P.E.R.C. NO. 97-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Petitioner,

-and- Docket No. SN-97-39

CUMBERLAND COUNTY PBA LOCAL 231,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of portions of an expired collective negotiations agreement between the County of Cumberland and Cumberland County PBA Local 231 that the PBA seeks to retain in a successor agreement. The Commission finds that a provision concerning work schedules for officers in the corrections division is mandatorily negotiable. The Commission finds that a provision concerning work schedules in the transportation division is mandatorily negotiable except to the extent it would prohibit the employer from scheduling employees after 6:00 p.m. The Commission finds a provision concerning scheduling of weekends off in the corrections division to be mandatorily negotiable.

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, Richard J. Geiger, County Counsel

For the Respondent, Stuart J. Alterman, attorney

DECISION AND ORDER

On November 4, 1996, Cumberland County petitioned for a scope of negotiations determination. The employer seeks a declaration that portions of its expired collective negotiations agreement with Cumberland County PBA Local 231 are not mandatorily negotiable and a PBA proposal to retain those provisions in a successor agreement may not be submitted to interest arbitration. The challenged provisions address work schedules.

The parties have filed affidavits, their predecessor contract, and briefs. These facts appear.

The employer operates a 500-inmate jail staffed by 95 correction officers plus supervisory and civilian personnel. The PBA represents the County's Sheriff's Officers and Correction Officers. The parties entered into a collective negotiations agreement effective from January 1, 1993 through December 31, 1995.

Article XVIII covers work schedules. The employer challenges the negotiability of these provisions:

> B. Transportation Division
>
> The regular scheduled work week for Employees in this Division shall consist of five (5) consecutive days, Monday through Friday inclusive and will be scheduled for eight (8) hours per day within a daily time period of 6:00 a.m. to 6:00 p.m.
>
> C. Correction Division
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> Employees in the Correction Division working on continuous operation, shall be scheduled so as to provide five (5) consecutive working days on, followed by two (2) consecutive days off. Each working day shall be divided into three (3) shifts, to wit: 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to 12:00 a.m.; and 12:00 a.m. to 8:00 a.m.
>
> F. Where the nature of the work involved require[s] continuous operation, Employees so assigned will have their schedules arranged in a manner which will insure, wherever practical, on a rotating basis, that all Employees so assigned will have an equal share of Saturdays and Sundays off, distributed evenly throughout the year.

The parties are engaged in negotiations and interest arbitration over a successor agreement. The employer seeks to eliminate the work schedule language and replace it with language recognizing management's right to schedule the length, frequency and timing of shifts and days off. The PBA wishes to retain the current work schedules, which it asserts have been in effect since 1972, but is willing to negotiate over an alternative schedule. It contends that it has reviewed alternative work schedules, but has found that a staffing shortage precludes any schedule other than the current one. The County responds that the PBA has not proposed an alternate schedule.

The affidavit of the warden states that for the corrections division, peak service periods are from 7 a.m. to 8 a.m. and 10 a.m. to 3 p.m. The hours of least activity are from midnight to 6 a.m. For the transportation division, peak service periods are from 9 a.m. to 10 a.m. and 6 p.m. to 10 p.m.[1/] The affidavit states that overtime in the transportation division could be virtually eliminated if management could schedule staff in accordance with activities and tasks. The affidavit of the employer's director of personnel and human resources states that it must await publication of a new Civil Service eligibility list before it can hire any new officers, presumably in permanent positions. The PBA asserts that the present contract does not prevent management from deploying additional persons during peak periods or from using transportation workers to perform other duties, particularly during peak periods in the morning.

Public 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. But within that framework, work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982). That general rule applies in cases involving the work schedules of police officers and firefighters. In re Mt. Laurel

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1/ The employer's brief explains that large numbers of inmates are transported to and from municipal court between 6 p.m. and 10 p.m.

