P.E.R.C. NO. 2006-95

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2006-062

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1037, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1037, AFL-CIO. The grievance asserts that the City violated an agreement to move attorneys who were on a 35 hour per week pay scale to a 37.5 hour per week pay scale without changing their work schedule or increasing their work hours. The Commission concludes that while the City has a managerial prerogative to determine the hours and days during which its services will be operated and the staffing levels to provide such services, these prerogatives do not take away the employees' right to negotiate over which employees will work what hours given the hours of operation and staffing levels set by management. The Commission concludes that the employees' interests in seeking to enforce the alleged agreement outweigh the employer's interests in increasing the employees' work hours unilaterally.

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 & Vernoia, attorneys (Brian W. Kronick and Michael J. Grohs, on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys (Annmarie Pinarski, on the brief)

DECISION

On February 22, 2006, 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 Communications Workers of America, Local 1037, AFL-CIO. The grievance asserts that the City violated an agreement to move attorneys who were on a 35 hour per week pay scale to a 37.5 hour per week pay scale without changing their work schedule or increasing their work hours.[1/]

1/ Local 1037 also filed a related unfair practice charge (CO-2006-195). That charge is being held pending this decision.

The parties have filed briefs and exhibits. Local 1037 has filed the certification of its president, Hetty Rosenstein. The City has not filed any certifications.

Rosenstein's certification concerns the negotiations history leading to the alleged agreement. We set forth the facts alleged in her certification for the purposes of better understanding the nature of the parties' dispute and determining whether that dispute is legally arbitrable. The factual allegations are relevant for that purpose. We do not determine whether the allegations are true or whether the parties actually made the agreement alleged.

Local 1037 represents all attorneys regularly employed by the City, including the assistant corporation counsels and municipal prosecutors in the City's Law Department and the City's public defenders and zoning attorneys. In the Spring of 2004, the parties began negotiations for a first contract. At that time, municipal prosecutors were classified under different codes corresponding to different hours of work and salary ranges. Mayoral executive orders noted that attorney positions are "an exempt class of positions with no standard hours of work" and that "[w]here required for data processing purposes only, the herein above noted salary shall be calculated on a [35] hour work week or a [37.5] hour work week or a [40] hour work week except as otherwise noted."

During negotiations, CWA asserted that there was neither rhyme nor reason as to why attorneys were placed on varying pay scales. In particular, some Law Department attorneys were on a 35 hour pay scale and others were on a 37.5 hour pay scale, but all Law Department attorneys worked the same 9:00 a.m. to 5:00 p.m. schedule. Public defenders were on a 40 hour per week pay schedule. Rosenstein asserts that all attorneys frequently worked through lunch and worked additional hours preparing cases – time for which they did not receive additional compensation. She also asserts that Law Department attorneys had been moved from one pay scale to another over the years to increase their compensation, but their weekly work hours were never changed. Further, she asserts that attorneys were hired at all different steps of the pay scale, without regard to experience.

Local 1037 proposed that attorneys receive the same wage increases as management and that a labor-management committee develop a single compensation plan for attorneys based on experience and service. Management rejected this proposal.

On or about July 30, 2004, the parties initialed an Hours of Work article. That article has two typed schedules of hours -- a 35 hour workweek and a 40 hour workweek -- and one handwritten one: "The employees covered by the Agreement who have a [37.5] hour workweek shall work [7.5] hours per day exclusive of the lunch period."

In October 2004, Rosenstein and CWA’s attorney and two management representatives, Gregory Franklin and Bill Schwartz, had a phone conference. To address the equities of the varying pay scales, the management representatives proposed moving all attorneys who were on the 35 hour pay scale to the 37.5 hour pay scale. That movement would affect four attorneys in the Law Department. According to Rosenstein, CWA specifically discussed that no attorney’s work schedule would be changed; attorneys moved to a 37.5 hour pay scale would not be required to work 2.5 more hours per week; and attorneys working from 9:00 a.m. to 5:00 p.m. would not have their work schedule changed. She asserts that the parties agreed to use the language “pay scale” to make clear that a different “workweek” would not be required.

On October 28, 2004, Rosenstein sent Franklin an e-mail with an attached Tentative Agreement. The e-mail explained that she had deleted the handwritten sentence from the Hours of Work article “about the hours scheduling on the 37.5 hours (after the much discussed understanding).”

