P.E.R.C. NO. 2000-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LONG BRANCH,

Petitioner,

-and- Docket No. SN-2000-67

F.M.B.A. LOCAL NO. 68,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of a work schedule proposal made by F.M.B.A. Local No. 58 during negotiations for a successor collective negotiations agreement with the City of Long Branch. The FMBA has proposed a 24/72 hour work schedule where unit members would work one 24-hour tour of duty followed by 72 hours, or 3 days, off. The Commission concludes that the City's concerns are not so clearcut and dominant to preclude an interest arbitrator from evaluating both parties' evidence and arguments concerning the benefits and detriments of the proposed schedule. An arbitrator can evaluate the parties' concerns in light of the public interest and all the statutory criteria. The Commission makes no judgment on the merits of the work schedule issue in interest arbitration and notes that it has jurisdiction to review interest arbitration awards.

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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Appearances:

For the Petitioner, Apruzzese, McDermott, Maestro & Murphy, P.C., attorneys (James L. Plosia, of counsel; Robert J. Merryman, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys (Stacey B. Rosenberg, of counsel)

DECISION

On December 28, 1999, the City of Long Branch petitioned for a scope of negotiations determination. The City seeks a determination that a work schedule proposal made by F.M.B.A. Local No. 68 during negotiations for a successor collective negotiations agreement is not mandatorily negotiable and may not be submitted to interest arbitration.

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

The FMBA represents all full-time permanent firefighters and lieutenants employed by the City. The City and the FMBA are parties to a collective negotiations agreement which expired on December 31, 1998. The parties are involved in negotiations for a

successor agreement and the FMBA has petitioned for interest arbitration.

The fire department is comprised of 23 paid uniformed firefighters and fire officers. There are 18 firefighters, 4 lieutenants and 1 captain. The City is a civil service community. Of the 18 firefighters, 2 are in temporary status awaiting civil service certification. These temporary employees fill in for firefighters on vacation. There is also a division of volunteer officers and firefighters.

Captain Joseph Johnson is the department's commanding officer and is responsible for day-to-day operations and supervision of the department's paid firefighters. The fire chief is a volunteer firefighter who is away from the department eight or nine hours each day.

A minimum of four firefighters and one lieutenant is needed for each shift. A lieutenant is assigned to headquarters and one firefighter is assigned to each of four other stations. Other fire stations are staffed solely by volunteers.

The current work schedule is a four days on/four days off 10-hour/14-hour schedule. Firefighters and lieutenants work two 10-hour day shifts followed by two 14-hour evening shifts. They

are then off duty for four days before beginning another four-day 10/14 tour.[1/] Captain Johnson works Monday through Friday, 9:00 a.m. to 5:00 p.m.

The FMBA has proposed a 24/72 hour work schedule where unit members would work one 24-hour tour of duty followed by 72 hours, or three days, off. Firefighters and lieutenants would continue to work a 42-hour week computed over an eight-week cycle.

The City contends that, if adopted, the FMBA's proposal would significantly interfere with its ability to insure adequate staffing and supervision. It maintains that, when unit members' vacation days are taken into account, a 24/72 schedule would leave 61.5 days and shifts where minimum staffing levels could not be met without overtime -- a calculation that does not take sick leave into consideration.[2/]

The City also asserts that, under a 24/72 schedule, its ability to meet staffing levels through overtime would be more limited than it is now, given the City's longstanding policy against assigning unit members to work more than two shifts, or

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1/ Captain Johnson's certification states that this schedule has been in effect since 1988. The FMBA disputes that statement and asserts that in 1988 the parties agreed to reduce the weekly work hours from 53 to 48, but actually went into a 42-hour work week using the 10/14-hour work schedule in 1992.

2/ This calculation applies once the temporary firefighters are made permanent. Until that time, there would be 46.5 days and shifts where full coverage was not available.

24 hours. It maintains that this policy, which was designed to protect the health and safety of firefighters, would limit the pool of unit members available for overtime to those on the shift not immediately preceding or following the overtime shift. And it argues that, where such overtime is given, the unit member assigned would be required to work three 24-hour shifts in five consecutive days -- a circumstance that also raises health and safety concerns.

The City further argues that the proposed schedule would hurt supervision because there would be only one lieutenant on duty each day, as opposed to the current schedule, where there are two lieutenants on duty. It asserts that, when lieutenants' vacation time is taken into account, there would be 51 days under a 24/72 schedule when no lieutenant would be working. If the captain were also absent, there would be no one available to perform administrative and supervisory duties.

The FMBA responds that, consistent with Commission case law, the City's arguments and evidence concerning staffing and supervision should be considered in interest arbitration. It also maintains that implementation of the 24/72 work schedule would not change staffing levels, coverage procedures, or supervision. It states that there would still be one lieutenant for four firefighters on each shift and that the captain would continue to work during the day, Monday through Friday. It emphasizes that, under the current schedule, overtime is regularly required to meet

minimum staffing levels, and that the proposed schedule would not increase the number of built-in overtime hours. Further, it notes that, as is the case now, a large portion of the coverage gaps could be addressed by reassigning Captain Johnson to the headquarters lieutenant position and reassigning the lieutenant to fill in for an absent firefighter.