Tp., 215 N.J.Super. 108 (App. Div. 1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); 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 10 NJPER 79 (¶15044 App. Div. 1983); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd NJPER Supp.2d 129 (¶109 App. Div. 1983); Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd NJPER Supp.2d 97 (¶80 App. Div. 1981). But a particular work schedule proposal is not mandatorily negotiable if the record demonstrates that 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); 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) (proposed work schedule would have eliminated relief officer system and caused severe coverage gaps in small department); 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)(conforming shifts of supervisors and subordinates). Each case must be decided on its own facts. Mt. Laurel; Roselle.

The employer claims that it has a managerial prerogative to control the length, frequency and timing of shifts and days off.

Given the case law governing the negotiability of work hours and work schedules, we must reject this claim to an unfettered right to set these employment conditions unilaterally.[2/] In Maplewood, we explained that:

> we must examine the facts of each case to determine whether negotiations over a work schedule proposal or change would significantly interfere with governmental policy. It is important to understand, however, that this task is different from judging the wisdom of a proposal or determining which party's negotiations position is more reasonable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (1977). When the Legislature required negotiations over terms and conditions of employment, it recognized that both management and employees would have legitimate concerns and competing arguments and it decided that the negotiations process was the best forum for addressing those concerns and arguments and the best way to improve morale and efficiency. See N.J.S.A. 34:13A-2; Woodstown-Pilesgrove[Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582] at 591[1980]. When the Legislature approved interest arbitration as a means of resolving negotiations impasses over the wages, hours, and employment conditions of police officers and firefighters, it recognized that both management and employees would have legitimate concerns and competing evidence and it decided that the interest arbitration process was the best forum for presenting, considering, and reviewing those concerns and evidentiary presentations and the best way to ensure the high morale of these employees and the efficient operation of their departments. N.J.S.A. 34:13A-14 et seq. Indeed, the Legislature

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2/ The employer's concern that separate arbitrations for rank-and-file and superior officers could lead to separate work schedules and thereby compromise supervision is a common concern and one that must be considered by both arbitrators.

> expressly instructed interest arbitrators to consider the public interest and welfare in determining wages, hours, and employment conditions and contemplated that such considerations would be based on a record developed by the parties in an interest arbitration proceeding. N.J.S.A. 34:13A-16g(1). See also Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994). The question, then, is not which party should prevail in negotiations or interest arbitration or whether a particular proposal raises some legitimate concerns, but whether the facts demonstrate that a particular work schedule issue so involves and impedes governmental policy that it must not be addressed through the negotiations process at all despite the normal legislative desideratum that work hours be negotiated in order to improve morale and efficiency.

The employer may seek to obtain a contractual right to control work schedules, but it does not have a managerial prerogative to do so.

Turning to the facts of this case, we cannot say that negotiations and interest arbitration will not produce a work schedule that accommodates the interests of both the employer and employees. While the outer limits of the current work schedule appear to have resulted in using employees at overtime rather than straight time rates to meet staffing needs, that labor cost issue alone does not make the subject of work schedules non-negotiable. See, e.g., New Jersey Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div.1988). In addition, the employer has not proposed an alternative work schedule for the PBA or us to consider.

We have previously addressed the issue of "power shifts" created to address a need for increased coverage at a time of increased demand. Two cases illustrate the relationship between negotiations over work schedules and the employer's reserved right to act unilaterally. Where an agreement or a failure to reach agreement significantly interferes with a governmental policy decision, an employer may be able to change a schedule unilaterally.

In City of Jersey City, P.E.R.C. No. 94-30, 19 NJPER 542 (¶24256 1993), the contract set the police work schedule and the union sought to block the establishment of a power shift by enforcing the contractual work schedule through binding arbitration. We restrained arbitration over the grievance because the employer had established a need to create a special unit outside the existing work schedule to increase police coverage without increasing work hours and to improve police response when most needed. Here the PBA does not seek to enforce a work schedule that the employer has shown interferes with governmental policy. The parties are engaged in successor contract negotiations and the employer asserts that problems with the existing schedule necessitate it having the right to set the length, frequency and timing of shifts and days off.

