

P.E.R.C. NO. 2003-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Petitioner,

-and-

Docket No. SN-2002-46

MILLVILLE P.B.A. LOCAL #213,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Millville for a restraint of binding arbitration of a grievance filed by Millville P.B.A. Local #213. The grievance contests the City's decision to return police officers from 12-hour shifts to 8-hour shifts. The Commission restrains arbitration to the extent the grievance challenges the City's right to assign police officers to 8-hour shifts to meet its staffing, fatigue and supervision concerns. The request is otherwise denied.

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, Gruccio, Pepper, DeSanto, Farnoly,
P.A., attorneys (Lawrence Pepper, Jr., on the brief)

For the Respondent, Stuart J. Alterman, attorneys
(Kendall J. Collins, on the brief)

DECISION

On March 28, 2002, the City of Millville petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Millville P.B.A. Local #213. The grievance contests the City's decision to return police officers from 12-hour shifts to 8-hour shifts.

The parties have filed briefs and exhibits. The City has submitted the certification of Police Chief Ronald J. Harvey. The PBA has submitted the certification of PBA President Steven Felice.^{1/} These facts appear.

^{1/} On September 12, 2002, the PBA submitted a copy of a draft Addendum to Agreement for discussion only purportedly memorializing the 1999 agreement providing for 12 hour shifts. The City argues that the PBA's submission does not comply with our rules prohibiting additional filings without leave of the Commission. We agree and will not consider it. See N.J.A.C. 19:13-3.5(c). In any event, the PBA has not explained the relevance of this draft agreement.

The PBA represents police officers, excluding sergeants. The parties' collective negotiations agreement is effective from January 1, 2000 through December 31, 2003. The grievance procedure ends in binding arbitration.

The City is mostly urban with a population of over 26,000. According to a State of New Jersey Uniform Crime Report, the City has the third highest crime rate in the county. It employs 68 sworn police officers.

Before the summer of 1999, all patrol officers worked 8-hour shifts. During that summer, the parties negotiated an alternative work schedule which allowed the assignment of police officers to either 8-hour or 12-hour shifts. The 12-hour shift was implemented on a trial basis for one year. The 1999 agreement provides, in part:

The Chief, in his absolute discretion, shall have the right to assign other bargaining unit employees to the twelve (12) hour shift schedule in addition to the Patrolman assigned to the Patrol Division if the Chief determines that such assignment will promote the effective and efficient operation of the Police Department. In such event, these additionally assigned employees to the twelve (12) hour shift schedule shall be governed by the provisions hereunder, which cover the patrolman assigned to the Patrol Division.

The change of the work schedule for patrolman assigned to the Patrol Division is on a trial basis. Therefore, the City reserves the right to change the normal work hours and days per week and to establish new work hours and work days per week. Employees will be given as much notice as possible of permanent or temporary shift changes which affect them.

On June 5, 2001, the parties signed their 2000-2003 agreement. Neither party had raised any question about shift schedules during negotiations. The new agreement contains both an 8-hour and 12-hour shift provision for police officers in the Patrol Division. Article VII provides, in part:

For Patrolmen assigned to the Patrol Division who are assigned to work the twelve (12) hour shift schedule, the following provisions shall apply:

Part One, Section 1

The normal work week schedule of Police Officers shall be 2184 hours annually or 52 hours per week. Employees shall normally work twelve (12) hour shifts. The schedule of shifts shall be determined by the City depending upon its determination of its public safety needs and requirements and to promote the effective and efficient operation of its Police Department function. The City shall have the right to exercise any election or option available to it under the FLSA or the regulations provided under Section 7(K), except as limited by the terms of this Agreement. The work schedule will be based upon a twenty (28) day work cycle.

