

P.E.R.C. NO. 86-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-86-9

F.O.P. LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance which F.O.P. Lodge No. 12 filed against the City of Newark. The grievance alleges that a proposed change in police shifts and work schedules would violate the parties' agreement. The Commission holds that these charges are not arbitrable because they are prompted by the significant governmental policy interest of increasing the level and efficiency of police services.

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Appearances:

For the Petitioner, Rosalind Lubetsky Bressler, Corporation Counsel (Lucille LaCosta-Davino, Assistant Corporation Counsel, Of Counsel and On the Brief).

For the Respondent, Stephen C. Richman, Esq.

DECISION AND ORDER

On August 7, 1985, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The City seeks to restrain arbitration of a grievance filed by the Newark Fraternal Order of Police Lodge No. 12 ("FOP"). The grievance alleges that a proposed overhaul of police shifts and work schedules would violate the parties' collectively negotiated agreement.

Both parties have filed briefs. The following facts appear.

The FOP is the majority representative of the City's non-supervisory police officers. The parties' contract runs from January 1, 1985 through December 31, 1986. Article 5, Section 1(b) provides:

The hours for those employees other than [administrative and investigative employees] shall be various tours of duty worked out in schedule form and made up for no less than three (3) months in advance, but complying with the general concept of four days or nights on duty and two (2) days or nights off duty.

The current 4 days on, 2 days off police work schedule, which has been in existence for decades, has officers working on three rotating, equally staffed shifts commencing at 8:00 a.m., 4:00 p.m. and 12 midnight. Over the past six years staffing in the police department has declined.

As a result of a study of high crime periods and police response time to emergency calls, the City devised a work schedule and shift schedule to increase the level and efficiency of police services. The new schedule results in each officer working on several different patterns rather than the prior 4-2 rotation. New patterns include 3-2, 3-3, 4-2, 4-3, 5-2 and 5-3. In addition, there will be five instead of three shifts with the new shifts commencing at 12 midnight, 8 a.m., 11 a.m. 4 p.m. and 7 p.m.^{1/}

^{1/} The City attached copies of a projected day to day schedule from September 1985 through December, 1986 for 37 police squads. We are unable to discern any repeating pattern other than that officers will rotate through all five shifts in order (e.g. a tour on the midnight shift is followed by a tour on the 8 a.m. shift, then 11 a.m. 4 p.m. 7 p.m. and back to midnight) during a cycle. Using the schedule of squad H for March 2, to March 31, 1986 as an example, the days of work, shifts and days off would be: 4 on (7 p.m.) 2 off; 4 on (7 p.m.) 2 off; 3 on (7 p.m.) 2 off; 3 on (7 p.m.) 3 off; 4 on (midnight), 3 off. For squad L, the schedule from May 31, 1986 to July 1, 1986 would be: 4 on (8
(Footnote continued on next page)

The City's comparison of the old and proposed schedules projects that the new schedule will reduce the number of days worked per year and the average number of hours worked per week and the number of weekends worked.^{2/}

On May 28, 1985, Charles Knox, Newark's police director discussed and provided copies of the proposed changes with FOP leaders. On June 14, 1985, the FOP notified Knox that the membership had rejected the proposed changes. On June 18, 1985 Knox wrote to the FOP President giving notice that the changes would be implemented in September, 1985.^{3/}

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a.m.), 3 off; 3 on (8 a.m.) 3 off; 4 on (8 a.m.) 2 off; 5 on (8 a.m.), 2 off 4 on (8 a.m.), 2 off. Under the projected schedules it takes approximately eight months (37 weeks) to rotate through all five shifts. (e.g. Squad B commences midnight shift tours on September 1, 1985 and does not return to the midnight shift again until April 28, 1986).

2/ The City says that new schedule will produce a 72 percent probability of an immediate police response to a critical call, compared with a 40 percent probability under the existing schedule. This "critical call response time" was one of seven factors the City considered in making the new schedule. They are: (1) for every officer there is another officer with the same schedule; (2) there are no more than five shifts; (3) no officer will work more than eight hours in a 24 hour period nor more than 40 hours in a 168-hour period; (4) the average number of hours worked in a week will be less than or equal to the average under the 4-2 schedule; (5) every officer has the same or more weekends off than under the 4-2 schedule; (6) at all times the probability of an immediate response is 72 percent or better; and (7) any new schedule meeting the first six criteria must not use fewer officers.

3/ On July 17, 1985 the City decided to utilize the same schedule for all four police districts, rather than previously announced
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On June 25, 1985, the FOP filed a grievance alleging that the change violated six separate provisions of the agreement, including Article V. The City denied the grievances. On July 9, 1985 the FOP demanded arbitration. This petition ensued.

The City, while recognizing that its proposed changes will substantially affect its officers, argues that its desire to improve the delivery of police services outweighs the officer's interest and makes the changes non-negotiable under Atlantic Highlands, 192 N.J. Super. 71 (App. Div. 1983), certif. den. ___ N.J. ___ (1984) and the balancing test set forth in Woodstown-Pilesgrove and Closter. The City's study shows that the existing 4-2 schedule cannot meet the need for an immediate response to "critical" calls for police assistance.

