

P.E.R.C. NO. 92-127

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LINDEN,

Petitioner,

-and-

Docket No. SN-92-86

LINDEN PBA LOCAL #42,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Linden for a restraint of binding arbitration to the extent that Linden PBA Local #42 seeks to challenge the City's decision to extend the hours of operation of the juvenile bureau and to require a certain number of detectives to work during those extended hours.

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Appearances:

For the Petitioner, Gerald L. Dorf, P.C., attorneys
(John C. Scannell, on the brief)

For the Respondent, Simon M. Bosco Associates

DECISION AND ORDER

On March 11, 1992, the City of Linden petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance which Linden PBA Local #42 has filed. The grievance contests a new shift in the juvenile bureau.

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

The PBA represents the City's permanent police officers, excluding superior officers. The parties entered into a collective negotiations agreement effective from January 1, 1990 through December 31, 1992. The grievance procedure ends in binding arbitration.

The investigative division is divided into three bureaus: detective, juvenile, and narcotics. The juvenile bureau has one lieutenant, one sergeant, and four detectives. The bureau handles matters involving juveniles, including protecting their safety and welfare, preventing delinquency, and investigating complaints. Detectives also participate in the Drug Awareness Resistance Education program (DARE) by visiting fifth grade classes for weekly sessions which can last two or three hours.

Juvenile bureau detectives have a four days on, three days off work schedule. Before January 7, 1991, there were two shifts -- 7:30 a.m. to 4:53 p.m. and 8:00 a.m. to 5:23 p.m -- each shift had two detectives working on Tuesdays, Wednesdays and Thursdays, and one detective working on Mondays and Fridays. There was no regular coverage on weekends or after 5:23 p.m. on weekdays. Detectives also served a rotating "on-call" assignment weekly. They responded to incidents involving juveniles and received overtime compensation in return.

At the end of 1990, there was an increase in complaints about juveniles after 5:30 p.m. For example, the daily police bulletin for November 10, 1990 noted that many complaints had been received about large groups of juveniles hanging around Wood Avenue, a business district thoroughfare. According to detective William Tyra, patrol officers investigated these complaints and determined that the groups consisted mostly of adults and non-residents. There were several other incidents, however, involving juveniles creating disturbances along Wood Avenue and elsewhere. Further, in December

1990, the superintendent of schools wrote the chief about a dramatic increase in vandalism. The superintendent appealed for increased surveillance of school buildings during after-school hours and weekends.

The captain also believed that overtime compensation in the juvenile bureau was too high. In 1990, overtime compensation in that bureau was \$11,177.47 as compared to \$6,250.75 for the narcotics bureau and \$12,350.75 for the detective bureau. Police officers in the juvenile bureau have opted for overtime compensation instead of compensatory leave time more often than police officers in the other bureaus.

On January 2, 1991, the captain circulated a memorandum announcing that the juvenile bureau would institute a new shift running from noon until 9:23 p.m. Every officer would be required to rotate to this new shift once every four weeks. When the officer was assigned to the DARE program for an afternoon during that week, the officer would work from 10:00 a.m. to 7:23 p.m. on that day.

The detective bureau has a night shift, but the captain determined that its hours (3:30 p.m. - 1:00 a.m.) would be impractical for the juvenile bureau. When assigned to the night shift, officers in the detective bureau work that shift for a four day tour. By contrast, the new shift for juvenile bureau detectives calls for two different time slots (10:00 a.m. to 7:23 pm. and noon to 9:23 p.m.) within the one week tour of duty.

On January 14, 1991, the PBA filed a grievance on behalf of three detectives who would be assigned by rotation to the new shift. The grievance claimed that the new shift violated Article II, which recognizes the PBA's right to negotiate over hours of work and other working conditions, and Article IV, Section 1B1, which states:

The hours of employment for all bargaining unit members other than those assigned to the patrol Division and the Police Officers of the Traffic Bureau during the year shall be as follows:
1. Four (4) consecutive days on duty followed by three (3) consecutive days off duty; provided that no police officer will be scheduled to work more than nine (9) hours twenty three (23) minutes in any one day.

The grievance specified that the order announcing the new shift "was given in an arbitrary and capricious manner" and that the PBA "was not consulted or notified of [the] schedule nor did it give approval...."

On February 21, 1991, the Mayor denied the grievance. The new shift was to be implemented on March 4, 1991, but the parties agreed to have the matter reviewed by the Public Safety Director. The Director apparently approved the new shift and on June 5, 1991, a memorandum was issued stating that the shift would be effective starting June 17, 1991. The memorandum listed two day shifts of 7:30 a.m. to 4:53 p.m. and 8:00 a.m. to 5:23 p.m. and one night shift of 12:00 to 9:23 p.m. No mention was made of a 10:00 a.m. to 7:23 p.m. shift.

Due to scheduling difficulties during the summer, the new work schedule was not implemented until September 1991. It includes

a 10:00 a.m. to 7:23 p.m. shift for days when detectives are assigned to the DARE program.

On October 2, 1991, the PBA's president wrote a letter to the Mayor. The letter noted that the Mayor had denied the PBA's earlier grievance, but stated that the detectives were not now working the schedule that had been grieved. The letter stated in part:

Recently a night schedule was formulated for the juvenile division where a detective working his night shift would have to alternate from that schedule by coming in one day and then return to nights. The PBA and the above grieved employees are not contesting ... a night shift, just the alternate day.

On January 9, 1992, the Association demanded binding arbitration. The demand stated that the City had violated the agreement because the detectives were no longer working consecutive tours.

