

P.E.R.C. NO. 2003-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2002-21

HOWELL TOWNSHIP SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds mandatorily negotiable a proposal of the Howell Township Superior Officers Association to memorialize the existing work schedule for police sergeants in the collective negotiations agreement with the Township of Howell. The Commission holds that the interest arbitrator may consider the SOA's proposal to continue the hybrid schedule. The arbitrator must evaluate the parties' evidence and arguments concerning the impact of the schedule on supervision, overtime, training, and sergeant morale.

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, Ruderman & Glickman, P.C.,
attorneys (Joel G. Scharff, on the brief)

For the Respondent, Klausner & Hunter, attorneys
(Stephen B. Hunter, on the brief)

DECISION

On December 17, 2001, the Township of Howell petitioned for a scope of negotiations determination. The Township seeks a negotiability determination concerning an existing sergeants' work schedule that the Howell Township Superior Officers Association seeks to memorialize in the parties' agreement.

The parties have filed briefs and exhibits.^{1/} The SOA has submitted the affidavit of Lieutenant Mark Pilecki, the former president of the SOA. With its reply brief, the Township has

^{1/} Numerous extensions of time to file initial briefs and the reply brief were granted, all of which were by mutual consent.

filed the affidavits of Bruce Davis, Township manager, and Ronald Carter, chief of police. These facts appear.

The SOA represents sergeants, lieutenants and captains. The parties' collective negotiations agreement expired on December 31, 2000. On January 22, 2001, the Township petitioned for interest arbitration. It listed eight economic issues and one non-economic issue in dispute. On April 17, the SOA filed a response to the interest arbitration petition and added three economic issues and three non-economic issues in dispute. One of the non-economic issues was "existing work schedule memorialized in the contract."

Unit members' work schedules were at that time set forth in a side bar agreement that provided that lieutenants and captains were to work a 4/3 schedule while patrol sergeants would work a "hybrid" schedule of two days on, followed by three days off, followed by five days on and four days off. The sidebar stated that, unless the Township exercised its option to revert to the old 4/2 schedule in September 2000, the sidebar would become a permanent part of the parties' agreement.

With the assistance of the interest arbitrator, the parties reached an agreement on all issues except the continuation of the sergeants' "hybrid" schedule. Both parties agreed that the Township would seek a negotiability determination and the interest arbitrator has retained jurisdiction. By virtue of the

parties' agreement on all other issues, and the provisions of the sidebar, Article VIII (a) of the parties' 2001-2004 agreement states:

The work schedules for all Officers represented by the SOA, with exception of Patrol Sergeants shall work a 4/3 schedule. A 4/3 schedule shall mean a schedule where an Officer works four (4) days and then is off for the next three (3) days. The scheduled work day shall be a ten (10) hour day as defined in the shift schedules below. Each scheduled work day shall include a minimum of forty-five (45) minutes of work out time as defined in paragraph (g) of this article. Patrol sergeants shall work a hybrid two (2) on, three (3) off, five (5) on, four (4) off, work schedule working ten (10) hour days, of which each shall include a minimum of forty-five (45) minutes of work out time for each shift. This clause is subject to Scope of Negotiations Petition.

The 2001-2004 agreement between the PBA and the Township includes the 4/3 schedule, which all patrol officers work.

Ronald Carter is chief of the police department and assumed that position in 1995. The patrol division is headed by a captain and divided into three squads, with one lieutenant, two sergeants, and approximately 14-15 patrol officers assigned to each squad. Carter certifies that, during the mid-1980s, police administrators decided that each division should be headed by a captain rather than a lieutenant, with the captain performing upper management administrative responsibilities and the lieutenant serving as squad commander.

Prior to 1999, both PBA and SOA members worked a 5/2 schedule. The 1998-2000 collective negotiations agreements for both the PBA and the SOA provided for a 4 days on, 2 days off, 8½-hour shift schedule, to be implemented on January 1, 1999 and November 1, 1999, respectively.

