P.E.R.C. NO. 2024-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PLAINSBORO,

Petitioner,

-and- Docket No. SN-2023-040

CWA LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township's request for restraint of binding arbitration of the CWA's grievance alleging that the Township reduced the regular work schedules of EMTs by eight hours per pay period and assigned them to per diem EMTs, resulting in the loss of overtime compensation. Finding that the Township has not demonstrated a particularized managerial need to change EMT work schedules and remove their overtime hours in order to meet its staffing needs for providing EMT services, the Commission holds that arbitration of the grievance would not significantly interfere with the Township's managerial prerogative to determine policy.

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, Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Weissman & Mintz, LLC, attorneys (Brett M. Pugach, of counsel)

DECISION

On April 27, 2023, the Township of Plainsboro (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by CWA Local 1032 (CWA). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it reduced the regular work schedule of its three full-time Emergency Medical Technicians (EMTs) by eight hours per pay period and assigned those hours to per diem EMTs, resulting in the loss of overtime compensation for the full-time EMTs.

The Township filed a brief, exhibits, and two certifications from Lieutenant Eamon Blanchard. The CWA filed a brief, exhibits, and the certifications of two grievants, B.Bo. and

B.Ba. These facts appear.

The CWA is the exclusive representative of all non-supervisory white collar and professional employees and part-time employees working twenty-one (21) hours or more per week, including all full-time EMTs. The Township and the CWA are parties to a CNA with a term of January 1, 2020 through December 31, 2022. The grievance procedure ends in binding arbitration.

Article 5 of the CNA is entitled "Overtime" and provides, in pertinent part:

> A. Overtime shall be paid for all work performed in excess of forty (40) hours per week at the rate of one and half (1-1/2) times the computed hourly rate. Hours between thirty-five (35) and forty (40) hours shall be paid at straight time. Hours of work shall be defined under FLSA. Full-time employees shall not be paid overtime until said employees shall have worked the hours specified above. . . All employees other than EMTs shall work a 35-hour work week. EMTs shall continue to work the same work schedule.
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> D. Working hours and daily schedules of employees will be arranged to fit Township needs. There is no guarantee of overtime hours.

The three grievants, B.Bo., B.Ba., and K.M., are full-time EMTs who comprise the Township's entire full-time EMT workforce. B.Ba. and B.Bo. certify to the following facts. As long as they have been employed, for seventeen years and since May 2015, respectively, their regularly scheduled working hours have always been the same. Pursuant to the CNA and over twenty years of past

practice, full-time EMTs have a three-week shift cycle whereby on the Friday of the third week of the cycle, full-time EMTs are provided with a twelve-hour work day, consisting of four hours paid at straight time and eight hours paid at the overtime rate. The last eight hours of the third week of the three-week cycle were never offered to anyone (per diem EMTs or other full-time EMTs) unless B.Bo. or B.Ba. called out. The procedure to provide coverage when an EMT was out on leave was to first offer the hours to per diem EMTs and, if they could not work the hours, offer the hours as additional overtime to full-time EMTs. When a full-time EMT was out, neither B.Bo. nor B.Ba. ever had to give up any of their regularly scheduled hours, included the last eight (overtime) hours on Friday of the third week of the cycle.

Blanchard certifies that, on or about January 23, 2023, one of the full-time EMTs advised the Township that he needed to go on an extended medical leave. He certifies that, on February 7, Lieutenant Brett Olma (Olma) spoke to the active EMTs about changing the work schedule and arranging for coverage with one employee out on leave. B.Ba. certifies that on or about February 13, he informed the Township that he would be out on extended medical leave, while B.Bo. certifies that B.Ba. went out on extended leave on or about the second week of February 2023.

Blanchard certifies that as a result of one of the full-time EMTs going out on medical leave, the Township had to rearrange

its remaining EMT work force to provide coverage by changing EMT schedules and temporarily increasing the use of per diems. He certifies that it is a longstanding policy of the Township to use per diem EMTs to ensure the Township is able to maintain adequate staffing levels. Blanchard certifies that "[t]he work schedule for EMTs was changed from rotating forty-eight (48) and thirty-nine (39) hour workweeks to rotating forty (40) and thirty-nine (39) hour workweeks." He certifies that once the EMT returns to full duty, "the schedule will revert to the schedule that was in effect prior to his leave."

