

P.E.R.C. NO. 2018-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARLSTADT,

Petitioner,

-and-

Docket No. SN-2018-027

PBA LOCAL 312,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for a restraint of binding arbitration of a grievance contesting the modification of work schedules for the purpose of avoiding overtime payments. Finding that the Borough failed to sufficiently demonstrate that arbitration would substantially limit its prerogative to determine minimum staffing levels, the Commission declines to restrain arbitration.

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, The Corrigan Law Firm, attorneys
(David F. Corrigan, of counsel; Rahool Patel, on the
brief)

For the Respondent, Law Office of D. John McAusland,
attorneys (D. John McAusland, on the brief)

DECISION

On January 9, 2018, the Borough of Carlstadt (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 312 (PBA). The grievance alleges that the Borough violated the parties' collective negotiations agreement (CNA) by modifying work schedules for the purpose of avoiding overtime payments.

The Borough filed a brief, exhibits, and the certification of its Chief of Police (Chief). The PBA filed a brief and the certification of its State Delegate. The Borough also filed a reply brief. These facts appear.

The PBA represents police officers, sergeants, and lieutenants employed by the Borough's Police Department.^{1/} The Borough and the PBA are parties to a CNA in effect from January 1, 2016 to December 31, 2019. The grievance procedure ends in binding arbitration.

Article X of the parties' CNA, entitled "Work Day and Work Week," provides:

A. The normal work day tour shall be eight (8) hours, which shall include forty five (45) minutes for a meal period in addition to a fifteen (15) minute coffee break prior to the meal period and a fifteen (15) minute coffee break subsequent to the meal period, per day, which shall be taken pursuant to present practice including the obligation to respond to all calls.

B. The present work schedule system and charts shall continue in full force and effect during the term of this Agreement. This paragraph shall be subject to law. The Memorandum of Understanding dated January, 2010 concerning the 12 hour schedule shall continue during the term of this Agreement.

C. Except as otherwise modified by this Agreement, the present calendar shall remain in full force and effect. The calendar showing the semi-annual schedule rotations and assignments for January 1 through June 30 of each calendar year shall be posted no later than December 15 of the previous year. The calendar showing the semi-annual schedule rotations and assignments for July 1 through December 31 of each calendar year shall be

^{1/} Local 312 represents sworn law enforcement officers below the rank of chief in two units: the PBA represents police officers, sergeants, and lieutenants; the SOA represents captains and deputy chiefs.

posted no later than January 15 of each calendar year. Vacations are selected pursuant to the Agreement and shall be fully shown and included upon the posted schedule as set forth in this Article.

Article XII of the parties' CNA, entitled "Overtime," provides:

- A. Work in excess of the Employee's basic work week or tour for a day is overtime.
- B. Overtime shall be paid by the following rules: It shall be paid as overtime compensation (time and one-half) or as compensatory time (time and one-half).
- C. Overtime shall be as required and approved by the superior on duty or the department. Overtime shall be paid in fifteen (15) minute segments and an Employee who works eight (8) minutes or more of any fifteen (15) minute segment shall be paid overtime for the entire fifteen (15) minute segment.
- D. All overtime shall be paid no later than the first pay period following the period in which the overtime is worked.
- E. Overtime for regularly scheduled shifts and details will be offered in an order of preference based upon a rotating seniority and accumulated hours roster. The purpose of this paragraph is to equalize overtime among Employees and same shall not be defeated by the Employer's selection of special persons within the unit for special details as set forth herein.
- F. Compensatory time earned pursuant to this Agreement or pursuant to past practice may be accumulated and utilized in the Employee's discretion. Compensatory time earned must be utilized within one year of the date that the compensatory time was earned by the Employee.

Article XIII of the parties' CNA, entitled "Shift Changes," provides:

The Employer agrees that it will not unreasonably adjust shifts so as to avoid overtime payment to Employees covered by this Agreement and shift changes shall not occur without giving affected Employees seventy two (72) hours notice.

