

P.E.R.C. NO. 2013-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Petitioner,

-and-

Docket No. SN-2011-055

PBA LOCAL 266,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Vineland for a restraint of binding arbitration of a grievance filed by PBA Local 266. The grievance contests changes in the scheduling of the power shift. The Commission holds that City had a managerial prerogative to change the start time and to rotate the power shift to achieve its policymaking goal of improving supervision of officers.

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, Buonadonna & Benson, attorneys
(Michael E. Benson, of counsel)

For the Respondent, Alterman & Associates, LLC,
attorneys (Christopher A. Gray, of counsel)

DECISION

On February 9, 2011, the City of Vineland filed a scope of negotiations petition. The City seeks to restrain binding arbitration of a grievance filed by PBA Local 266. The grievance contests changes in the scheduling and starting time of the power shift. We restrain arbitration.

The parties have filed briefs. The City has filed exhibits and the certification of Captain Thomas Ulrich. The following facts appear.

The PBA represents the City's rank and file police officers. The parties' most recent agreement expired on December 31, 2010. The grievance procedure ends in binding arbitration.

Article 3 is entitled Management Rights. It provides in pertinent part:

The City hereby retains and reserves unto itself, or through and by the Chief of Police, Director of Public Safety or designee, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and constitutions of the State of New Jersey and the United States, including, but without limiting the generality of the foregoing, the following rights not inconsistent with the terms and conditions of this Agreement or aforesaid laws of the State of New Jersey or United States:

- d. the transfer, assignment, reassignment, layoff or recall of employees to work, subject to NJDOP regulations;
- e. the determination of the number of employees and of the duties to be performed, in accordance with applicable NJDOP regulations, and the relief of its employees from duty because of a lack of work or lack of funding or other legitimate reason;
- f. the maintenance of the efficiency of its operations and employees as well as the establishment, expansion, reduction, alteration, combination, consolidation or abolition of any job or job classification, department operation or service;
- g. the determination of staffing patterns and areas worked, hours of operation, the control and regulation of the use of facilities, supplies, equipment, materials and other property of the City;
- h. the determination of the number, location and operation of divisions, departments, units and all other work groups of the employer, the assignment of work, the qualifications required, the performance standards and the size and composition of the work force;

- j. the determination of the methods, means and personnel by which its operations are to be conducted;
- m. the making, maintenance and amendments of such operating rules as it may from time to time deem best for the purposes of maintaining order, safety or the effective and efficient operation of the work of the City.

Article 33 is entitled Seniority. It provides that seniority shall be defined for purposes of determining vacation, shift assignments, days off, and for other purposes relating to terms and conditions of employment. It further provides:

Shift assignments shall be fixed and shall not be on a rotating basis provided, however, the Chief shall have the right to reasonably reassign personnel to different shifts as the needs of the Department require. It is noted that the Management Rights Article in this Agreement is hereby recognized and that the Chief of Police shall assign employees to various shifts as he determines to be in the best interests of the Department. In making this determination, the Chief will take into consideration each employee's seniority within the Police Department and, with all things being equal and all qualifications being equal, the selected preference and reasons for the selective preference of each employee for shift assignment. Preferences shall be provided to the Chief of Police by the PBA, immediately; and shall be provided to the Chief of Police no later than November 15 of any given calendar year hereinafter to deal with any change in shift assignments. Likewise, the Chief or designee shall, except in the case of an emergency, notify the PBA of any changes in shift assignments at least 30 days prior to such change.

The PBA recognizes that the Chief of Police must ensure that the proper complement of employees combined with their varying

experience and qualifications are deployed in an appropriate manpower to maintain the efficiency of the Police Department.

The grievance contests the City's unilateral change of the start time for the power shift to 9:00 a.m. The grievance also contests an order that requires squad sergeants to rotate the power shift assignment through his/her squad rather than seek volunteers. On January 7, 2011, the PBA demanded binding arbitration of this grievance (Docket No. AR-2011-575).

According to Captain Ulrich, the power shift is a supplemental shift to provide extra manpower for the patrol division at critical times. The shift has changed numerous times in the past 28 years from a rotating shift to a voluntary shift. The current general order provides for squad sergeants to rotate the power shift assignment throughout their squad and for the shift to begin at 9:00 a.m. Ulrich certifies that these changes grew out of concern for shift supervision. It was determined that the power shift should be drawn from the day shift start times and rotate forward instead of backwards. According to Ulrich, this keeps day shift officers on the day shift and keeps the officer on a shift with their supervisor for a longer period. The prior schedule provided for an officer to be on shift with their supervisor for three hours. The new schedule has the officer and supervisor working together for six and one-half hours.

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.

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:

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 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

It is undisputed that the issues involved in the grievance intimately and directly affect the work and welfare of the officers. The City argues that fixing the overall work schedule for police is a non negotiable managerial prerogative. It asserts that eliminating the practice of shift rotation ended the instances where one officer consistently worked without supervision. The new schedule provides sergeants with the ability to more effectively evaluate and train officers as well as remedy any situations that arise. As to the change in the start time, the City asserts that it provides greater overlap to

achieve its goal of effective supervision. On balance, the City proposes we find the dominant concern is to provide government the absolute unfettered right to consider a multitude of factors relating to deployment of its work force.^{1/}

The PBA responds that the City's change to the parties' past practice of limiting manpower coverage for the power shift to volunteers and changing the start time violated the contract. It requests that we find the grievance is permissively negotiable as the dominant concern is the adjustment of the officer's schedules that effects pay rates and work hours. Since the parties have a past practice of assigning volunteers to the power shift, the PBA asserts that permitting the practice to continue would not substantially limit governmental policy.

Shift schedules and rotations are a component of work hours and, accordingly, implicate Court and Commission case law concerning work schedule negotiability. That case law holds that the work schedules of individual employees, including police officers, are, as a general rule, mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work schedule to effectuate governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215

^{1/} The City argues that there is no permissive category of negotiations. This is an erroneous statement of law as Paterson clearly established a permissive negotiability test for police and fire units.

N.J. Super. 108 (App. Div. 1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), *aff'd* NJPER Supp.2d 245 (¶204 App. Div. 1990); *See also* Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), *aff'd o.b.* 177 N.J. 560 (2003). We and the Courts have held that employers had a prerogative to unilaterally change the shifts of positions or individuals to achieve operational, supervisory or other governmental policy objectives. *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) (employer had a prerogative, in order to correct supervision and discipline problems on midnight shift, to change shift assignments so that all patrol officers worked the same rotating shift as their superiors); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence that 12-hour shift had resulted in staffing, supervision, and fatigue problems - and had compromised officer safety because of reduced number of hours on evening shift - justified a mid-contract change); Borough of Roselle Park, P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005) (enforcement of an agreement providing for annual non-rotating shift selections would substantially limit governmental policymaking given the chief's description of the problems experienced under that system).

These issues need to be determined on analysis of the facts and application of the balancing test. The City has provided the Captain's certification establishing that he made the changes to the power shift schedule for supervisory reasons. The PBA has not provided a certification or even asserted any background facts to rebut the assertions of the Captain. Against this backdrop, we conclude that enforcing an alleged agreement to rotate the power shift and change the start time back would substantially limit the City's policy determination concerning supervision of officers. We grant the City's request to restrain binding arbitration.

ORDER

The City of Vineland's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall recused himself. Commissioner Bonanni was not present.

ISSUED: December 13, 2012

Trenton, New Jersey