

P.E.R.C. NO. 86-139

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-84-69

STATE TROOPERS FRATERNAL
ASSOCIATION OF N.J., INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission considers the negotiability of an overtime compensation proposal which the State Troopers Fraternal Association seeks to submit to interest arbitration. In an earlier decision, the Commission had held the proposal mandatorily negotiable, but had recognized that the legislatively-created Overtime Committee could preempt negotiations through contrary regulatory action. P.E.R.C. No. 86-16, 11 NJPER ___ (¶ ___ 1986). After that decision, STFA revised its proposal and Congress also amended the Fair Labor Standards Act. The Appellate Division then remanded the case to the Commission to consider the negotiability question in light of these developments. Doing so, the Commission reaffirms its earlier decision. The Commission specifically rejects the employer's arguments that a Civil Service regulation preempts negotiations and that the proposal significantly interferes with its managerial prerogatives as well as STFA's argument that the Overtime Committee has no regulatory power to preempt overtime compensation negotiations.

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Appearances:

For the Petitioner, W. Cary Edwards, Attorney General
of New Jersey (Melvin E. Mounts, Deputy Attorney
General, of Counsel and on the Brief)

For the Respondent, Loccke & Correia, Esq. (Richard
D. Loccke, of Counsel and on the Brief)

DECISION AND ORDER

On July 16, 1985, the Public Employment Relations
Commission issued a scope of negotiations determination concerning
certain proposals made by the State Troopers Fraternal Association
during successor contract negotiations with the troopers' employer.
P.E.R.C. No. 86-16, 11 NJPER __ (¶____ 1986). We held that some
proposals were not mandatorily negotiable in whole or part and could
not be submitted to interest arbitration while some proposals were
mandatorily negotiable in whole or part and could be submitted to
interest arbitration. In particular, applying the tests set forth
in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978)
("State Supervisory"), we held that a proposal that troopers receive

overtime compensation after working more than 40 hours per week was mandatorily negotiable to the extent the public employer had discretion under N.J.A.C. 4:6-3.3 to ask the Overtime Committee to approve overtime payments. We recognized, however, that the Overtime Committee could take contrary action preempting negotiations. We followed an earlier decision affirmed by the Appellate Division. State of New Jersey and Local 195, App. Div. Dkt. No. A-2408-83T3 (2/8/85), aff'g P.E.R.C. No. 84-77, 10 NJPER 42 (¶14024 1983) ("Local 195")

The public employer appealed our ruling concerning the negotiability of overtime compensation as well as our rulings finding five other proposals partially or wholly negotiable. While this appeal was pending, two developments occurred. First, interest arbitration proceedings began. The majority representative revised its proposals on overtime compensation, leaves of absence and grievance procedures and withdrew three other proposals; these proposals had all been subjects of appeal. Second, Congress amended the Fair Labor Standards Act, 29 U.S.C. §201 et seq. ("FLSA"), to specify the rights of public safety officers to overtime compensation. These amendments responded to Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. ___ (1985), which held that the FLSA applied to public sector employees.

On April 9, 1986, the Appellate Division remanded this case for reconsideration of the overtime proposal's negotiability in light of the FLSA amendments. App. Div. Dkt. No. A-0027-85T5 (4/9/86). The Court stated these amendments "might affect the

regulations upon which the State relies in contending that the issues of hours and overtime cannot be made the subject of mandatory negotiations." Because this proposal might also affect negotiations regarding grievance procedures and leaves of absence, the Court remanded those issues as well. Finally, the Court declined to consider the negotiability of the three withdrawn proposals.

The parties have submitted new statements of position. We heard oral argument on May 21.

STFA asserts that the FLSA strengthens our initial decision by extending the rights of public employees to receive overtime compensation. Before the FLSA, it argues, the employer had discretion, absent a contrary negotiated agreement, to deny any overtime compensation to troopers, no matter if they worked 168 hours in a week.^{1/} After the FLSA, it argues, the employer must pay overtime compensation after the troopers have worked 42 3/4 hours a week. Thus, according to STFA, the amendments have narrowed the dispute to whether the public employer may agree to pay overtime compensation to troopers working between 40 and 42 3/4 hours per week, before the federal obligation to pay overtime is triggered.