In November 1999, negotiations commenced between former Township manager Jacqueline Ascione and PBA and SOA representatives with respect to a 4/3 schedule.^{2/} Ascione and the SOA agreed to retain contractual shift bidding by seniority provisions. They recognized that, if each squad lieutenant exercised his seniority to avoid weekend shifts, the sergeants would be left with fixed schedules requiring them to work every weekend. The hybrid schedule for sergeants was designed to permit each sergeant to have a four-day weekend off every other week.

On November 19 and November 29, 1999, the chief wrote to Ascione, and recommended against adopting the 4/3 for the patrol division. He stated that the change from an 8½ hour day to a 10½ hour work day would require additional patrol officers; provide each officer with up to an additional 76.5 days off each year; increase the cost of holiday pay; and generate more overtime. He maintained that the schedule would immediately reduce the

^{2/} We need not resolve the parties' dispute over who initiated those negotiations.

availability of supervisors by approximately 43.7% over the course of a year because, under the 4/2 schedule, two supervisors were scheduled on each shift every day of the year, but under the 4/3 schedule, two supervisors would only be scheduled to work 156 days of the year.

On December 20, 1999, despite the chief's objections, the Township and the SOA entered into a Sidebar Agreement adopting the 4/3 work schedule and the hybrid schedule for sergeants. The lieutenants' fixed schedule for 2000 resulted in the midnight lieutenant having off Sunday, Monday, and Tuesday; the evening lieutenant Saturday, Sunday and Monday, and the day lieutenant Friday, Saturday, and Sunday. Therefore, no lieutenants would be on duty from 7:00 a.m. Saturday through 6:00 a.m. Monday. The record includes 2003 schedules showing that lieutenants continue to have fixed schedules with weekends off.

On January 27, 2000, Carter wrote to Ascione and urged her to abandon the "experiment" with the 4/3 schedule. However, the option to revert to the 4/2 was not exercised.

In January 2001, Bruce Davis became interim Township manager, replacing Ascione. He became concerned about the 4/3 schedule, particularly the fact that it was implemented so that no lieutenants were scheduled to work weekends.

The parties have competing views on the impact of sergeants working a hybrid schedule while patrol officers and other superior officers work the 4/3.

The Township maintains that the different schedules have resulted in an unacceptable deterioration of command; caused understaffing and fatigue; increased overtime; and interfered with supervisors' evaluation of patrol officers.

With respect to departmental operations and supervision on weekends, the Township notes that there is a single sergeant scheduled from 7 a.m. Saturday through 6 a.m. Monday, contrary to the Township's current and pre-2000 policy that lieutenants should provide a command-level operational presence to interact with the public when the chief and captains are off. Further, because Township "calls for service" statistics show that there are more sensitive domestic abuse calls on weekends, Davis believes that a lieutenant should be working at that time.

In order to help address these concerns, Carter changed his own schedule in May 2001 to work on Saturdays. However, he had to revert to the standard Monday to Friday workweek to handle his own responsibilities. Davis asserts that a 4/3 schedule could be plotted that would allow lieutenants to be scheduled on weekends, without unduly limiting their ability to have some weekends off.

The Township also contends that the current schedules result in the scheduling of too few supervisors both on weekends and

generally. The Township maintains that in order to effectively manage the department, two supervisors should be scheduled for each squad.^{3/} It cites a February 2002 memorandum from Carter, where he quotes police administration experts for the proposition that a supervisor should have no more than 5-7 supervisors under his or her command. A 1997 memorandum from Pilecki espouses a similar point of view. The Township states that this level of supervision was provided under previous schedules and could be achieved if both sergeants and lieutenants worked a consistent 4/3 schedule.

However, Carter asserts that under the current schedules, squads are working with only one supervisor 42% of the time, prior to any vacation, personal, or compensatory time being deducted. As a result, a single supervisor is in charge of as many of 12 officers and up to three civilian dispatchers. Carter's February 2002 memorandum asserts that supervisors are stretched to the limit and cannot effectively supervise patrol officers who are dispersed throughout the Township's 65-square miles; and that, as a consequence, patrol officers, many of whom have less than three years of experience, are making decisions without supervisory assistance.

