

P.E.R.C. NO. 2006-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FRANKLIN,

Petitioner,

-and-

Docket No. SN-2005-088

FOP LODGE 57,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Franklin for a restraint of binding arbitration of a grievance filed by FOP Lodge 57. The grievance asserts that a memorandum issued on August 31, 2004 is an improper administration of the work schedule contained in the parties' agreement. The Commission concludes that the Borough has shown a governmental policy basis for establishing a hybrid rather than a rotating work schedule.

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, Weiner Lesniak, LLP, attorneys
(Mark A. Tabakin, of counsel and on the brief;
Brian J. Aloia, on the brief)

For the Respondent, Loccke & Correia, PA, attorneys
(Merick H. Limsky, on the brief)

DECISION

On June 15, 2005, the Borough of Franklin petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 57. The grievance asserts that a memorandum issued on August 31, 2004 is an improper administration of the work schedule contained in the parties' agreement.

The parties have filed briefs and exhibits. The Borough has submitted the certification of police chief Joseph A. Kistle. These facts appear.

The FOP represents patrol officers and sergeants. The parties' collective negotiations agreement is effective from

January 1, 2002 through December 31, 2004. The grievance procedure ends in binding arbitration.

Kistle became police chief in January 2003. At that time, Article V of the parties' contract called for officers to rotate through three 10-hour tours of duty on day, evening and night shifts. Section G of that article permitted the officer assigned to Community Policing/D.A.R.E. to work a different schedule to fulfill those obligations. According to Kistle, many officers were dissatisfied with the 10-hour rotating schedule and requested permanent shifts. He also states that some officers were unable to perform their job duties while on night shift, particularly the school resource and vehicle maintenance officers.

In April 2003, the parties negotiated an amendment to Article V. The amendment changed the 10-hour schedule to one in which the officers were assigned to fixed squads on a 12-hour, 3-days on, 3-days off schedule with a cycled rotation as defined by the chief. The amendment also included agreements on impact issues arising from the work schedule. The amendment included this language:

- G. This addendum shall be put into place upon mutual agreement between members of the Franklin Borough Police Department Sergeants and Patrolman and The Borough of Franklin Sussex County, New Jersey upon the signing of this agreement as indicated below on a trial basis until December 31, 2003. If at the completion of the trial period, either party

wishes to return to the original contractual agreement, that party shall notify the other in writing within thirty (30) days after the trial period of its wishes to cancel this addendum and return to the original agreement. If neither party contacts the other, this addendum shall become a permanent part of the existing contract between the Franklin Borough Police Department Sergeants and Patrolman and The Borough of Franklin Sussex County, New Jersey.

The April 2003 schedule divided the officers into four squads as follows:

Squad #1 Sgt. McInerny, PO Mattessich and PO Geddis
Squad #2 Sgt. Garrera, PO Kinney and PO Churchwell
Squad #3 PO Burgos, PO Korger and PO Arnott
Squad #4 PO Douma, PO Snyder and PO Smith

Once the new shift was implemented, the chief maintains that additional requests for permanent shifts were received and there were certain duties that could only be performed during the day. For example, Sergeant Garrera is responsible for vehicle inspection and maintenance and for maintaining emergency contacts with Borough businesses. Under the April 2003 schedule, he could not complete these assignments because he worked the night shift six months out of the year and could not interact with business owners or the Borough's mechanic during regular business hours. Similarly, Patrol Officer Mattessich is the school liaison officer; has completed work in Gang Resistance Education & Awareness Training; and is trained as a school resource officer. Under the April 2003 schedule, he also worked the night shift

every other month and was unable to fulfill his school assignments or use his specialized training.

Kistle states that he performed a detailed analysis of the existing schedule and the previous rotation and schedule, and experimented with numerous other staffing arrangements to see which would best fit within the Borough's organization table.

On August 31, 2004, Kistle notified all officers that effective September 19, 2004 there would be a work schedule adjustment and squad reassignments. He states that he created a "hybrid" work schedule that combined a steady day squad, a steady night squad, and two rotating squads. He asserts that the hybrid schedule provides greater operational efficiency and control over staff. Kistle adds:

In developing the work schedule and assigning officers to particular shifts and squads, I considered several factors including, but not limited to: (a) the officers' training, talent, experience and individual assignment/responsibilities; (b) the officers' requests to work particular shifts; (c) increasing the effectiveness of the school liaison officer; (d) enhancing administrative efficiencies; (i.e., maintenance/repairs of police vehicles and maintaining the Department's presence within the Borough's business community); and (e) staffing of each squad with the proper mix of officers and supervisors best suited to foster proper discipline and operational control. There were no changes in the number of hours worked per shift or in any other terms or conditions of employment.

The staff was assigned to squads as follows:

Steady Days: Sgt. Garrera, PO Kinney, PO Mattessich
Steady Nights: PO Douma, PO Arnott, PO Korger
Rotating #1 PO Burgos, PO Churchwell, PO Smith
Rotating #2 Sgt. McInerny, PO Snyder, PO Geddis

The chief assigned Mattessich and Garrera to steady day shifts because of their school liaison and vehicle maintenance/emergency contact responsibilities, respectively. The assignments also furthered Kistle's supervisory objectives. Kistle believed that Mattessich needed more supervision because of past performance concerns. Kistle concluded that Garrera was the sergeant most qualified to address Mattessich's performance issues, both because of Garrera's supervisory skills and because more supervision could be provided on the day shift. The chief adds that he was able to accommodate almost all of the officers' preferred squad assignments, but that the operational needs of the police department were paramount and 2 of 12 officers' requests were not accommodated.^{1/}

On September 7, 2004, the union filed a grievance contending that the chief's August 31 memo and work schedule change violated the parties' agreement because "there is no longer a cycled rotation. Officers have been assigned to fixed schedules." The

^{1/} Mattessich was one of the two.

grievance was denied at all levels.^{2/} On November 19, the FOP 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 merits of the grievance or any contractual defenses the employer may have.