Part Two, Section 1

For Patrolmen assigned to the Patrol Division who are assigned to work the eight (8) hour shift schedule, the following provisions shall apply:

The work week schedule of Police Officers shall be 2080 hours annually or 40 hours per week. Employees shall normally work eight (8) hour shifts. The schedule of shifts shall be determined by the City depending upon its determination of its public safety needs and requirements and to promote the effective and efficient operation of its Police Department function. The City shall have the right to exercise any election or option available to it under the FLSA or the regulations provided

under Section 7(K), except as limited by the terms of this Agreement. The work schedule will be based upon a twenty (28) day work cycle.

Article II is a management rights clause. It provides that the City has the right to "determine work schedules, the starting and ending hours of employment, and the duties, responsibilities, and assignments of employees with respect thereto limited only by the specific and express terms of this Agreement. . . ."

Article VIII is a retention of benefits clause. It provides that all rights, privileges and benefits which the employees have and presently enjoy shall be maintained and continued by the employer during the term of the agreement.

The 12-hour schedule was implemented in 1999 under the prior police chief, William Herman. He retired in June 2000 and Chief Harvey was appointed. On or about July 29, 2001, Harvey implemented the disputed return to an 8-hour shift schedule. In his certification, Harvey states that he determined that the problems caused by the 12-hour shift were insurmountable and adversely affected the maintenance of the department and the public safety. He states that his views were shared by the police supervisors in the uniformed division. He references a July 1999 letter from Lieutenant Ed Grennon setting forth concerns about the 12-hour shift. Grennon stated that the 12-hour shift caused a reduction in staffing; a loss of police presence on the streets, especially during peak periods for service calls; and a reduction in the ability to respond to citizen complaints and calls for

assistance quickly and efficiently. Grennon's letter specifies three main concerns. He stated that one of the "selling points" for the switch to the 12-hour shift was that it would put more officers on the street. However, a review of the schedule from January to June 2001 showed that the number of officers on the evening shift had been reduced, thereby compromising officer safety. The second concern was officer fatigue and safety. Grennon stated that supervisors reported that officers are often fatigued near the end of the 12-hour shift; officers have said that after nine or ten hours they do not feel safe responding to calls; and some officers have been using blocks of time from two to four hours because they cannot finish their shifts due to fatigue. The third concern deals with continuity of supervision. Because supervisors work 8-hour shifts that rotate each month and police officers work 12-hour shifts that rotate biweekly, there is lack of continuity of supervision. Supervisors find it difficult to learn the strengths and weaknesses of officers and officers find it difficult to learn the expectations of supervisors. Grennon finally stated that the supervisors had also reported problems with poor report quality, administrative concerns, and little or no follow-up investigations being done.

On July 26, 2001, the PBA filed a grievance objecting to the return to the 8-hour shifts without negotiations. The PBA asserts that this shift change deprives it of a benefit without negotiation and compensation. The grievance was denied.

On January 10, 2002, the PBA demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police and fire employees 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. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson, at 92-93, outlines the scope of negotiations analysis for police 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.

Because the dispute involves a grievance, arbitration will be permitted if the dispute is at least permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983).

The City argues that it has a managerial prerogative to revert to the 8-hour shift schedule. It concedes that work hours are generally negotiable, but asserts that its chief and other supervisory personnel reverted to the 8-hour schedule based on serious concerns about staffing, employee and public safety, and supervision. The City cites Borough of Atlantic Highlands and Atlantic Highlands PBA Loc. 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984), and City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997).^{2/}

^{2/} The City also relies on a portion of Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), requiring that a work schedule for firefighters not be implemented until the same work schedule was adopted for supervisory officers as well. The Appellate Division has since reversed and remanded that portion of the decision. ____ N.J. Super. ____ (App. Div. 2002).

