

P.E.R.C. NO. 94-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-93-54

JERSEY CITY POLICE OFFICERS
BENEVOLENT ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Jersey City Police Officers Benevolent Association against the City of Jersey City to the extent the grievance seeks to enforce a contract provision that prevents the City from establishing a tactical patrol unit. The Commission finds that the City has established a need to take measures to ensure greater police coverage during high crime periods. Severable issues such as bidding procedures for assignment to the new shift and compensation for such assignments are mandatorily negotiable.

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Appearances:

For the Petitioner, Gerald L. Dorf, P.C., attorneys (Gerald L. Dorf, of counsel)

For the Respondent, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C., attorneys (David Solomon, of counsel)

DECISION AND ORDER

On January 11, 1993, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Jersey City Police Officers Benevolent Association. The grievance concerns the creation, staffing, and shift hours of a tactical patrol unit.

The parties have filed exhibits and briefs. The City has also filed certifications executed by its police chief and a police lieutenant who administers the department's computer system. These facts appear.

The POBA represents the City's non-supervisory police officers. The parties entered into a collective negotiations

agreement with a grievance procedure ending in binding arbitration.

Article 10 is entitled "Work Day & Work Week." Section A provides:

Effective February 11, 1989, the normal work day and work week shall be the eight (8) section schedule for employees working the steady day, evening, midnight schedule. This schedule shall consist of five (5) 8 1/2 hour tours on duty followed by three (3) days off, after which the cycle repeats itself. The tours shall commence at a quarter of the hour and end at a quarter after the hour.

Section E calls for bidding by seniority for steady shifts.

Before February 28, 1992, the police department had three shifts. The day shift began at 6:45 a.m. and ended at 3:15 p.m.; the evening shift began at 2:45 p.m. and ended at 11:15 p.m.; and the midnight shift began at 10:45 p.m. and ended at 7:15 a.m. These shifts accorded with the parties' contract.

During 1991, City officials received a host of letters from citizens, neighborhood associations and other community groups, and councilpersons. These letters complained that gangs would congregate at night and would engage in such activities as dealing drugs, shooting guns, committing assaults, robbery, vandalism, prostitution, fighting, under-age drinking, urinating, racing cars, begging, and playing extremely loud music. The letters complained that the police had not patrolled or responded to calls for help and they urged that more officers be assigned to patrol these areas.

The computer system administrator compiles data concerning calls for service. From June 2 through December 31, 1991, the

police department received 188,016 calls for service; 42.77% of these calls were received between 6:00 p.m. and 2:00 a.m. The number of unanswered calls was highest during this period. The administrator reported this data to management officials.

On February 28, 1992, the City responded to the complaints by creating the tactical patrol unit. A new shift was also established, with tour hours beginning at 5:45 p.m. and ending at 2:15 a.m. This shift overlapped the evening and midnight shifts and increased coverage at the times coverage was most needed. To staff this unit, the City assigned police officers who had been laid off in February 1991 and who had been recalled for reorientation at the police academy. It also invited police officers to volunteer for this unit. Since the tactical patrol unit was created, the percentage of calls unanswered between 6:00 p.m. and 2:00 a.m. has decreased.

On February 28, 1992, the POBA filed a grievance. It asserted that the City had violated the parties' collective negotiations agreement, specifically Article 10, by creating the fourth shift and assigning police officers to it without negotiating adequate compensation.

The police chief and the police director denied this grievance, asserting a prerogative to set the tours for special units. The POBA demanded binding arbitration and 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 POBA's grievance or any contractual defenses the City may have. We specifically decline to consider the argument in the City's reply brief that a seniority bidding claim is not contractually arbitrable.

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 Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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 an inconsistent term in their agreement. 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. [87 N.J. at 92-93; citations omitted]

We will not restrain arbitration of a grievance unless the alleged agreement is preempted or would substantially limit government's policymaking powers. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83).

