

P.E.R.C. NO. 2006-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROSELLE PARK,

Petitioner,

-and-

Docket No. SN-2005-089

ROSELLE PARK POLICE SUPERVISORS
GROUP, P.B.A. LOCAL #27,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Roselle Park for a restraint of binding arbitration of a grievance filed by the Roselle Park Police Supervisors Group, P.B.A. Local #27. The grievance alleges that a sergeant's shift reassignment and the implementation of a six-month shift rotation for all sergeants violates the parties' collective negotiations agreement. The Commission concludes that enforcement of an agreement providing for annual non-rotating shifts selections would substantially limit governmental policymaking given the chief's description of the problems experienced under that system.

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, Niedweske Barber, P.C., attorneys
(Linda J. Niedweske, on the brief)

For the Respondent, Lindabury McCormick & Estabrook,
P.A., attorneys (Donald B. Ross, of counsel and Dennis
McKeever, on the brief)

DECISION

On June 15, 2005, the Borough of Roselle Park petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the Roselle Park Police Supervisors Group, P.B.A. Local #27. The grievance alleges that a sergeant's shift reassignment and the implementation of a six-month shift rotation for all sergeants violate the parties' collective negotiations agreement.

The parties have filed briefs, exhibits and certifications. The Borough has submitted a certification and supplemental certification of its police chief, Warren Wielgus, and the PBA

has submitted a certification of Sergeant Arthur Dodd. These facts appear.^{1/}

The PBA represents all full-time sergeants and lieutenants. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2005. The grievance procedure ends in binding arbitration.

The Roselle Park Police Department has 34 officers, including four sergeants and 21 patrol officers. The patrol division is organized into four platoons, each staffed by a sergeant and four patrol officers. The division operates on a 4/4 schedule, with sergeants and patrol officers working either a 7 a.m. to 7 p.m. or a 7 p.m. to 7 a.m. shift.

Article 6, entitled Hours of Work and Overtime, pertains to shift assignments for sergeants. It provides, in part:

It is specifically understood that [the] Police Chief or his designee shall have the right to adjust the shifts for training, schools or special assignment. It is also understood by the parties, once the employee[s] make their preference for the yearly shifts, the Chief of Police reserves the right reasonably to adjust the shifts to reflect proper balance between inexperienced and experienced officers as well as other legitimate management concerns such as safety and security of the Borough, siblings working together, and personality conflicts. The chief shall not be arbitrary or capricious in such determinations, and such decisions shall be subject to the grievance procedure.

^{1/} We deny the PBA's request for oral argument. The matter has been fully briefed.

The chief certifies that, in 2000, he implemented a six-month rotation for sergeants to prevent them from becoming complacent about their job responsibilities, including the management and oversight of police officers. In the chief's view, the department's effectiveness diminished after sergeants and officers had worked together for six months because sergeants did not hold the officers to high performance standards. As a consequence, the chief concluded that patrol officers were less vigilant in observing suspicious activity; addressing moving violations; reporting for work on time; and maintaining self-discipline. Police officers made fewer arrests and remained in one location for their entire shift rather than riding around the entire designated area. In his supplemental certification, the chief adds that in the five years since the six-month rotation has been in place, there has been better adherence to rules and regulations and sergeants and patrol officers have maintained professional relationships.

The chief also contends that the six-month rotation has improved training and supervision because it allows patrol officers to be supervised by sergeants with a range of experience and seniority, resulting in a more highly trained and effective police force. Similarly, he states that by rotating shifts, all sergeants are periodically supervised by a lieutenant or captain, who work only on the day shift. The chief states that,

previously, night shift sergeants were lax in their performance because no one supervised them. Finally, he adds that, under the prior shift assignment procedure, sergeants confined to one shift were not as knowledgeable about the problems faced on the other shift and could not competently substitute when necessary. In that vein, he notes that day shift sergeants deal with moving violations, shoplifting, and the safety of school children, while evening sergeants are more likely to deal with issues of intoxication, weapons possession, and drugs.

On July 7, 2004, Sergeant Arthur Dodd was notified that he would be on the 7:00 p.m. shift rather than the 7:00 a.m. shift effective August 1, 2004.

On July 16, 2004, the PBA filed a grievance on behalf of Dodd contesting the change in shift and alleging a violation of Article 6. On July 20, Captain Paul W. Morrison denied the grievance. On March 25, 2005, 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, 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 the grievance or any contractual defenses the employer may have. We specifically do not address the parties' arguments as to whether the chief had a contractual right to adjust Dodd's shift or the shifts of the other sergeants.

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 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 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]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The Borough argues that it has a managerial prerogative to make shift assignments that enable superior officers to enforce discipline and train rank-and-file officers. It also asserts that the substantive decision to transfer or reassign an employee is a non-negotiable policy determination.

The PBA characterizes the grievance as protesting the shift rotation system for all four sergeants, as well as the assignment of Dodd. It maintains that, consistent with Borough of Little Ferry, P.E.R.C. No. 91-25, 16 NJPER 494 (¶21217 1990), arbitration of this shift rotation dispute would not substantially limit governmental policy making, and that the

Borough has not identified any safety, security or other management concerns that would be compromised by arbitration.

