

P.E.R.C. NO. 96-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-95-66

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 304,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Policemen's Benevolent Association, Local 304 against New Jersey Transit Corporation. The grievance asserts that NJT violated the parties' collective negotiations agreement when its police chief rotated police officers from road patrol to foot patrol and vice versa every three months instead of every four months. The Commission concludes that this rotation issue is permissibly negotiable and this employer could have agreed to maintain a four-month rotation for the life of the contract.

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, Deborah T. Poritz, Attorney General
(David S. Griffiths, Deputy Attorney General)

For the Respondent, Abramson & Liebeskind Associates,
(Marc D. Abramson, consultant)

DECISION AND ORDER

On January 23, 1995, New Jersey Transit Corporation ("NJT") petitioned for a scope of negotiations determination. NJT seeks a restraint of binding arbitration of a grievance filed by the Policemen's Benevolent Association, Local 304. The grievance asserts that NJT violated the parties' collective negotiations agreement when its police chief rotated police officers from road patrol to foot patrol and vice-versa every three months instead of every four months.

The record contains the parties' briefs and collective negotiations agreement, their responses to a request for information, and the police chief's certification. These facts appear.

Local 304 represents police officers below the rank of captain in NJT's police department. The parties entered into a collective negotiations agreement with a grievance procedure ending in binding arbitration. The agreement expired on June 30, 1992, but provides for continuation from year to year unless a party notifies the other of its intention to commence negotiations. Article XXIII is entitled Advertisement and Selection of Positions. Section 2 provides: "Positions awarded or assigned, will be based on fitness, ability and seniority."

Positions in NJT's police department are defined by shift times, reporting locations, and duties. Positions are posted once a year and qualified officers bid upon them in accordance with Article XXIII.

Several positions involve alternating road and foot patrols. Some officers start with road patrol and then rotate to foot patrol and other officers start with foot patrol and then rotate to road patrol. Officers on road patrol report to the command desk at Newark's Broad Street rail station for dispatching and travel throughout New Jersey and parts of New York. Officers on foot patrol report to Newark's Penn Station for dispatching and patrol the one square block surrounding Penn Station. While on foot or road patrol, officers are authorized to enforce New Jersey laws.

Local 304 asserts that foot patrol officers make more arrests; use a central room for processing arrests and a lunchroom

for meal breaks; are more exposed to diseases, infestations, confrontations, and vehicle emissions; patrol smaller areas but with more police back-up; are under more public scrutiny; remain standing during their tours of duty; and must park their own cars and worry about vandalism. The employer asserts that road patrols give officers more familiarity with NJT's territory and property; more interaction with local police officers and citizens; more opportunities to enforce State laws; more exposure to a wider range of situations, emergencies, and accidents; and less supervision and thus more room for initiative and independent judgment. Neither party has specified any differences between foot and road patrols in work hours and shift times.

During 1993 and 1994, road and foot patrols rotated every four months -- thus an officer starting on road patrol would stay on road patrol for four months, then do foot patrol for four months, and then return to road patrol for four months. For 1995, the police chief decided to rotate road and foot patrols every three months so that an officer selecting this type of assignment would receive equal experience on road and foot patrols over the course of a year. The chief states that rotating these assignments every three months "results in a more effective and efficient police service for N.J. Transit."

On September 30, 1994, the employer issued its 1995 position bid package. Local 304 then grieved the change in the rotation of road and foot patrols. The grievance asserted that the

employer had violated a past practice of rotating these patrols every four months.

The grievance was denied and Local 304 demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the employer may have. We specifically do not consider whether a contractually enforceable past practice existed.

N.J.S.A. 27:25-15.1 established the NJT police department. Section (b) of that statute specifies that the "terms and conditions of ... labor contracts are within the scope of negotiations as defined by the Public Employment Relations Commission under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Contrast In re NJ Transit Bus Operations, Inc., 125 N.J. 41 (1991) (defining wider scope of negotiations for NJT bus employees).

No clear line separates mandatory subjects of negotiation from management prerogatives. Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980). Most decisions of a public employer affect terms and conditions of employment to some extent and most negotiated items included in an agreement influence the exercise of management prerogatives to some extent. Id. at 589. To resolve the question of mandatory negotiability, a balancing or weighing of the disputed subject must be made. Where a management prerogative is the dominant factor, the subject is not mandatorily negotiable. Where terms and conditions of employment are dominant, the matter is mandatorily negotiable.

The scope of negotiations for police officers and firefighters under the Act is broader than for other public sector employees. While most public employers can only make binding agreements over mandatorily negotiable subjects, public police and fire departments can agree to be bound over permissive subjects of negotiations. See N.J.S.A. 34:13A-16f(4). Neither party is required to negotiate about a permissive subject. And any agreement to include a permissive item in a contract is valid and enforceable only during the term of the contract. The public employer is free not to include any permissive item in a successor contract by refusing to negotiate over that item or submit it to interest arbitration. By providing for a permissive category, where it is the employer's option to negotiate, the Legislature intended to give police and firefighters more subjects of potential negotiation than

those that are mandatorily negotiable for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92 (1981). The permissive category is therefore carved out of the management prerogative side of the balance. Ibid.; see e.g., City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981) (choice of health insurance carrier); Saddle Brook Tp., P.E.R.C. No. 91-95, 17 NJPER 250 (¶22114 1991) (phase-out period for old uniforms). That category includes aspects of assignments that are otherwise not negotiable. See e.g., City of Jersey City, P.E.R.C. No. 93-75, 19 NJPER 157 (¶24080 1993) (temporary assignments to replace absent officers); City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992) (temporary assignments to higher rank). Only significant matters of governmental policy must remain non-negotiable for police and firefighters, where citizen participation will not be precluded. Paterson at 92.

