

P.E.R.C. NO. 2012-72

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLE SHADE,

Petitioner,

-and-

Docket Nos. SN-2011-052

SN-2011-061

PBA LOCAL 267,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals that PBA Local 267 seeks to submit to interest arbitration for a successor agreement with the Township of Maple Shade. The Commission holds that the proposals regarding layoff by seniority; work hours; shift bidding; and pay periods are mandatorily 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, Capehart & Scatchard, attorneys  
(Armando Riccio, of counsel)

For the Respondent, Mets, Schiro & McGovern, LLP,  
attorneys (Leonard C. Schiro, of counsel)

DECISION

On February 11, 2011, the Township of Maple Shade petitioned for a scope of negotiations determination. The Township asserts that a number of proposals that PBA Local 267 has made during collective negotiations are not mandatorily negotiable and may not be submitted to compulsory interest arbitration.

Specifically, the Township objects to the following proposals.

1. Any formal layoff proceeding taken by the Township will be done on the basis of Seniority in accordance with the regulations set forth by the New Jersey Department of Personnel as in effect as of July 1, 2010.
2. All employees performing the duties of Detective as assigned by the Chief of Police, with the approval of the Township Manager, shall be assigned to a

42 hour work week consisting of four 10 ½ hour work days, with the exception of the Duty Detective and the Juvenile Detective who will be assigned to a five day work week consisting of four 8 ½ hour days and one 8 hour day. It shall be at the discretion of the Chief of Police or his designee to change the work week from a five day work week to a 4 day work week.

3. Employees will be entitled to bid on which shift they request, but only day or night. This shift bidding will be based upon seniority within the department. Management will make every attempt to grant the more senior officer the shift requested except where special skills and/or qualifications may be required or where emergent matters dictate a deviation from seniority.
4. Employees will be paid every 2 weeks for a period of 52 weeks for a total of 26 pay periods per calendar year.

The Township also contends that other issues concerning various contractually negotiated leave time should be precluded from inclusion in a successor agreement. No formal proposals have been advanced by either the PBAs' or the Township concerning these issues, but arise from a recent Unfair Practice Charge filed by the PBAs' relating to restrictions imposed upon the use of vacation leave, personal holiday leave, bereavement leave, compensatory time and sick leave. The PBAs' application for interim relief was granted by Commission Designee Jonathan Roth on February 7, 2011 (I.R. No. 2011-23).

The parties have filed briefs and exhibits. The PBAs' have filed the certification of its President, Police Officer Robert Bennett McGuire and the Township has filed the certification of Police Chief Gary Gubbei. These facts appear.

The PBA Local 267 represents the titles police officer and detective, and Local 267 (SOA Sergeants Unit) represents sergeants employed by the Township. Both CNA's are duplicative in all respects material to this decision. The parties collective negotiations agreements are effective from January 1, 2006 through June 30, 2010.

On December 26, 2010, the PBAs' filed petitions to initiate compulsory interest arbitration together with attachments setting forth the text of new sections it seeks to add. The Township asserts that the PBAs' proposals as set forth above as well as the sections of the expired contracts involved in the unfair practice charge are not mandatorily negotiable, and cannot be submitted to interest arbitration.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 92-93 (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. [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 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.

Although public safety employers and the representatives of police or firefighters may make legally enforceable agreements on permissive subjects of negotiations, neither party may insist upon the continuation of such subject in a successor agreement nor may a permissive subject be submitted to interest arbitration. A public employer may limit interest arbitration to mandatorily negotiable subjects only. See N.J.S.A. 34:13A-16f(4); Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981). Accordingly, in order to be eligible for interest arbitration, the PBA's proposals must be mandatorily negotiable.

The first issue challenged by the employer in its petition is the PBAs' proposal to insert language into the Agreement that requires the employer to undertake any layoffs on the basis of seniority "in accordance with the regulations set forth by the New Jersey Department of Personnel as in effect as of July 1, 2010." The employer argues that this clause is preempted by Civil Service regulations that regulate the procedures by which layoffs are conducted in a Civil Service community. The PBAs'

argue that the proposal merely references the Civil Service regulations, and therefore is not preempted. In State v. State Supervisory Employees' Association, 78 N.J. 54, 90-91 (1978) our Supreme Court determined that it would be non negotiable for an employee organization to seek to replace the Civil Service Commission's role in determining the standards to be utilized by a public employer in effectuating a layoff since those standards were fully set forth in the Civil Service Law and Rules.

However, that is not what the PBAs' seek to accomplish by their proposals. Rather, the proposals recognize the authority of the Civil Service Commission to mandate that layoffs be accomplished by seniority in accordance with the Civil Service regulations.

