

P.E.R.C. NO. 98-138

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FRANKLIN,

Petitioner,

-and-

Docket No. SN-98-60

FRANKLIN FOP LODGE 57,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals of the Borough of Franklin and the Franklin FOP Lodge 57 made during interest arbitration proceedings for a successor collective negotiations agreement. The Commission finds not mandatorily negotiable the FOP's proposal that there be two patrol officers on a shift at all times. The Commission finds mandatorily negotiable the FOP's proposal that whenever officers work alone they be compensated at the overtime rate for the first four hours and at the double time rate after that and the FOP's proposal that an employee be released from the midnight shift at least six hours before a scheduled court appearance the next day. The Commission declines to decide the negotiability of the Borough's work schedule proposal since the Borough does not propose precise contractual language, but instead proposes a statement of future intent to propose an unidentified modification of the current work schedule.

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, Laddey, Clark & Ryan, attorneys  
(Thomas N. Ryan, on the brief)

For the Respondent, Locke & Correia, attorneys  
(Charles J. Sciarra, on the brief)

DECISION

On January 23, 1998, the Borough of Franklin petitioned for a scope of negotiations determination. The Borough seeks a determination that proposals made by Franklin FOP Lodge 67 are not mandatorily negotiable and may not be submitted to interest arbitration.

The parties have filed briefs and exhibits; the FOP has filed a certification. These facts appear.

The FOP represents patrol officers and sergeants. The parties' most recent contract expired on December 31, 1997. They are engaged in interest arbitration.

The FOP seeks to add provisions that would: (1) mandate that there be two uniformed patrol officers on shift at all times; (2) provide that when a uniformed patrol officer is required to

work alone on the road, that officer will receive overtime compensation for the first four hours of the shift and double-time pay for all work thereafter; and (3) require that an employee be released from the midnight shift at least six hours before any scheduled court appearance the next day. In its brief, the FOP clarifies this last proposal to state that the Borough may refuse release time in emergencies or where the Borough deems it necessary to maintain minimum staffing levels.

The Borough also asks that we determine the negotiability of one of its proposals. That proposal states:

The Borough is undertaking a review of scheduling and proposes a modification of the current language to facilitate flexibility and to reduce reliance on overtime.

The Borough's police force has twelve officers, including the chief, seven patrol officers, one detective and three sergeants. Patrol officers respond to calls and patrol Route 23, a commercial, heavily-traveled highway. Officers are now required to work alone during certain periods which, the Borough maintains, allows for deployment of more officers when more police coverage is needed. On about ten to twelve occasions per year, a Borough officer has a scheduled court appearance on the morning after working a midnight shift.<sup>1/</sup>

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<sup>1/</sup> Most court appearances are in municipal court, which is scheduled in the evenings. Superior Court appearances are scheduled during the day and may require a full day in court.

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 No. 1 v. 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 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 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]

However, in a case arising in the context of initial or successor negotiations, we will determine only whether a contract proposal is mandatorily negotiable since an employer may decline to submit permissive proposals to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

We turn first to the FOP's proposal that there be two patrol officers on a shift at all times. We have long held that such minimum staffing requirements are not mandatorily negotiable. See, e.g., Paterson; City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983); Readington Tp., P.E.R.C. No. 84-7, 9 NJPER 533 (¶14218 1983). We reach the same result here.

We next consider the FOP's proposal that whenever a patrol officer works alone on the road, he or she shall be compensated at the overtime rate for the first four hours and at the double-time rate after that. Compensation and premium pay provisions are, in general, mandatorily negotiable. See, e.g., State of New Jersey (Dept. of Law and Public Safety, Div. of State Police), P.E.R.C. No. 95-40, 21 NJPER 38 (¶26024 1994) (one and one-half time pay for insufficient notice of schedule change); Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984) (one and one-half time pay if work hours change without four days' notice); Township of Rochelle Park, P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd NJPER Supp.2d 198 (¶176 1988) (one and one-half time pay where involuntary reassignments effected without

contractual notice or exceed contract maximum). This is so even where managerial prerogatives are implicated, so long as the pay bears a reasonable relationship to a particular hazard or to other circumstances affecting working conditions which it is designed to compensate. Rutherford Bor., P.E.R.C. No. 97-7, 22 NJPER 280 (¶27151 1996), aff'd 23 NJPER 242 (¶28116 1997).

