P.E.R.C. NO. 2006-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2006-031

NEWARK FIRE OFFICERS UNION,
IAFF LOCAL 1860,

Respondent.

Appearances:

For the Petitioner, Joanne Y. Watson, Corporation Counsel (Steven F. Olivo, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys (Paul L. Kleinbaum, on the brief)

DECISION

On October 11, 2005, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Fire Officers Union, IAFF Local 1860. The grievance challenges a prohibition on any tour exchange or overtime assignment that results in a firefighter being on duty for more than 38 consecutive hours.

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

Local 1860 represents fire officers. The parties' collective negotiations agreement expired on December 31, 2004. The parties are negotiating for a successor agreement.

Article 17.01 of the work hours clause provides:

> The work week for all employees who perform firefighting duties shall be an average of not more than forty-two (42) hours computed over periods of duty in an eight (8) week cycle based on the schedule of two (2) days of ten (10) hours each, followed by forty-eight (48) hours off, followed by two (2) nights of fourteen (14) hours each, followed by seventy-two (72) hours off, followed by two (2) days of ten (10) hours each and so on.

In February 2002, the parties entered into a Memorandum of Agreement modifying Article 17.01 as follows:

> The work week for all employees who perform firefighting duties shall be an average of not more than forty-two (42) hours computed over periods of duty in an eight (8) week cycle based on the schedule of one (1) 24-hour shift followed by forty eight (48) hours off, followed by one (1) 24-hour shift followed by ninety-six (96) hours off, and so on.

The change was adopted as a pilot program for six months with the parties to mutually decide on its continuation.

The Memorandum of Agreement also included an Addendum covering Exchange of Shifts (Mutual Swaps). Article 5.01 provides:

> The Director, Chief, Deputy Chief or Battalion Chief may grant the request of any two officers to exchange shifts. Members shall be allowed to swap one (1) 24 hour

> shift per 8 day cycle. The Director or Acting Director may grant approval for exchanges of greater duration. Exchanges shall be permitted only where one of the two officers involved has exhausted his allotted compensatory days or where one of the officers had requested a compensatory day and been denied.

Under Section 5.01, officers were permitted to combine 10 or 14-hour shifts with mutual swaps to work up to a maximum of 48 consecutive hours. This practice continued after the change to 24-hour shifts.

On December 15, 2004, the Fire Chief sent the following notice to officers and members limiting the number of consecutive work hours to 38:

> Members are prohibited from working more than thirty-eight consecutive hours. This includes but is not limited to the use of mutual swaps, the acceptance of overtime, or any other scheduling arrangement that violates this directive. The on-duty Deputy Chief will be responsible for review of the daily exception reports to prevent such scheduling.

Chief Norman Esparolini and Fire Director Lowell Jones assert that continuous duty without rest adversely affects officers' health and efficiency, leading to increased sick days or unavailability for emergencies later, or loss of performance while dealing with situations in which lives are at stake. Esparolini states that "the human body can only be in a peak state of readiness to deal with emergencies for a finite length of time, and though alertness can be maintained temporarily

through the use of caffeine or other stimulants, reflexes become slower, reaction time suffers, thinking becomes clouded and judgment becomes less than reliable." Jones contends that allowing members to work more than 38 hours without rest is dangerous.

The City has submitted an arbitration award in its favor issued on March 5, 2003. There, Local 1860 grieved the City's decision to use 10/14 hour shifts for scheduled overtime rather than 24-hour tours. The arbitrator concluded that the union had not proved that fire officers had a contractual right to overtime in 24-hour increments.

Local 1860's president, John Sandella, asserts that before the directive officers were encouraged to use mutual swaps to take time off with no problems. A June 1, 2003 notice from the Fire Director concerning the suspension of personal days during summer vacations tells deputy chiefs to advise members to seek mutual swaps for time off during that period. A 1988 General Order setting guidelines for mutual swaps does not limit consecutive hours worked. Sandella also asserts that this issue was never raised during negotiations or during any monthly Safety Committee or Labor Management Committee meetings. He states that firefighting tours allow significant periods of rest and sleep and fire officers are rarely engaged in firefighting functions for 24 or 48 consecutive hours. He contends that the change in

consecutive hours is arbitrary because it is not based on any data but on unsupported personal beliefs.

On January 24, 2004, Local 1860 filed a grievance asserting that the directive violated Article 5.01. The City did not respond to the grievance and Local 1860 demanded arbitration. This petition ensued. The arbitration hearing has been adjourned pending a decision on this scope petition.

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:

> 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. No statute or regulation is alleged to preempt negotiations.

We begin with a brief review of the negotiability of shift exchanges and firefighter work schedules. We will then address whether the particular facts of this case warrant a deviation from the case law establishing the general negotiability of those subjects.

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 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]

Our Supreme Court has held that work hours and schedules are generally negotiable. Teaneck Tp. v. Teaneck FMBA, Local No. 42, 177 N.J. 560 (2003) aff'g o.b. 353 N.J. Super. 289 (App. Div. 2002); Local 195, IFPTE v. State, 88 N.J. 393, 411-412 (1982); see also Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). However, exceptions to the rule of negotiability

have been found when the facts prove a particularized need to preserve or change a work schedule -- for example, to ensure appropriate supervision, prevent gaps in coverage, or otherwise protect 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); Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992).

The City has a governmental policy interest in ensuring the safety of its fire officers. However, given the history of permitting shift swaps up to 48 hours, the absence of any particularized evidence of health or safety problems, and the usual ability of firefighters to rest during part of a 24-hour shift, we cannot find that enforcement of an alleged agreement to continue shift swaps to a maximum of 48 hours would substantially limit that governmental policy interest. Contrast City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence, including a supervisor's operational report, showed that 12-hour shift had resulted in staffing, supervision, and fatigue problems and had compromised police officer safety because of reduced number of officers on evening shift). Compare City of Vineland, P.E.R.C. No. 94-69, 20 NJPER 60 (¶25023 1993) (absent evidence that 12-hour tours had

fatigued Emergency Medical Technicians, proposal to preserve such tours rather than switch to eight-hour tours found negotiable).

Our case law on shift exchanges and work hours does not bar either grievance or interest arbitration where potential, as opposed to proven, fatigue and other operational problems are raised as a bar to a particular work schedule or an extended tour. City of Long Branch, P.E.R.C. No. 2000-94, 26 NJPER 278 (¶31110 2000); Maplewood Tp. If in a particular situation, a supervisor determines that a fire officer is actually too fatigued to continue working, then the officer can be ordered to stop working and, if necessary, another officer can be summoned as a replacement. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) (employer may reject request to work overtime if employee is physically incapable of doing required work). Accordingly, we find that the subject of the grievance is at least permissively negotiable.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

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: February 23, 2006

Trenton, New Jersey