The only aspect of the proposal which differs from the Civil Service Rule is the insertion of the words: "in effect as of July 1, 2010." Because this language would seek to limit the Civil Service Commission's discretion to modify its regulations, this phrase is not mandatorily negotiable. See State v. State Supervisory Employees.

The Township also challenges the proposal related to the scheduling of the work-week for the Detectives employed by the employer. This proposal would require the Township to schedule certain Detectives to either a four-day work week or a five-day work week, with either schedule consisting of a 42-hour work week. Applying the standard for negotiability set forth above,

and with particular attention to the decisions in Local 195, IFPTE v. State 88 N.J. 393 (1982) and Tp. of Teaneck v. FMBA, 353 N.J. Super. 289 (App. Div. 2002), the issue of individual work schedules are unquestionably negotiable terms and conditions of employment. Only where the employer can demonstrate that negotiation over such an issue would interfere with a managerial policy decision would the balancing test turn the issue into a non negotiable matter of policy. The employer's arguments regarding the size of the detective division and that crimes are committed at hours outside of the specified schedules of the detectives do not rise to the level of a significant interference with the ability of the Township to provide effective police service to its citizens. This is even more so where as here the contract in subsequent clauses provides the Township with the right to temporarily alter Detective schedules in order to meet circumstances involving a "public inconvenience or threat." In Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997), we comprehensively addressed the negotiability of police work schedules. Consistent with Supreme Court cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that work schedules of police officers are mandatorily negotiable. Id. at 113. 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 to effectuate a governmental policy. We must therefore examine the facts of each case in making a negotiability determination in the context of a work schedule dispute. Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); see also Borough of Closter, P.E.R.C. No 85-86, 11 NJPER 132 (¶16059 1985) (weighing or balancing approach requiring case by case analysis). The question in Maplewood was whether a proposed contract provision on work schedules, if adopted, would so significantly interfere with governmental policy that it had to be taken off the negotiations table as a matter of law. Under the circumstances of this case, we hold that if the employer did agree to the proposals put forth in this regard by the PBAs', abiding by such an agreement during the life of this contract would not substantially limit the Township's governmental policymaking powers. Therefore, we conclude that the proposal is negotiable and may be submitted to interest arbitration.

The Township also challenges the PBAs' proposal that would give employees the right to bid for shift assignments based upon seniority. The employer bases its objection on two arguments. First, it argues that the use of seniority as a determinant for bidding on shifts violates the authority of the Civil Service Commission to regulate assignments of employees, including shift assignments, citing N.J.S.A. 11A:4-16, and N.J.A.C. 4A:4-7.2.

Second, it argues that an employer may not be compelled to honor a seniority based shift bidding clause because it retains the managerial prerogative to make such assignment based upon its determination of both subjective and objective qualification.

Neither of these arguments is persuasive. The Commission has long held that shift bidding proposals are not pre-empted by Civil Service regulations. Camden County Sheriff and PBA Local 277, SOA, 30 NJPER 33 (¶10 2004). To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Neither the Statute nor the Regulation relied upon by the Township herein specifically and comprehensively set out the method by which an employer must determine how a shift schedule is assigned. N.J.S.A. 11A:4-16 provides:

§ 11A:4-16. Transfer, reassignment and lateral title change

The rules of the Civil Service Commission shall define and establish the procedures for transfer, reassignment and lateral title change. Employees shall be granted no less than 30 days' notice of transfer, except with employee consent or under emergent circumstances as established by rules of the Civil Service Commission. The commission shall provide for relocation assistance for State employees who are transferred or reassigned to a new work location due to a phasedown or closing of a State operation, subject to available appropriations. Transfers, reassignments, or lateral title

changes shall not be utilized as part of a disciplinary action, except following an opportunity for hearing. Nothing herein shall prohibit transfers, reassignments, or lateral title changes made in good faith. The burden of proof demonstrating lack of good faith shall be on the employee;

N.J.A.C. 4A:4-7.2 provides:

N.J.A.C. 4A:4-7.2. Reassignments

A reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit. See N.J.A.C. 4A:4-7.7 for appeals.

While it is apparent that the Code section defines a change in shift within an organizational unit as a reassignment, the statute pointed to by the Township does not specifically and comprehensively set out the method by which an employer must determine how a shift schedule is assigned. Rather it provides for notice of a transfer, relocation assistance for employees transferred to a different work location, a ban on making transfers, reassignments or lateral title changes for disciplinary reasons, and requires that any such action shall only be done in good faith. Neither the statute nor regulation references how shifts are to be assigned.

