P.E.R.C. NO. 2014-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY
(OCEAN VICINAGE),

Petitioner,

-and- Docket No. SN-2013-016

PROBATION ASSOCIATION OF NEW JERSEY
(PROFESSIONAL CASE RELATED UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey Judiciary (Ocean Vicinage) for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case Related Unit). The grievance asserts that the Judiciary violated several provisions of the parties' collective negotiations agreement (CNA) when it unilaterally imposed a new schedule requiring probation officers to conduct field work on at least one Saturday per quarter. The Commission holds the work schedule change is not mandatorily negotiable as negotiations would substantially limit the Vicinage's governmental policies associated with having an effective Probation Division that can ensure that Court orders are enforced.

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, Office of Counsel to the Administrative Director of the Courts (R. Brian McLaughlin, of counsel; Susanna J. Morris, on the brief)

For the Respondent, Fox & Fox LLP, attorneys (Lynsey A. Stehling, of counsel)

DECISION

On October 23, 2012, the State of New Jersey Judiciary (Ocean Vicinage) filed a scope of negotiations petition. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case Related Unit)("PANJ"). The grievance asserts that the Judiciary violated several provisions of the parties' collective negotiations agreement (CNA) when it unilaterally imposed a new schedule requiring probation officers to conduct field work on at least one Saturday per quarter, for a total of four per year.

The parties have filed briefs and exhibits. The Judiciary submitted the certification of James Kelly, the Ocean Vicinage Chief Probation Officer (VCPO). PANJ submitted the certifications of Senior Probation Officers Stephen McMullen and Dwight Covaleskie. These facts appear.

PANJ represents all non-supervisory, case-related professional employees of the Judiciary, in all trial court operations (from the courtroom to probation to case management) who have caseload responsibilities. The Judiciary and PANJ are parties to a CNA with a term of July 1, 2008 through June 30, 2012. The grievance procedure ends in binding arbitration.

Article 5.1 of the CNA, entitled "Hours of Work", provides, in pertinent part:

> (a) Normal work week for all employees covered by this Agreement shall be 35 hours per week within a five day work week and shall have a work week designation of NE....The Judiciary reserves its right to schedule alternate work weeks within the provisions of the Administrative Code. For purposes of this contractual period, alternate work weeks as they relate to practices involving night reporting, supervision and special programs shall be limited to 30 hours per month which may include but shall not be limited to approximately 12 hours per month for night reporting and approximately 18 hours per month for work outside the standard workday/work week and one Saturday or Sunday per month.
>
> (b) Flexible Work Arrangements
> 1. The Judiciary may permit flex-time, job sharing, telecommuting and/or employee

> needs, provided participation by employees is voluntary. The Judiciary may limit participation in an alternative workweek program to selected groups of job titles, work units and/or work locations to accommodate work units' and/or work locations' operational needs.
>
> 2. Flexible work schedules will be subject to change if the Judiciary determines it to be necessary. With 30 days notice to the employees and the Union, the Judiciary may eliminate, or, with the employee's permission, amend flex-time, job sharing, telecommuting or alternative workweek schedules.
>
> (c) Due consideration shall be given to issues of joint concern to the parties including safety, health, individual employee hardship and need for performance of service in the community....
>
> (d) Schedules for flexible and for alternate work weeks shall be issued 30 days in advance....

Article 5.3 of the CNA, entitled "Reporting Time", provides, in pertinent part:

> Probation Officers assigned to offender supervision generally have a particular assignment known as reporting time ("reporting time") whereby they regularly work scheduled extra hours in the evening or on weekends for the purpose of supervising clients or for certain special programs....Existing practices in the counties as to such "reporting time" shall be exceptions to the premium pay overtime requirement unless the existing practice calls for premium pay. The Association maintains that the Letter of Agreement prohibits changes in this practice without agreement and/or completion of the negotiations process, relying in part on paragraph 12b as well as other paragraphs.