A statute will not preempt negotiations unless it speaks in the imperative and eliminates the employer's discretion by expressly, specifically, and comprehensively fixing an employment condition. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). N.J.S.A. 40A:14-118 provides, in part, that the chief of police shall "prescribe the duties and assignments of all subordinates and other personnel." This general statute does not address work schedules and is not preemptive. Rochelle Park Tp., P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd App. Div. Dkt. No. A-1398-87T8 (12/12/88); Franklin Tp., P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982); Borough of Roselle, P.E.R.C. No. 80-137, 6

NJPER 247 (¶11120 1980), aff'd App. Div. Dkt. No. A-3329-79 (5/7/81). See also Paterson at 96-97.^{1/}

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, 88 N.J. 393 (1982). That rule applies in cases involving the work schedules of police officers. 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 App. Div. Dkt. No. A-918-89T1 (9/25/90); Borough of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd App. Div. Dkt. No. A-3071-82T2 (12/15/83); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd App. Div. Dkt. No. A-4143-80T3 (3/25/83); Roselle. But a particular work schedule proposal is not 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

^{1/} The City also alleges that our exclusive unfair practice jurisdiction under N.J.S.A. 34:13A-5.4(c) preempts arbitration over a contractual claim that it did not negotiate adequate compensation for officers assigned to the new shift. We disagree. Parties may agree to incorporate into their contract the duty to negotiate over new employment conditions, but they may not agree to eliminate that duty altogether. Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982).

need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training); Bor. of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposed work schedule would have eliminated relief officer system and caused coverage gaps); see also Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), recon. den., P.E.R.C. No. 85-112, 11 NJPER 310 (¶16111 1985) (improving supervision). Each case must be decided on its own facts. Mt. Laurel; Roselle.

In this case, the City has established a need to take measures to ensure greater police coverage during high crime periods. The facts show that the incidence of crimes and the percentage of unanswered calls were highest between 6:00 p.m. and 2:00 a.m. The police department had received many community complaints about gangs congregating and committing crimes during these hours and a more visible, prompt and potent police response was needed. The City did not change or eliminate the three contractual shifts. It decided to create a special unit to increase police coverage without increasing officers' work hours and to improve police response when most needed. We have restrained arbitration over grievances contesting similar decisions. See City of Newark, P.E.R.C. No. 88-137, 14 NJPER 442 (¶19181 1988); City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982); see also City of Linden, P.E.R.C. No. 92-127, 18 NJPER 362 (¶23158 1992).

Borough of Sayreville, P.E.R.C. No. 91-35, 16 NJPER 542 (¶21244 1990), is distinguishable. There, as part of an overall work schedule proposal during contract negotiations, the majority representative proposed creating a fourth shift; that proposal was rejected but the employer later unilaterally implemented the fourth shift; the employer did not attempt to prove a governmental policy need for another shift; and the employer discontinued that shift after three days. Under those circumstances, we found an unfair practice. However, we also agreed with the employer that our order should be tailored to require negotiations only when similar circumstances were involved since negotiations over a "power shift" might not be required under different circumstances. Given this employer's factual presentations, we find such different circumstances here. Under these facts, an agreement which precludes the City from establishing a special unit to provide special coverage necessary to deliver essential police services would represent a substantial limitation on its policymaking powers. Paterson. Accordingly, we will restrain arbitration over that grievance.


While the POBA cannot enforce a contractual provision limiting the City to these three shifts under these facts, issues severable from that decision may be negotiable. City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985). Severable issues include bidding procedures for assignment to the new shift and compensation for such

assignments. We therefore decline to restrain arbitration over any severable issues.

ORDER

The request of the City of Jersey City for a restraint of binding arbitration is granted to the extent the grievance seeks to enforce a contract provision that prevents the City from establishing a tactical patrol unit.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: September 24, 1993
Trenton, New Jersey
ISSUED: September 24, 1993