^{1/} The parties' 1982-1984 agreement, however, provided that the total scheduled hours over a 28 day cycle would be 160 and that troopers would receive overtime benefits if they worked more hours than those hours scheduled (between 64 and 88) in either half cycle.

The public employer concedes the proposal does not violate either the FLSA or regulations of the Overtime Committee, adopted on April 16, 1986, in response to those amendments. It asserts instead that the proposal is not negotiable because N.J.S.A. 4:1-18.7 requires troopers to work a non-limited workweek of irregular and variable hours. The employer also contends, in an argument not raised before us earlier, that the proposal would significantly interfere with its managerial prerogative to deploy its work force by increasing the compensation paid troopers working more than 40 hours a week.

We attach STFA's revised proposal now before the interest arbitrator. It essentially provides that troopers shall receive overtime compensation after working more than 40 hours in a seven day work cycle.^{2/} Employees will also receive overtime compensation if their schedules or shifts are changed with less than 48 hours notice. Employees shall be paid 1 1/2 times the regular pay rate, but an employee may elect to take compensation in the form of compensatory time off which may accumulate up to 24 hours.

This proposal simply addresses the question of when employees will receive overtime compensation and how much compensation they will receive. It does not prevent the employer

^{2/} STFA's original proposal had specified troopers would receive overtime compensation after working 8 hours in a day. This aspect has been deleted.

from requiring its employees to work more than 40 hours per week. The employer thus controls when and how long troopers work. The proposal is limited to how much troopers will be paid.

Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) articulates the tests for determining whether contract proposals covering police officers are mandatorily negotiable:

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. 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.
Id. at 92-93, (citations omitted).

In State Supervisory, the Supreme Court held that negotiations over a term and condition of employment will not be preempted unless a statute or regulation specifically eliminates the employer's discretion to alter that term and condition. The Court added:

It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights

or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum.

Id. at 81-82, (footnote omitted).

See also Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982).

In our previous decision, we applied State Supervisory's tests and determined that the proposal was mandatorily negotiable to the extent that N.J.A.C. 4:6-3.3 conferred discretion upon the employer's negotiations representative to ask the Overtime Committee to approve the requested payments.^{3/} That regulation provided:

the Overtime Committee may, upon the request of the Office of Employee Relations [OER], authorize overtime payments for State Police law enforcement officers.

^{3/} The Overtime Committee is composed of the State Treasurer, the Director of the Division of Budget and Accounting in the Department of the Treasury and the president of the Civil Service Commission. N.J.S.A. 52:14-17.13; N.J.A.C. 4:6-1.1.

We also held, however, that the Overtime Committee could take contrary action ruling out the requested compensation and thus preempting negotiations. Our holding was thus co-extensive with the amount of discretion conferred by N.J.A.C. 4:6-3.3.

In our earlier decision, we relied on Local 195. There, a regulation provided that overtime compensation must be paid in either cash or compensatory time off at the discretion of the department head with the approval of the Overtime Committee. The Appellate Division held that this regulation did not preempt a negotiated agreement giving employees a choice between these forms of compensation in the absence of any contrary action by the Overtime Committee. The Court quoted our decision with approval:

Based upon the record before us, we do not believe that the statutes and regulations should be applied to preempt arbitration in this case. Local 195 has alleged that the public employer has exercised its statutory discretion by agreeing to pay cash to employees working overtime if they prefer pay to compensatory time off; under State Supervisory and Bethlehem, that discretion could be properly exercised through negotiation. No statute or regulation specifically bars such an agreement if proved at arbitration, and there is nothing in the record to indicate that the Overtime Committee has specifically held that the Department of Transportation may not pay its employees working overtime instead of giving them compensatory time off. Given an allegation that the public employer has exercised its statutory discretion through negotiations, and in the absence of any indication that the President of the Civil Service Commission and the Overtime Committee have exercised their statutory review powers to the contrary, we believe that the statutory system does not preempt negotiation or binding arbitration concerning the meaning of the contractually agreed-upon article.

We believed Local 195 applicable since N.J.A.C. 4:6-3.3 permitted the employer's negotiations arm, OER, to request overtime compensation for troopers and the Overtime Committee had not ruled out the proposed compensation.

