on tours which do not coincide with their "pre-experiment" work schedules.[1/]

On January 7, 1986 an arbitration hearing was held. The City contended that its decision to continue the shifts was a managerial prerogative. It requested that the arbitrator hold his decision until it could obtain a scope of negotiations determination. The arbitrator agreed and this petition ensued.

The boundaries of the Commission's scope of negotiations jurisdiction are narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

1/ The grievance seeks compensation by assuming that an officer who continued to work a steady shift after the one-year period would be working during his off-duty time two out of every three weeks, since he would have worked one week on day shift, one week on evening shift and one week on midnight shift if the experiment had been terminated.

> 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. [78 N.J. at 154; emphasis added].

Accordingly we only determine whether the City could legally agree to arbitrate the grievance. We do not determine any procedural or substantive issues pertaining to the grievance's merits.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.[2/] 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

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2/ The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

> 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 policy-making 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]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

The City contends that arbitration should be restrained because continuing the steady shifts was a managerial decision required to improve police protection. It asserts that the steady tours resulted in more officers being deployed during "critical" (i.e. high crime) hours and in better police-community relations. The South district also reported the least use of sick leave, a fact which the City attributes to the steady tours. The City also asserts that the results of the steady tours were incorporated into a study which lead to an overhaul of work schedules for the entire department. It relies upon City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985), in which we held that a grievance

challenging that proposed change in its police work schedules was not arbitrable because those changes were prompted by a significant governmental policy interest in increasing the level and efficiency of police services. It contends that in this case, where the year-long test of the steady tours produced the desired improvements, there are compelling reasons to restrain arbitration.

The City, while recognizing that the shift schedule substantially affects its officers, argues that improvements in the delivery of police services outweighs the officers' interests and makes the maintenance of the steady tours non-negotiable. It asserts that the PBA's demands for compensation would negate the changes because the compensation would be calculated as if the change to steady tours had been discontinued resulting in two weeks extra pay for every three weeks worked.

The FOP does not directly challenge the City's assertions that the steady shifts improved the delivery of police services. It contends that even if the City had a non-arbitrable prerogative to maintain the steady tours,[3/] it may seek extra compensation provided by the agreement for work performed on other than the officers' regularly scheduled tours. It contends that such compensation is arbitrable irrespective of the size of the award which might be granted by the arbitrator.

P.E.R.C. No. 87-71 was one of a series of decisions we issued in light of an apparent conflict among reported and unreported Appellate Division and Supreme Court cases involving the

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3/ The FOP does not concede this issue.

negotiability of work schedules for public safety employees. We reconciled those cases in Bor. of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985). 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 [81 N.J. 582 (1980)] recognized that:
>
> > Logically pursued, these general principals -- 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.
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> 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 negotiations will continue to be so. For instance, matters concerning hours and days of work would, in general, be mandatorily negotiable. [11 NJPER at 134-135].

Our analysis has been accepted by the Appellate Division. Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd 215 N.J. Super. 108 (App. Div. 1987).

Applying these principles, we find that the decision to maintain steady shifts in the South and West divisions was based upon the City's desire to increase police coverage during high crime periods, an end apparently achieved during the experiment. Subjecting such a decision to arbitration would substantially limit the City's policy-making powers. Based upon the particular facts of this case, which include the absence of any allegation that the change increased the number of hours or weekends worked by police, we hold that the FOP may not arbitrate this decision.

Although we held in P.E.R.C. No. 86-71 that severable issues such as premium pay would be negotiable and arbitrable, we agree with the City that arbitration over the alleged violation of Article 5, Section 3 should also be restrained. Any claim under that article would require that rotating, not steady, shifts be viewed as the employees regular schedule. But we have already held that the City had a prerogative to establish steady shifts. Compensation is a severable issue, but not here, where the claim is based on a return to rotating shifts. Contrast Tp. of Edison, P.E.R.C. No. 84-49, 10 NJPER 121 (¶15063 1984) (premium pay mandatorily negotiable for failure to give notice of off-duty appearances).

However, we do not agree with the City that P.E.R.C. No. 86-71 rendered all of Article 5, Section 1(b) unenforceable. That section states, in pertinent part, "that the hours for...employees ...shall be various tours of duty worked out in schedule form and made up for no less than three (3) months in advance,..." (emphasis added). A provision guaranteeing employees notice of a change is mandatorily negotiable and arbitrable. Cf. Old Bridge Tp. Bd. of Ed. and Old Bridge Ed. Ass'n, 98 N.J. 523 (1985). The City acknowledged that it had an obligation to obtain the FOP's waiver of the notice provisions before beginning the experiment. It has not argued that adhering to the notice provision when the experiment neared its completion would have significantly interfered with its policy objectives. Thus to the extent the grievance alleges that the City failed to provide adequate notice to the officers that they would remain on steady shifts rather than return to rotating shifts after the experiment was over, it is negotiable and arbitrable.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted, except to the extent the grievance asserts that the maintenance of steady shifts beyond the experimental period violated the notice provisions of Article 5, Section 1(b).

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson, Smith, Reid and Bertolino voted for this decision. None opposed.

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988