

P.E.R.C. NO. 2008-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLOSTER,

Petitioner,

-and-

Docket No. SN-2008-054

P.B.A. LOCAL 233,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a work schedule issue raised by P.B.A. Local 233 in negotiations with the Borough of Closter for inclusion in a successor collective negotiations agreement. The Commission holds that work schedules are normally mandatorily negotiable and that there are exceptions to the negotiability rule when facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. The Commission does not discount the employer's concerns but decides only that they are not so compelling and so incontrovertible to warrant cutting off the negotiations and interest arbitration process. The parties may present their concerns to the interest arbitrator for consideration based on the statutory criteria.

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, Edward Rogan & Associates, LLC,
attorneys (Joann Riccardi, on the brief)

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

DECISION

On February 1, 2008, the Borough of Closter petitioned for a scope of negotiations determination. The Borough seeks a determination that the issue of "work schedule" listed on a petition to initiate compulsory interest arbitration filed by P.B.A. Local 233 is not mandatorily negotiable and may not be considered by an interest arbitrator for inclusion in a successor collective negotiations agreement. We find that the issue is mandatorily negotiable and may be considered by the interest arbitrator.

The parties have filed briefs and exhibits. The Borough has submitted the certification of its police chief. The PBA has

submitted the certification of its president. We draw these facts from the parties' certifications and exhibits.

The PBA represents all sworn police personnel, excluding the chief and deputy chief. The parties' collective negotiations agreement expired on December 31, 2007 and the PBA has petitioned for interest arbitration. It appears the PBA is seeking a 12-hour work schedule, but specific language has not been submitted.

Article 8.00 of the expired agreement is entitled Work Day, Work Week and Overtime. It provides, in pertinent part:

8.01 The normal work day tour shall be eight (8) hours in a twenty-four (24) hour period which shall include within the eight (8) hour span, forty-five (45) minutes of mealtime per day as well as appropriate rest periods.

8.02 There shall always be sixteen (16) hours of time off between tours of work. The normal work week shall be forty (40) hours in a seven (7) consecutive day period. Work in excess of the Employee's basic work week or tour for a day is overtime.

The Borough employs 13 patrol officers, 6 sergeants, 2 lieutenants, and the chief. The chief states that he has always reserved the right to make the final decision on work schedules and has never negotiated over them. He asserts that a 12-hour schedule was in effect from 1999 through 2005 to increase productivity and reduce costs, including overtime and sick time, and that it was implemented with the cooperation of the rank and file. The chief states that the data for 1999-2005 demonstrated that performance statistics were lower and sick time increased.

He also states that of the three performance categories that were higher in 2005 when compared to 1999, there were minimal increases in criminal and drunk driving arrests, and there was a significant rise in CDS (drug) arrests. The chief attributes this statistic to heightened awareness by newly-hired patrol officers, rather than the 12-hour shifts. Also, starting in 2001 supervisors began complaining that they could not effectively supervise the patrol officers since supervisors were on eight-hour shifts, while patrol officers were on 12-hour shifts. The chief states that supervisors also expressed discontent that the 12-hour shifts resulted in 87 less working days for the patrol officers.

In 2006, the chief implemented an eight-hour shift for patrol officers. The chief asserts that he must retain a prerogative to set schedules to effectively and efficiently run the department.

The PBA president states that the 12-hour shift schedule in effect during 1999-2005 was collectively negotiated each year and states that the chief never expressed concerns over performance, but threatened to revert to the eight-hour schedule if patrol officers failed to increase the number of citations issued. During the six years of the 12-hour work schedule, the PBA agreed to have senior patrol officers assume supervisory posts on

Friday, Saturday and Sunday to resolve supervision concerns. The president asserts that this practice continues.

In February 2007, the PBA filed an unfair practice charge alleging that the Borough violated the New Jersey Employer-Employee Relations Act when it refused to negotiate over the 2007 work schedule.^{1/} The PBA's application for interim relief was denied by a Commission Designee. Borough of Closter, I.R. No. 2007-10, 33 NJPER 101 (¶35 2007). The unfair practice case and a pending grievance were ultimately resolved through a written settlement providing:

The Employer agrees to reinstate the original January 22, 2007 "Patrolman Schedule," attached hereto as "Exhibit A." This schedule shall remain in effect until such time as the parties fully negotiate and execute the successor collective bargaining agreement which replaces the current collective bargaining agreement expiring on December 31, 2007.

Our jurisdiction is narrow. We do not consider the wisdom of proposals, only the abstract issue of their negotiability.

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J.

^{1/} In 2006, the chief implemented a 12-person rotation with eight-hour shifts and five "drop" shifts. A drop shift apparently is a practice that allows the Borough to change a patrol officer's schedule without the minimum advance notice required by the parties' agreement. In January 2007, the chief posted a 13-person rotation with eight-hour shifts, seven drop shifts and more coverage on the 11 p.m. to 7 a.m. shift.