While the FOP does not challenge the City's study, it does question some of the seven listed factors chosen for deciding a change was necessary. It asserts that the City has not adequately explained why its goals cannot be met by adhering to the contractual 4-2 schedule and adjusting other factors such as hiring, reassignment or overtime. The FOP notes that under the new schedule there would be a decreased unity of supervision since a supervisor

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separate schedules for each. The letter to the FOP advising of this decision delayed the implementation date of the changes to October 16, 1985 and the City's counsel has further advised that implementation will await our decision.

may not work the same hours as the members of his squad. The FOP in asserting that the contract does not significantly interfere with the City's manning needs, also notes that the contract refers to the "general concept" of a 4-2 schedule within the confines of the City's manning requirements. It distinguishes Atlantic Highlands on the grounds that the City's 1,000 plus police officers give it much more flexibility in martialing manpower while adhering to an existing work schedule than the 14-officer force in Atlantic Highlands.

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.^{4/}

The Court stated:

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

^{4/} The scope of negotiations for police and fire employees is broader than for other public employees because P.L. 1977, c. 85 provides for a permissive as well as a mandatory category of negotiations. Compare, IFPTE, Local 195 v. State, 88 N.J. 393 (1982).

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.

(Id at 92-93, citations omitted)

In Borough of Closter and PBA Local 233, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), we reviewed the negotiability of work hours and schedules for public safety employees in light of numerous Supreme Court and Appellate Division decisions requiring a balancing approach in each case. We stated, in part:

The fatal defect to the claim that work schedules are per se managerial prerogatives is that it focuses solely upon the interest of the public employer. But the Supreme Court has eschewed such a narrow approach. Woodstown-Pilesgrove recognized that:

Logically pursued, these general principals -- managerial prerogatives and terms and conditions of employment -- lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by a public employer involve some managerial function, ending the inquiry at that point would all but eliminate the legislated authority of the union representative to negotiate with respect to "terms and conditions of employment." N.J.S.A. 34:13A-5.3. Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives.
[Id. at 589].

Accordingly, the court cautioned against isolating and focusing solely upon one aspect of the test. Rather, it stressed that "[t]he nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made." Id. at 591.

Accordingly, we reject the assertion that the entire field of "work schedules" falls within the managerial prerogative sphere. Such a per se holding would be contrary to the "weighing or balancing" approach. Therefore, we will continue to make our work schedule scope of negotiations determinations based upon the balancing tests enunciated in Paterson, Woodstown-Pilesgrove and Local 195. In view of this balancing test, we cannot delineate with absolute precision what proposals will be mandatorily or permissibly negotiable. We merely point out that items which have traditionally been held to be appropriate subjects of negotiations will continue to be so. For instance, matters concerning hours and days of work would, in general, be mandatorily negotiable.

[11 NJPER at 134-135].

We now apply these principles to the proposed changes. Two separate negotiability issues arise from this dispute: (1) The work schedule for patrol officers (i.e. the change from the 4-2 schedule to the new irregular patterns); and (2) The change from three eight hour tours to five tours.

While both parties agree that the changes will have a substantial impact on the lives of the police officers, the Appellate Division held in Atlantic Highlands, supra and Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif den. 82 N.J. 286 (1980), that changes in work hours and shift schedules which are prompted by significant governmental policy interests outweighing

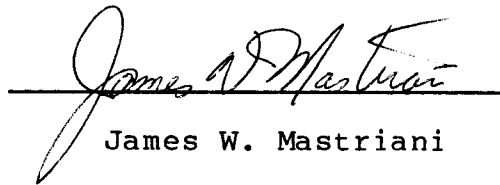
the impact on terms and conditions of employment are not negotiable. As in Closter, the City has significant policy reasons for realigning police officers' shifts. Based upon the particular facts of this case, which include a showing by the City that the number of hours and weekends worked by police under the new schedule will not increase, we hold that Atlantic Highlands and Irvington compel the conclusion that the FOP may not arbitrate the City's decision to implement these work and shift schedule changes.

However, this decision does not affect any other severable issues, such as overtime payments and shift differentials. Article 5 Section 9 provides a \$250.00 annual shift differential for officers who are assigned to rotating shifts or who are permanently assigned to shifts which do not begin between 5:45 a.m. and 12 noon. When these differentials were negotiated, an officer would complete a tour of all three shifts within 18 days. Now that an officer will rotate through five different shifts in an 8-month cycle, the assumptions underlying the agreement upon a \$250.00 annual shift differential are no longer in force and a demand for negotiation and arbitration on these severable issues could be made by the FOP. See City of Elizabeth and Elizabeth Fire Officers, 198 N.J. Super. 382 (App. Div. 1985); Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984).

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

A handwritten signature in cursive script, reading "James W. Mastriani", is written over a horizontal line.

James W. Mastriani

Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioners Hipp and Graves were opposed.

DATED: Trenton, New Jersey

November 18, 1985

ISSUED: November 19, 1985