Two recent decisions discuss the relationship between a premium pay clause and a claimed managerial prerogative. In Rutherford Bor., we held to be not mandatorily negotiable a contract provision requiring that all unit members receive a 5% increase whenever six or more members of the 38-officer unit were transferred from fixed-shift work assignments. We found that the premium pay for all employees was not reasonably related to removal from fixed work assignments of a much smaller number of unit members. We concluded that the provision was a penalty that significantly interfered with the employer's prerogative to make transfers for such reasons as long-term illness, personality conflicts, emergencies, training needs or other operational reasons. In Lopatcong Tp., P.E.R.C. No. 96-12, 21 NJPER 290 (¶26184 1995), we considered a contract provision requiring double-time pay for patrol officers working alone after sunset. The case arose after the Township stopped complying with the provision, the PBA filed an unfair practice charge and, as a defense, the Township maintained that the clause was an impermissible restriction on its ability to make staffing

decisions. We acknowledged that it might be possible "to construct a scenario where a premium pay provision would significantly interfere with an employer's ability to set staffing levels...." We found that that was not the case in Lopatcong where, both before and after it stopped complying with the provision, the Township had routinely scheduled two officers after dark. We concluded that paying double-time on the rare occasions when an officer worked alone after sunset would not significantly interfere with the Township's staffing decisions. We therefore found that the Township had violated the Act by repudiating the contract provision. In an earlier decision, Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (121207 1990), we found to be mandatorily negotiable the same provision requiring double-time pay for officers working alone after sunset. We held that the proposal involved compensation issues which were severable from a companion proposal to require the Borough to assign two patrol officers after sunset.

Within this framework, we consider the Borough's contention that the proposal would significantly interfere with its ability to make staffing decisions and the FOP's position that the proposal bears a reasonable relationship to, and is designed to compensate for, the safety hazards of working alone.

This proposal would not, on its face, nullify the decision to deploy only one patrol officer during certain periods. Given the rule that premium pay proposals are

mandatorily negotiable, we cannot say on this record that this premium pay proposal would significantly interfere with the Borough's staffing decisions.<sup>2/</sup> We stress however, that in considering such a proposal, an interest arbitrator must weigh all the statutory criteria under N.J.S.A. 34:13A-16g, including evidence concerning the financial impact of the proposal and the safety risks or other considerations for which it is designed to compensate.<sup>3/</sup>

We turn now to the FOP's proposal that an employee be released from the midnight shift at least six hours before a scheduled court appearance the next day. The Borough concedes that the release time proposal is not preempted by any statute or regulation, but argues that the provision is not mandatorily negotiable because it would either reduce the staffing assigned to the midnight shift or require that staffing be maintained by paying another officer at overtime rates to fill the slot.

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<sup>2/</sup> We need not address whether there might be circumstances where a clause requiring the payment of double time for an entire shift to one officer working alone would not be mandatorily negotiable. Cf. Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 533 (1985) (award of full year's salary for employer's breach of layoff notice provision would nullify fiscal decision to abolish position).

<sup>3/</sup> The Borough argues that the small size of its department warrants making an exception to the general rule that premium pay proposals are mandatorily negotiable. We decline to do so and note that the size of the Lopatcong police force was even smaller. See Interest Arbitration award in Lopatcong Tp., Docket No. IA-93-116 at p. 2. Again, however, the arbitrator must fully consider the financial impact of any proposal in light of the size of the department.



The FOP asserts the provision is mandatorily negotiable because an officer on the midnight shift would have insufficient time to rest between shifts if the officer were required to be in court the next morning. It notes that midnight shifts are ten hours long.

