

P.E.R.C. NO. 2019-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF ROCKAWAY,

Petitioner,

-and-

Docket No. SN-2018-053

ROCKAWAY TOWNSHIP FOP LODGE 31,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township's request for a restraint of binding arbitration of a grievance filed by the FOP contesting the rescission of the practice of allowing shift swaps for up to three months at a time. The Commission finds that shift rotations and shift swaps are generally negotiable work schedule issues unless an employer demonstrates that shift exchanges would substantially limit governmental policy by causing operational problems such as preventing the employer from having qualified employees perform an assignment. The Commission holds that the County failed to provide evidence of a particularized governmental policy objective which would prevent the dispute from being legally arbitrable.

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, Laddey, Clark & Ryan, LLP,
attorneys (Thomas N. Ryan, of counsel; Jessica A.
Jansyn, of counsel and on the brief)

For the Respondent, Loccke, Correia & Bukosky,
attorneys (Michael A. Bukosky, of counsel and on the
brief; Corey M. Sargeant, of counsel and on the brief)

DECISION

On June 20, 2018, the Township of Rockaway (Township) filed a scope of negotiations petition seeking a restraint of arbitration of a grievance filed by the Rockaway Township FOP Lodge 31 (FOP). The grievance contests the Township's September 21, 2017 memorandum that rescinded the practice of allowing officers to swap shifts for up to three months at a time in order to remain on a steady day or night shift, and implemented a rotating shift schedule of four weeks on the day (or night) shift followed by four weeks on the opposite shift.

The Township filed briefs, exhibits, and two certifications of Chief of Police Martin D. McParland, Jr. The FOP filed a

brief, exhibits, and the certification of its President, John Reilly.^{1/} These facts appear.

The FOP represents the Township's uniformed and non-uniformed police officers, excluding all police personnel above the rank of sergeant. The Township and FOP are parties to a collective negotiations agreement (CNA) effective January 1, 2015 through December 31, 2017. The grievance procedure ends in binding arbitration.

In 1995, the Township and FOP agreed to implement a "4/4 - 12 Plan" work schedule. The 1995 agreement states: "Under the 4/4 - 12 plan, sworn officers will be scheduled to work a 12-hour day for four (4) consecutive days, followed by four (4) consecutive days off in an eight (8) day cycle." The 4/4 - 12 schedule is divided into a day shift (6 a.m. - 6 p.m.) and a night shift (6 p.m. - 6 a.m.). The 1995 agreement does not state how long officers are to remain on a steady day or night shift.

The Chief certifies that the Township has a practice of rotating officers from four weeks on the day-shift to four weeks on the night-shift. The FOP President certifies that the contract has been interpreted by the parties to encompass steady, rather than rotating, shift selection. Both parties certify to a

^{1/} The FOP also filed a request for evidentiary hearing, which the Township opposed. As we do not find "substantial and material disputed factual issues" pertinent to deciding this scope of negotiations petition, we deny the FOP's request for evidentiary hearing. N.J.A.C. 19:13-3.8(a).

past practice by which officers could pair up and request permission from the Chief to switch their respective night and day shift cycles resulting in one officer having steady night shifts and the other officer having steady day shifts for up to three (3) months at a time. Officers could request permission to swap shifts using the "Request for a Change of Assigned Shift/Hours" form, and the Chief or his designee would approve the steady shifts and could re-approve them every three months.

In September 2017, the Chief told the FOP President that the switching of day/night shifts for up to three months at a time was going to be eliminated. On September 21, 2017, the Chief issued a memorandum stating:

Please be advised that on or about November 1, 2017, the Patrol Division shall be resuming a rotating four (4) week schedule of four (4) days on, four (4) days off. Shift hours shall remain P1 (6am to 6pm) and P2 (6pm to 6 am) for the present time. Any exceptions and/or modifications previously granted in regards to steady patrol shifts are hereby rescinded as of November 1, 2017.

The Chief certifies that rotating officers through day and night shifts will help alleviate the efficiency issues of calling in higher paid sergeants to fulfill the duties of patrolmen who call out sick after holiday weekends, and of scheduling court appearances and completing court paperwork for night shift officers. He states that he needs to ensure officers with

special skills are spread throughout the squads and that training officers are available on a rotating basis.

The FOP President certifies that there is no evidence of issues with the supervision of steady night shift officers or with the scheduling of officers with special skills. He states that officers complete their required training and court appearances and there is no evidence of issues with training officers or scheduling court appearances due to the shift schedule.

On November 17, 2017, the FOP filed a grievance contesting the change from steady shifts to rotating shifts.^{2/} The Township denied the grievance at every step. On December 1, the FOP demanded binding grievance arbitration. This petition ensued.

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

^{2/} The FOP also contested the alleged shift change with an October 30, 2017 unfair practice charge alleging that it violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) through (7). The unfair practice charge is pending before the Commission's Director of Unfair Practices (Docket No. CO-2018-111).

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., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER

Supp.2d 130 (¶111 App. Div. 1983). Thus, if we conclude that the FOP's grievance is either mandatorily or permissively negotiable, the arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Township asserts that its decision to deny shift swapping requests and rescind previously granted requests is not arbitrable because it has managerial discretion to approve or deny shift swap requests. It argues that the FOP unit members were never formally on a "steady shift" schedule, but were always on a four-week rotating schedule despite the Township permitting shift swaps for up to three months. The Township contends that it has experienced discipline, supervision, and efficiency issues that support its managerial discretion to deny shift swaps and implement the four-week rotating schedule.

