

P.E.R.C. NO. 2006-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Petitioner,

-and-

Docket No. SN-2006-037

P.B.A. LOCAL 167,
MERCER COUNTY CORRECTIONAL OFFICERS,

Respondent.

SYNOPSIS

_____The Public Employment Relations Commission denies the request of the County of Mercer for a restraint of binding arbitration of a grievance filed by P.B.A. Local 167, Mercer County Correctional Officers. The grievance contests the Warden's memoranda adding restrictions on shift exchanges. The Commission concludes that Article 35.8 of the parties' agreement allowing for temporary shift exchanges conditioned on the Warden's approval is mandatorily negotiable and enforceable through binding arbitration.

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, Genova, Burns & Vernioia, attorneys
(Brian W. Kronick, of counsel and on the brief;
Nicholas J. Repici, on the brief)

For the Respondent, Klatsky, Sciarrabone & De Fillippo,
attorneys (David J. De Fillippo, on the brief)

DECISION

On October 26, 2005, the County of Mercer petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 167, Mercer County Correctional Officers. The grievance contests the Warden's memoranda adding restrictions on shift exchanges.

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

The PBA represents correction officers. The parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2004. However, Article 32 provides

that the terms and conditions continue to be in full force and effect until a new agreement is entered into. The parties are engaged in interest arbitration proceedings for a successor agreement.

Article 4 addresses work schedules and job assignments. Article 35 sets forth Bidding of Days Off, Shifts, and Assignments by Seniority. Section 35.8 provides:

Nothing in this contract shall preclude any employee from voluntarily switching or swapping shift assignments with another employee prior to the rebid date. However, such switches or shifts and assignments shall occur with approval of the Warden or his designee. Such approval shall not be arbitrarily, capriciously or unreasonably denied.

The contract's grievance procedure ends in binding arbitration.

On June 28 and August 2, 2005, Warden Shirley Tyler issued memoranda to all staff regarding shift exchanges at the Mercer County Correction Center. The June 28 memorandum provided:

Due to the high volume for Officers that are choosing to "switch days", the impact on the Corrections Center has been limiting the number of Officers and Supervisors available for Forced Overtime. The following directive is effective immediately:

- Effective July 16, 2005 only **two** "switches" will be approved for Officers and **one** for Superiors each day and each tour i.e. one/two switches for Tour A, Tour B or Tour C.
- All switches must be completed within fourteen days.

- All "switches" will be date stamped.
- All "switches" are approved through Bob Zorn, in the Time and Attendance Office.
- No "switches" will be requested or approved by telephone.
- Shift Commanders and Master Control Supervisors may not approve last minute "Switches."
- No "switches" are approved on Holidays.
- All "switches" are to be noted on the Duty Rosters.
- "Switches" may be cancelled by the Shift Commander, only when all overtime personnel have been exhausted.

The August 2 memorandum amended the June 28 memorandum in these particulars:

The following directive is effective immediately:

- Effective immediately, **three** "switches" will be approved for Officers and **one** for Superiors each day on each Tour. **Clarification: Officers/Superiors may switch across Tours, however not more than three will be granted on each Tour.**
- All switches must be completed within a **pay period.**
- **Switching Officers retain their own seniority when forced overtime is being assigned. However, switching Officers working on their day(s) off are eligible for forced overtime.**

The PBA filed a grievance contesting the changes outlined in the memoranda. The County denied the grievance and the PBA demanded arbitration.^{1/} This petition ensued.

Warden Tyler's certification asserts that the memoranda were a response to operational problems resulting from overuse of shift swapping. She recites that there were at least 15-16 shift swaps on one day and that swapping sometimes resulted in officers' working jobs they were not trained to perform. She states that officers who had agreed to swap a shift occasionally did not show up for the swapped shifts, resulting in additional overtime expenses when another officer had to be called in for the no-show. The Warden also states that it was necessary to use her contractual authority to deny certain exchanges and that implementation of the policy will ensure the safe and efficient operation of the Center.

The PBA president responds that the number of swaps has dropped significantly since the Warden's memoranda and that he is not aware of any situation where an officer was assigned to perform a job that he or she was not qualified to perform. He adds that the County has means to deal with employees who do not show up for swapped shifts without banning shift exchanges on holidays, requiring that shifts swaps be completed within a particular pay period, or imposing other arbitrary restrictions.

^{1/} Neither party provided a copy of the grievance.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. We specifically do not consider whether the restrictions on shift exchanges are arbitrary, capricious or unreasonable under Article 35.8.

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]

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 preemption argument has been made.

The County recognizes that contract provisions allowing shift swaps with management's approval are mandatorily negotiable. However, it asserts a grievance will not be arbitrable if the employer can show that allowing such exchanges would cause operational problems that would substantially limit governmental policy.

The PBA responds that Article 35.8 is mandatorily negotiable because it conditions shift exchanges on employer approval and

asserts that grievances alleging violations of such clauses may be submitted to arbitration.

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 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]

See also Borough of North Plainfield, P.E.R.C. No. 97-77, 23 NJPER 38 (¶28026 1996). Because it expressly recognizes the Warden's right to approve shift exchange requests, Article 35.8 is a mandatorily negotiable provision under Hanover Tp. that is enforceable through binding arbitration. See Town of Kearny, P.E.R.C. No. 2001-58, 27 NJPER 189 (¶32063 2001) (proposal to increase number of tour swaps was mandatorily negotiable where swaps conditioned on chief's approval). The contract thus preserves the employer's right to deny shift swaps based on

qualifications and the PBA does not challenge that right. The employer's reliance on Borough of Paramus, P.E.R.C. No. 2002-19, 28 NJPER 13 (¶33002 2001), is misplaced because that case involved shift exchanges that would have resulted in detectives serving in bureaus for which they were unqualified. See also City of Jersey City, P.E.R.C. No. 98-96, 24 NJPER 116 (¶29058 1998). There is no suggestion that the memoranda target qualifications^{2/} and no showing that the employer's operational concerns cannot be addressed by invoking its contractual right to deny individual exchanges or calling in employees to work overtime.

ORDER

The request of the County of Mercer 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

^{2/} The PBA President cites several existing restrictions on shift swaps due to job experience and qualifications.