^{3/} The record shows that under the 4/2 schedule, two supervisors - most often a lieutenant and a sergeant - were scheduled more frequently than is the case currently.

Carter acknowledges that 1987 and 1993 General Orders establish a minimum staffing of one supervisor per shift. However, based on his experience as an SOA representative in the 1980s, he certifies that the SOA and the Township agreed that in the initial preparation of a schedule, no two superior officers in any patrol unit would be scheduled off on the same day. However, scheduling of vacation or other time off could result in only one supervisor working, and, according to Carter, the General Orders reflect that circumstance.

Carter's February 2002 memorandum also states that the schedule has generated overtime and caused fatigue, in part because sergeants scheduled to work weekends call in sick, and the prior shift sergeant has been forced to work 20 hours to provide coverage. He estimates that one-third of the department's overtime is attributable to the sergeants' hybrid schedule.

With respect to training, the record includes an August 2002 memorandum to Carter from Sgt. Cavaluzzi, the department training officer, tendering his resignation from the position. Cavaluzzi explained that he was the only supervisor on over 90% of the days he was on duty, with the consequence that he had to look out for

"the men and women on the road" rather than complete training duties.^{4/}

Finally, Carter maintains that the schedule has interfered with the Township's ability to assign officers based on actual service demands and has hampered the evaluation of patrol officers by sergeants and of sergeants by lieutenants. He asserts that patrol sergeants are scheduled to work with some patrol officers as few as eight days per month, and potentially fewer days once contractual obligations are plotted on the schedule. As a consequence, Carter maintains that patrol officer deficiencies are not being detected. He cites two instances where patrol officers were unaware of Attorney General guidelines, which in one case resulted in the invalidation of a search warrant in a high profile case.

The Township also asserts that, under the hybrid schedule, patrol officers seldom have the opportunity to work with a lieutenant, and are thus never exposed to a true chain of command. Further, sergeants are also less exposed to lieutenants and do not receive the supervision necessary to perform their responsibilities.

^{4/} Carter declined to accept the resignation, explaining that he anticipated that additional sergeant positions would be created and one sergeant would be assigned as a full-time training officer.

The SOA stresses that the Township did not exercise its option to revert to the 4/2 and that the former Township manager decided to retain the current schedules because they saved the Township money, promoted morale, and kept officers healthy through the "work out time" allotted to them as part of their daily shifts. Pilecki states that the hybrid schedule reduces stress in the department by allowing sergeants to have time off on the weekends that they would not have under the 4/3.

The SOA also maintains that there are compelling reasons to continue the hybrid schedule and disputes the Township's description of supervision, training, and other problems allegedly flowing from the schedules. Pilecki states that the hybrid schedule results in two supervisors on duty on four weekdays, and that this coverage corresponds to calls for service statistics showing a greater number of calls during the week, with fewer calls on weekends. Citing departmental general orders, Pilecki asserts that the Township's minimum staffing policy requires only one supervisor per shift.

With respect to training and supervision, Pilecki maintains that supervision is improved, since both sergeants assigned to each squad have an equal opportunity to work with all patrol officers in the squad. He also maintains that lieutenants work with each patrol officer at least once a week and that training is not compromised since it is completed by senior patrol

officers assigned to junior patrol officers for a three-month period.

