

P.E.R.C. NO. 2020-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Petitioner,

-and-

Docket No. SN-2020-035

FMBA LOCAL 67,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for a restraint of binding arbitration of Local 67's grievance contesting the Borough's failure to schedule junior firefighters to 24-hour shifts, as firefighters, following their probationary period. Finding that Local 67's claim relates to the generally negotiable issue of work schedules, and that the Borough has not sufficiently demonstrated a particularized need based on its asserted governmental policy interests to preclude the junior firefighters from working the 24/72 shift schedule, the Commission finds the grievance mandatorily negotiable and 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, Decotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys (Gregory J. Hazley, of counsel; Susan E. Volkert, on the brief)

For the Respondent, Kroll Heineman Carlton, attorneys (Raymond G. Heineman, of counsel and on the brief)

DECISION

On January 13, 2020, the Borough of Carteret (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FMBA Local 67 (Local 67). The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) by failing to schedule junior firefighters to 24-hour shifts, as firefighters, following the completion of their probationary period.^{1/}

^{1/} In P.E.R.C. No. 2020-23, 46 NJPER 228 (¶53 2019), app. pending, involving these same parties, the Borough sought to restrain arbitration of a Local 67 grievance that contested the Borough's failure to reassign probationary firefighters who had completed their academy training (but not yet become junior firefighters, who are at issue here) from a daytime
(continued...)

The Borough filed briefs, exhibits, and the certification and supplemental certification of its Fire Chief, Mark Hruska. Local 67 filed a brief, an exhibit, and the certification of its President, Jason Kurdyla. These facts appear.

Local 67 represents all fire personnel within the fire department but excluding the Fire Chief. Local 67 and the Borough are parties to a CNA in effect from January 1, 2011 through December 31, 2015. The grievance procedure ends in binding arbitration.

Article III of the CNA, entitled "Hours of Work and Overtime," provides, in pertinent part:

Section 1. Hours of Work

The work week for all employees of the Fire Department who perform fire fighting duties shall be what is commonly known as the "24-72" system. The four shifts alternate as follows:

The first shall work 24 consecutive hours beginning at 7:00 a.m. and ending the following morning at 7:00 a.m., followed by 72 consecutive hours off duty. The second shift shall relieve the first beginning at 7:00 a.m. and work 24 consecutive hours, followed by the third and fourth shifts on a rotating basis.

* * *

1/ (...continued)
weekly work schedule to the 24-hour shifts. The Commission found that the Borough did not sufficiently demonstrate its asserted governmental policy interests in maintaining the post-academy probationary firefighters on the daytime schedule, and declined to restrain arbitration.

Section 4. Relief Men's Hours of Work

Relief men shall not work more than 48 hours or less than 24 hours in any week. All shifts shall consist of 24 consecutive hours starting at 7:00 a.m. The relief men will also have at least 24 hours in between each shift, unless called in for overtime when their names come up in the overtime list.

Section 5. Relief Men's Shifts

Relief men in each of the two firehouses shall be given at least one-week notice for each change. Relief men shall be assigned a specific shift whenever scheduling allows. Relief men preference or shift selection shall be governed by relief man seniority.

Section 6. Bureau of Fire Safety Hours

The hours of work for the Bureau of Fire Safety will be four days a week, nine hours a day, on a Monday through Friday basis.

Kurdyla certifies that there are currently 4 Fire Lieutenants and 11 firefighters assigned to Fire Suppression, 1 Fire Lieutenant assigned to Fire Prevention, and an additional junior firefighter assigned to the day shift, while working on fire suppression apparatus. Hruska is the Fire Chief and Fire Official, and works Monday through Friday. There are also two probationary firefighters who will be assigned to day shifts.

Kurdyla certifies that since 2018, newly hired firefighters, during their first year, have been scheduled consistent with the Fire Prevention schedule, of four 9-hour days per week. During the first few weeks, the recruits go through normal in-house training by Chief Hruska and the firefighter assigned to Fire Prevention. The trainees then attend and pass Fire Academy

classes. After graduating the Fire Academy, the trainees work the Fire Prevention schedule of four 9-hour days and have generally been assigned as additional staffing on the fire apparatus, complementing firefighters working 24-hour shifts. The firefighters and fire officers assigned to 24-hour shifts would continue to train them on operating equipment. The trainees occasionally accompanied Fire Prevention and shift firefighters to do building walkthroughs.