We now consider the negotiability issue in light of the FLSA amendments and the new regulations. The employer concedes that these developments do not preempt STFA's proposal. We agree. STFA argues that these developments preclude the Overtime Committee from taking any contrary action ruling out this proposal and thus preempting negotiations. We disagree. These developments eliminate neither the discretion of OER to request the proposed overtime payments nor the regulatory power of the Overtime Committee to take contrary action. We thus reaffirm our initial determination.

The FLSA provides generally that covered employees must be paid overtime at the rate of one and one-half times their regular pay rate for hours worked in excess of 40 during the employee's workweek. 29 U.S.C. §207(a)(1). Employers of public safety officers, however, have an option of selecting a work period of from 7 to 28 days which in turn will have a corresponding maximum hours standard for determining when mandatory overtime compensation begins. 29 U.S.C. §207(k). For example, if the work period selected for police officers is 7 days, then the maximum hours standard is 43 hours and employees must receive overtime compensation for working more than 43 hours within the 7 day period. If the work period selected for police officers is 28 days,

then the maximum hours standard is 171 and employees must receive overtime compensation for working more than 171 hours within the 28 day period. The federal Department of Labor has published interim regulations, 29 C.F.R. §553 et seq., implementing the FLSA amendments and correlating the work period chosen with the maximum hours worked before overtime compensation begins. 29 C.F.R. §553.230.^{4/} Overtime compensation mandated by the FLSA must be paid at 1 1/2 times the regular pay rate; collective negotiations agreements may provide for compensatory time off instead of cash, but an employee may not accrue more than 480 hours of compensatory time off. 29 C.F.R. §553.24.

The FLSA thus guarantees employees, including troopers, certain minimum rights to overtime compensation. These minimum benefits override any contrary State laws or regulations and are incorporated by reference in any agreement. State Supervisory at 80. A public employer, however, may negotiate over greater overtime benefits than those the FLSA mandates, absent a preemptive State law or regulation. State Supervisory at 81.

^{4/} The work period chosen is simply an accounting device for calculating overtime compensation. It need not coincide with the pay period, with the employees' work schedules, or with a particular day of the week or hour of the day. 29 C.F.R. §553.224. See also U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, State and Local Government Employees Under the Fair Labor Standards Act, WH Publication 1459 (May 1985).

We now consider whether the Overtime Committee's new regulations preempt the troopers' proposal. The employer concedes they do not. We agree.

Troopers occupy non-limited ("NL") titles, N.J.A.C. 4:1-18.7, and are classified as having irregular or variable work hours. N.J.A.C. 4:6-2.1.^{5/} Overtime Committee regulations preceding the FLSA amendments provided that NL employees were not eligible for overtime compensation, N.J.A.C. 4:6-3.2. That rule, however, was deleted from the regulations adopted by the Overtime Committee on April 16, 1986, presumably because it would have violated the FLSA. The employer's earlier reliance on this rule is thus no longer warranted: The mere fact that an employee may work irregular or variable hours cannot be said to preclude overtime compensation.

To the contrary, the regulations now provide that employees in non-exempt, NL titles (now termed "NE" titles) "shall be eligible for either cash payment or compensatory time off at the discretion of the department head with the approval of the Overtime Committee or its representative for time worked in excess of 40 hours per week." N.J.A.C. 4:6-4.1. (Emphasis supplied).^{6/} This regulation treats employees in fixed workweek titles and NE titles the same and is virtually identical to the regulation construed by us and the

^{5/} Some, but not all troopers work a 40 hour week within the previously negotiated 28 day cycle.

^{6/} Non-exempt NL titles such as troopers are designated "NE" for purposes of determining overtime compensation eligibility whereas NL titles exempt from FLSA coverage are still denominated NL. This opinion thus will refer to non-exempt NL titles as NE.

Appellate Division in Local 195. The employer thus has discretion to agree to overtime compensation for NE employees working more than 40 hours per week, absent contrary action by the Overtime Committee.

The regulations also give an employer of law enforcement officers the same option provided in the FLSA: the employer has the discretion to choose an alternate work period with a corresponding maximum hours standard. The Overtime Committee may approve any alternate work period. N.J.A.C. 4:6-4.1(c).