144, 154 (1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Under Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), a subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with the determination of governmental policy.

In filing for interest arbitration, the PBA listed the work schedule article as a disputed non-economic issue. The Borough argues that whether a work schedule is negotiable depends on the outcome of Paterson's balancing test. It maintains that the balancing test falls in its favor since it has a small police force and must retain the management prerogative to set the work schedules to address overtime, efficiency, coverage and supervisory issues. It asserts that the chief has always set the work schedules and must retain that managerial prerogative.

The PBA responds that work schedules have consistently been held to be mandatorily negotiable. The PBA claims that the Borough should be required to show how the eight-hour schedule has improved the deficiencies allegedly created by the 12-hour schedule. The PBA asserts that even under the eight-hour schedule, there are supervisory concerns. It maintains that the Borough has not met the burden of showing that negotiating a 12-

hour schedule would significantly interfere with any existing policies or managerial prerogatives.

The work schedules of police officers and firefighters are normally mandatorily negotiable. Teaneck Tp. v. Teaneck FMBA Local No. 42, 177 N.J. 560 (2003); Mt. Laurel Tp. and Mt. Laurel Police Officers Ass'n, 215 N.J. Super. 108 (App. Div. 1987). See also cases cited in Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). Given these precedents, we reject the Borough's claim that the chief has a non-negotiable right to set work schedules. In Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236, 237 (¶28113 1997), we said that the employer's assertion of an unfettered right to control the length, frequency and timing of shifts and days off conflicted with cases holding that work hours and schedules are mandatorily negotiable. We cited Maplewood, explaining that:

[W]e must examine the facts of each case to determine whether negotiations over a work schedule proposal or change would significantly interfere with governmental policy. It is important to understand, however, that this task is different from judging the wisdom of a proposal or determining which party's negotiations position is more reasonable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (1977). When the Legislature required negotiations over terms and conditions of employment, it recognized that both management and employees would have legitimate concerns and competing arguments and it decided that the negotiations process was the best forum for addressing those concerns and arguments and the best way to improve morale and

efficiency. See N.J.S.A. 34:13A-2; Woodstown-Piles Grove [Bd. of Ed. v. Woodstown-Piles Grove Ed. Ass'n, 81 N.J. 582] at 591[1980]. When the Legislature approved interest arbitration as a means of resolving negotiations impasses over the wages, hours, and employment conditions of police officers and firefighters, it recognized that both management and employees would have legitimate concerns and competing evidence and it decided that the interest arbitration process was the best forum for presenting, considering, and reviewing those concerns and evidentiary presentations and the best way to ensure the high morale of these employees and the efficient operation of their departments. N.J.S.A. 34:13A-14 et seq. Indeed, the Legislature expressly instructed interest arbitrators to consider the public interest and welfare in determining wages, hours, and employment conditions and contemplated that such considerations would be based on a record developed by the parties in an interest arbitration proceeding. N.J.S.A. 34:13A-16g(1). See also Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994). The question, then, is not which party should prevail in negotiations or interest arbitration or whether a particular proposal raises some legitimate concerns, but whether the facts demonstrate that a particular work schedule issue so involves and impedes governmental policy that it must not be addressed through the negotiations process at all despite the normal legislative desideratum that work hours be negotiated in order to improve morale and efficiency.

The chief has listed a mix of operational, economic and morale reasons in urging that we find a 12-hour schedule non-negotiable.^{2/} The PBA president has contested some of those

^{2/} The Borough asserts that the decision denying interim relief in the unfair practice case supports its present position.

(continued...)

assertions and stated that others do not exist or are not a factor. He also asserts that the chief has threatened to change work schedules if the officers do not issue enough citations.

There are exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. See Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (employer proved on appeal that discipline problems caused by inadequate supervision of radio patrol officers on midnight shift necessitated a shift change); 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) (proposal would have eliminated relief officer system used to plug coverage gaps in small police department). However, on this record, the PBA's proposal would not result in the severe coverage and supervision problems found to preclude negotiations altogether in Irvington and Atlantic Highlands.

As in Maplewood, we do not discount the employer's concerns; we decide only that they are not so compelling and so incontrovertible as to warrant cutting off negotiations and the interest arbitration process altogether. Both parties may

2/ (...continued)

An interim relief decision is not a final determination and the Designee did not hold that the Borough had a non-negotiable prerogative to set police work schedules.

present their concerns to each other and may develop a full record enabling an interest arbitrator to evaluate their concerns in light of the specifics of any PBA proposal, the public interest, and all the statutory criteria. Nothing we have said should be construed as commenting on the merits of the work schedule issue in negotiations or interest arbitration.

ORDER

The issue of work schedules listed on P.B.A. Local 233's interest arbitration petition concerns a mandatorily negotiable subject and may be submitted to compulsory interest arbitration.

BY ORDER OF THE COMMISSION

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

ISSUED: March 27, 2008

Trenton, New Jersey