> Any agreement made here is without prejudice to the Association's position in this regard and without prejudice to the Judiciary's position on such issues as well. If the Association believes that the Judiciary is acting in a fashion that is inconsistent with this position, then its position in these issues may be submitted by the Association to the appropriate standing arbitrator under the grievance procedure for a final binding determination prior to implementation of any change....

Article 27 of the CNA, entitled "Maintenance and Terms and Conditions of Employment", provides:

> Unless specifically altered by this Agreement, existing practices, as well as the Letter of Agreement entered into between the Judiciary and its employee representative on December 28, 1994, shall remain unchanged.

Section 5.f. of the 1994 Letter of Agreement provides, in pertinent part:

> The Judiciary understands that employees have a great interest in their existing hours of work and in being involved in discussions surrounding any changes in their hours of work. Current hours of work, existing flex-time arrangements, and existing work schedules shall continue unless the Judiciary determines that a change in the hours of work, work schedules or flex-time arrangement will be implemented, in which case no less than thirty (30) days written notice shall be provided to the majority representative prior to such implementation. Upon request of the majority representative to discuss this issue, representatives of the Judiciary will meet with the majority representative to discuss the proposed change.

Title 4A of the New Jersey Administrative Code contains the rules that govern the Civil Service for public employment in New

Jersey. Title 4A, Chapter VI., Subchapter 2. of the Code (N.J.A.C. 4A:6-2 et. seq.) is entitled "Hours of Work." N.J.A.C. 4A:6-2.6 is entitled "Flexitime programs: State service" and subsection 2.6(d) provides, in pertinent part:

> (d) Establishment, modification or termination of a flexitime program shall not become effective without the approval of the Commissioner. Requests for these actions shall be submitted at least 30 days in advance of the proposed effective date to the Department of Personnel and shall include:...

N.J.A.C. 4A:6-2.6 is entitled "Alternative workweek programs: State service" and subsection 2.6(d) provides, in pertinent part:

> (g) Establishment, modification or termination of an alternative workweek program shall not become effective without the approval of the Commissioner. Requests for these actions must be submitted at least 30 days in advance of the proposed effective date to the Department of Personnel and shall include the same items listed in N.J.A.C. 4A:6-2.6(d).

Probation Officers (POs) generally work between the hours of 8:30 am to 4:30 pm, except on field and reporting nights when hours of work are 11:30 am to 7:30 pm. Reporting days are days in which probationers report to the office to see their assigned PO. From 1999 until January 2012, POs were required to work four (4) reporting days per month. Field work is any interaction that occurs outside the office with probationers/clients or any relevant parties to the case. The Ocean Vicinage Field Work Standard states that the purpose of field/home visits is to:

a. verify/confirm address, work site, treatment;
b. make contact to monitor compliance;
c. make contact on failure to report or other non-compliance issue;
d. observe and document environment;
e. show Probation's presence in the community;
f. interview clients;
g. conduct home inspections; and
h. hand serve documents and court notices.

From 1999 until June 2010, POs could choose to conduct field visits on any day of the week, including Saturday or Sunday. There were no mandatory Saturday/Sunday work days, and POs were not restricted with regard to the weekend days on which they chose to work (other than being required to partner up with another employee while conducting field visits). If a PO worked a weekend day, he or she was permitted to take a day off during the following Monday through Friday.

VCPO Kelly certified that in June 2010, he realized that some POs were not in compliance with Article 5.1 of the CNA (providing a 35 hour work week) because some POs worked less than seven (7) hours on Saturday or Sunday field work yet still took a full day off during the following Monday through Friday. On June 11, 2010, VCPO Kelly issued a directive providing two options to POs who chose to work a weekend day. The first option was to work a full seven (7) hours on the weekend day, then take a full day off during the next Monday through Friday. Alternatively, if the PO worked less than 7 hours on the weekend day and took a day

off during the following week, the PO would have to make up the missing time in order to work a full 35 hour week.