The PBA states that the 12-hour shift has been in effect for approximately two years, during which time the City and the PBA negotiated a new agreement. It asserts that the City never expressed any dissatisfaction with the 12-hour schedule during negotiations, but waited until one month after the agreement was signed to act. It argues that the City has not shown that the 12-hour shift interferes with its managerial prerogatives. It claims that the chief can still manage the schedule using the 8-hour and 12-hour shifts to meet the City's goals for efficiency and public safety. Finally, the PBA argues that even if we were to permit the City to unilaterally eliminate the 12-hour shift, we should still require the City to negotiate over the impact of its decision. The PBA asserts that the 12-hour shift is an integral part of the contract for which consideration was given in other areas of the contract. It argues that the City should therefore be equitably estopped from seeking to avoid arbitration of a contractual term it negotiated with the PBA.

The City responds that arbitration of the PBA's grievance should be restrained because its police force is involved in serious and widespread issues of crime investigation and prevention and that failure to act on issues of safety, staffing and fatigue could have disastrous results. The City also responds that it did not create a new shift schedule to implement its policy goals, but rather assigned personnel to an existing 8-hour schedule under the parties' agreement.

Beginning with its first scope of negotiations case, Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973), the Supreme Court has held work hours to be a term and condition of employment requiring negotiations. See also Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589, 594 (1980); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. of Ed. Sec'ys, 78 N.J. 1, 8 (1978); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973). Recognizing that the subject of work hours encompasses work schedules setting the hours and days employees will work, the Court has held that work schedules are generally negotiable. Local 195 at 411-412. Accord Hardin and Higgins, The Developing Labor Law, 1158 (4th ed. 2001).

The Legislature has expressly designated work hours as a negotiable condition of employment for police officers and firefighters. The Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq., repeatedly refers to "hours" as an employment condition. See N.J.S.A. 34:13A-16g(2), N.J.S.A. 34:13A-16g(8), and N.J.S.A. 34:13A-21. These references embody the labor relations assumption that work hours are mandatorily negotiable.

Consistent with the Supreme Court's cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that the work schedules of police officers and

firefighters are mandatorily negotiable. See Teaneck; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); 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). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability 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). Mt. Laurel requires us to examine the facts of each case in making a negotiability determination.

In the instant matter, the parties have negotiated an agreement that both sides agree grants the employer the discretion to schedule employees on either 8 or 12-hour shifts. The PBA

concedes that, under the parties' agreement, the City is free to use an 8-hour shift along with a 12-hour shift. The PBA argues that the City simply cannot eliminate the 12-hour shift unilaterally.

Binding arbitration will be restrained when an agreement a union seeks to enforce or a remedy a union seeks to have imposed would substantially limit government's policymaking powers.

Paterson. The employer has presented unrebutted facts that compel us to restrain an arbitrator from restoring the pre-July 2001 work schedule. The City's concerns about staffing, fatigue and supervision justified a mid-contract schedule adjustment.

Whether that adjustment was authorized by the contract or triggered a right to negotiations over impact issues cannot be decided in this proceeding. Ridgefield Park. The PBA can make its argument to the arbitrator that the contract requires negotiations over impact issues. The employer may raise its defense that all impact issues have already been negotiated.

The PBA's argument that the employer engaged in bad faith negotiations would have to be raised in an unfair practice proceeding. Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. (1983).


As for the PBA's estoppel claim, in Northern Burlington Cty. Reg. Bd. of Ed., P.E.R.C. No. 2001-19, 26 NJPER 436 (¶31172 2000), we explained that our jurisdiction is limited to the abstract issue of whether a grievance is legally arbitrable,

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), and that where we find that it is not, we do not consider whether equitable estoppel could or should be applied. See Hudson Cty., P.E.R.C. No. 90-6, 15 NJPER 495 (¶20203 1989). The estoppel issue is more appropriately resolved in a judicial forum. See also Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650 (App. Div. 1999).

ORDER

The request of the City of Millville for a restraint of binding arbitration over the challenge to the City's right to assign police officers to 8-hour shifts to meet its staffing, fatigue and supervision concerns is granted. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Mastriani abstained from consideration.

DATED: September 26, 2002
Trenton, New Jersey
ISSUED: September 27, 2002