The City contends that it has a non-negotiable prerogative to establish a new shift to meet its coverage needs and that N.J.S.A. 40A:14-118 preempts negotiations. The PBA contends that the only reason the City established the new shift was to reduce overtime compensation; that this work schedule issue is mandatorily negotiable under In re Mt. Laurel Tp., 215 N.J. Super 108 (App. Div. 1987); and that N.J.S.A. 40A:14-118 does not preempt negotiations.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) states:

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. [Id. at 154]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the City may have. In particular, we do not consider the parties' dispute about the timeliness of the PBA's demand for arbitration.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a 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 an 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 not restrain arbitration of a grievance unless the alleged agreement is preempted or would substantially limit government's policymaking powers. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83).

A statute will not preempt negotiations unless it speaks in the imperative and eliminates the employer's discretion by expressly, specifically, and comprehensively fixing an employment condition. 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). N.J.S.A. 40A:14-118 provides, in part, that the chief of police shall "prescribe the duties and assignments of all subordinates and other personnel." This general statute does not address employee work schedules and is not preemptive. Rochelle Pk. Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd App. Div. Dkt. No. A-1398-87T8 (12/12/88); Franklin Tp., P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982); Bor. of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd App. Div. Dkt. No. A-3329-79 (5/7/81). See also Paterson at 96-97.

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine

the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982). That general rule applies in cases involving the work schedules of police officers. In re Mt. Laurel Tp., 215 N.J. Super 108 (App. Div. 1987); 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 Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd App. Div. Dkt. No. A-3071-82T2 (12/15/83); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd App. Div. Dkt. No. A-4143-80T3 (3/25/83); Roselle; see also Bor. of Sayreville, P.E.R.C. No. 91-35, 16 NJPER 542 (¶21244 1990) (employer could not create "power shift" unilaterally). But a particular work schedule proposal is not mandatorily negotiable if it would significantly interfere with a governmental policy determination. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 176 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (employer proved need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training); Bor. of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposed work schedule would have eliminated relief officer system and caused coverage gaps); see also Bor. of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), recon. den., P.E.R.C. No. 85-112, 11 NJPER 310 (¶16111 1985) (conforming shifts

of supervisors and supervisees). Each case must be decided on its own facts. Mt. Laurel; Roselle.

In Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982), we held that a grievance contesting the assignment of four police officers to a new nighttime shift was outside the scope of negotiations. We stated:

The first change, involving four of the officers, resulted from the Town's decision to create a Juvenile Bureau. Unquestionably, it is within the Town's managerial prerogative to make such a decision, to decide further when the Bureau shall be manned, and then to staff the Bureau. Id. at 602.

Applying Kearny, we hold that the City had a non-negotiable right to extend the hours of operation of the juvenile bureau to provide evening and nighttime coverage and to determine the staffing levels during these extended hours of operation. See Local 195. The City has demonstrated an increase in complaints about juveniles during those hours and has a prerogative to determine that having detectives on duty is a more efficient way to respond to those complaints than having detectives on call. Compare City of Newark, P.E.R.C. No. 88-137, 14 NJPER 442 (¶19181 1988) (holding non-negotiable steady shifts instituted to increase police coverage during high crime periods). We will therefore restrain arbitration to the extent the PBA seeks to challenge the decision to extend the hours of operation of the juvenile bureau and to require a certain number of detectives to work during those extended hours.

The City's right to extend the hours of operation of the juvenile bureau and to determine staffing levels does not mean that it has a managerial prerogative to determine individual work schedules unilaterally. So long as the employer's coverage needs are met, the employees have a right to negotiate over who works what hours and how much they are paid for those hours. Local 195; New Jersey Sports and Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (2/25/88).^{1/} Compare Morris Cty. College, P.E.R.C. No. 92-24, 17 NJPER 424 (¶22204 1991) (employer had right to extend hours of operation of print shop, but had to negotiate over individual work schedules given extended hours). The employer's desire to reduce overtime compensation does not entitle it to insist, without negotiations, that employees working evening and night hours be paid at regular rates. Bor. of Little Ferry, P.E.R.C. No. 91-25, 16 NJPER 494 (¶21217 1990); Sports and Exposition Auth; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

The PBA's October 2, 1991 letter accepts the new night shift, but contests having to alternate between night and day shifts within a tour of duty. This alternation appears to result from DARE assignments; but it is not clear on this record that the employees' concern about consistent schedules during a tour of duty could not

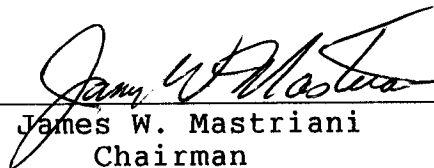
^{1/} The employer, however, has a reserved right to determine that it needs an employee with special skills to perform special tasks at a given time or that a particular employee is not qualified to perform on a particular shift. See, e.g., Warren Cty., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985); Kearny.

be accommodated with the employer's right to assign officers to DARE. Further, the January 14, 1991 grievance alleges that the PBA was not consulted or notified about the schedule changes. These allegations are mandatorily negotiable. Local 195; Teaneck Bd. of Ed. v. Teaneck Teachers' Ass'n, 94 N.J. 9 (1983); Morris Cty. College; Newark. The City's contractual defenses on the merits and arbitrability of the grievance must be addressed to the arbitrator.

ORDER

The request of the City of Linden for a restraint of binding arbitration is granted to the extent the PBA seeks to challenge the City's decision to extend the hours of operation of the juvenile bureau and to require a certain number of detectives to work during those extended hours.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 25, 1992
Trenton, New Jersey
ISSUED: June 26, 1992