

P.E.R.C. NO. 2008-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY and the
MERCER COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2007-059

MERCER COUNTY SHERIFF'S
OFFICERS, P.B.A. LOCAL NO. 187

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Mercer County and the Mercer County Sheriff's Office for a restraint of binding arbitration of a grievance filed by Mercer County Sheriff's Officers, P.B.A. Local No 187. The grievance alleges that the Sheriff's Office violated the parties' collective negotiations agreement when it refused to implement the work schedule approved in negotiations. The Commission holds that the employers could have filed a scope of negotiations petition during the interest arbitration process and argued that a proposed ten-hour work schedule was not mandatorily negotiable. N.J.A.C. 19:16-5.5. By not doing so, they have effectively forfeited their ability to argue that the work schedule is not mandatorily negotiable. The Commission finds that the employers' efficiency concerns could have been addressed in the recently completed negotiations and can be addressed in any future negotiations. The Commission further finds that the employers have not argued or shown that arbitration seeking implementation of the recently negotiated work schedule would substantially limit any governmental policymaking powers. The grievance is therefore at least permissively negotiable.

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, on the briefs)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

On March 28, 2007, Mercer County and the Mercer County Sheriff's Office petitioned for a scope of negotiations determination. The joint employers seek a restraint of binding arbitration of a grievance filed by Mercer County Sheriff's Officers, P.B.A. Local No. 187.^{1/} The grievance alleges that the Sheriff's Office violated the parties' collective negotiations

1/ The petition was filed on behalf of the Sheriff. Other documents indicate that the County is pursuing the petition. Sheriffs and counties have been found to be joint employers. Each possesses independent, distinct and controlling authority over separate aspects of the employment relation. See Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). We will therefore refer to the Sheriff's Office and the County as joint employers.

agreement when it refused to implement the work schedule approved in negotiations. We decline to restrain arbitration over this legally arbitrable work schedule issue.

The parties have filed briefs and exhibits. The employers have submitted an undersheriff's certification. The PBA has not filed any certifications. While the PBA did request an evidentiary hearing on the factual allegations in the undersheriff's certification, it did not recite facts "supported by certification(s) based upon personal knowledge" or detail "the substantial and material disputed factual issues that the requesting party contends necessitate an evidentiary hearing." N.J.A.C. 19:13-3.5 and N.J.A.C. 19:13-3.6. We therefore deny the request for a hearing. These facts appear.

The Sheriff has operated a substation at the Trenton-Mercer Airport since 1995. Commercial flights are limited to certain unspecified hours so the airport is not a 24-hour-a-day operation. Approximately ten sheriff's officers are assigned to provide security. They patrol the grounds, terminal and airfield. The officers have historically worked an eight-hour work schedule with shifts from 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight, and midnight to 8:00 a.m. The sergeants who supervise the sheriff's officers work an eight-hour schedule.

The PBA represents sheriff's officers jointly employed by the County of Mercer and the Sheriff. After a previous collective negotiations agreement expired, the parties engaged in successor contract negotiations and the PBA petitioned for interest arbitration. During those proceedings, the County and the PBA reached a voluntary agreement that included a ten-hour work schedule for sheriff's officers at the airport. Article 3 reflects that agreement. It states:

3.1 The regular work shifts will be determined by the Employer on January 1 of each year. The Employer reserves the right to adjust work schedules and/or work shifts upon two (2) weeks notice to the Employee. Work shifts shall consist of thirty-five (35) hours per week, or seven (7) hours per day, excluding lunch.

* * *

3.3 Employees working at the airport shall be on a ten (10) hour work schedule. Airport duty shall be subject to a one (1) year bidding provision.

The agreed-upon grievance procedure ends in binding arbitration.

According to the employers' brief, before implementing the modified work schedule, the Sheriff evaluated the needs of the airport and the consequences of the work schedule change. According to the undersheriff, the ten-hour schedule would cause shift overlaps for four hours a day. During the overlaps, staff

would be doubled and some officers would be idle because there would not be enough work or vehicles.

The ten-hour work schedule was not implemented so the PBA filed a grievance. The record does not contain the grievance or any response. The PBA then demanded arbitration over the alleged failure to abide by the ten-hour work schedule in the contract. The demand asks for this remedy: "all affected employees working eight (8) hour shifts and extra day per week will be compensated with double time or overtime for each extra day worked within seven (7) day work week or commensurate time period retroactive to execution of contract." This petition ensued.