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:

^{2/} In its denial of the grievance, the Borough Council states that it would like to open this issue to continued negotiations during the upcoming contract talks in the hopes that a workable solution can be found for the future without need for further arbitration. On January 18, 2005, the FOP petitioned for interest arbitration.

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 recognizes that work schedules are generally mandatorily negotiable but argues that it had a prerogative to implement this shift change because it promoted the efficient

operation of the department. It also asserts that the minimum staffing requirement in the contract amendment affects its right to alter work schedules; is not mandatorily negotiable; and must be removed from the parties' agreement.

The FOP rejects the Borough's managerial prerogative argument, maintaining that there was no overwhelming need to change the schedule three months before the contract's expiration. It contends that, except for the assignment issues involving Guerra and Mattessich, the amended work schedule did not interfere with any governmental policy determinations and, in any case, the contract included an exception for the school assignment. It also asserts that there is no support for the Borough's statement that unit members were dissatisfied with the amended schedule but that, in any case, the FOP represents the officers and it seeks to retain that schedule. Finally, the FOP argues that the subject of minimum staffing should not be addressed by the Commission because the issue is neither in dispute nor asserted in the scope petition.

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, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982). That rule applies in cases involving the

work schedules of police officers. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 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); 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). But a particular work schedule may not be mandatorily negotiable if it would significantly interfere with 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) (employer proved need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training); 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 time services were most needed); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's un rebutted evidence that 12-hour shift had resulted in staffing, supervision and fatigue problems justified a mid-contract change). Each case must be decided based on its own facts, Teaneck; Mt. Laurel, and we and the courts have recognized that small departments may have scheduling issues that could affect the negotiability of particular work schedules. See Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposal not mandatorily

negotiable where it would have eliminated relief officer system used to plug coverage gaps in small police department); Borough of Peapack and Gladstone, P.E.R.C. No. 2002-62, 28 NJPER 227 (¶33081 2002) (recognizing that small departments may face difficulties in covering for absent officers, but declining to hold that the subject of work schedules was not mandatorily negotiable; union had not yet proposed a specific schedule).

In applying this negotiability analysis, we have considered whether there is a nexus between the employer's desired schedule and its supervision or operational concerns. See Howell Tp., P.E.R.C. No. 2003-74, 29 NJPER 183 (¶55 2003) (employer's contentions that its current schedule resulted in too few squad supervisors and deprived the department of a "command presence" on weekends were serious issues that implicated managerial prerogatives, but employer did not show a nexus between those problems and the schedule that the union proposed to retain); 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 interest arbitration). Further, the fact that an employer raises legitimate operational or supervision concerns about a schedule does not mean that it is automatically non-

negotiable. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). Some of those concerns may be addressed in negotiations or interest arbitration. Ibid; see also Howell.

Within this framework, we hold that the Borough has shown a governmental policy basis for placing Mattessich and Garrera on steady day shifts given their assignments, the chief's concerns about Mattessich's performance, and his judgment that Mattessich is best supervised by Garrera. Consistent with Trenton, the adjustments were made, in part, to align the officers' schedules with when their services were most needed. See also City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997) (employer had prerogative to change a deputy chief's and captain's work schedule in order to provide a command-level presence on weekends). Indeed, the FOP asserts that the contractual work schedule has an exception for the school liaison officer and it appears to concede that there are governmental policy reasons for assigning both officers to a steady day shift.

Further, the governmental concerns that warrant placing Mattessich and Garrera on steady day shifts are, in this 12-member department, intertwined with the overall September 19, 2004 order adjusting the schedule for some other officers. For example, given that the April 2003 schedule had fixed squads, a governmental policy decision to place Garrera and Mattessich on a steady day shift would necessarily require that their squad's

third officer also be placed on a steady day shift. Further, given a governmental policy reason for implementing a steady day shift, there would appear to be a corresponding need to have a steady night shift - as was provided for in the order. Thus, we conclude that the operational reasons for adjusting the schedules of Mattessich and Garrera also warranted the other schedule adjustments that were made in the September 19 order. We note that the order retains a rotating schedule for two shifts, or half the department's officers, and that there is no indication or contention that the adjustments were made for economic as opposed to operational reasons. See Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997).

With respect to the Borough's contention that the minimum staffing clause in the parties' agreement is not mandatorily negotiable and should be removed, this scope petition asks us to restrain arbitration of a grievance that does not mention or seek enforcement of the minimum staffing clause. Therefore, we decline to consider the minimum staffing provision in this proceeding. However, regardless of whether a particular clause is retained in a successor agreement, a provision that is not mandatorily or permissively negotiable is not enforceable.

ORDER

The request of the Borough of Franklin for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", written over a horizontal line.

Lawrence Henderson
Chairman

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

DATED: September 29, 2005
Trenton, New Jersey
ISSUED: September 29, 2005