The Township's scope-of-negotiations petition frames the issue as "whether a police sergeant work schedule which is at variance with the work schedules of all police superior officers and patrol officers may be submitted to interest arbitration?" Its initial brief asks that the hybrid schedule be deemed not mandatorily negotiable, arguing that the record shows that the schedule has impaired supervision and therefore, may not be continued under Teaneck Tp. And Teaneck FMBA Local No. 42, P.E.R.C. No. 2000-33,25 NJPER 450 (¶30199 1999), aff'd in part, rev'd and remanded in part, 353 N.J. Super. 289 (App. Div. 2002), certif. granted, 175 N.J. 76 (2002). It asserts that the problems it has identified would be remedied if sergeants were placed on the 4/3 schedule.^{5/}

The SOA counters that, under Teaneck, the Township has not met its burden of showing that supervision has been impaired by the schedule and that, even if it had, the SOA has shown compelling reasons to continue the schedule.

^{5/} In its reply brief, the Township states that, when compared to the 4/2, the 4/3 "spreads the availability of superior officers and explains why there are fewer tours covered by two superior officers." It then urges the Commission to hold that the 4/3 and hybrid schedule are not mandatorily negotiable. We will not consider this late-raised challenge to the 4/3, particularly since the parties have reached a successor agreement and agreed that a scope petition would be filed with respect to the hybrid schedule only.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J.

78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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.

[Id. at 92-93; citations omitted]

We consider only whether a contract proposal is mandatorily negotiable. It is our policy not to decide whether proposals, as opposed to grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to

their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

No statute or regulation preempts negotiations by mandating that the Township use a particular work schedule. Compare Local 195, IFPTE v. State, 88 N.J. 393, 405-406 (1982). The question, then, is whether, based on a balancing of the parties' interests in light of the facts, the work schedule issue involves a mandatorily negotiable term and condition of employment. Local 195 at 404. See also City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998). We consider the petition in light of our recent body of case law concerning work schedule changes proposed for interest arbitration, as well as Teaneck. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997), reviewed the relevant cases and statutory provisions establishing that, in general, work schedules are mandatorily negotiable. It then summed up our approach when labor or management seeks to present a 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.

The Appellate Division in Teaneck approved this approach, see 353 N.J. Super. at 305, and we have followed it in other cases, generally allowing work schedule proposals to be considered by an arbitrator, even where an employer has raised legitimate concerns that must be considered in arbitration. See City of Long Branch, P.E.R.C. No. 2000-94, 26 NJPER 278 (¶31110 2000); 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); Cumberland Cty.,
P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997).

Maplewood recognized that we and the Courts have found exceptions to the rule of work schedule negotiability when the record showed 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 Maplewood, 23 NJPER at 113-114 and cases cited therein; see also City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002).

With respect to supervision, our Teaneck decision rejected the argument that a proposal is per se non-negotiable if it would result in rank-and-file employees being on a different schedule from their supervisors. However, we held that an arbitrator may award such a proposal only if he or she finds that the different work schedules would not impair supervision or that, based on all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns. 25 NJPER at 455. The Appellate Division endorsed this analysis and accepted our impairment-of-supervision standard as one that should guide arbitrators. 353 N.J. Super. at 305, 310.

Teaneck was an interest arbitration appeal and we modified the award to delay implementation of a work schedule awarded to a firefighters' unit until it was agreed to or awarded for the fire

officers. The Appellate Division reversed this aspect of the decision and directed us to remand the case to the arbitrator to apply our newly-articulated impairment of supervision standard. We read the Appellate Division decision as holding that an interest arbitrator should ordinarily evaluate competing claims about whether supervision would be impaired because rank-and-file employees would be on a different schedule from their supervisors.

We start with the following comments. Our scope of negotiations decision is primarily guided by Maplewood and those aspects of Teaneck, particularly the Appellate Division decision, addressing scope of negotiations issues. However, Teaneck was an interest arbitration appeal and the standards it set out concerning arbitral consideration of work schedule proposals, and the proponent's burden of justifying such proposals, apply only if a schedule is mandatorily negotiable.

The Township describes several alleged problems in the patrol division that it argues flow from the hybrid schedule. These concerns may be legitimate and must be considered by the arbitrator but, under Maplewood, the issue is not whether a party has legitimate concerns about a proposal, but whether the proposal so involves and impedes governmental policy that it must not be submitted to interest arbitration. Under all the

circumstances of this case, we conclude that the Township's concerns do not rise to this level.