On or about December 17, 2004, Local 1037 representatives, including Rosenstein, and City representatives, including Franklin and Joanne Watson, the Corporation Counsel, signed a Tentative Agreement. One provision stated:

> Hours of work: Attorneys who are on the 35 hour pay scale shall be moved up to the 37.5 hour pay scale on January 1, 2005.

According to Rosenstein, this language reflected the agreement reached during the telephone conference.

On January 10, 2005, Franklin sent Rosenstein an e-mail entitled CWA Contract Review. The e-mail asked her to make several changes, including adding this language to Article 6: "Effective January 1, 2005, attorneys on the 35-hour pay scale shall work seven and one-half (7.5) hours per day exclusive of the lunch period." Rosenstein discussed this request with Franklin; according to her, they agreed that the parties had agreed to put all attorneys on the 37.5 hour pay scale because they were all working the same schedule. He acknowledged that management had made this proposal and that no one's hours of work would be changed.

According to Rosenstein, Franklin proposed that the 37.5 hour work week be removed from the Hours of Work article. As a result of this conversation, Rosenstein sent Franklin revised contract language removing any reference to the 37.5 hour workweek from Article 6, but including the reference to moving the attorneys up to the 37.5 hour pay scale.

On January 25, 2005, Franklin sent Rosenstein a revised contract taking the language about the 37.5 hour pay scale out of the Hours of Work article. She sent Franklin an e-mail questioning the exclusion. He allegedly responded: "It's in the

TA and we're bound to it anyway. No need to include it in the contract."

The City prepared a final contract and the City Council adopted a resolution executing that contract on March 2, 2005. Article 6 provides:

> Those employees covered by this Agreement who have a thirty-five (35) hour workweek shall work seven (7) hours per day exclusive of the lunch period.
>
> Those employees covered by the Agreement who have a forty (40) hour workweek shall work eight (8) hours per day exclusive of the lunch period.
>
> The City shall provide a 13 day notice in advance of non-emergency work schedule changes, subject to review by management.

No language concerning the 37.5 hour workweek or pay scale was included in this article.

In May of 2005, Franklin told Rosenstein that the 37.5 hour pay scale would have to go into effect on July 1 instead of January 1 so that there would be no issue about changing anyone's hours. She responded that Local 1037 would file a grievance if the pay raise was not made effective in January. The new contract's grievance procedure ends in binding arbitration.

On May 24, 2005, Watson issued a memorandum to four attorneys concerning a change in work hours. It stated that in accordance with the parties' contract, their work hours had been changed as of January 1, 2005; they had to work 37.5 hours per

week; they could choose between working from 9:00 a.m. to 5:30 p.m. or from 8:30 a.m. to 5:00 p.m.; and they had to punch in and out to ensure being credited for working 37.5 hours per week. On June 30, Watson issued a memorandum to several individual attorneys. This memorandum advised these attorneys that they were not working the required 37.5 hours per week and reminded them to choose a work schedule. Three other attorneys received a memorandum stating that they had failed to work 37.5 hours per week and that their work schedule would now be from 9:00 a.m. to 5:30 p.m. Local 1037 was not copied on any of these memoranda.

On July 12, 2005, Rosenstein sent Franklin an e-mail stating that these memoranda confused her since the parties had repeatedly discussed the matter and agreed that no one had to change work hours. She received an e-mail response from a Labor Relations Specialist. The e-mail stated:

> The Law Dept. has instructed all attorneys to have the time which they punch in and out of work be reflective of the weekly hours of their title as they are administratively required to monitor. Consequently an additional thirty (30) minutes per day must be accounted for in their work hours in order that their 37.5 status continue.
>
> Therefore, these employees may return to their 35hr status in order to maintain their current schedules or remain [in] the new 37.5hr status with the requirement of the additional 30 minutes per day. . . .

