

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY/
SOMERSET/HUNTERDON/WARREN VICINAGE,

Petitioner,

-and-

Docket No. SN-2021-017

PROBATION ASSOCIATION OF NEW JERSEY
PROFESSIONAL SUPERVISORS UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the State of New Jersey Judiciary's (Judiciary's) request for a restraint of binding arbitration of a grievance filed by Probation Association of New Jersey (PANJ). The grievance alleges that the Judiciary violated the parties' collective negotiations agreement (CNA) by imposing an alternate work week schedule that required two Court Services Supervisors 2 (CSS2) to work on the weekend. The Commission finds that the Judiciary has not demonstrated proven or particularized reasons for unilaterally changing the CSS2's weekend work schedules from remote, on-call to onsite every other weekend. The Judiciary did not establish any discipline, performance, or operational problems that were occurring with the former schedule that required a unilateral change. The Commission concludes that the employees' interests outweigh the Judiciary's interests and that PANJ's grievance is 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, State of New Jersey Judiciary,
attorneys (V. Nicole Langfitt, Deputy Counsel of the
Administrative Director, of counsel; Susanna J. Morris,
Staff Counsel, on the brief)

For the Respondent, Law Offices of Daniel J. Zirrith,
LLC, attorneys (Daniel J. Zirrith, of counsel and on
the brief; Lynsey A. Stehling, on the brief)

DECISION

On October 14, 2020, the State of New Jersey Judiciary,
Somerset/Hunterdon/Warren Vicinage (Judiciary) filed a scope of
negotiations petition seeking a restraint of binding arbitration
of a grievance filed by the Probation Association of New Jersey,
Professional Supervisors Unit (PANJ). The grievance alleges that
the Judiciary violated the Preamble, Article 2, Article 5,
Article 6 and Article 11 of the parties' collective negotiations
agreement (CNA), a Letter of Agreement dated December 28, 1994,
and past practice by imposing an alternate work week schedule

that required two Court Services Supervisors 2 (CSS2) to work on the weekend.

The Judiciary filed briefs, exhibits and the certification of its Assistant Criminal Division Manager, Brian Nauer. PANJ filed a brief, exhibits and the certifications of its First Vice President and CSS2, Gavin Cummings; the grievants, CSS2 A.C. and CSS2 A.M. These facts appear.

PANJ represents, among others, employees in the CSS2 title. The parties' CNA has a term of July 1, 2016 through June 30, 2020. The PANJ asserts that the Judiciary's unilateral work schedule change violates several provisions of the parties' CNA, including Article 5 ("Hours of Work"), Section 5.3 ("Alternate Work Week") which states, in pertinent part:

A. The Judiciary reserves the right to schedule alternate work weeks within the provisions of the administrative code. The purposes of alternate work weeks include, but are not limited to, practices involving night reporting, field visits by supervisors for purposes of evaluation and training of probation officers as well as weekend supervision of such officers and special programs. The amount of time allocated to the alternate work weeks is set forth as follows:

* * *

4. Up to one (1) weekend day of field work per six (6) consecutive pay periods.

The CNA's grievance procedure ends in binding arbitration.

Nauer certifies that he supervises the Pretrial Services (PTS) Unit. PTS staff are responsible for providing accurate and comprehensive information regarding both risk measurement and management concerning pretrial defendants. Nauer further certifies that the maximum time permitted to detain a defendant prior to holding a pretrial release hearing is 48 hours; however, the statewide goal is to hold the pretrial release hearing within 24 hours of the defendant's detention. Nauer certifies that, on the day of the pretrial release hearing, the PTS staff prepares and disseminates the court orders establishing the defendant's release conditions and they are responsible for monitoring defendants' compliance with such orders.

Nauer certifies that PTS staff are supervised by a CSS2, who is responsible for developing the professional skills of the PTS staff and monitoring their performance. Two court sessions are held each Saturday. Occasionally, if there is a Monday holiday, the PTS staff's work may be done on a Sunday to meet the 48-hour pretrial hearing deadline.

Nauer certifies that in January 2017, the PTS staff consisted of five employees, and the grievant, CSS2 A.M., was the only supervisor. Nauer further certifies that CSS2 A.M. was advised that she would be required to work Saturdays, as well as the occasional Sunday onsite. CSS2 A.M.'s schedule was Monday through Friday, 8:30 - 4:30, and every other Saturday

(alternating with an Assistant Division Manager), and she would receive a day off in the week following a Saturday workday.