B.Bo. certifies that when B.Ba. took his extended leave, B.Bo. continued to work his regularly scheduled hours, including all twelve hours of the Friday of his three-week cycle. However, B.Bo. certifies that on March 14, 2023, he learned that starting on March 31, the Township would be offering the last eight hours of his three-week cycle to per diem EMTs, even though he had not called out. B.Bo. informed Olma that he intended to work the full day on the Friday of his three-week cycle and asked why his hours were offered as an open shift. B.Bo. certifies that Olma replied that any overtime now had to be offered to per diem EMTs first. B.Bo. certifies that since then, the Township has continued to eliminate the last eight hours of the Friday in his three-week work cycle and continued to offer these eight hours to per diem EMTs first. He certifies that B.Ba. returned to work on

May 3, 2023 but that as of June 8, the Township has not reverted back to the regular schedule for full-time EMTs.

On March 25, 2023, B.Ba. notified the Township that he was cleared to return to work. The enclosed March 24 letter from B.Ba.'s doctor stated that B.Ba. was cleared to return to work without any restrictions and can resume full duty EMS work on May 3, 2023. B.Ba. and B.Bo. certify that B.Ba. returned to full duty work on May 3, 2023. Blanchard certifies that the EMT on extended leave "returned to work on May 4, 2023 in a limited capacity" and that he "has now returned to full-duty and the schedule will revert to the schedule that was in effect prior to his leave effective June 26, 2023."

On March 21, 2023, the CWA filed a grievance asserting that the Township's unilateral reduction in hours to the regular work schedules of all three full-time EMTs violated the CNA. The grievance seeks restoration of the grievants' regular work schedules, which they assert include eight hours of overtime compensation per pay period due to the final eight hours worked of the 48-hour week in each three-week cycle. On April 6, the Township denied the grievance. On April 13, the CWA filed a request for submission of a panel of arbitrators. This petition ensued.

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

We must balance the parties' interests in light of the particular

facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Township asserts that arbitration should be restrained because it has the managerial prerogative to deploy personnel, including determining when overtime is needed. It argues that the change in the full-time EMT schedules and the increased use of per diems was based on the Township's determination that it was necessary in order to ensure adequate staffing. The Township contends that when one of the three full-time EMTs went out on medical leave, it needed to revise the schedules of the other two EMTs by reducing their 48-hour week in their three-week work cycle to a 40-hour week and increasing the assistance of per diems to maintain sufficient coverage. The Township asserts that the schedule change was temporary and that the schedule of the full-time EMTs will revert back to what it had been when the third full-time EMT returns to full duty.

The CWA asserts that the grievance is arbitrable because it concerns the mandatorily negotiable issues of work schedules and compensation. It argues that the Township's unilateral reduction in the work schedule of the full-time EMTs from 48 hours to 40 hours in one week of their three-week work cycle resulted in a loss of compensation. The CWA contends that arbitration would not significantly interfere with the determination of governmental policy, as there was no operational need for the

schedule change. The CWA asserts that the Township has not demonstrated a legitimate staffing issue, as it reduced the hours of the full-time EMTs just to replace them with per diems. It argues that because the governmental services were already being provided by the full-time EMTs at the time the Township needed them, the only thing that changed was who was providing the services. The CWA contends that instead of using per diems just to replace the hours of the full-time EMT out on medical leave, the Township unnecessarily cut eight hours from the shifts of the remaining full-time EMTs and used per diems for those hours.

The CWA asserts that this case does not involve a determination of whether overtime is needed because the eight hours cut from the full-time EMT schedules were part of their regular schedules. It argues that this is not a situation where the employer needs to determine whether it is necessary to call in employees outside of their regular shift, as it is undisputed that there is a governmental need for EMT services during these hours that the full-time EMTs have already been regularly scheduled to work but happen to be paid at the overtime rate because they are the last eight hours of a 48-hour week. The CWA contends that the allocation of overtime opportunities among qualified employees is mandatorily negotiable.