Article L of the parties' CNA, entitled "Past Practice Clause," provides:

A. The parties agree that all benefits, rights, duties, obligations, terms, and conditions of employment relating to the status of Borough of Carlstadt Police Officers, which benefits, rights, duties, obligations, terms, and conditions of employment are not specifically set forth in this Agreement shall be maintained at not less than the highest standards in effect at the time of commencement of collective bargaining negotiations between the parties leading to the execution of this Agreement.

B. Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations, terms and conditions of employment applicable to any police officer pursuant to any rules, regulations, instructions, directives, memorandums, statutes, or otherwise shall not be limited, restricted, impaired, removed, or abolished. The parties agree that the past practice whereby unit members report for duty ten (10) minutes prior to their tour is eliminated.

According to the Chief, Borough police officers (patrol) work a 12-hour shift from either 6 a.m. to 6 p.m., or 6 p.m. to 6 a.m., in a 28-day rotation of two days on, two days off, three days on, two days off, two days on, three days off. The Chief

certifies that the Police Department's minimum staffing requirements for each shift are three officers, one of which must be a supervisor (lieutenant or sergeant). As of May 2017, there were four squads which had the following complement of police officers:

<u>A Squad</u>	<u>B Squad</u>	<u>C Squad</u>	<u>D Squad</u>
5 officers (2 supervisors)	6 officers (2 supervisors)	6 officers (2 supervisors)	5 officers (2 supervisors)

According to the Chief, a member of A Squad suffered an injury that necessitated surgery, caused the officer to be out of work from September 2017 until January 2018, and reduced A squad to four officers. As of September 2017, the complement of police officers on each squad was as follows:

<u>A Squad</u>	<u>B Squad</u>	<u>C Squad</u>	<u>D Squad</u>
4 officers (2 supervisors)	6 officers (2 supervisors)	6 officers (2 supervisors)	5 officers (2 supervisors)

The Chief certifies that A Squad fell below minimum staffing requirements on 21 days between September 29 and December 28 due to the injury-related absence and other pre-approved leave requests. On those 21 days, the Chief reassigned a member of B Squad from his original assigned shift to the inadequately-staffed A Squad shift. The Chief certifies that this "resulted in the squad being able to meet minimum staffing levels . . .

without resorting to repeated and unnecessary overtime assignments."

According to the State Delegate, Borough police officers know their scheduled work days for the calendar year as of January 1 "because the pattern of days on and off continues throughout the year." The State Delegate certifies that the police officer "was not reassigned to [A Squad] permanently" but was "moved . . . only on the 21 tours when [the injured officer's] absence would have to be covered on overtime." Based upon this ad hoc work schedule, the State Delegate certifies that the police officer "worked days and nights in the same two week cycle" which was "a significant stress on him."

On September 27, 2017, the PBA filed a grievance contesting the Borough's modification of work schedules "for the purpose of avoiding overtime payments." The grievance was denied at every step of the process. On October 31, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2018-213). 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.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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. In a case involving police and firefighters, 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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See *Middletown Tp. and Middletown PBA*, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), *aff'd* NJPER Supp.2d 130 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

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 Borough argues that public employers have a "non-negotiable managerial prerogative to determine . . . staffing levels" and that "minimum staffing levels are not permissively negotiable." The Borough asserts that "[t]he circumstances present here are materially indistinguishable" from *Teaneck FMBA Local No. 42 and Tp. of Teaneck*, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), *aff'd* 41 NJPER 293 (¶97 App. Div. 2015) and maintains that "[a]llowing [the PBA] to arbitrate this grievance would place substantial limitations on [its] policy-making powers" in violation of *Paterson Police PBA No. 1 v. City of Paterson*, 87 N.J. 78 (1981).