Nauer certifies that beginning April 2017, CSS2 A.M. began to work remotely on Saturdays, but PTS staff continued to work onsite. Instead of working a full day, she worked on-call, and received compensation time for the time worked on Saturdays. In April 2018, Nauer was promoted to a CSS2, and he began remotely supervising the PTS staff every other Saturday, alternating with CSS2 A.M. Nauer further certifies that in March 2019, CSS2 A.C. was hired to replace Nauer because he had been promoted to his current title, overseeing the entire PTS unit. Nauer certifies that CSS2 A.C. was notified, both through the Notice of Vacancy and during the interview process, that if she was selected as a CSS2 she would be required to work weekends, nights, and holidays.

Nauer certifies that in the fall of 2019, the Vicinage's management determined that having supervisors work remotely and on-call on Saturdays/Sundays resulted in ineffective supervision of the onsite staff and complicated decision-making concerning issues having to do with facilities or equipment. Nauer asserts that having the supervisor in the office promotes ease of communication, allows the supervisor to monitor the court sessions, and ensures that staff are timely performing their responsibilities.

Nauer certifies that on December 19, 2019, he advised CSS2 A.M. and A.C. that their weekend work schedules would change beginning on February 1, 2020. By letter dated December 23, Nauer provided CSS2 A.M. and A.C. with written notification of the schedule change, which states in pertinent part:

As you know, the Vicinage 13 Pretrial Services Unit covers Central Judicial Processing Court on weekends. This weekend work is required in order to meet the expectation set forth by Judge Grant that defendants are processed within 48 hours after being taken into custody. After a careful review of our weekend staffing model, along with a review of the PANJ Professional Supervisors Union contract, it has been determined that there is a need for a Supervisor to report in person for CJP court, from 8:00am to 4:00pm one day each weekend. At the time of your promotion to Court Services Supervisor 2 in Pretrial Services, you were advised of this possible need for you to work on weekends.

* * *

During the week following your weekend work assignment, you will have one weekday off as indicated on that schedule.

Nauer further certifies that the schedule change has not changed the number of hours worked (35 hours over 5 days) or the compensation for the CSS2s.

CSS2 A.M. certifies that she has been employed by the Judiciary since July 2001 and has been a CSS2 since 2008, with a period between January 2014 and October 2016 where she served as an Assistant Division Manager. CSS2 A.M. certifies that prior to

the February 2020 work schedule change, for the majority of her tenure as CSS2, she worked remotely, on-call every other Saturday and she would receive compensatory time for the extra hours worked on the weekend. CSS2 A.M. certifies that the only exception to this work schedule was between January 2017 and April 2017, when the PTS unit was first being established, where CSS2 A.M. would go to the office on her scheduled Saturdays in order to supervise staff and get the new PTS program operational.

CSS2 A.M. certifies that, based on a conversation she had with Nauer, she believed the weekend work schedule change was initiated because an investigator, who is not currently employed with the Judiciary, allegedly fell asleep at the office during a weekend shift while the supervision was working remotely and on-call. CSS2 A.M. further certifies that prior to the schedule change two PTS staff members would work in the office, reporting to the remote CSS2 on Saturday duty. However, CSS2 A.M. certifies that after the February 2020 schedule change only one PTS staff and a CSS2 would be assigned to work in the office on Saturdays, and on busy weekends, the CSS2 would have to perform much of the work of the absent second PTS staff member. CSS2 A.M. further certifies that Nauer never provided an explanation for why the second PTS staff member was no longer being assigned to weekend duty.

CSS2 A.M. certifies that during the current COVID-19 pandemic, between February and March 2020, most Judiciary employees began working remotely; however, both CSS2 A.M. and A.C. were required to physically report to Somerset County Courthouse for weekend duty. CSS2 A.M. certifies that the CSS2s will be required to report to the office every other weekend when the pandemic abates and Vicinage facilities reopen. CSS2 A.M. further certifies that the February 2020 schedule change has had a significant impact on her personal life and adversely affected her family. CSS2 A.M. certifies that CSS2s do not need to report to the office on weekends and that she worked remotely, on-call without incident from April 2017 and throughout the ongoing pandemic.

CSS2 A.C. certifies to many of the same statements certified to by CSS2 A.M. Additionally, CSS2 A.C. certifies that she has worked for the Judiciary for 11 years and has been a CSS2 since March 2019. CSS2 A.C. certifies that when she was promoted to CSS2 she was told by Judiciary management that weekend duty would be remote and on-call, and that she was never told that she would be required to regularly work onsite every other weekend. CSS2 A.C. further certifies that throughout her tenure as CSS2 she has worked weekends remotely, on-call without incident.