The Township replies that it is up to the Township, not the CWA, to determine that a staffing issue is present, and that it

determined that the medical leave of one full-time EMT created a staffing issue that required the reduction of the overtime hours previously worked by full-time EMTs and an increase in the use of per diems to cover those hours. It argues that the rate of pay of EMTs has not changed, that they are simply not being afforded as much overtime as they previously were, and that under the CNA there is no guarantee of overtime hours.

This case concerns the intersection of the issue of assigning available overtime opportunities to qualified EMTs with the issue of changing the work schedules, and concomitant compensation, of full-time EMTs by eliminating eight hours of overtime which had been part of their 48-hour work week in their three week work schedule cycle and using per diems instead.

The Commission and courts have consistently held that work schedules are mandatorily negotiable except where the employer has demonstrated that maintaining a particular schedule would substantially limit a governmental policy determination. Local 195, supra, 88 N.J. at 411-413; Franklin Tp., 424 N.J. Super. 369 (App. Div. 2012) (despite employer's alleged efficiencies from changing work schedules, it did not demonstrate that the previous work schedule significantly interfered with its governmental policy need to provide police services); Mount Laurel Tp., 215 N.J. Super. 108, 115 (App. Div. 1987) (where employer did not meet its "burden . . . to advance reasons in support of its need,

from a policy making point of view, to unilaterally control police work hours[,]" the union's proposal to memorialize existing work schedule was mandatorily negotiable); Atlantic Highlands Bor., 192 N.J. Super. 71 (App. Div. 1983), certif. den., 96 N.J. 293 (1984) (employer's undisputed claims of diminished efficiency and coverage gaps demonstrated that union's schedule proposal would significantly impact the determination of governmental policy); and Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den., 82 N.J. 296 (1980) (given demonstrated need to correct supervision and discipline issues, employer had prerogative to change shift schedules so patrol officers worked same shifts as their supervisors).

"A public employer has a managerial prerogative to determine when governmental services will be delivered and the manning or staffing levels necessary for the efficient delivery of those services and, derivative from those determinations, when overtime work is necessary." Clark Tp., P.E.R.C. No. 2016-55, 42 NJPER 372 (¶105 2016), aff'd, 2016 N.J. Super. Unpub. LEXIS 2348; see also City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). "[T]he allocation of overtime and procedures for selecting employees to work overtime are generally mandatorily negotiable and arbitrable." West Milford Tp., P.E.R.C. No. 2016-45, 42 NJPER 310 (¶90 2015); see also Wayne Tp., 1998 N.J. Super. Unpub. LEXIS 8 (App. Div. 1998), aff'g P.E.R.C. No. 97-74, 23

NJPER 42 (¶28029 1996).

Therefore, the Commission and courts have held that, where the employer has determined a need to provide services at certain times with a certain level of staffing, disputes over whether those services will be provided on an overtime basis based on existing work schedules and/or overtime procedures are mandatorily negotiable as long as such schedules and procedures are not demonstrated to significantly interfere with the delivery of those services. New Jersey Sports & Expo. Auth., 1988 N.J. Super. Unpub. LEXIS 5 (App. Div. 1988), aff'g P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987) (union could arbitrate employer's use of seasonal, casual, or part-time employees to work weekend hours at straight-time rates rather than using full-time unit members on overtime); Town of West New York, 1991 N.J. Super. Unpub. LEXIS 8 (App. Div. 1991), aff'g P.E.R.C. No. 91-52, 17 NJPER 5 (¶22003 1990) (union could arbitrate employer's use of Emergency Response Team officers to work certain special duty assignments instead of calling in PBA unit members on overtime); and Maywood Bor., 1983 N.J. Super. Unpub. LEXIS 1 (App. Div. 1983), aff'g P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983) (union could arbitrate to enforce use of overtime priority list to achieve employer's minimum staffing levels, rather than employer's unilateral directive requiring shift swaps instead of overtime opportunities).

