

L.D. NO. 98-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-L-95-412

SAYREVILLE PBA LOCAL 98,

Charging Party.

Appearances:

For the Respondent
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Robert Merryman, of counsel)

For the Charging Party
Richard J. Kaplow, attorney

DECISION

On June 5, 1995, Sayreville Policemen's Benevolent Association Local 98 filed a three-count unfair practice charge against the Borough of Sayreville. On September 14, 1995, the Director of Unfair Practices issued a decision ^{1/} dismissing the first count of the charge and issuing a complaint on the remaining two counts. I was assigned as the hearing examiner and the matter was scheduled for hearing.

The matter was thereafter held in abeyance while the parties attempted to resolve it. In the spring of 1997, I

^{1/} D.U.P. No. 96-8, 21 NJPER 369 (126231 1995).

reactivated the hearing upon Local 98's request. At a June 1997 prehearing, the parties jointly requested that the matter be decided through the Commission's Litigation Alternative Program. The parties requested that I issue a LAP decision and agreed that it would be final and binding. I conducted an informal LAP hearing on August 5, 1997. The parties requested the opportunity to submit letter briefs which were received by August 22, 1997.

Count II of Local 98's charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act by refusing to compensate PBA members who were subpoenaed to testify at an earlier PERC hearing, while issuing payment to a witness who appeared on behalf of the Borough. The hearing concerned a charge filed by Sayreville Police Captain Leo Farley. Local 98 alleges that the Borough's refusal to pay Farley's witnesses violated past practice and was motivated by union animus.

Local 98 alleges that the Borough's practice was to pay employees who had been scheduled to work and were subpoenaed as witnesses for litigation between the PBA and the Borough. It alleges that this practice was repudiated by the Borough's failure to pay officers who were scheduled for duty but were subpoenaed as witnesses for Farley. Local 98 further alleges that the Borough's failure to pay Farley's witnesses was to punish them for testifying on his behalf. Local 98 seeks restoration of any vacation, personal or compensatory days that officers who testified for Farley were required to charge and a finding that the Borough's actions were motivated by union animus.

At the August 5, 1997 LAP hearing, the following facts were presented:

Charles Kelly is serving his 12th term as Local 98's president. According to Kelly, prior to the Farley hearing, Local 98 members were never required to charge leave time to testify under a subpoena at PERC hearings, arbitration hearings or any other litigation between Local 98 and the Borough. In 1992, Local 98 filed a charge alleging that the Borough discriminated against Kelly because he was the PBA president. Three officers, including Kelly, testified under subpoena at that hearing, and were not required to charge any time off. In the Kelly hearing, the Commission found that Chief Sprague was hostile towards Kelly because he was the president of Local 98. Borough of Sayreville and P.B.A. Local 98, P.E.R.C. No. 95-97, 21 NJPER 213 (126135 1995).

On November 15, 1994, Captain Leo Farley, as an individual, filed an Unfair Practice Charge (Docket No. CI-H-95-21) against the Borough alleging that the Borough's failure to promote him to a vacant deputy chief position was in retaliation for his participation in an earlier Commission proceeding.

Kelly and three other Local 98 members were subpoenaed to testify on Farley's behalf at the May 1995 hearings before a Commission hearing examiner. The four attended both hearing days. Kelly was scheduled to work on one of those two days and was not required to charge leave time for that day. The three other Local 98 members who were subpoenaed and testified for Farley were

required to charge leave time. All of Farley's witnesses attended both hearing days and remained at the hearing after they had finished testifying.

The Borough called Lieutenant Dunworth as its witness in the Farley hearing. Dunworth was not subpoenaed. Dunworth charged half a day of leave time to attend the hearing and left after concluding his testimony.

Although the hearing examiner found that the Borough did not violate the Act in the Farley matter, he did find evidence that the Borough was hostile towards Farley. Sayreville Boro, H.E. No. 97-10, 23 NJPER 55 (¶28037 1996).

The parties' agreement is silent regarding compensation for employees who are subpoenaed as witnesses for administrative hearings. Article V (C) 7 of the parties' grievance procedure provides that "Expenses of witnesses for either side shall be born by the parties producing such witnesses." Local 98 attempted to negotiate a provision requiring the Borough to pay for all witnesses at grievance hearings but was not successful.

