

P.E.R.C. NO. 2001-72

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket Nos. SN-2001-21  
SN-2001-22

NEW JERSEY SUPERIOR OFFICERS  
LAW ENFORCEMENT ASSOCIATION  
(LIEUTENANTS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of two provisions in an expired agreement between the State of New Jersey and the New Jersey Superior Officers Law Enforcement Association (Lieutenants). The Commission holds that a work hours provision that includes an overlap between shifts is mandatorily negotiable. The Commission finds that this provision is not preempted by State regulations on salary and work hours and minimum work hours for certain titles. The Commission concludes that this issue may be addressed through the collective negotiations process. The Commission also holds that portions of a provision concerning assignments and job postings may remain in the contract for informational purposes only.

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, Grotta, Glassman & Hoffman, P.A.  
(Beth A. Hinsdale, on the brief)

For the Respondent, Mario A. Iavicoli, on the brief

DECISION

On November 13, 2000, the State of New Jersey filed two petitions for scope of negotiations determination. The petitions seek determinations that work hours and reassignment/job posting provisions in an expired agreement between the State and the New Jersey Law Enforcement Supervisors Association (Lieutenants) are not mandatorily negotiable.<sup>1/</sup>

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

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<sup>1/</sup> The petitions were consolidated for processing.

The Association represents corrections lieutenants and various other supervisory titles. The employer and the Association are parties to a collective negotiations agreement which expired on June 30, 1999. The parties are in negotiations for a successor contract and the Association has petitioned for interest arbitration. "Overtime/overlap" is listed as one of the disputed issues in the Association's petition.

The employer seeks the removal of the portions of Article XXVI, Hours of Work, that provide for a shift overlap. The employer also seeks to eliminate Appendix I which concerns reassignments and job postings.

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

To be preemptive under Paterson's first prong, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); State of New Jersey (State Colleges), P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174), aff'd 336 N.J. Super. 167 (App. Div. 2001). Under Paterson's second prong, we will consider only whether the proposals are mandatorily negotiable. We do not decide whether contract proposals concerning police employees are permissively negotiable since the employer need not negotiate over such proposals or consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).<sup>2/</sup>

For over a decade, the parties' collective negotiations agreements have contained articles setting the hours of work and specifying the rates of pay for weekly work hours beyond the first 40 hours per week. Article XXVI is entitled Hours of Work. Sections H through J provide, in part:

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<sup>2/</sup> We therefore do not consider the employer's alternative arguments that the challenged portions of Articles XXVI and XXXI are only permissively negotiable.

Correction Lieutenants serving in positions involving custody of inmates shall be employed on a normal work schedule of eight (8) hours and thirty (30) minutes per day (forty-two (42) hours and thirty (30) minutes per five (5) day week). Each Lieutenant shall have thirty (30) minutes for meal time within each work shift which shall be duty status.

The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that Correction Lieutenants who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily thirty (30) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of thirty (30) minutes is in exception to the provisions of Article XXVII, Section B, [Overtime].

I. Effective July 1, 1997, Correction Lieutenants shall be employed on a normal work schedule of eight (8) hours and twenty-five (25) minutes per day (forty-two (42) hours and five (5) minutes per five (5) day week). Each officer shall have thirty (30) minutes for meal time within each work shift which shall be duty status.

The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that Correction Lieutenants who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily twenty-five (25) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of twenty-five (25) minutes is in exception to the provisions of Article XXVII, Section B.

J. Effective July 1, 1998, Correction Lieutenants shall be employed on a normal work schedule of eight (8) hours and twenty (20) minutes per day (forty-one (41) hours and forty

(40) minutes per five (5) day week). Each officer shall have thirty (30) minutes per meal time within each work shift which shall be duty status.