In Camden Cty., P.E.R.C. No. 2003-54, 29 NJPER 34, 35 (¶12 2003), the Commission held that the employer's change from five to seven day work schedules to reduce overtime costs was arbitrable because the employer did not demonstrate how the employees' interests in maintaining their negotiated work schedule significantly interfered with governmental policy interests. Camden Cty., 29 NJPER at 35. See also City of Atlantic City, P.E.R.C. No. 2004-25, 29 NJPER 490, 492 (¶154 2003) (reducing overtime costs, while a legitimate concern, did not outweigh employees' interest in preserving work schedules). Similarly, in Clementon Sewerage Auth., P.E.R.C. No. 84-49, 9 NJPER 669 (¶14291 1983) the Commission found that the employees' work schedule, which included four regular overtime hours every weekend, was mandatorily negotiable, and therefore the employer committed an unfair practice by unilaterally changing to schedules that eliminated the overtime without a dominant policy reason. See also Carlstadt Bor., P.E.R.C. No. 2018-45, 44 NJPER 409 (¶114 2018) (shift schedule modification was arbitrable where the employer failed to sufficiently demonstrate that the change, rather than overtime assignments, was necessary to maintain minimum staffing).

In this case, the Township has not demonstrated a particularized managerial need to change full-time EMT work schedules from two 39-hour weeks and a 48-hour week to two 39-

hour weeks and a 40-hour week. The Township does not dispute the CWA's certified assertion that the full-time EMTs had been working that schedule, including eight overtime hours every third week, for more than 20 years. As the record indicates that the full-time EMTs were available to continue working those hours, there was no legitimate staffing issue implicated that required the use of per diem EMTs for those eight hours. The Township's non-negotiable managerial prerogative to determine that EMT work needs to be performed during those eight hours is not impeded by continuing to use full-time EMTs for the final eight hours of their shifts on an overtime basis, rather than per diem EMTs. Applying the Local 195 balancing test and the above-discussed precedent concerning the negotiability of work schedules and overtime opportunities, we find that the employees' interests in maintaining their work schedules and concomitant compensation outweigh the Township's interests in replacing their overtime hours with increased hours for per diem EMTs. We therefore hold that arbitration of the grievance would not significantly interfere with the Township's determination of when EMT services will be delivered and the staffing levels necessary to deliver them.

This case is distinguishable from Clark Tp., supra, in which we restrained arbitration of a grievance challenging a change in a record clerk's schedule. In Clark, the records clerk had been

performing increased work hours and paid overtime to cover evening sessions of the municipal court. However, because the employer stopped offering evening court sessions and no longer needed records clerk work performed in the evening, it changed the record clerk's hours back to regular work hours. Here, by contrast, the Township continues to provide EMT services during the eight hours on Fridays that comprised the overtime portion of the full-time EMT schedule. This case is also distinguishable from the Rutgers University, 2015 N.J. Super. Unpub. LEXIS 1198, aff'g P.E.R.C. No. 2014-41, 40 NJPER 289 (¶110 2013) decision relied on by the Township. In Rutgers, we restrained arbitration of a grievance that contested the assignment of licensed boiler operators (LBOs) to perform weekend boiler checks when shift operation specialists (SOS employees) were on vacation, rather than calling in SOS employees on overtime. In contrast to this case, the lost overtime opportunities in Rutgers were not part of the SOS employees' regular work schedules but were only available when others were out on leave. Furthermore, Rutgers involved a staffing redundancy where the SOS employees sought to continue to perform overtime work that could have been performed by LBOs who were already on duty performing other related work. Here, by contrast, the CWA employees were already on duty on Fridays and were the only EMTs regularly working the contested eight hours until the Township changed the schedule by calling in per diem

EMTs to work those eight hours instead of CWA employees.

ORDER

The Township of Plainsboro's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Higgins, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: August 24, 2023

Trenton, New Jersey