The PBA concedes that it is "not objecting [to] a policy determination to reassign an employee to another function"; it is

"not seeking to arbitrate the size of the workforce"; it is "not seeking to negotiate over the size of each of the four squads, the number of police officers permitted to use leave time, or the minimum manpower that the Borough elects to deploy on each shift." Rather, the PBA maintains that it is "merely . . . requesting to enforce [its] agreement with the Borough that PBA members will not have their negotiated and established schedule changed for the purpose of avoiding the payment of overtime." The PBA argues that "[w]ork schedules continue to be mandatorily negotiable absent unusual circumstances" and that the Commission "found a nearly identical clause to be mandatorily negotiable" in Camden Cty., P.E.R.C. No. 2003-54, 29 NJPER 34 (¶12 2003).

In reply, the Borough maintains that the State Delegate's certification "does not and cannot address the issue at the heart of this matter: the need to reassign [a police officer] to maintain minimum staffing levels." The Borough reiterates that minimum staffing levels have been recognized as a non-negotiable managerial prerogative. The Borough argues that Camden Cty. is distinguishable from this matter because in that case the public employer "did not assert that the shift changes [at issue] were necessary to maintain minimum staffing levels." Rather, the Borough argues that "[t]he principles of Teaneck apply with equal force here."

The Commission has held that “[p]ublic employers have a prerogative to determine the hours and days during which a service will be operated and the staffing levels at any given time during those hours.” Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997). “[W]ithin that framework, work schedules of individual employees are, as a general rule, mandatorily negotiable . . . [and] [t]hat general rule applies in cases involving the work schedules of police officers and firefighters.” Id. However, “a particular work schedule may not be legally arbitrable if the facts demonstrate that arbitration would substantially limit a governmental policy determination.” Woodbridge Tp., P.E.R.C. No. 2003-55, 29 NJPER 16 (¶4 2003).

The Commission has also held that “[r]educing overtime costs is a legitimate concern, but not one that outweighs the employees’ interest in enforcing an alleged agreement to preserve work schedules.” City of Atlantic City, P.E.R.C. No. 2004-25, 29 NJPER 490 (¶154 2003). “[A] desire to reduce labor costs does not make a work schedule issue non-negotiable.” Union Beach Bor., P.E.R.C. No. 92-129, 18 NJPER 366 (¶23160 1992).

Initially, we note that the contractual provision at issue here^{2/} is substantially similar to a clause that the Commission found mandatorily negotiable in Camden Cty., P.E.R.C. No. 2003-

^{2/} Article XIII of the parties’ CNA specifies that the Borough “will not unreasonably adjust shifts so as to avoid overtime payment to Employees covered by this Agreement.”

54, 29 NJPER 34 (¶12 2003). In Camden Cty., the PBA filed a grievance alleging that the County violated the parties' CNA by changing the work schedules of certain correction officers. The Commission held that the operative contractual provision, which specified that "no employee shall have his work schedule or regular day off schedule changed at any time for the purpose of avoiding payment of overtime," was negotiable "because it protect[ed] the employees' interests in negotiating over their work hours and [did] not interfere with any governmental policy interests." The Commission noted that the County's contractual defense (i.e., that it did not change work schedules to avoid overtime costs but rather to provide better service to the public and inmate population) could be considered by the arbitrator.

Given the Commission's holding in Camden Cty., we find that the Borough has failed to sufficiently demonstrate that arbitration of the PBA's claim (i.e., modifying work schedules for the purpose of avoiding overtime payments) would substantially limit its prerogative to determine minimum staffing levels. The Borough has not shown that modifying a particular work schedule, rather than an overtime assignment, is necessary in order to maintain adequate manpower on a particular shift. See Union Cty., P.E.R.C. No. 2010-28, 35 NJPER 389 (¶130 2009) (holding, in part, that "to the extent [a] grievance involves situations where employees had their shifts changed to avoid the

need to fill posts on an overtime basis, the grievance involves a mandatorily negotiable subject that can be submitted to binding arbitration").

Accordingly, we decline to restrain arbitration.

ORDER

The request of the Borough of Carlstadt for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: April 26, 2018

Trenton, New Jersey