The overtime provisions of this Agreement shall pertain to all time worked beyond these normal work schedules. However, it is understood that Correction Lieutenants who work at least forty (40) hours in any work week shall be compensated at the premium rate (one and one-half (1 1/2) times for all of the time accumulated as a result of working the daily twenty (20) minutes beyond the basic eight (8) hours in the work shift. It is further understood that this assignment of twenty (20) minutes is in exception to the provisions of Article XXVII, Section B.

Pursuant to this article, correction lieutenants now work eight hours and 20 minutes per day or 41 hours and 40 minutes a week. They receive premium pay for the weekly work hours beyond 40 hours and overtime pay for work hours beyond the contractual work week -- the record does not disclose the reason for the distinction between premium pay and overtime pay in the language chosen by the parties. The overlap period between each of the three daily shifts was intended to be used so that officers going off duty could exchange information with officers coming on duty. The overlap was reduced from 30 minutes in 1996 to 25 minutes in 1997 to 20 minutes in 1998.

The employer asserts that N.J.A.C. 4A:6-2.1, N.J.A.C. 4A:6-2.2 and the State Compensation Plan establish a 40-hour work week for correction lieutenants and thus preempt having employees regularly scheduled to work more than 40 hours a week. It also contends that, by increasing the number of lieutenants on duty at

the beginning and end of each shift, the clause significantly interferes with its right to determine work hours; set staffing levels; and decide when overtime will be worked. It maintains that the automatic overlap is inefficient and that it can require overlap as needed.

The Association responds that the regulations do not preempt Article XXVI because they contemplate that overtime may be worked and do not prohibit setting work times beyond the normal work week. It also argues that the shift overlap is mandatorily negotiable, both as part of a work schedule and as a health and safety provision. It lists numerous possible events on a preceding shift that an incoming lieutenant should be apprised of including, for example, "forced cell extractions" of inmates or incidents of fighting, weapons possession, drug smuggling, theft or attempted escape. The Association maintains that lieutenants cannot safely perform their jobs without the overlap and that, if it is eliminated, they will still remain after their shift to brief their colleagues but will not be compensated. It asserts that the employer understands this and wants the overlap continued without compensation.

The employer responds that, if the shift overlap is removed from the contract, a lieutenant will still be compensated at the overtime rate whenever he or she is required or "knowingly permitted" to work before or after his shift. It also maintains that Sections H through J of Article XXVI intrude on its right to

determine when overtime may be worked. It argues that the dangers faced by correction lieutenants do not make shift overlap a mandatorily negotiable safety provision. Finally, it adds that the expired agreement requires it to make reasonable provisions for employee health and safety; provides for advisory arbitration on this issue; and establishes a joint health and safety committee.

The employer's preemption arguments are the same as in State of New Jersey, P.E.R.C. No. 2001-71, 27 NJPER \_\_\_\_ (¶\_\_\_\_ 2001), a case involving primary level law enforcement supervisors, including correction sergeants, and an identical work hours provision. We incorporate the analysis in P.E.R.C. No. 2001-71 and hold that Sections H through J of Article XXVI are not preempted by N.J.A.C. 4A:6-2.1 and -2.2.

This case, like P.E.R.C. No. 2001-71, also requires us to consider whether the work hours provision significantly interferes with achievement of the employer's policy goals, such that the provision may not be the subject of negotiations or interest arbitration. Again, we incorporate the discussion in P.E.R.C. No. 2001-71 and hold that the employer has not shown that an agreement to retain the work hours provision would significantly interfere with such goals as ensuring appropriate supervision or preventing coverage gaps.

The employer's arguments that Sections H through J are inefficient and result in overstaffing during the overlap should be considered by the Association and must be evaluated in interest



arbitration. However, we conclude, as we did in P.E.R.C. No. 2001-71, that concerns about possible overstaffing do not warrant completely cutting off negotiations and interest arbitration, given that weekly work schedules with built-in overtime pay are not per se non-negotiable and Sections H through J do not mandate that a given number of officers be on duty. Moreover, since the impact of the shift overlap on the employer appears to be primarily financial, it is akin to the premium pay proposals that we have found to be mandatorily negotiable and that also arose out of a majority representative's concerns about safe working conditions. For all these reasons, and as set forth in P.E.R.C. No. 2001- 71, we conclude that Sections H through J are mandatorily negotiable.