Kurdyla certifies that, following the completion of their probationary period, the junior firefighters have continued to work four 9-hour days per week, Monday through Thursday, and have continued to be assigned to additional staffing on the apparatus and working with personnel on 24-hour shifts performing other duties. While they are scheduled under the Fire Prevention Bureau, they have not been assigned Fire Prevention work. Lieutenant E.W., who is the only firefighter regularly assigned to Fire Prevention duties, continues to perform his own inspection duties, with only limited interaction with the junior firefighters assigned to the 9-hour work days. E.W. performs almost all the inspections and works Monday through Thursday, nine hours a day. Kurdyla certifies that over the past two years, all of the inspections were performed by him or E.W. The remaining firefighters and fire lieutenants are not regularly assigned to any fire inspections.

Kurdyla also certifies that rather than assign inspectors to the Bureau of Fire Safety, Hruska has used the Bureau of Fire Safety schedule for probationary and junior firefighters to cover fire suppression and other duties performed by firefighters on the 24/72 schedule. Those duties have included some inspection duties. Firefighter M.C., who was hired in May 2017, was also assigned as firefighter to the Fire Prevention schedule. While he performs the same duties as the firefighters, including being assigned to ride the fire apparatus and working as additional staffing during the day, he continued to work four 9-hour days per week. Since February 6, 2020, he has been assigned to 24-hour shifts. Firefighter R.U., who was hired in June 2018, has continued to be assigned to the day shift Fire Prevention Bureau schedule, even though he normally works on fire suppression apparatus with the firefighters on the 24/72 schedule and does not currently have a fire inspectors certification. Since mid-January, Hruska had advised that R.U. would be re-assigned to the 24/72 schedule.

Chief Hruska certifies that the CNA provides for the following staffing options and hours of work: a 24/72 schedule (24 consecutive hours on duty followed by 72 consecutive hours off duty); Relief Man hours including 24 consecutive hours starting at 7 a.m. with 24 hours between shifts (and no more than 48 or less than 24 hours per week); and a Bureau of Fire Safety

schedule of four days per week, nine hours per day. He certifies that he has the authority to assign firefighters to any of those, which allows him flexibility and the ability to meet department needs at times of peak calls and appointments.

Chief Hruska certifies that the fire department's busiest time is Monday through Friday during regular business hours when inspections, fire prevention tasks, EMT calls and, to a lesser extent, fire calls are at peak levels for the week. Fires represent less than three percent of the department's duties, with the bulk of time associated with EMT calls and service calls. One of the department's most critical and frequent roles is fire prevention. Fire department employees provide fire safety inspections and associated work in non-life hazard use (non-LHU) locations, as well as maintenance of standpipe connections and service of emergency key boxes on commercial buildings, among other tasks. Hruska also certifies that all Carteret firefighters, assigned to any staffing position (24/72, Fire Prevention, Relief Men), conduct fire prevention duties as part of their regular employment. Accordingly, no employee, regardless of staff hours, solely handles fire calls.

Hruska further certifies that if all firefighters must be assigned as 24/72 hour staff, the remaining two bargained-for shift schedules would be unfilled, inspections and prevention duties would not be completed, personnel could not be matched to

their particular aptitude at the discretion of the Fire Chief, and the City would accrue the significant financial burdens of overtime. Evaluating personnel also requires determining who is best-suited to send for training for more advanced licensure, to perform, for example, life-hazard inspections for major industrial facilities and multilevel, mid- and high-rise residential developments. At times, more personnel may be needed to cover "lower" level inspections for which all firefighters are qualified, while more advanced certifications must be staffed to handle the more advanced inspections.

Chief Hruska's supplemental certification states that the Fire Department and Fire Prevention Bureau are two separate divisions that share the goal of fire safety, and that he is the Chief of the Fire Department and the Fire Official of the Fire Prevention Bureau. The Fire Prevention Bureau is responsible for enforcement of the Fire Safety Code of New Jersey. Hruska certifies that the assignment of firefighters to the Fire Prevention Bureau has occurred for decades. He certifies that he developed new training protocols to address the increased federal and state regulatory requirements.