On July 20, 2005, Local 1037 filed a grievance asserting that "Management is seeking to unilaterally change the schedule

and hours of CWA represented attorneys." The grievance was moved to the second step. It stated, in part:

> Statement of Grievance: 1. Attorneys who were on a 35 hour pay scale, were to be moved to a 37.5 hour pay scale, without any change in work schedule, as of January 1, 2005.
>
> The change to a 37.5 hour pay scale was not made until June and workers did not receive retroactive money. In addition, these workers were told to change their work schedule and work additional hours in order to be put in this pay scale, even though there was an agreement that this was just a movement to another pay scale and no one was to have to work additional hours or change their work schedule.
>
> 2. Attorneys who were on a 37.5 hour pay scale were told that they were to change their work schedule and work additional hours.
>
> Remedy for Grievance: Move attorneys who were on a 35 hour pay scale to a 37.5 hours pay scale and pay them retroactively on that pay scale to January 1, 2005 as the contract requires, and do not change any work schedules or require any additional hours of work.

The grievance was not resolved and Local 1037 demanded arbitration. This petition ensued.

Our jurisdiction is narrow. <u>Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed</u>., 78 <u>N.J</u>. 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. We specifically do not consider the City's argument that the negotiated agreement authorized it to increase the number of weekly work hours to 37.5.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable. A subject is negotiable if it is not fully or partially preempted by a statute or regulation; it intimately and directly affects the employees' work and welfare; and a negotiated agreement would not significantly interfere with the determination of governmental policy. Local 195 adds:

> To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The City has not identified any statute setting its attorneys' work hours or pay and thus preempting negotiations by

eliminating its discretion to enter into the agreement alleged by Local 1037. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).[2/] We thus focus on balancing the employees' interests in seeking to enforce the alleged agreement against the City's interests in acting unilaterally regardless of the alleged agreement.

From its first case addressing the scope of negotiations to its most recent case, our Supreme Court has recognized the vital interests of employees in negotiating over their work hours and their compensation. See Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973); 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); see also Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980) (working hours and rates of pay are the prime examples of terms and conditions of employment); Local 195 at 403 (accord); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 331-332 (accord). Work schedules are thus mandatorily negotiable unless the facts of a particular case prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. Teaneck; Local 195; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). Further, the

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2/ The City does cite N.J.S.A. 40A:9-139 and In re City of Newark, 346 N.J. Super. 460 (App. Div. 2002), but neither citation speaks to attorney work hours or pay.

equation between the amount of work required and the amount of pay received is an issue at the heart of the negotiations process. Woodstown-Pilesgrove at 591 (when an employment condition is significantly tied to the relationship of the annual rate of pay to the number of days worked, negotiation is proper even if its cost may have a significant effect on managerial decision); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (parties negotiated over equation between hours or days of work and pay received and it was for an arbitrator to decide what agreement they made). Local 1037's claim is based legally and factually on the interests cited in these cases: the employer allegedly agreed to continue the attorneys' historical work schedule; it allegedly agreed to increase their pay but not their work hours in order to make salaries and work schedules rational and uniform; and it allegedly agreed to change the attorneys' pay scale effective January 1, 2005.

The City correctly asserts that its managerial prerogatives generally include determining the hours and days during which a service will be operated, Local 195, and the staffing levels needed to provide its services, Passaic. Bd. of Ed., P.E.R.C. No. 90-3, 15 NJPER 490, 492 (¶20200 1989). But these prerogatives do not negate the employees' right to negotiate over which employees will work what hours given the hours of operation and staffing

levels set by management. Local 195; Sports & Exposition Auth. Further, the City has submitted no certifications establishing facts that would show how the alleged agreement would interfere with these prerogatives. We note that it is undisputed that attorneys work during lunch and beyond regular work hours when necessary to prepare cases.

On balance, the employees' interests in seeking to enforce the alleged agreement outweigh the employer's interests in increasing the employees' work hours unilaterally. The employer has not demonstrated a particularized governmental policy need to change the normal work schedule. And even if it had, it would not have a prerogative to unilaterally increase work hours without renegotiating the equation between work hours and pay it allegedly agreed to or to unilaterally determine the effective date of the pay scale change. We therefore decline to restrain arbitration.[3/]

ORDER

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

BY ORDER OF THE COMMISSION

3/ Local 1037 asserts that the petition is frivolous and requests that we order the City to compensate it for its costs in responding. We do not have the power to award attorneys' fees so do not consider whether such an award would be appropriate in this case.

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

ISSUED: June 29, 2006

Trenton, New Jersey