The issue of witness payment was previously grieved in June 1987. The grievance involved a departmental hearing for which the Borough paid its witnesses, but not those appearing on behalf of the disciplined employee. The arbitrator held that absent a specific contract provision requiring payment for all witnesses, limiting payment to the Borough's witnesses did not constitute discrimination.

The parties agree that Kelly was treated consistently - he was allowed to attend both the unfair practice charge hearing filed by the PBA and Farley's hearing without being required to charge any leave time. The parties' dispute centers on the Borough's requirement that Local 98 members who testified on behalf of Farley had to charge leave time.

The Borough contends that Local 98 has not established that there was a past practice of the Borough paying witnesses who are subpoenaed to testify at hearings initiated by individual employees. Sprague stated that Kelly was paid, Farley was paid, and the others were required to charge time. Sprague made the decision that Farley's witness' would be required to charge leave time to attend the hearing. Kelly was not required to charge time "as a courtesy because he was president of the PBA". Sprague did not discuss charging time with the Borough's witness Lieutenant Dunworth, who told Sprague he would charge time to attend the hearing.

Local 98 contends that the Borough violated an alleged practice of allowing Local 98 members to attend prior hearings without charging any leave time. Local 98 contends that the Borough's hostility towards Farley carried over to its non-payment of its witnesses and that Chief Sprague's hostility towards Kelly as the PBA president is additional evidence that union animus motivated the decision not to pay Farley's witnesses.

I find that Local 98 did not sustain its burden of proving a past practice regarding the Borough's payment of witnesses. A past practice concerning a term and condition of employment is a pattern of conduct implied from parties' mutual behavior.

Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979). Local 98 was unable to demonstrate that there was a pattern of the Borough paying for witnesses who are subpoenaed for hearings filed by an individual. Local 98 has shown no evidence that the Borough allowed witnesses to attend hearings of charges filed by individuals without charging leave time. Kelly's testimony regarding witness payment concerned hearings filed by Local 98 - not individuals.

I also find that the Local 98 has not sustained a finding that the Borough's non-payment of witnesses in the Farley matter constituted disparate treatment or was motivated by animus. I base this finding upon the fact that the Borough's witness for the Farley hearing charged leave time. This defeats a claim that the witnesses were treated disparately for reasons of union animus. Although previous decisions of the Commission and PERC Hearing Examiners found animus on the part of the Borough, Local 98 has not sustained

a finding of disparate treatment or animus regarding this count of its charge.^{2/}

Count III of Local 98's charge alleges that the Borough violated the agreement by refusing to allow two patrolmen to charge vacation days on the same shift. Local 98 also alleges that the Borough violated past practice by refusing to pay overtime to replacement officers in order to accommodate additional vacation requests. This count was not deferred to the parties' contractual grievance procedure because it originally included allegations that the Borough's actions were motivated by union animus. However, Local 98 did not litigate the union animus allegations of this count in the LAP proceeding but requested that I issue a decision on the contractual issue.

On May 4, 1995, Patrolman Scott Henry requested Saturday, May 6, 1995 as a vacation day. Chief Sprague denied Henry's request on May 5, 1995, for the reason that one patrolman on the shift was already approved for vacation and another was out on "injured on duty leave" (IOD).

On May 9, 1995, Henry grieved the Borough's denial of his vacation day request, alleging that the Borough's past practice permitted two patrolmen from each shift to take a vacation day at

^{2/} I reach this conclusion independently from the arbitration award submitted by the Borough. That award dealt with an administrative hearing and is not dispositive of this matter. I also accord no significance to Local 98's negotiations proposal regarding payment of witnesses, which addressed grievance and arbitration proceedings.

the same time. Sprague denied the grievance because staffing levels would not permit him to grant Henry's request. On the date Henry requested a vacation day, one sergeant and one patrolman had previously been approved for vacation leave and one patrolman was on IOD. Sprague also stated at the LAP hearing that he denied Henry's vacation request because it was made with only two days notice.

When Henry requested the vacation day, the Borough's policy on minimum staffing per shift required that each shift be staffed by six officers - one road supervisor and five patrolmen. According to Sprague, this requirement could not be met if more than two patrolmen and one superior officer were allowed to charge vacation time on the same shift. Within this policy, requests for individual vacation days are granted at the discretion of the division commander or in his absence, the chief of police. Captain Farley was normally in charge of handling vacation requests, but he was not working the day of Henry's request so Sprague handled the issue.