Chief Hruska certifies that he placed the probationary firefighters with the Fire Prevention Bureau for exposure to critical training scenarios. He certifies that assignment to the Fire Prevention Bureau is necessary to produce a well-rounded

firefighter who will conduct himself in a safe manner and can respond in an emergency. Chief Hruska certifies that scheduling probationary firefighters to the 24/72 system would deleteriously decrease their training hours, as the four day nine-hour shift schedules of the Fire Prevention Bureau exposes them to the maximum amount of training time when businesses and their related structures are open. In contrast, he certifies that under the 24/72 schedule, probationary firefighters would only work six weekdays per month. He certifies that means probationary firefighters on the Fire Prevention Bureau schedule get 156 hours of training during weekday business hours, as opposed to 54 for those on the 24/72 schedule.

Chief Hruska certifies that assignment of probationary firefighters to the Fire Prevention Bureau is a customary and necessary management prerogative for proper training, evaluation, and staffing. He certifies that the previous training protocol was antiquated and failed to effectively combat the myriad of evolving new requirements the Borough faced, and that the protocols he has instituted have supplied the best training and safe operating environment.

On October 17, 2018, Local 67 filed a grievance contesting the Borough's continued scheduling of junior firefighters, who are not fire inspectors, to the nine hours a day, Monday through Thursday Fire Prevention Bureau schedule, rather than to the

24/72 firefighter shift schedules after completion of their probationary periods. On October 18, the Borough denied the grievance. Local 67 filed for binding grievance arbitration (Docket No. AR-2019-413). 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 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, 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough asserts that arbitration should be preempted because it concerns staffing levels and it has a managerial prerogative to staff its firefighters and determine the hours and days when services will be operated and the number and type of employees on duty to provide services and supervision. It argues that it has a managerial prerogative to staff its firefighters to provide the most efficient use of manpower and to maintain efficiency and have staff on hand when demand is at its highest. The Borough contends its placement of firefighters on the Fire

Prevention Bureau schedule is to meet the staffing and operational needs as demanded by the public every day. It asserts that having probationary firefighters on the Fire Prevention Bureau schedule exposes them to numerous training opportunities and allows them to continually be trained and supervised by the Chief.

Local 67 asserts that it is not contesting the assignment of inspection and other duties to fire suppression personnel, and that, except for Kurdyla, firefighters on 24-hour schedules have not been assigned inspections, with limited exceptions. It argues that under the 24/72 schedule, firefighters' schedule overlaps completely with the hours during which the Borough provides fire inspection services and also covers Friday, when the Bureau is closed. Local 67 contends the grievance is arbitrable because it only concerns the scheduling of firefighters during their contractual shifts, which are consistent with the hours of operation of the fire department. It asserts that the Borough has not credibly presented any evidence of why the junior firefighters cannot be scheduled under the 24/72 firefighter schedule specified in the CNA. Local 67 argues that the junior firefighters who the Borough has continued on the nine-hour, four day a week probationary schedule are not "assigned" to the Fire Prevention Bureau, but that they perform the same duties as, and are working directly with, the

firefighters on the 24/72 schedule or relief schedule.

Shift schedules are a component of work hours. Court and Commission case law hold that the work schedules of individual employees, including firefighters, are generally mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Mount 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) (union's proposed change from 10/14 to 24/72 schedule was mandatorily negotiable despite employer's efficiency and supervision concerns); Franklin Tp., P.E.R.C. No. 2011-48, 36 NJPER 461 (¶179 2010), aff'd, 424 N.J. Super. 369 (App. Div. 2012) (changing from "4 & 2" to "4 & 4" work schedule was negotiable despite staffing and management efficiencies identified by employer); and Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997) (change from 14/10 to 24/72 shift was negotiable despite employer's concerns about training, fatigue, and loss of continuity).

However, the Commission and the Appellate Division have found exceptions to the negotiability of work schedules when the employer demonstrates that negotiations would significantly interfere with the exercise of the inherent managerial prerogatives necessary to the proper operation of a police force. 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 non-negotiable prerogative to change shift schedules so patrol officers worked same rotating shift as their supervisors based on undisputed supervision and discipline problems on midnight shift); Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den., 96 N.J. 293 (1984) (union's work schedule proposals were non-negotiable where employer's uncontroverted factual claims of diminished efficiency and coverage gaps demonstrated a significant impact on the determination of governmental policy).