A scope of negotiations analysis for police and firefighters involves these steps:

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. 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 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. [Id. at N.J. at 92-93; citations omitted]

No statute or regulation preempts negotiations so we are required to examine the competing interests and determine if an agreement to rotate patrols every four months rather than every three months would substantially limit NJT's governmental policymaking powers.

Local 304 argues that this dispute is legally arbitrable under precedents permitting negotiations and arbitration over work schedules. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (1987); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990). NJT argues that the rotation period is not mandatorily negotiable because the change in rotations was instituted to ensure that officers have equal amounts of time in both areas of assignment. It further argues that such negotiations never took place and that its prerogative cannot be waived by prior practice.

Both parties have submitted information about the differences between road and foot patrol. Those differences are substantial. Cases dealing with the negotiability of work schedules do not control because it appears that the road and foot patrols occur simultaneously. Asbury Park is, however, instructive because

it addressed a similar issue of rotations. There, the union sought to negotiate a provision preserving the existing practice of bidding on shift assignments every six months. The employer argued that a three-month rotation was needed so that officers would rotate frequently enough to maintain the skills needed to cover different shifts. The chief claimed that six-month rotations would result in officers spending too much time on each shift and that rotation more frequently than every three months would prevent officers from gaining necessary skills. We balanced the competing interests and determined that the City's policy assertions about the ideal nature of three-month rotations versus six-month rotations did not outweigh the substantial impact that work schedule changes have on the work and welfare of the police officers. We found that the rotation was mandatorily negotiable. The Appellate Division affirmed.

In this case, the rotation between foot and road patrols is related to the overall work schedule selection. Once a year, employees choose positions defined by shift times, reporting locations, and duties. It also appears that the employer's interest in unilaterally setting this rotation period is similar to the employer's interest in unilaterally setting the rotation period in Asbury Park, where the rotation period was found mandatorily negotiable. Nevertheless, applying the balancing test set out in Paterson, we conclude that the subject of the grievance is not mandatorily negotiable. Although the employer's interests may parallel the employer's interests in Asbury Park, these rotations do

not involve shift changes and would appear to have less of an impact on employees than rotations that affect work hours.

The next question is whether the subject of the grievance is permissively negotiable. We recognize that the rotation involves aspects of assignment and that assignments are usually not mandatorily negotiable or permissively negotiable. Public employers have a prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990). But some aspects of assignments are mandatorily negotiable. See, e.g., Union Tp. Bd. of Ed., P.E.R.C. No. 89-50, 14 NJPER 692 (¶19295 1988), aff'd NJPER Supp.2d 215 (¶189 App. Div.1989) (allocation of student supervision duties among supervisors). And even if not mandatorily negotiable, some aspects of assignments are permissively negotiable. See, e.g., Franklin Tp., P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995) (allocation of light duty assignments); Jersey City (temporary assignments to replace absent officers). Thus, the label "assignment" does not answer whether this grievance is legally arbitrable. We must instead determine whether permitting arbitration of this grievance would substantially limit governmental policymaking powers.

Paterson.

This case does not involve an individual assignment based on an assessment of an employee's qualifications. Nor does it involve exclusive assignments to road or foot patrol. It involves a

three versus a four month rotation. It appears to us that the difference between a three or four month rotation is not an issue that involves significant matters of governmental policy which must remain non-negotiable. Contrast Paterson (requirement that all vacancies be filled within 60 days too severely restrains City's discretionary power not to promote if promotions are deemed unnecessary). An agreement to continue a four-month rotation for the life of the contract would not substantially limit NJT's governmental policymaking. Ibid. We thus conclude that this rotation issue is permissively negotiable and this employer could have agreed to maintain a four-month rotation for the life of a contract.

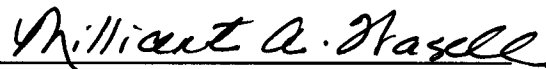
For purposes of this decision, we must assume that the employer agreed to a four-month rotation and that the PBA has a contractual right to arbitrate an alleged breach of such an agreement. Ridgefield Park; see also City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994) (affirming negotiability determination but vacating arbitration award on permissive subject based on past practice alone). Any challenges to those assumptions must be made to the arbitrator or a court. Under the existing legislative scheme, it may be necessary to come here and to go to the Superior Court to resolve both the legal and contractual arbitrability of a disagreement over the arbitrability of a particular dispute. Ridgefield Park. We reiterate that we express no opinion on the

contractual merits of the PBA's claim or the contractual arbitrability of the grievance.

ORDER

The request of the New Jersey Transit Corporation for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: May 23, 1996
Trenton, New Jersey
ISSUED: May 24, 1996