Applying the tests set forth in Paterson, we hold the proposal to be mandatorily negotiable. The proposal seeks to reduce the possibility that an officer will be required to work a ten-hour midnight shift, then appear for a perhaps day-long court appearance the next morning, and then return for another ten-hour shift the next evening. It, in essence, proposes a work break during such a long shift and, as such, it intimately and directly affects employee work and welfare. Cf. Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997) (proposal to give all employees an equal share of weekends off is mandatorily negotiable); Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988) (work breaks are a mandatory subject of negotiations). While the Borough has an interest in ensuring that its staffing needs are met, the FOP has clarified its proposal to state that the Borough may deny release time in emergencies or where the Borough deems it necessary to maintain minimum staffing levels. In this posture, the proposal does not significantly interfere with the Borough's right to make staffing decisions. While the Borough maintains that the proposal may require additional overtime, that labor cost issue alone does not make the

proposal not mandatorily negotiable. Cumberland Cty.; 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).<sup>4/</sup> In any case, an interest arbitrator may consider the costs of the proposal, as well as the employees' interests in obtaining the release time, in applying the statutory criteria and deciding whether to award the proposal.

Finally, we consider the Borough's position on work schedules. The Borough does not seek to change employee work hours in any specific way, but states that it is undertaking a review of scheduling and proposes "a modification of the current language to facilitate flexibility and to reduce reliance on overtime." It seeks a determination that, given the small size of its force and the difficulty in providing police coverage under the current work schedule, any negotiations over work schedules would significantly interfere with its managerial prerogatives.

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 rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J.

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<sup>4/</sup> We also note that an officer on the midnight shift will not necessarily miss six hours of work each time a court appearance is scheduled for the next day. If the court appearance is scheduled for 1 p.m., the officer will not miss any time because, according to Article 5, Section A, the midnight shift ends at 7 a.m.

393 (1982). That rule generally applies in cases involving the work schedules of police officers and firefighters. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); see also Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997) and cases cited therein.

While an employer does not have a managerial prerogative to control work schedules, it may seek to obtain a contractual right to do so. Cumberland Cty.; cf. Bor. of Somerville, P.E.R.C. No. 84-14, 9 NJPER 558 (¶14232 1983) (management rights clause is mandatorily negotiable and did not constitute an illegal blanket waiver of union's right to negotiate over proposed new rules or modifications of existing rules governing working conditions). However, the Borough has not proposed sufficiently precise contractual language. Instead, its proposal is a statement of future intent to propose an unidentified modification of the current work schedule. As such, the proposal is too vague to permit a negotiability analysis. See N.J.A.C. 19:13-2.2(a)3 (requiring clear and concise statement of the disputed matter on which a Commission determination is sought); see also Highland Park Bd. of Ed., P.E.R.C. No. 89-83, 15 NJPER 100 (¶20047 1989) (declining to rule on negotiability of existing contract provision given its ambiguity and parties' disagreement over its meaning).

We also decline to rule on whether the Borough has a right to control or change work schedules independent of a

contractual waiver. The Commission and the Appellate Division have found exceptions to the rule that work schedules are negotiable when the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. See Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); 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); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992). While the Borough generally maintains that the current schedule makes it difficult to maintain police coverage, neither it nor the FOP has sought a specific change in the current schedule. In the absence of a specific proposal by either party, we cannot determine whether the Borough has a particularized need to change or preserve the work schedule without negotiations.

ORDER

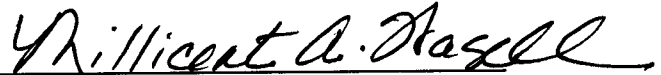
The FOP proposal requiring that there be two uniformed patrol officers on shift at all times is not mandatorily negotiable.

The FOP proposal to require the payment of overtime and double time to a uniformed patrol officer on the road who is required to work alone is mandatorily negotiable.

The FOP release time proposal is mandatorily negotiable.

We dismiss that part of the petition that requests a scope-of-negotiations determination with respect to the Borough's work schedule proposal.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: April 30, 1998  
Trenton, New Jersey  
ISSUED: April 30, 1998