P.E.R.C. NO. 2014-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and- Docket No. SN-2013-038

PASSAIC COUNTY SHERIFF'S PROFESSIONAL ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Passaic County Sheriff's Office for a restraint of binding arbitration of a grievance filed by the Passaic County Sheriff's Professional Association. The grievance asserts that the County violated the parties' collective negotiations agreement when it eliminated 12-hour Pitman shifts and changed to 8-hour shifts. Noting that the County's concerns regarding the Pitman schedule were general and speculative, the Commission holds that the County did not prove a particularized governmental policy need justifying non-arbitrability of an alleged elimination of a negotiated work schedule.

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 Giantomasi Webster LLC, attorneys (Jennifer Roselle, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Randi Doner April, of counsel)

DECISION

On January 9, 2013, the Passaic County Sheriff's Office ("County") filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Passaic County Sheriff's Professional Association ("Association"). The grievance asserts that the County violated the parties' collective negotiations agreement by eliminating the 12-hour "Pitman" shift schedule and reverting to a regular 8-hour shift schedule.

The County filed briefs, exhibits, and the certification of Business Administrator Charles Meyers. The Association filed a

brief and the certification of President John Strangeway. These facts appear.

The Association represents all civilian employees of the County's Sheriff's Office. The Association and County are parties to a collective negotiations agreement (CNA) effective from January 1, 2007 through December 31, 2011. The grievance procedure ends in binding arbitration.

Article 4 of the CNA is entitled "Work Week - Hours of Work" and has sections detailing the following four scheduling options: "5 & 2 Employees - Full time"; "5 & 2 Employees - Part time"; "4 & 2 Employees"; and "Pittman [sic] Employees."

Mr. Meyers certifies that in early 2012, the Sheriff's Office determined that the operations structure failed to "provide appropriate services to the public", and that the Pitman schedule and length of shifts "directly impacted the employees' ability to remain alert and focused." He certifies that the Sheriff's Office reverted from the Pitman schedule to other scheduling formats contained in the CNA in order to ensure appropriate staffing levels and proper supervision of employees. Mr. Meyers certifies that having employees on the Pitman schedule "will result in a detriment to the delivery of efficient public services and the increase of risk or harm or death to the sworn officers assigned to Uniform Patrol who rely upon support services to perform their duties."

Mr. Strangeway certifies that the Pitman schedule does not preclude the delivery of appropriate services from the communications division. He certifies that the division was staffed more than adequately under the Pitman schedule, and certainly staffed much better than the current 4-2 schedule. He certifies that there is no change in supervision by changing from the Pitman schedule, because regardless of what schedule the unit members are on, the division commander works 8 a.m. to 4 p.m. Monday through Friday and the patrol commander supervises at all other times. Mr. Strangeway certifies that communications division coverage was not adversely affected by operating on the Pitman schedule for the past three years.

The Association filed a grievance alleging that the County violated the parties' CNA by eliminating the Pitman shift schedule. On May 23, 2012, the Association demanded binding arbitration. This petition ensued. An arbitration hearing was held on January 14, 2013. On February 11, prior to the rendering of a final arbitration award, a Commission Designee granted the County's request for interim restraint of arbitration pending the Commission's scope decision (I.R. No. 2013-10).

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the

County may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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]

Citing City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002), the County asserts that the Commission has deemed it managerial prerogative for an employer to change from one negotiated shift schedule to another in order to meet its staffing, fatigue, safety, and supervision concerns. Citing Borough of Roselle Park, P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005), the County notes that a unilateral shift reassignment was found non-arbitrable based on the police chief's certification that the old shift assignments impaired public safety due to

supervision, performance, and discipline problems. Therefore, the County asserts that its concerns regarding staffing, safety, performance, and supervision allow non-arbitrable schedule changes necessary to implement governmental policy.

Citing Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997) and Maple Shade Tp., P.E.R.C. No. 2012-72, 39 NJPER 61 (¶25 2012), the Association asserts that the Commission and courts have found exceptions to the rule of negotiability of work schedules only when the facts prove a particularized need to preserve or change a work schedule in order to effectuate governmental policy. It argues that Millville and Roselle Park, supra, involved the submission of sufficient proof of particularized needs for changing work schedules, but that here the County has not submitted such proof for its proposition regarding the effect of Pitman schedules on employee safety, supervision, and delivery of services.

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, our Supreme Court and Appellate Division have held that work hours and schedules of individual employees are, as a general rule, negotiable. Local 195, IFPTE v. State, 88 N.J. 393, 411-412 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); 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); 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).

However, a grievance protesting a work schedule change is not legally arbitrable if enforcement of a particular work schedule agreement would substantially limit 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 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). Thus, we have restrained arbitration when the facts prove a particularized need to change a work schedule in order to address supervision or operational problems or to adjust work schedules to conform to the employer's judgment about when services should be delivered. See, e.g., Roselle Park, supra; Borough of Franklin, P.E.R.C. No. 2006-20, 31 NJPER 305 (¶120 2005); City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005); and Millville, supra.