The PBA argues that the petition is untimely under N.J.A.C. 19:16-5.5, which requires that scope petitions be filed within 14 days of receipt of an interest arbitration petition or the respondent will be deemed to agree to submit all unresolved issues to interest arbitration. The employers respond that a party does not lose its right to challenge whether an issue is an illegal subject of negotiations even after entering into a collective negotiations agreement containing the provision at issue.

The employers could have filed a scope of negotiations petition during the interest arbitration process and argued that a proposed ten-hour work schedule was not mandatorily negotiable. N.J.A.C. 19:16-5.5 (party may file scope petition within 14 days

of filing of interest arbitration petition; failure to do so shall be deemed to constitute an agreement to submit all unresolved issues to arbitration). By not doing so, they have forfeited their ability to argue that the work schedule is not mandatorily negotiable. However, they can still argue that a grievance arising under the negotiated provision is not permissively negotiable and therefore not legally arbitrable. 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 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 and explains the difference between mandatory and permissive negotiability:

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]

Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented. In this case, arbitration will be permitted if the work schedule is permissively negotiable.

Work hours have long been considered a mandatorily negotiable term and condition of employment. Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973); see also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 331 (1989). Recognizing that the subject of work hours encompasses work schedules setting the hours and days employees will work, the Supreme Court has held that work schedules are generally negotiable. Local 195, IFPTE v. State, 88 N.J. 393, 411-412 (1982). The Legislature has also expressly designated work hours as a negotiable term and condition of employment for police officers and firefighters. N.J.S.A. 34:13A-14 et seq.; N.J.S.A. 34:13A-16g(2) and (8).

Consistent with the Supreme Court's cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that work schedules of police officers and

firefighters are mandatorily negotiable. Teaneck Tp. v. Teaneck FMBA Local No. 42, 177 N.J. 560 (2003); see also cases cited in Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule in order, 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); Borough of 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 employers do not assert that implementing the negotiated schedule would result in under-staffing or make the airport less secure. See Clinton Tp., P.E.R.C. No. 2000-3, 25 NJPER 365 (¶30157 1999), recon. den. P.E.R.C. No. 2000-37, 26 NJPER 15 (¶31002 1999) (while gaps in coverage significantly interfere with a public employer's ability to provide police protection, proposal that would result in overstaffing did not implicate the same concerns and was not per se non-negotiable); contrast Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992) (as distinguished in Clinton Tp., work schedule

proposal that left gaps in police coverage, did not provide necessary supervisory coverage, and created overlaps in coverage not mandatorily negotiable). While their brief asserts that supervisory problems might result by virtue of having different work schedules for supervisors, the employers have not submitted any factual certifications addressing that point or detailing what the problems might be. Compare Teaneck Tp. and FMBA Local No. 42, 353 N.J. Super. 289, 302-305 (App. Div. 2002), *aff'd o.b.* 177 N.J. 560 (2003) (different work schedule for superior officers was mandatorily negotiable).^{2/} The Sheriff's efficiency concerns could have been addressed in the recently completed negotiations and can be addressed in any future negotiations. We also note that the Sheriff's Office may assign sheriff's officers to duties within their job descriptions and during their work hours as it sees fit. Cherry Hill Tp. Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (¶16024 1984) (employer that was ordered to restore unilaterally reduced work hours could assign any related employment duties during those hours).

In sum, the employers have forfeited their right to claim that the agreed-upon work schedule was not mandatorily negotiable and they have not argued or shown that implementing the recently

^{2/} The managerial prerogative finding in Ocean Tp., D.U.P. No. 2007-3, 32 NJPER 349 (¶146 2006), a case the employers rely upon, was reversed in P.E.R.C. No. 2007-44, 33 NJPER 5 (¶5 2007).

negotiated work schedule would substantially limit any governmental policymaking powers. The grievance is therefore at least permissively negotiable. Accordingly, we deny the employers' request for a restraint.

ORDER

The request of the County of Mercer and Mercer County Sheriff 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.

ISSUED: August 9, 2007

Trenton, New Jersey