In addition, the FMBA maintains that the City's overtime policy does not prohibit unit members from working more than two consecutive tours or 24 hours, but instead provides that these members are eligible for overtime, but are placed at the bottom of the overtime list. It contends that unit members have often worked more than 24 hours.

Finally, the FMBA also asserts that it will introduce extensive evidence to the interest arbitrator that will show that the proposed schedule will provide health and safety benefits and decrease overtime, sick time and injury leave. In that vein, it maintains that, by providing for three consecutive days off, the 24/72 schedule would increase recuperative time and reduce the overtime costs needed to replace a unit member on sick leave for several days.

The City responds that, since at least 1994, City policy has been that firefighters may not work three straight shifts. It maintains that the language cited by the FMBA does not negate that policy. Instead, Captain Johnson indicates that the language reflects an acknowledgment that there may be some occasions where,

because of a severe staff shortage, unit members may be required to work three straight shifts. He states that, in calendar year 1999, there were only three such instances.

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

We will consider only whether the proposal is mandatorily negotiable. We do not decide whether contract proposals concerning firefighters are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a

successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Work hours has long been considered 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. v. CWA, 116 N.J. 322, 331 (1989); 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, the Court has held that work schedules are generally negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982) at 411-412. Accord Hardin, The Developing Labor Law, 882-883 (3d ed. 1992). The Legislature has also expressly designated work hours as a negotiable terms and conditions 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).

Consistent with the Supreme Court's cases and the Legislature's decrees, 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 in order, for example, to ensure appropriate supervision, prevent gaps in coverage, or otherwise 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); see also 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), app. pending App. Div. Dkt No. A-002208-99T2 (while gaps in coverage significantly interfere with a public employer's ability to provide police protection, proposal that would allegedly result in overstaffing did not implicate the same concerns and was not per se non-negotiable).

Maplewood sums up our approach when labor or management presents 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.

Maplewood itself held that a proposal for a 24/72 work schedule was mandatorily negotiable and stated that the Township's concerns about increased fatigue; diminished continuity and commitment; and effect on firefighter recalls should be evaluated by an interest arbitrator. 23 NJPER at 114.

Within this framework, the City's concerns about how the proposal would affect its ability to ensure minimum staffing and appropriate supervision may be legitimate and must be considered by an interest arbitrator. See Teaneck Tp., P.E.R.C. No. 2000-33,

25 NJPER 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99T1)(before awarding a major work schedule change, an arbitrator should carefully consider the fiscal, operational, supervision and managerial implications of such a proposal, as well as its impact on employee morale and working conditions). They may or may not warrant rejection of the FMBA's proposal -- that is not for us to decide. Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed, 78 N.J. 144, 154 (1978).

However, in the circumstances of this case, the City's staffing concerns do not justify cutting off interest arbitration altogether, since it appears that similar staffing shortfalls exist under the current schedule. On this record, we cannot say that the 24/72 schedule would so interfere with the City's ability to respond to staffing shortfalls that an interest arbitrator may not evaluate the FMBA's contention that coverage problems could be addressed, as they are now, through overtime and the assignment of the captain to act as lieutenant. The City may present to the arbitrator its argument that, under a 24/72 schedule, the overtime required to meet staffing levels would require too much work in too short a time.

Nor do the City's supervision concerns warrant cutting off interest arbitration. While the City argues that the proposal would result in having one lieutenant on duty as opposed to two, both the current and proposed schedules contemplate having one lieutenant on duty at all times of the day. Under the proposed

schedule, one lieutenant would work for 24 hours, as compared with the current schedule, where one lieutenant works a ten hour shift and the second lieutenant works a 14-hour shift.

The City also maintains that, because of lieutenant vacation time, the 24/72 schedule would result in 51 days when no lieutenant is on duty. However, it is not clear whether a similar problem exists under the current schedule -- given that staffing requirements generally cannot be met without overtime -- or whether any lieutenant shortfall could be appropriately addressed, as the FMBA contends, through overtime or current reassignment procedures.

In sum, in applying the negotiability balancing test, we conclude that the City's concerns are not so clearcut and dominant that they preclude an arbitrator from evaluating both parties' evidence and arguments concerning the benefits and detriments of the proposed schedule. Both parties may develop a full record enabling the arbitrator to review, among other things, the built-in overtime requirements of the existing and proposed schedules; the impact of any required overtime on unit members' health and safety and their ability to perform their jobs; and the number and effect of lieutenant shortages under the two schedules. The arbitrator may then evaluate the parties' concerns in light of the public interest and all the statutory criteria. We make no judgment on the merits of the work schedule issue in interest arbitration and note that we have jurisdiction to review interest arbitration awards. N.J.S.A. 34:13A-16f(5)(a).

ORDER

The FMBA proposal is mandatorily negotiable and may be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commisioners Buchanan, Madonna, McGlynn, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Muscato was not present.

DATED: May 25, 2000
Trenton, New Jersey
ISSUED: May 26, 2000