

P.E.R.C. NO. 2006-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OCEAN,

Petitioner,

-and-

Docket No. SN-2005-091

P.B.A. LOCAL NO. 57,

Respondent.

SYNOPSIS

_____The Public Employment Relations Commission denies the request of the Township of Ocean for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 57. The grievance contests the denial of an officer's request for temporary shift exchanges on three Thursdays during August 2005. The Commission holds that it cannot conclude that the employer's policy goal of improving the continuity of supervision would be substantially limited if the PBA were given the opportunity to prove to an arbitrator that the August shift exchange requests were arbitrarily denied.

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 (Mark S. Ruderman, on the brief)

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

DECISION

On June 27, 2005, the Township of Ocean petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 57. The grievance contests the denial of an officer's request for temporary shift exchanges on three Thursdays during August 2005.

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

The PBA represents patrol officers. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2007. The grievance procedure ends in binding arbitration.

Article XII is entitled Working Hours/Overtime/Compensatory Time. Section 9 provides that:

Employees may initiate shift or day off changes between themselves, subject to approval by supervisory personnel. Supervisory personnel shall not arbitrarily deny requested switches.

Patrol officers work a schedule of rotating eight-hour shifts, five days on and two days off, with steady days off picked by seniority. Patrol unit shifts had rotated every two weeks, but were changed to a monthly rotation in 1988.

The Township Council conducted a study of the police department during the summer of 2004. The consultants raised concerns about a lack of platoon unity because most shift coverage was made up of officers from all three platoons. The study recommended that platoons function as a team with members committed to the platoon whenever possible with minimal "trading" amongst the platoons.

On January 1, 2005, Antonio Amodio was appointed probationary chief of the Township's police department. He had serious concerns about the negative effects of officers circumventing the rotation schedule for extended periods of time. On January 29, he issued a new policy, to take effect March 1, 2005, prohibiting long-term switching of shifts between officers. The chief's certification states that a majority of supervisors complained that they rarely worked with their assigned

subordinates and therefore could not easily monitor their work and do a proper yearly performance evaluation.

Bruce Friend has been a patrol officer for 16 years. He is also vice-president of the PBA. In February 2005, Friend requested that his 3:00 p.m. to 11:00 p.m. shift every Thursday in May be changed because of a conflict with child care and his wife's employment. The chief approved this request, but told Friend that if he would be seeking a change every time he worked the 3:00 p.m. to 11:00 p.m. shift, he would deny his request for the next tour scheduled in August. The chief believed that if he allowed Friend to make the "perpetual shift exchange," he would be required to afford this option to other members and would thus create scheduling problems with supervisors and their subordinates. Lieutenant Neil Ingenito states that he was in the chief's office during the conversation and that Friend indicated that the request to exchange this shift would be routine on his part.

In April 2005, Friend submitted a request for a shift exchange of his 3:00 p.m. to 11:00 p.m. shift in August 2005.

The request stated:

Patrolman Friend requests some shift changes with Patrolman DeSimone due to child care responsibilities. During the month of August, Patrolman Friend requests a days off and shift change August 11-13, August 18-20 and August 25-27. Patrolman Friend will assume DeSimone's days off and work his 7-3 shift on Saturdays. Patrolman DeSimone will

assume Friend's days off and work his 3-11 shift on Thursdays.

The request was denied.

Friend states that all requested shift changes were officer for officer and no overtime issues came into play. He also asserts that his request was neither for a perpetual shift exchange, nor was it excessive. If granted, he would have been able to change his shift one day for each of the three weeks so he could care for his children. Friend also observes that his request for shift changes affects three out of 260 shifts and states that the number of times the Township has unilaterally changed officers' shifts exceeds shift change requests made by police officers. Friend denies that the change would have had any impact on continuity of supervision or officer evaluations.

On May 19, 2005, the PBA demanded arbitration, asserting:

The Township violated the Collective Bargaining Agreement when patrolman Bruce Friend's requested shift change for August, 2005 was arbitrarily denied.

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.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters.^{1/} 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 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

^{1/} The scope of negotiations for police and fire employees 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No statute or regulation is asserted to preempt.

Hanover Tp., P.E.R.C. No. 93-5, 18 NJPER 398 (¶23179 1992), recon. den., P.E.R.C. No 93-21, 18 NJPER 473 (¶23213 1992) reviews our case law on the negotiability of temporary shift exchanges.

Proposals allowing temporary shift exchanges with the chief's approval are mandatorily negotiable. See, e.g., Teaneck Tp., P.E.R.C. No. 85-51, 10 NJPER 644 (¶15309 1984); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Proposals allowing temporary shift exchanges with notice but without approval are not mandatorily negotiable, but are permissively negotiable when officers of equal rank are involved. See Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd NJPER Supp.2d 198 (¶176 App. Div. 1988); Teaneck Tp., P.E.R.C. No. 85-52, 10 NJPER 644 (¶15310 1984); Town of Kearny, P.E.R.C. No. 83-7, 8 NJPER 435 (¶13203 1982); Saddlebrook Tp., P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978). The employer, however, has a reserved right to veto an exchange if

specially qualified employees are needed to do special tasks. [18 NJPER at 399]

Hanover also involved a shift exchange request prompted by child-care arrangements. There the police chief asserted that the grievant was seeking a permanent shift exchange that would upset the balance between junior and senior officers on a shift. The PBA acknowledged that the grievant could not seek a permanent shift exchange and asserted that the grievance sought an exchange for only two weeks. 18 NJPER at 398. We found that the employer had not argued that a two-week shift exchange would substantially limit governmental policy and restrained arbitration only to the extent the grievance might seek a permanent shift exchange.^{2/}

The present grievance challenges the employer's refusal to grant Friend's shift exchange request for three Thursdays in August when he was assigned to the 3:00 p.m. to 11:00 p.m. shift. Given the rotating shift schedule and the pattern established by the May and August requests, the chief asserts that honoring Friend's demands would result in 16-18 shift exchanges for him annually and the same number of exchanges for the officer on the other end of the exchange. The Chief asserts that granting those requests would undermine continuity of supervision, a goal

^{2/} In seeking reconsideration, the Township asserted that the grievant could continually seek two-week tour exchanges for child-care reasons for the duration of his wife's education. We noted that the Township could renew its application if those facts came to pass. 18 NJPER 473.

recommended by the independent study and a legitimate management concern.

While we understand the employer's extrapolations, as in Hanover, the grievance before us is more limited. It challenges only the shift exchanges that were denied in August 2005. We cannot conclude that the employer's policy goal of improving the continuity of supervision would be substantially limited if the PBA were given the opportunity to prove to an arbitrator that Friend's August shift exchange requests were arbitrarily denied.^{3/}

ORDER

The request of the Township of Ocean for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2006

Trenton, New Jersey

^{3/} The Township may present to the arbitrator the history and pattern of this officer's shift exchange requests for the purpose of defending against the allegation that it acted arbitrarily.