The FOP asserts that the parties have a past practice regarding steady shift schedules because the 1995 Agreement is silent as to rotation of day and night shifts. It asserts that steady versus rotating shift schedules are mandatorily negotiable, and that the Township's rescission of previously granted shift swaps eliminated steady shifts. The FOP contends that because the shift swaps have always required advance approval, the issue is mandatorily negotiable. It asserts that

the Township has failed to demonstrate legitimate, particularized governmental needs for revoking shift swaps and steady shifts.

Shift rotations and shift swaps/exchanges are components of work hours, and the work schedules of individual employees are generally mandatorily negotiable. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); 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).

Temporary shift exchanges with management's approval are generally mandatorily negotiable. Hanover Tp., P.E.R.C. No. 93-5, 18 NJPER 398 (¶23179 1992), recon. den., P.E.R.C. No 93-21, 18 NJPER 473 (¶23213 1992). However, if an employer shows that shift exchanges would substantially limit governmental policy by, for example, causing operational problems or preventing an employer from having qualified individuals perform an assignment, then they are not mandatorily negotiable. Paramus Bor., P.E.R.C. No. 2002-19, 28 NJPER 13 (¶33002 2001).

In County of Mercer, P.E.R.C. No. 2006-71, 32 NJPER 89 (¶44 2006), the union filed a grievance contesting the warden's directive limiting the number of shift swaps allowed per day per tour, limiting the length of shift swaps to fourteen days, disallowing shift swaps on holidays, and changing shift swap procedures. The warden certified that the directive was "a

response to operational problems resulting from overuse of shift swapping" including that "officers' working jobs they were not trained to perform" and "additional overtime expenses" when an officer did not show up for a swapped shift. Id. at 90. Despite those management concerns, the Commission denied the employer's request to restrain arbitration, holding:

There is no suggestion that the memoranda target qualifications and no showing that the employer's operational concerns cannot be addressed by invoking its contractual right to deny individual exchanges or calling in employees to work overtime.

[Mercer Cty., 32 NJPER at 91; footnote omitted.]

In Township of Ocean, P.E.R.C. No. 2006-73, 32 NJPER 93 (¶46 2006), the union filed a grievance contesting the denial of one officer's specific shift swap requests for three Thursdays in August 2005. The chief asserted that "granting those requests would undermine continuity of supervision, a goal recommended by the independent study [of the police department conducted by Township Council in 2004] and a legitimate management concern." Id. at 94. The Commission nevertheless denied the employer's request to restrain arbitration, holding:

While we understand the employer's extrapolations, as in Hanover, the grievance before us is more limited. It challenges only the shift exchanges that were denied in August 2005. We cannot conclude that the employer's policy goal of improving the continuity of supervision would be substantially limited if the PBA were given

the opportunity to prove to an arbitrator that Friend's August shift exchange requests were arbitrarily denied.

[Ocean Tp., 32 NJPER at 94; footnote omitted.]

See also City of Passaic, P.E.R.C. No. 2001-27, 27 NJPER 14 (¶32007 2000) (finding "there has been no showing of a governmental policy need for placing caps on the number of exchanges" to eight annually, arbitration was allowed); and City of Newark, P.E.R.C. No. 2006-60, 32 NJPER 40 (¶22 2006) (absent evidence of asserted health, safety, and efficiency problems, change prohibiting shift swaps resulting in firefighter being on duty more than 38 consecutive hours was found arbitrable).

In contrast, the Commission has restrained arbitration of grievances contesting the denials of shift exchanges where the employer's decision predominantly implicated its managerial prerogative to ensure that qualified individuals fill particular shifts that require specialized skills or experience. See Paramus Bor., supra, (employer demonstrated that tour exchange policy regarding Juvenile unit assignments would result in a non-Juvenile unit detective serving full tour in Juvenile without a detective regularly assigned to that section); and City of Jersey City, P.E.R.C. No. 98-96, 24 NJPER 116 (¶29058 1998) (police chief had prerogative to prevent special task force members from exchanging tours because they could not perform their functions or achieve their special mission on the midnight shift).

The question here is whether an alleged past practice allowing shift exchanges and steady shifts for up to three months subject to the Chief's approval would substantially limit governmental policy such that the past practice is not legally arbitrable. The evidence consists of the conflicting certifications of the Chief and the FOP President. The Chief generally asserts that the steady shifts via shift swaps cause the Township to use higher paid replacements when officers are out sick. However, "comparative labor costs do not make a work schedule question non-negotiable." Egg Harbor City, *supra*, 24 NJPER at 224; *see also* Mercer Cty., *supra*, 32 NJPER at 90-91 (warden cited "additional overtime expenses" from shift swaps, but Commission noted employer's operational concerns could be addressed by "calling in employees to work overtime"). The Chief also asserted that court appearances and paperwork for night shift officers could be handled more efficiently with rotating schedules, but the Township provided no particularized evidence of any problems with night shift officers attending court or completing paperwork as necessary. The Township's assertions about needing officers with special skills spread throughout the squads are also unsupported by any evidence, such as documentation of all the special skills required on each shift, the numbers of officers with the requisite skills on each shift, and if there were any shortages that could have been remedied by

using four week rotating shifts. Contrast Jersey City, supra (special task force members could not complete their duties if switching to midnight shift); Paramus Bor., supra (shift swaps could not result in no juvenile unit detectives on juvenile unit tour). Finally, the Township's concerns about training were not supplemented by any evidence of officers being unable to complete training as required or that any training issues have been caused by shift swaps and steady schedules.

Accordingly, the Township has failed to assert a particularized governmental policy objective which would prevent the dispute from being legally arbitrable. We note that it is undisputed that the City has the discretion to deny a shift exchange when appropriate.

ORDER

The request of the Township of Rockaway for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 29, 2018

Trenton, New Jersey