The Borough responds the institution of the six-month rotation was intended to address safety and security issues, regardless of whether the chief used those words in his initial certification. In his supplemental certification, the chief states that public safety was negatively affected by the performance problems he had observed under the prior shift assignment procedure. He states that safety and security were the driving forces behind the implementation of the six-month rotation system.

Preliminarily, the Borough does not argue that there were individualized reasons for transferring Dodd to the night shift. Instead, its prerogative argument is grounded in the chief's explanation as to why he implemented a shift rotation for all sergeants. Similarly, the PBA now characterizes the grievance as protesting the unilateral change for all sergeants. Therefore, we consider whether the Borough had a prerogative to issue the shift rotation order for all sergeants, including Dodd.

Shift schedules and rotations are a component of work hours and, accordingly, implicate Court and Commission case law concerning work schedule negotiability. That case law holds that the work schedules of individual employees, including police officers, are as a general rule mandatorily negotiable, unless

the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); 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); see also 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). While all shift schedules or rotations affect employee work hours, some are also intertwined with the nature of the duties performed. When that is the case, a shift schedule proposal or provision may implicate the principle that an employer has a prerogative to match the best qualified employees to particular assignments. See Union Tp., P.E.R.C. No. 2003-81, 29 NJPER 214 (¶163 2003); Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified and recon. den. 26 NJPER 16 (¶31003 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001).

Applying these principles, we have held that shift bidding clauses based on seniority are mandatorily negotiable provided all qualifications are equal and managerial prerogatives are not otherwise compromised. Union Tp., City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); contrast Camden Cty. (proposed shift bidding clause not mandatorily negotiable to the extent it

would apply to a range of assignments for which the qualifications were not equal).

With respect to shift rotations, Asbury Park held to be mandatorily negotiable a proposal that provided for shift selections and rotations every six months. We noted the employer's arguments that shift assignments should rotate every three months to provide better training, but reasoned that the employer's arguments about "the ideal nature" of the three-month vs. six-month rotation did not outweigh the substantial impact that work schedule changes have on officers' work and welfare. We added that the proposal allowed the City to alter shift assignments to provide training, use specialized abilities on a particular shift, or meet safety needs.

Similarly, in Little Ferry, we found to be legally arbitrable a grievance protesting a unilateral change to fixed shifts despite an alleged agreement providing for rotating shifts. Little Ferry acknowledged that the Borough's goal of providing increased staff on the second shift, when service calls peaked, might be more difficult to achieve on a rotating as opposed to fixed schedule. However, we declined to restrain arbitration, commenting that the Borough had not shown that it would be unable to accomplish its goals "by a rotating schedule or by some means less drastic than a complete change to fixed shifts." 16 NJPER at 496. We added that any arbitral remedy

could not compromise the Borough's prerogative to meet its staffing needs on each shift and that, to the extent any aspect of the rotating shift schedule did that, "then that aspect must fall." Ibid.

On the other hand, we and the Courts have held that employers had a prerogative to unilaterally change the shifts of positions or individuals to achieve operational, supervisory or other governmental policy objectives. 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) (employer had a prerogative, in order to correct supervision and discipline problems on midnight shift, to change shift assignments so that all patrol officers worked the same rotating shift as their superiors); City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005) (employer had prerogative to change vice unit's hours to align unit's schedule with the time when services were most needed); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence that 12-hour shift had resulted in staffing, supervision, and fatigue problems - and had compromised officer safety because of reduced number of officers on evening shift - justified a mid-contract change).

Against this backdrop, we conclude that enforcement of an alleged agreement providing for annual non-rotating shift selections would substantially limit the Borough's governmental

policy determinations concerning supervision; sergeant assignments; and the type of sergeant-patrol officer relationships that it wants to foster. The decision to have sergeants rotate shifts implicates the employer's judgments about the nature of the duties sergeants should perform because it was instituted in part to enable the department's four sergeants to have enough familiarity with both day and night shift responsibilities so that they could effectively substitute for one another. Contrast Middletown Tp., P.E.R.C. No. 2004-70, 30 NJPER 138 (¶55 2004) (where record did not indicate that shift assignments were based on matching employees to particular job duties, arbitrator could consider whether decision to assign swing shifts by productivity rather than seniority violated agreement). Further, similar to the shift changes in Irvington and Millville, the shift changes here were implemented to correct perceived supervision, performance and discipline problems under the prior system -- problems that the chief certifies impaired public safety and that he attributed to sergeants' reluctance to supervise and discipline patrol officers with whom they had a longstanding working relationship. Contrast Little Ferry (employer concerns that reinstatement of rotating schedule could create discipline and supervision problems were based on conjecture; no showing that problems had arisen in the past). In addition, the rotation system also effectuates the chief's policy

judgment that sergeants and officers inevitably form too close a relationship if they work together for too long. Finally, the rotation of the four sergeants also ensures that each is regularly supervised by a day-shift lieutenant, a circumstance that could not occur under a non-rotating shift assignment system.

In sum, we conclude that enforcement of an agreement providing for annual non-rotating shift selections would substantially limit governmental policymaking given the chief's description of the problems experienced under that system; his conclusion that rotating shifts has improved safety and operations; and his judgment that rotating shifts fosters sergeants' familiarity with both day and night shift responsibilities and maintains effective supervisory relationships between sergeants and patrol officers and sergeants and lieutenants.

ORDER

The request of Roselle Park Borough for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

ISSUED: December 15, 2005

Trenton, New Jersey