The Township points to several alleged supervision problems. One centers on the fact that sergeants under the hybrid schedule work a different schedule from the patrol officers they supervise. It argues, similar to the employer in Teaneck, that this circumstance makes it more difficult for sergeants to evaluate patrol officers and correct problems as they arise, because they do not work together as frequently as they would if they were on the same schedule.

We stressed in Teaneck that an arbitrator must consider the desirability of supervisors and rank-and-file employees being on a common schedule; consider whether supervision is impaired by the different schedules; and, if so, determine whether there are compelling reasons that outweigh any supervision concerns. As we noted earlier, the Appellate Division in Teaneck decision strongly suggests that that exercise ordinarily should be completed by the arbitrator rather than by us in a scope proceeding or in an interest arbitration appeal. The circumstances here do not present a basis to deviate from that Appellate Division guidance, particularly since the primary focus of the Township's petition is not the lack of interaction between patrol sergeants and patrol officers or between sergeants and

lieutenants, but the number of supervisors per shift. The latter factor is not self-evidently tied to the hybrid schedule.

Other supervision problems identified by the Township are not linked to the differences in sergeant-patrol officer or sergeant-lieutenant schedules but to the Township's contention that current superior officer schedules have caused too few squad supervisors to be scheduled on many shifts and deprived the department of lieutenants' "command presence" on weekends. These are serious issues that implicate managerial prerogatives.

An employer has a prerogative to change individual work schedules to require command-level police officers to work on weekends, City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997), as well as a prerogative to determine how many supervisors to assign to each patrol officer squad. Clinton, P.E.R.C. No. 2000-37. However, the record does not show a clear nexus between the hybrid schedule and these alleged problems. Nor does it indicate that the problems would necessarily be corrected if the hybrid schedule were eliminated. The fact that lieutenants do not work weekends appears primarily to be a result of shift bidding provisions. And there is no evidence in this record to support the Township's position that the number of supervisors assigned per shift would be increased if the entire department were on a 4/3 schedule. Indeed, Carter at one point speculated that a change from the 4/2 to the 4/3 would result in

decreased supervisory coverage and the Township argues that point in its reply brief.

Finally, we comment on the Township's concerns about training, overtime, and assignment of officers based on service demands. The Township's concerns about training and fatigue are intertwined with the number of supervisors assigned per shift, and our foregoing discussion thus addresses those issues.

With respect to assignment of officers based on service demands, the Township has a prerogative to decide how best to deploy police officers to protect its citizens. See Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). But the Township's arguments and evidence on this point are not particularized, and we cannot say whether or to what extent the hybrid schedule interferes with its objective of achieving "proportional staffing." The arbitrator may consider the parties' evidence and arguments on this point.

Finally, the arbitrator must consider the Township's concerns about the overtime allegedly generated by the hybrid schedule, but that cost factor alone does not render the schedule not mandatorily negotiable. Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997)


For these reasons, we decline to hold that the hybrid schedule is not mandatorily negotiable. The Township has not expressly proposed a standardized 4/3 schedule and we decline to

excise from the contract the current hybrid schedule absent a stronger showing that the Township has an alternative that will address its concerns. Compare City of Plainfield, P.E.R.C. No. 2000-74, 26 NJPER 176 (¶31071 2000) (City cited problems with respect to 4/4 schedule that had previously been in place, but did not show how its current 4/2 schedule solved those problems to the point where no other schedule was negotiable; union proposal for 4/4 could be submitted to arbitration); Cumberland (no unfettered right to set work schedules). The arbitrator may consider the SOA proposal to continue the hybrid schedule, and must evaluate the parties' evidence and arguments concerning the impact of the schedule on supervision, overtime, training, and sergeant morale.

ORDER

The SOA's proposal to continue the hybrid schedule is mandatorily negotiable.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: April 24, 2003
Trenton, New Jersey
ISSUED: April 25, 2003