In Borough of Sayreville, P.E.R.C. No. 91-35, 16 NJPER 542 (¶21244 1990), the union proposed a change in work schedules and included a "power" shift to put extra officers on the street during high-need hours. The employer rejected the schedule change and the

power shift was not pursued independently. When the employer then created a power shift unilaterally, we found that it had violated its obligation to negotiate in good faith. The employer had not shown that the union would not have agreed to the shift or negotiated some mutually satisfactory compromise. As in Sayreville, the employer has not shown that negotiations will not produce a schedule that both parties can live with.

At this stage of the parties' successor contract negotiations, the employer has articulated its preference for having at least some officers in the corrections division begin work at 7 a.m. rather than 8 a.m. It has not made a negotiations proposal to that effect but instead seeks to have the right to set work schedules unilaterally.

On this record, we conclude that the issue of work schedules for officers in the corrections division is mandatorily negotiable. Both parties may present their proposals and concerns to each other and may develop a full record enabling the interest arbitrator to evaluate their concerns in light of the public interest and the statutory criteria that an arbitrator must consider in crafting an interest arbitration award.[3/]

3/ Nothing we have said should be construed as commenting on the merits of the work schedule issue in negotiations or interest arbitration. This caution is crucial given our jurisdiction to review interest arbitration awards. N.J.S.A. 34:13A-16f(5)(a).

We have also considered the employer's concerns about the transportation division. According to the warden, few transportation assignments must be performed from 6 a.m. to 9 a.m. Peak activity is from 9 a.m. to 10 a.m. and from 6 p.m. to 10 p.m. The current work schedule precludes the employer from scheduling employees after 6:00 p.m and is not mandatorily negotiable to that extent. However, while the employer has a right to schedule employees to transport inmates to and from court at night, it has not proposed a change in this division's work schedule or explained what changes it seeks to meet its coverage needs. Contrast Gloucester Cty., P.E.R.C. No. 89-70, 15 NJPER 69 (¶20026 1988), recon. den. P.E.R.C. No. 89-86, 15 NJPER 154 (¶20063 1989)(employer had prerogative to implement third shift for laundry workers but had to negotiate, upon demand, over adjustments in hours of work or a differential for new shift). Thus, on this record, we cannot say that negotiations over the work schedules for the transportation division employees would necessarily interfere with any governmental policy determinations. The employer has raised financial considerations that should be considered by the PBA and must be considered by the arbitrator. The PBA has expressed a willingness to consider alternative schedules, but the employer has not yet proposed one. Under all these circumstances, we are not inclined to halt the negotiations process over this subject. Should the parties make new proposals but be unable to reach agreement, should the interest arbitrator award a new work schedule, and should the

employer believe that the arbitrator has failed to apply the criteria specified in N.J.S.A. 34:13A-16(g), it may appeal the arbitrator's award.

Finally, the employer has contested the negotiability of Section F of Article XVIII, which appears applicable to the correction division but not the transportation division. The ability to be off on weekends intimately and directly affects employee work and welfare and the language is flexible enough to accommodate the employer's practical needs. See Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996). Neither of the employer's affidavits addresses the practical impact of this clause. Absent any showing that equalizing weekends off interferes with operational needs, this provision is mandatorily negotiable.

ORDER

Sections C and F of Article XVIII are mandatorily negotiable. Section B is mandatorily negotiable except to the extent it prohibits the employer from scheduling employees after 6:00 p.m.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. Commissioner Boose voted in favor of the decision, but voted against that portion of the Order which finds Section C to be mandatorily negotiable. Commissioner Wenzler was not present.

DATED: March 26, 1997
Trenton, New Jersey
ISSUED: March 26, 1997