Henry called in sick on the day the Borough denied the use of a vacation day, and was allowed to use a sick day. The Borough staffed the shift by calling in three patrolmen and one sergeant, who were paid overtime. Sprague said he does not have the discretion to deny sick days and if a staffing shortage occurs because of the use of sick days, he must use overtime to cover shifts. Denial of Henry's request did not constitute a change in Sprague's practice in granting or denying vacation day requests. Individual vacation days were usually approved unless approval would incur overtime.

Local 98 contends that the Borough's practice allowed two patrolmen from the same shift to take vacation on the same day. It contends that a superior officer could charge a vacation day on the same day that two patrolmen were scheduled for vacation. Kelly stated that the vacation requests of patrolmen and superior officers from the same shift were always treated separately from each other, and interpreted the agreement as allowing two patrolmen from the same shift to take vacation at the same time, rather than two officers, without regard to rank.

Kelly contends that Sprague's rejection of the request because one man was on IOD should not have any impact on vacation policy. Kelly stated that in the past, a second patrolman on a shift was not denied a vacation day when another was out on IOD and that the Borough used overtime to cover these situations. Kelly also pointed out that Sprague's written grievance denial did not state that a superior officer's use of a vacation day was a basis for denial of Henry's request.

Article IX, section B.2. of the parties' agreement governs vacation scheduling. It reads as follows:

B.1. No patrolman shall be compelled to take his full vacation entitlement at one time but may be permitted to break up his vacation entitlement into two (2) or more vacation periods. Further, all employees covered by the terms of this Agreement may break up one of their vacation weeks into day periods with the approval of the Division Commander. The said scheduling of the breaking up of one vacation week into day periods is at the sole discretion of the Division Commander and vacation week periods take precedent and supersedes vacation day periods.

In cases where a conflict of vacation schedules exists, the most senior patrolman will be given a preference as to selection.

Dispatchers shall not be included for purposes of selection or preference of vacation periods. It is understood that the entire police department, exclusive of Dispatchers, shall be under one vacation schedule which shall include all patrolmen and superior officers, exclusive of Captains, the Deputy Chief and the Chief of Police.

2. For the purposes of scheduling vacation periods two (2) men, whether it be a patrolman or a superior officer, shall be off from each patrol shift or a total of eight (8) men at one time shall be permitted to select their vacation periods at the same time. (emphasis added) The Division Commanders may allot vacation periods at the same time. The Division Commanders may allot vacation periods to the rest of the Department insofar as possible in accordance with the desires of the rest of the employees in the Department in order of their seniority in rank, whether it be a patrolman or superior officer up to and including Lieutenants. If there is any conflict in the selection of a vacation period the awarding of a vacation period shall be at the sole discretion of the Division Commander.

Where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by ending a practice that granted more generous benefits and returning to the benefit level set by the contract. Kitatinny Reg. Bd. of Ed, P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991). The contract provides that for vacation scheduling purposes, two men, whether patrolmen or superior officers, shall be off from each patrol shift. The contract further specifies that the entire department (except for dispatchers) shall be under one vacation schedule which shall include all patrolmen and superior officers. Even if I accept

Local 98's contention that the Borough's practice was to treat patrolmen and superior officers separately for the purposes of vacation scheduling, that practice does not constrain the Borough from its contractual right to allow no more than two men, whether patrolmen or superior officers, to schedule vacation at the same time. Kitatinny. Since one patrolman and one superior officer had already been granted vacation days on the shift where Henry sought to take a vacation day, the Chief was within his contractual right to deny Henry's request. I further find that Local 98 has not established a practice of the Borough using overtime to cover situations where officers sought to take vacation time in excess of the contractual maximum.

However, I do note that when he denied both Henry's request and the subsequent grievance, Sprague's reason was that one patrolman was on vacation and another was on IOD. At the hearing, Sprague also stated that the short notice Henry gave for his vacation request was a reason for its denial. This charge may have been avoidable if Sprague had cited the correct contract provision as the reason for denying the day. In the future, I encourage the Borough to clearly state the contractual basis for its actions.

CONCLUSION

Based upon the arguments of the parties and the evidence before me, I find that the Borough of Sayreville did not violate the Act by refusing to pay PBA Local 98 members who testified at a PERC

hearing concerning a charge filed by Captain Leo Farley. I further find that the Borough of Sayreville did not violate the Act by denying Patrolman Scott Henry the use of a vacation day on May 6, 1995.



Margaret A. Cotoia
LAP Umpire

DATED: November 26, 1997
Trenton, NJ