CSS2 A.C. certifies that the February 2020 schedule change has created a hardship for her and her family. CSS2 A.C.

certifies that after the schedule change in March 2020, she had a family commitment that interfered with a scheduled weekend shift, and she requested that day off. CSS2 A.C. certifies that Nauer covered that weekend shift because CSS2 A.M. was unavailable, but that he notified CSS2 A.C., via email, that he would not allow vacation days to be used for scheduled weekend shifts in the future.

Cummings certifies that he is a CSS2, also serving as the First Vice President of the PANJ since July 1, 2013, and he has been employed by the Judiciary for over 30 years. Cummings certifies that Judiciary management never contacted PANJ to advise that it would be changing the CSS2's schedule. Cummings certifies that the Judiciary's weekend schedule change violates the various provisions of the parties' CNA, as well as the parties' Letter of Agreement dated December 28, 1994, and the parties' past practice. Specifically regarding the Judiciary's alleged violation of Article 5.3, Cummings certifies that CSS2s should only be expected to work on weekends no more than four times per year pursuant to the CNA, but the Judiciary's unilateral implementation of the weekend work schedule requires CSS2s to work 26 weekends per year in violation of the CNA. Cummings further certifies that prior to the work schedule change the parties' CNA was not violated because the CSS2s received compensatory time and were allowed to work remotely, on-call.

Following the filing of the PANJ's January 29, 2020 grievance, the Judiciary held hearings on June 16, and July 14, and it denied the grievance in a written decision dated August 24. 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." In addition, we do not consider the wisdom of the contract language in question, only its negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982) states:

[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.

The Judiciary argues that although work schedules are generally mandatorily negotiable and legally arbitrable,

arbitration of the PANJ's grievance would substantially interfere with its ability to effectively supervise PTS staff on the weekends and meet the statutory 48-hour deadline for pretrial release hearings. The Judiciary's rationale for the work schedule change is that a CSS2 working remotely and on-call is not as hands-on in order to coordinate with PTS staff, to address questions on the cases and from the court, and to ensure that staff were meeting their responsibilities. In the Judiciary's reply brief, it argues that the certifications of the CSS2s in this matter evidence that when they were working remotely, on-call they performed far less supervisory duties.

The PANJ argues that its grievance challenging the Judiciary's unilateral weekend work schedule change is mandatorily negotiable and legally arbitrable because it violates myriad provisions of the parties' CNA and past practice. The PANJ argues that, unlike the Judiciary's cited Commission cases, the Judiciary has not established any facts that demonstrate that the former weekend work schedule resulted in ineffective supervision or led to operational problems with the PTS unit. The PANJ asserts that CSS2s have been working weekends remotely, on-call for years without incident, including during the ongoing COVID-19 pandemic. The PANJ claims that even if the Judiciary showed that onsite weekend supervision is more effective, it

would still not be permitted to implement the new work schedule unilaterally, without negotiations.

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 v. State, supra; 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). Where potential or generalized, as opposed to proven and particularized reasons 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., 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); 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).

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 proved need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training); 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 time services were most needed); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶ 33153 2002) (employer's un rebutted evidence that 12-hour shift had resulted in staffing, supervision and fatigue problems justified a mid-contract change).

On this factual record we find that the Judiciary has not demonstrated proven or particularized reasons for unilaterally changing the CSS2's weekend work schedules from remote, on-call to onsite every other weekend. The Judiciary states that in December 2019 it determined that the CSS2s working remotely, on-call on the weekends resulted in ineffective supervision. It provides a general, non-specific rationale that the CSS2s, working remotely and on-call, are not hands-on enough to provide the proper support to the PTS staff on the weekends. However, unlike the above-cited cases where the Commission restrained arbitration over an employer's work schedule change, the

Judiciary does not establish any discipline, performance, or operational problems that were occurring with the former schedule that required a unilateral change. Although the Judiciary argues in its brief that making the work schedule change would help it to meet the 48-hour deadline for pretrial release hearings, Nauer's certification does not include any indication that the CSS2s working remotely on the weekends has resulted in any issues meeting that deadline. The one allegation of poor performance (i.e. the sleeping investigator) was not raised or factually established by the Judiciary. Given all of the above considerations, we find that the employees' interests outweigh the Judiciary's interests and conclude that PANJ's grievance is mandatorily negotiable and legally arbitrable.

ORDER

The Judiciary'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: March 25, 2021

Trenton, New Jersey