VCPO Kelly certified that after the June 11, 2010 directive, very few POs agreed to work on weekends, so the Probation Division did not have the necessary community presence to provide effective supervision of probationers. In late November 2011, VCPO Kelly met with PANJ representatives regarding the Judiciary's plans to change the weekend field work schedule and assignment process. SPO McMullen certified that during that meeting, he advised VCPO Kelly that the Judiciary is obligated negotiate with PANJ prior to implementing a schedule change.

On December 2, 2011, VCPO Kelly distributed a new mandatory alternate workweek policy, effective January 7, 2012. The policy requires POs to conduct field work one Saturday (7 hours) every three months for a total of four Saturdays per year, and requires that the PO take one day off during the Monday through Friday following the Saturday worked. The mandatory alternate workweek policy permits POs to choose one Saturday per quarter from a list of six available Saturdays, and does not allow Sunday field work. At the beginning of the year, POs select from among the available Saturdays on a first come, first serve basis.

On January 20, 2012, PANJ filed a grievance asserting that the Judiciary violated multiple contractual provisions, the Administrative Code, and past practice by imposing the new

weekend schedule on POs without negotiation. As a remedy, PANJ requests that the Judiciary cease the schedule change, forward all schedule change approvals from the Civil Service Commission and the Judiciary Central Office, and immediately negotiate the schedule change. On February 23, VCPO Kelly denied the grievance. The grievance was again denied after Step 2 and 3 grievance hearing decisions in April and July. On August 9, 2012, PANJ demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 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 contractual merits of the grievance or any contractual defenses the employer may have.

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 between public employers and employees when (1) the item intimately and directly affects the work and

> welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. 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]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Judiciary argues that arbitration should be restrained because public employers have a managerial prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. It notes that work schedules of individual employees are mandatorily negotiable, but contends that a particular work schedule is not negotiable if it would significantly interfere with a governmental policy determination. Citing City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005) and City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002), the Judiciary asserts that the Commission has 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. It argues that it has established a particularized need to have its POs work four Saturdays a year in order to carry out their mandated role of enforcing court orders and providing rehabilitative assistance to probationers.

PANJ argues that the Judiciary is required to negotiate impact issues of the new scheduling requirement, as well as abide by language in the CNA and the Administrative Code. It asserts that it does not seek to arbitrate the requirement that POs conduct weekend field visits; however, PANJ contends that the Judiciary has failed to demonstrate a particularized need to have POs work only on the specific Saturdays chosen by the Judiciary. PANJ argues that the Judiciary has also failed to demonstrate why the number of POs allowed to conduct Saturday field work is limited, and why selections are made on a first come, first serve basis. It asserts that the cases cited by the Judiciary in which arbitration of schedule changes was restrained are inapplicable to the instant case because arbitrability was determined based on reasons including: discipline, efficiency, supervision and training, fatigue issues, or changing schedules to coincide with the time that services are most needed.

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a

general rule, mandatorily negotiable. Local 195, IFPTE, supra. But a particular work schedule may not be mandatorily negotiable if it would significantly interfere with 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) (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 Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005) (employer had prerogative to change vice unit's hours to align unit's schedule with the time when services were most needed); 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 officers on evening shift - justified a mid-contract change). Each case must be decided on its own facts. City of Jersey City, supra.

In this case, the Ocean Vicinage has established a need to have POs conduct field visits at the probationers' homes on Saturdays for the Probation Division to have the necessary community presence to provide the effective supervision of the probationers. On this record, we conclude that a contractual restriction on its right to change the work schedule would

substantially limit the governmental policies associated with having an effective Probation Division that can ensure that the court Orders, setting forth the terms and conditions of probation, are appropriately enforced.[1/] Accordingly, we restrain arbitration of the grievance.

ORDER

The request of the State of New Jersey Judiciary (Ocean Vicinage) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: January 30, 2014

Trenton, New Jersey

1/ In our scope of negotiations analysis, we do not consider the impact, if any, of the Administrative Code provisions cited by PANJ; if the Ocean Vicinage is required to comply with those provisions, that is a matter for the New Jersey Civil Service Commission or the courts. Our holding is on the specific facts of this case that the instant issue is not mandatorily negotiable.