Alternatively, where potential or generalized, as opposed to proven and particularized, fatigue and other operational problems are raised as a bar to a particular work schedule, we have declined to restrain arbitration of work schedule changes. See, e.g., Clayton Bor., P.E.R.C. No. 2013-47, 39 NJPER 272 (¶93

2012)(absent evidence of employer's fatigue concerns, change in overtime shift bidding found arbitrable); Edison Tp., P.E.R.C. No. 2009-51, 35 NJPER 72 (¶29 2009)(grievance over schedule change found arbitrable where Chief's staffing and operational efficiency reasons for change were not particularized and were disputed by union); Newark, P.E.R.C. No. 2006-60, 32 NJPER 40 (¶22 2006)(absent evidence of health, safety, and efficiency problems asserted by fire chief, work schedule change limiting consecutive hours in a shift was found arbitrable); Egg Harbor City, P.E.R.C. No. 98-125, 24 NJPER 223 (¶29105 1998)(grievance over change from steady to rotating shifts found arbitrable where employer's efficiency, supervision, and staffing reasons were hypothetical and not emergent); and Little Ferry Bor., P.E.R.C. No. 91-25, 16 NJPER 494 (¶21217 1990)(grievance over change from rotating to fixed shifts found arbitrable where employer's supervision concerns were conjecture and were rebutted by union).

The question for us is whether an alleged contractual agreement on work schedules, if made, would so substantially limit governmental policy that it cannot be allowed to be enforced through grievance arbitration. Such a finding requires a specific showing that a governmental policy need requires the employer to act now, in the middle of a contract despite an alleged agreement, rather than at the end of the contract and through the normal collective negotiations process. Egg Harbor

City, supra. 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., supra.

In the instant case, the presented evidence consists of the conflicting certifications of the County's Business Administrator, Meyers, and the Association's President, Strangeway. Meyers makes the general assertion that the Pitman schedule and length of shifts "directly impacted the employees' ability to remain alert and focused", but the County has not provided any specific examples and has offered no supporting documentation, such as reports/memoranda from supervisors, of alleged impacts on focus and alertness.

The County also provided no supporting documentation of Meyers' claim that Pitman schedule employees were absent more frequently. Furthermore, the parties dispute whether Meyers' certification regarding absences refers to all Pitman schedule employees (including patrol division officers), or just the Association's unit members (who are communications division civilians). Another disputed assertion is whether the communications division is staffed better under the new schedule, as Meyers contends, or was staffed better under the Pitman schedule, as Strangeway claims.

Finally, Meyers made the general assertion that "the reversion to a different scheduling system was necessary to

ensure proper supervision of employees", but the County did not provide any specific examples or documentation of supervisory problems due to the Pitman schedule that had been in effect. Strangeway's opposing certification states that the supervision of the communications division has not changed.

The facts in this case do not prove a particularized need to eliminate the current work schedule to protect a governmental policy determination. Unlike in Millville, where the employer submitted unrebutted and specific facts of particularized staffing, fatigue, and supervision problems justifying a change from a 12-hour shift to an 8-hour shift, here the County provided only general or speculative concerns that were unsupported and rebutted. Contrast also City of Vineland, P.E.R.C. No. 2013-44, 39 NJPER 265 (¶90 2012) (employer's certification specifying the increased supervision of a changed power shift schedule went unrebutted); Roselle Park (the Chief certified to actual, specific improvements in supervision/oversight, adherence to rules, and training under the six-month rotation system for sergeants versus performance problems observed under the prior shift assignment procedure); Franklin (employer had particularized concerns about specific officer's performance justifying change to day shift to align better with a particular supervisor and align with his school and business liaison assignments); and Trenton (employer demonstrated particularized

need to change vice unit's schedule to align with times when their services were most needed).

Under these circumstances, the record does not support a compelling or emergent staffing, supervision, or safety issue justifying non-arbitrability of an alleged unilateral change of the unit members' work schedules from 12-hour Pitman shifts to 8-hour shifts.[1/] The County may make its argument to the arbitrator that the CNA permits it to assign staff to any of a number of negotiated schedules. The County may also seek an agreement to change to the 8-hour shifts through the regular collective negotiations process.

ORDER

The request of the Passaic County Sheriff's Office for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: February 27, 2014

Trenton, New Jersey

1/ We note that a Commission Designee granted the County's request for an interim restraint of binding arbitration (I.R. No. 2013-10, 39 NJPER 414 (¶131 2013)) based on a different factual record. That record did not include a certification from the Association, so the grant of interim relief was in part "based on the unrebutted facts submitted by the County." Id. at 417.