As to the Township's claim that the proposal improperly interferes with its managerial prerogatives regarding staffing, and therefore is non negotiable, here too the argument is not

persuasive. Both the Commission and the Courts have long held that while a strict shift-bidding by seniority clause would not be negotiable, unless the proposal provides sufficient reservation of management's right to deviate from seniority due to required qualifications, skills, or other circumstances so dictate. City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (App. Div. 1990). Here, the proposal specifically exempts adherence to seniority "when special skills and/or qualifications may be required or where emergent matters dictate a deviation from seniority." In Teaneck Tp., P.E.R.C. No. 93-66, 19 NJPER 122 (¶24058 1993), aff'd 20 NJPER 406 (¶25205 App. Div. 1994), we reviewed our long-established case law that finds a shift selection by seniority clause to be mandatorily negotiable only if it expressly preserves management's right to act unilaterally when necessary - for example, when special qualifications are needed for particular tasks, minimum staffing levels must be met, training is required, or emergencies occur. That approach carefully balances the employees' interests in negotiating over their work hours and the employer's duty to protect public safety. As we stated in City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391, 394 (¶25197 1994):

The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any agreed-upon seniority system must be assessed

case-by-case. In the instant matter the proposed language provides the requisite protection for the employer's rights to deviate from strict application of the seniority standard, and the proposal is, therefore negotiable.

The final proposal the Township asserts is nonnegotiable concerns paying employees every two weeks for a period of 52 weeks for a total of 26 pay periods per calendar year. This issue arises in the context of an arbitration ruling wherein a grievance arbitrator rejected the PBAs' claim based upon the language in the expired agreement which read; "Employees shall be paid every two (2) weeks for a period of fifty-two weeks in accord with the provisions of the Township Ordinance." In 2009, based upon the vagaries of the calendar, there were twenty seven pay days within the calendar year. The PBAs' sought an additional pay check during that calendar year. In rejecting their grievance, the arbitrator determined that the meaning of the contract language did not include the possibility of employees exceeding their annual salary by receipt of an additional bi-weekly check. His award was confirmed by Superior Court.

The PBAs' seek to preclude this type of occurrence from repeating, by offering the proposal set forth above, and urge that the subject matter is negotiable. The Township seeks to preclude the proposal from interest arbitration by asserting that the grievance arbitration constitutes either res judicata or

collateral estoppel. In this regard the Township misconstrues those equitable doctrines, and the nature of the interest arbitration process. Both doctrines are designed to preclude a party from re-litigating an issue previously decided either in the same or a different cause of action. The problem with the application of either of these doctrines to the instant petition is that the arbitration which took place dealt with the issue of the interpretation of the old contract language, while the issue before the Commission in the current petition is whether or not the issue of the timing of paychecks is a negotiable matter which may be placed before an interest arbitrator. This Commission has consistently held that the issue of the scheduling of paychecks is a mandatory subject of negotiations. City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989), Borough of River Edge, P.E.R.C. No. 89-44, 14 NJPER 684 (¶19289 1988), Mine Hill Township, P.E.R.C. No. 87-92, 13 NJPER 125 (¶18055 1987), Borough of Fairview, 23 NJPER 398 (¶28183 1997). While we offer no opinion as to the merits of the proposal, nonetheless as it deals with a negotiable issue, it may be submitted to interest arbitration.

In addition to the specifically enumerated issues discussed above, the Township also makes a generalized argument relating to certain issues relating to various leaves with respect to which a Commission designee issued an interim relief decision on

February 7, 2011. Op. of Maple Shade, I.R. No. 2011-33, 37 NJPER 50 (¶19 2011). That decision granted a stay of certain modifications sought to be implemented mid-contract by the Township regarding the use of vacation leave, compensatory time off, and personal holiday leave, and was issued in the context of alleged unfair practice charges. While the Township has not clearly articulated its rationale for claiming that these subject matters should not be permitted to be presented in an interest arbitration proceeding, we will treat this argument as a claim that the matters are not negotiable. Here too, the Township has failed to provide any specific legal or decisional basis for its claim. It appears that the Township argues that it has a right to establish systems to avoid abuse of leave time by employees. Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000), 26 NJPER 313. The PBAs' do not contest this managerial prerogative. The Township is free to make and present to the interest arbitrator whatever proposals it may fashion to address and/or modify the clauses from the current agreement that it deems unacceptable. It has provided no basis upon which we may, in accordance with established Commission and legal precedent, determine that these subjects are illegal, or even permissive subjects for which interest arbitration may not be invoked. For all of the reasons set forth above, the disputed issues may be placed before the interest arbitrator for analysis

and decision. We, of course, offer no opinion as to the substantive validity of the parties positions.

ORDER

The PBAs' proposals as aforesaid are mandatory subjects of negotiations and may be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Jones, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Eskilson recused himself. Commissioner Wall was not present.

ISSUED: June 28, 2012

Trenton, New Jersey