

P.E.R.C. NO. 2008-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY PROSECUTOR'S OFFICE,

Petitioner,

-and-

Docket No. SN-2007-078

ATLANTIC COUNTY PROSECUTOR'S
SUPERIOR OFFICERS, P.B.A. LOCAL #77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Atlantic County Prosecutor's Office for a restraint of binding arbitration of a grievance filed by the Atlantic County Prosecutor's Superior Officers, P.B.A. Local #77. The grievance contests the Prosecutor's decision to create a temporary 3:00 p.m. to midnight shift to deal with an investigation of multiple homicides. The Commission restrains arbitration to the extent the grievance challenges the decision to temporarily assign investigators to work from 5:30 p.m. to midnight. The Commission declines to restrain arbitration over any claim that the employer violated contractual overtime provisions.

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, Eric M. Bernstein & Associates,
LLC, attorneys (Deborah J. Bracaglia, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Gregory G. Watts, on the brief)

DECISION

On June 6, 2007, the Atlantic County Prosecutor's Office petitioned for a scope of negotiations determination. The Prosecutor's Office seeks a restraint of binding arbitration of a grievance filed by the Atlantic County Prosecutor's Superior Officers, P.B.A. Local #77. The grievance contests the Prosecutor's decision to create a temporary 3:00 p.m. to midnight shift to deal with an investigation of multiple homicides. We restrain arbitration to the extent the grievance challenges the decision to temporarily assign investigators to work from 5:30 p.m. to midnight. However, we decline to restrain arbitration

over any claim that the employer violated contractual overtime provisions.

The parties have filed briefs and exhibits. The Prosecutor's Office has submitted the certification of Daren J. Dooley, Chief of County Investigators. These facts appear.

The PBA represents all sergeants and investigators in the Detective Division of the Prosecutor's Office. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. The grievance procedure ends in binding arbitration.

Article II is entitled Work Hours and Overtime. It provides, in part:

A. A normal work week shall consist of forty (40) hours, Monday through Friday. The normal shift shall consist of eight (8) hours work between 8:00 a.m. and 5:30 p.m., with an unpaid half hour (1/2) for lunch, which will be at the discretion of the Prosecutor to assign.

B. Overtime worked after forty (40) hours shall be paid at one and one-half (1 1/2) times the employee's regular rate of pay, exclusive of longevity.

* * *

E. The assignment of overtime will be the exclusive responsibility of the County Prosecutor or his/her designee. No employee's shift will be split in order to avoid payment of overtime as defined above.

* * *

- I. Should an individual work any shift other than the normal Monday to Friday, 8:00 a.m. to 5:30 p.m. shift, and work in excess of forty (40) hours per week, he/shall be compensated in the same manner as described above.

* * *

- K. In the event the Employer determines to change the regularly assigned shift of an employee, the employee shall be given at least 48 hours notice of such change, except in emergent circumstances. When an employee's shift is changed he/she will have a minimum of ten (10) hours off between his/her old and new shift.

Article XI is entitled Management Rights. It provides:

The Atlantic County Prosecutor shall have the right to determine the standard of service to be offered to the citizens of Atlantic County and to determine the standard of selection for employment, subject to the rules and regulations of the Civil Service Commission, or as provided by law; to direct his employees; to maintain the efficiency of his operations; and exercise control and discretion over the organization of the department and the technology of performance.

In November of 2006, four bodies were found in Egg Harbor Township. A homicide investigation began and a task force among local, county, state and federal authorities was formed. The Prosecutor's Office directed the investigation. This large-scale investigation required having some investigators work until midnight.^{1/} Some investigators were reassigned from the day

^{1/} According to the employer's brief, the investigation resulted in a belief that the victims were involved in
(continued...)

shift to evening and night shifts to staff the investigation and cover the normal operations of the detective division. In making the reassignments, various criteria were considered including staffing levels, supervision, experience, assignments, and the demands of this investigation and other investigations. The reassignments were temporary and lasted 1 1/2 to 2 months.

In addition, overtime was paid to personnel who were assigned to normal day shift hours and who were recalled during their non-continuous work hours. Dooley states that overtime assignments were at the highest and third highest levels per pay period during this time.

On December 12, 2006, the PBA filed a grievance. It claimed that the 3:00 p.m. to midnight shift was created to avoid paying overtime; a shift cannot be changed absent an emergency; and no emergency existed. The grievance demanded that the 3:00 pm. to midnight shift be worked as overtime or compensatory time assignments at the employee's discretion. It also sought

1/ (...continued)
various illegal or questionable activities including prostitution, gambling and distribution and use of narcotics. It also states that most activity in those areas occurs during the evening and night-time hours. These descriptions were not, however, in the Chief's certification and therefore will not form the basis for our decision. N.J.A.C. 19:13-3.5 (all briefs shall recite all pertinent facts supported by certifications based upon personal knowledge).

clarification of the Prosecutor's authority to change work schedules and why the schedules were changed.

On December 22, 2006, the Prosecutor denied the grievance. He cited the contract articles concerning work schedules and management rights and added that the contract covered any compensation issues.

On December 27, 2006, the PBA demanded arbitration. This petition ensued.

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 merits of the grievance or any contractual defenses the employer may have.

As this dispute arises in the context of a grievance involving police officers or firefighters, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. A subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately

and directly affects employee work and welfare without significantly interfering with the exercise of a management prerogative. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). A subject involving a management prerogative can still be permissively negotiable if agreement would not place substantial limitations on government's policymaking powers.

The Prosecutor's Office argues that it had a prerogative to change the officers' shifts temporarily to respond to an emergency caused by the multiple murders. The PBA argues that overtime and work schedules are mandatorily negotiable; the shifts were changed to avoid paying overtime to investigators working outside their normal hours; and even if an employer has a right to change shifts, negotiations over the appropriate compensation is severable and negotiable. The Prosecutor's Office denies that these officers were reassigned to avoid overtime and states that all officers who worked beyond their normal 40 hours were paid overtime according to the contract.

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, negotiable. See, e.g., Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd

o.b. 177 N.J. 560 (2003); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

However, a grievance protesting a work schedule change is not legally arbitrable if enforcement of a particular work schedule agreement would substantially limit 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). For example, we have restrained arbitration over work schedule changes effected to address supervision or operational problems or to adjust officers' schedules to conform to the employer's judgment about when services should be delivered. See, e.g., Springfield Tp., P.E.R.C. No. 2006-27, 31 NJPER 328 (¶131 2005); City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005). Applying these cases, we find that the employees' interest in maintaining their normal work hours was outweighed by the emergent need to have investigative personnel available during the evening hours. Thus, a challenge to the Prosecutor's ability to temporarily assign officers to work between 5:30 p.m. and midnight would substantially limit the operational needs of an investigation of multiple homicides. That challenge is therefore not legally arbitrable.

The PBA argues that the contract entitles the affected employees to overtime compensation for work performed outside their regular work hours. In response, the Prosecutor's Office

argues that officers have been paid all overtime required by the contract for the temporary assignments and schedule changes. This is a contractual dispute outside our narrow scope jurisdiction. It can be considered by an arbitrator.

ORDER

The request of the Atlantic County Prosecutor's Office for a restraint of binding arbitration is granted to the extent the grievance challenges the decision to temporarily assign investigators to work from 5:30 p.m. to midnight. The request is denied as to the overtime compensation issue.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: October 25, 2007

Trenton, New Jersey