Not only may NE employees receive overtime compensation after working more than 40 hours per week, the regulations state that OER may request overtime compensation for troopers working beyond their regular work hours, although less than 40 hours per week. N.J.A.C. 4:6-3.1(a)3. In our earlier decision, we relied on this rule's predecessor in determining that OER could negotiate over using its discretion to ask the Overtime Committee to approve overtime payments for troopers. When it adopted the current regulations, the Overtime Committee had the opportunity recognized in Local 195 to reject this interpretation. It did not. Instead it readopted the rule and specified it could be invoked even if troopers regularly worked below 40 hours per week.

In sum, the new regulations recognize that an employee's classification as an NE employee does not negate that employee's right to certain minimum overtime benefits or the employer's discretion to ask the Overtime Committee to approve greater benefits. The analysis begins, rather than ends, with an employee's

NE classification, and the focus then becomes the employee's rights and the employer's discretion under the regulations. N.J.A.C. 4:6-4.1 and 4:6-3.1(a)3 spell out the employer's discretion: The former permits employers to pay overtime to NE employees working more than 40 hours per week or to choose an alternate work period for troopers, subject to the Overtime Committee's approval, and the latter provides that such a request can be made for troopers working under 40 hours a week. We thus hold that neither the FLSA nor the new regulations preempt the employer's discretion to ask the Overtime Committee to approve benefits for troopers beyond the federally mandated minimum.^{7/}

In our initial decision, we rejected STFA's position that the public employer had complete discretion to negotiate overtime compensation provisions precluding contrary action by the Overtime Committee. We still reject it. These regulations preserve the Overtime Committee's authority to review the use of the public employer's discretion and to take contrary action. The Overtime Committee was created by the Legislature, N.J.S.A. 52:14-17.13, and

^{7/} In its reply brief, the employer notes that STFA's proposal would limit the use of compensatory time off as a form of compensation to 24 hours instead of the maximum of 480 hours permitted by the FLSA amendments. The Overtime Committee regulations also provide for a maximum of 480 hours of compensatory time off for law enforcement officers. N.J.A.C. 4:6-4.2(a)3. The employer does not argue that either the FLSA or the Overtime Committee regulations preempt this aspect of the proposal. They do not. State Supervisory at 81-82; Local 195.

at least one member - the president of the Civil Service Commission - is not a representative of the public employer State Supervisory. Accordingly, as in Local 195 and in our earlier decision here, we hold that overtime compensation proposals may be subject to contrary regulatory action by the Overtime Committee. Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Board of Higher Education, 91 N.J. 18 (1982).

We now turn to the employer's contention that STFA's proposal would significantly interfere with its managerial prerogative to deploy its work force by increasing the compensation costs of assignments beyond 40 hours a week. In reviewing this claim, we must balance the effect of the proposal on the employee's work and welfare against the effect of the proposal on the employer's asserted managerial prerogatives. Paterson; Bd. of Ed. of the Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 594 (1980). Our Supreme Court has recognized that negotiation over matters affecting public employees' work and welfare will always impinge to some extent on the determination of governmental policy and has thus required a showing of "significant" interference before a managerial prerogative is found. Local 195, IFPTE v. State, 88 N.J. 393, 404 (1982). Compensation issues predominantly involving budgetary considerations are mandatorily negotiable. Woodstown-Pilesgrove at 594.

In City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), we held that a public employer has a managerial

prerogative to direct employees to work overtime, but overtime compensation is mandatorily negotiable. Local 195; City of Newark, P.E.R.C. No. 86-52, 11 NJPER 703 (¶16242 1985); Township of Edison, P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984); cf. Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979) (confirming grievance arbitration award requiring employer to pay overtime to police officers on standby beyond eight hour workday). This approach generally accommodates the employer's prerogative to deploy and direct the workforce with the employees' fundamental interest in negotiating over the compensation they will receive, including the possibility of premium pay when required to work long hours and to have their personal and family lives disrupted. State of New Jersey and State Troopers Fraternal Assn, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981).