Thus, we will restrain arbitration over work schedule changes when the facts prove a particularized need to change a work schedule in order to achieve operational, supervisory, or other governmental policy objectives. See, e.g., Atlantic Cty. Prosecutor, P.E.R.C. No. 2008-24, 33 NJPER 262 (¶99 2007), (employer demonstrated emergent operational need to create temporary extra evening shift to investigate homicides); Roselle Park Bor., P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005) (Chief certified to actual, specific improvements in supervision and training under six-month rotation for sergeants versus performance problems under prior shift assignments); City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005) (employer demonstrated particularized need to change vice unit's schedule to align with times when their services were most needed); and

City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence that 12-hour shift resulted in staffing, supervision, and fatigue problems justified a mid-contract change).

Alternatively, where potential or generalized, as opposed to proven and particularized, supervisory or other operational issues are raised as a bar to a particular work schedule, we have declined to restrain arbitration of work schedule changes. See, e.g., Passaic Cty. Sheriff's Office, P.E.R.C. No. 2014-56, 40 NJPER 417 (¶140 2014) (change from 12-hour shift to 8-hour shift was arbitrable where employer's certifications asserting supervisory, staffing, and performance issues on 12-hour shift lacked specificity and evidentiary support and were disputed by union's certifications); Edison Tp., P.E.R.C. No. 2009-51, 35 NJPER 72 (¶29 2009) (schedule change arbitrable where Chief's staffing and operational efficiency reasons for change were not particularized and were disputed by union); Mercer Cty., P.E.R.C. No. 2008-10, 33 NJPER 216 (¶80 2007) (10-hour work schedule arbitrable where employer's assertions about staffing inefficiencies and supervisors working different schedules were not supported by detailed factual certifications); and Egg Harbor City, P.E.R.C. No. 98-125, 24 NJPER 223 (¶29105 1998) (change from steady to rotating shifts was arbitrable where employer's

efficiency, supervision, and staffing reasons were hypothetical and not emergent).

The question for us is whether adherence to an alleged contractual agreement or past practice for a particular work schedule 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 or interest arbitration process. Egg Harbor City, supra, P.E.R.C. No. 98-125; Teaneck, supra, 353 N.J. Super. at 304-305 (“Therefore, the question is whether the proposed work schedule would so impede governmental policy to foreclose the issue for arbitration.”)

We find that the facts in this case do not prove a particularized need to prevent the junior firefighters from working the contractual 24/72 shift schedule and instead continue the 9-hour, Monday-Thursday schedule from their probationary periods in order to protect a governmental policy determination. The Borough has not refuted Local 67's certification that the junior firefighters in question have not actually been assigned to the Fire Prevention Bureau, but rather are performing firefighter duties like the 24/72 unit members but on a different

shift schedule. Although the Borough certified to increased daytime work hours under the 9-hour shift schedule as opposed to the 24-hour shift schedule, Local 67 noted that only the 24-hour shift schedules firefighters during business hours on Fridays. The Borough's general assertions about potentially more numerous training opportunities on the 9-hour shift are not supported by any specific examples of training deficiencies in firefighters on the 24-hour schedule. The Borough has not identified with specificity how the junior firefighters would be unable to receive necessary training and supervision when working alongside other firefighters and supervisors on the 24-shift.

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 Borough provided only general or speculative concerns that were unsupported and/or rebutted. This case is therefore more analogous to Passaic Cty. Sheriff's Office, Edison Tp., Mercer Cty., where the Commission held that similar shift schedule changes were arbitrable despite the employers' certifications asserting supervisory, staffing, and operational efficiency issues. In those cases, as here, the reasons for changing shift schedules were not supported by evidence of an emergent scheduling need implicating a governmental policy objective.

Under these circumstances, the record does not support a compelling or emergent staffing, supervisory, or operational need justifying non-arbitrability of an alleged failure to adhere to a contractual 24/72 shift schedule.

ORDER

The Borough of Carteret's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 25, 2020

Trenton, New Jersey