#### Assignments and Job Postings

The employer maintains that all but the underscored portions of Appendix I of the expired agreement are not mandatorily negotiable. Appendix I provides:

The following provision(s) are set forth herein for informational purposes only. Those matters not already included under Article XXX shall be grievable within the provisions of the Grievance Procedure in the Agreement as defined in Article X, Section A.2 except for the provisions below that are underlined, which are grievable under Article X, Section A.1.

#### Reassignment and Job Posting

A. 1. Reassignment is the movement of an employee from one job assignment to another within his job classification and within the work unit, organizational unit, or department.

2. Reassignments of employees may be made in accordance with the fiscal responsibilities of the appointing authority; to improve or maintain operational effectiveness; or to provide development and job training or a balance of employee experience in any work area. Where such assignments are not mutually agreed to, the appointing authority will make reassignments in the inverse order of the job classification seniority of the employees affected, providing the objectives stated above are met.

3. When temporary (i.e. for a period of six (6) months or less) reassignments are made to achieve any of the objectives in A.2. above, employees to be affected will be given maximum possible notice. The consideration of seniority otherwise applicable in reassignments will not apply.

B. Where the principles in A.2. above are observed, requests for voluntary reassignment within the organizational unit or department shall be given consideration.

An employee desiring reassignment to any job in his organizational unit or department may submit an application through his supervisor in writing to his Personnel Officer stating the reasons for the request. Employees who are capable of performing the work and who apply for such reassignments will be considered and reassignments will be made on the basis of these requests. Where more than one request for reassignment from qualified employees deemed capable of performing the work in such a job is on record, any assignment(s) will be made on the basis of job classification seniority of employees having recorded such a request.

C. 1. When personnel changes in a work unit provide opportunities for shift or schedule changes, interested employees may apply for desired assignments to the work unit supervisor. Such changes in assignment will be made on the basis of the job classification seniority of employees having recorded such a request, except that priority is given to the assignment of individual employees as provided in A.2. above.

D. An employee may have on record no more than two (2) requests for reassignment in B. above.

E. When an employee is granted a voluntary reassignment under provisions of B or C above, he shall then be eligible for only one (1) additional voluntary reassignment in the succeeding twelve (12) month period. Consideration will be given to a request for additional reassignments where special circumstances exist.

F. Job Posting

Any new or vacant position which the appointing authority desires to fill and which is not filled by a reassignment made in accordance with the provisions of paragraphs A through E of this Article shall be posted for a period of seven (7) days. The position shall be offered to the applicant responding to the posting who has the most job classification seniority providing that the applicant possesses the requisite qualifications for the position. The managerial decision as to the selection or nonselection of any employee shall not be subject to the arbitration process as described in Article X.

As we stated in P.E.R.C. No. 2001-71,

Local 195 addressed the negotiability of contract language nearly identical to Sections A through F of Article XXXI. Presumably in response to that decision, the parties added the prefatory language that makes clear that the portions of the clause that are not underlined are for informational purposes only and that grievances arising under the provision found not mandatorily negotiable in Local 195 are not subject to binding arbitration. Management has the unfettered right to set criteria for reassignment and to change those criteria subject to negotiated notice requirements. Placing those criteria in the contract for informational purposes only does not significantly interfere with any governmental policymaking determinations....

ORDER

Sections H through J of Article XXVI are mandatorily negotiable and may be submitted to interest arbitration. Appendix I may be submitted to interest arbitration for inclusion in a successor agreement consistent with the limitations in this decision.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Sandman voted in favor of this decision. Commissioner Ricci voted against this decision.

DATED: June 28, 2001  
Trenton, New Jersey  
ISSUED: June 29, 2001