Here, the employer indisputably may require the troopers to work more than 40 hours a week. STFA's proposal would not determine how long employees work, what schedule they follow or what assignments they receive. Instead, the proposal involves the rate of compensation troopers will be paid for required work, and the employer essentially argues that the economic impact of a reduced work cycle for purposes of calculating overtime compensation would limit its ability to deploy and assign personnel without incurring additional overtime costs. We see no reason in this case to deviate from our caselaw holding such compensation issues mandatorily negotiable. The parties have negotiated over such rate questions in

the past, and this proposal only provides that troopers may receive somewhat greater overtime compensation than what the parties had previously negotiated and what the FLSA now mandates as minimum benefits. Provisions for overtime compensation after working 40 hours a week are common in collective negotiations agreements covering police officers and firefighters in New Jersey. The interest arbitrator will be obligated to consider this proposal's cost as part of STFA's total economic package and give due weight to the enumerated factors in N.J.S.A. 34:13A-16g, including the financial impact of each party's package. In addition, as we and the courts have recognized, the Overtime Committee retains regulatory authority to take contrary action concerning overtime compensation not mandated by federal law; again, the Committee has not yet ruled out the proposed overtime compensation for troopers and will even entertain requests for overtime compensation for troopers working less than 40 hours a week. Accordingly, we hold this overtime compensation proposal is mandatorily negotiable absent contrary regulatory action by the Overtime Committee.^{8/}

Finally, the Appellate Division has also remanded the proposals on grievance procedures and STFA's security leaves.

^{8/} The employer has noted that subparts of the proposal require overtime compensation for schedule or shift changes on less than 48 hours' notice, limit the use of compensatory time off to a maximum of 24 hours, and define hours worked for purposes of calculating overtime compensation; but has not argued that each subpart should be considered individually non-negotiable. These subparts are mandatorily negotiable. Local 195; Township of Edison.

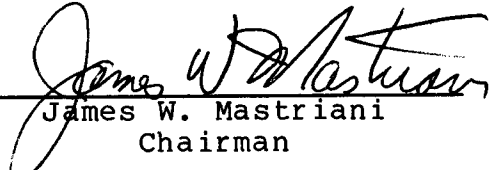
Neither party has asked us to reconsider our earlier determinations on these issues or suggested that our determination on the overtime issue will affect negotiations regarding these issues. We reaffirm our earlier determinations, adding only that STFA has made its security leave proposal dependent on the employer's operational needs.

ORDER

The Public Employment Relations Commission declares that the proposal of the State Troopers Fraternal Association is mandatorily negotiable to the extent it seeks overtime compensation mandated by federal law and to the extent the public employer has discretion to ask the Overtime Committee to approve additional overtime payments not mandated by federal law. The Overtime Committee, however, retains authority in its regulatory capacity to disapprove overtime compensation not mandated by federal law.

The Commission also declares that STFA's proposals concerning grievance procedures and security leaves, as modified, are mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 27, 1986
ISSUED: May 27, 1986

APPENDIX A

HOURS OF WORK AND OVERTIME

All work performed in excess of forty (40) hours in a seven (7) consecutive calendar day work cycle shall be considered overtime.

The seven (7) consecutive day work cycle, for computation purposes, shall commence at 12:01 A.M. on Saturday and end at midnight on Friday.

Work, for the purposes of this article, shall be defined as any service performed which arises out of the employee's status as a law enforcement officer. Meal and break periods which occur during periods of work shall be computed as work time.

Any schedule change or shift change which is effective on less than forty-eight (48) hours notice to the employee shall cause the entire work obligation so changed to be paid at the overtime rate. Change shall be defined as an alteration from a regularly posted work schedule. Work schedule posting shall continue pursuant to past practice. The forty-eight (48) hour notice period shall be calculated from the time that the extra work, overtime work, is completed.

All overtime shall be compensated as paid compensation at the time and one-half rate. (The overtime rate shall be base plus maintenance divided by 2080 x 1.5) unless the employee, at

said employee's sole option, elects to take compensation for overtime in compensatory time off (C.T.O.) which shall accumulate in a C.T.O. bank. Compensatory time compensation in the C.T.O. bank shall accumulate at the time and one-half (one and one-half hours banked for each hour of overtime worked in quarter hour units).

C.T.O., once banked in the C.T.O. bank, shall remain and only be used at the request of the employee. Each request is subject to prior employer approval based on operational needs.

At no time shall any employee's accumulated time in the C.T.O. bank exceed the total of twenty-four (24) hours.

Under no circumstances shall there be less than eight (8) hours of time off between consecutive shifts of work. Any violation of this provision shall result in paid overtime compensation for all time which violates the eight (8) hour provision.

The above changes shall be effective May 1, 1986.