

I.R. NO. 2008-20

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Respondent,

-and-

Docket No. CO-2008-360

PBA LOCAL 75,

Charging Party.

SYNOPSIS

PBA Local 75 filed an unfair practice charge, accompanied by an application for interim relief, alleging that the Township of Edison violated the Act when it unilaterally changed the work schedule for certain officers assigned to the Criminal Investigations Bureau. The Township responded that it acted in accordance with the parties' collective negotiations agreement and that it had a managerial prerogative due to staffing issues. The Commission designee finds that the PBA has not established a substantial likelihood of success on the merits and denied the PBA's application for interim relief.

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Appearances:

For the Respondent, Ruderman & Glickman, P.C. (Mark S. Ruderman, argued orally; John A. Boppert, on the brief)

For the Charging Party, Klatsky, Sciarrabone & DeFillippo (David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

\_\_\_\_\_ On May 21, 2008, PBA Local 75 filed an unfair practice charge with the Public Employment Relations Commission alleging that the Township of Edison violated 5.4(a)(1), (2), (3), (5) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."; "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by (continued...)"

34:13A-1 et seq., when it unilaterally changed the work schedules of certain officers assigned to the Criminal Investigation Bureau ("CIB") from a five days on and three days off ("5-3") to a five days on and two days off ("5-2") work schedule.

The charge was accompanied by an application for interim relief. An Order to Show Cause was signed on May 27, 2008 scheduling a return date for June 16. Both parties submitted briefs, certifications and exhibits and argued orally on the return date. The PBA submitted the certification of Michael Schwarz, PBA president and Alan Engel, a detective assigned to the CIB unit. The Township submitted the certification of Thomas Bryan, deputy chief of police. The Township also presented the testimony of Captains Matthew Freeman and Patrick Kelly and Deputy Chief Thomas Bryan. The PBA cross-examined these witnesses. The following facts appear.

The Township and PBA are parties to a collective negotiations agreement with a duration of January 1, 2005 to December 31, 2008. Article V is entitled Hours of Work and Work Schedule and provides in section c, in pertinent part:

2. The provisions of this article notwithstanding, hours of work and work schedule can be changed upon the mutual agreement of the Union and the Township.

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1/ (...continued)  
the majority representative." and "(7) Violating any of the rules and regulations established by the commission."

3. All non-tour officers shall work a regular five day week or in accordance with the practice in effect as of this date. This shall also include the daytime power shift, which shall continue to work a 5-2 work schedule of eight (8) hours Monday through Friday with weekends off duty.

4. On the declaration of an official emergency, as defined by N.J.S.A. 40A:14-133; 40A:14-134 and 40A:14-135 the provisions above shall not apply.

Article VI is entitled Overtime and provides that scheduled tours of duty shall not be changed without four days advanced notice except in emergencies. Employees not provided four days notice receive time and one-half for the newly scheduled hours. Article XXXIX is entitled Work Schedule Review Committee and provides:

Recognizing that work schedules may, from time to time, need some adjustments to address certain new concerns, the parties agree to form and institute a Work Schedule Review Committee (WSRC). This WSRC shall have four (4) members, two (2) appointed by the Administration and two (2) appointed by the P.B.A. The Committee shall meet as needed to review and discuss the work schedule and any concerns or problems which may arise. The Committee shall make recommendations to their various constituents regarding these concerns and their possible solutions. It is agreed that no recommended changes concerning the schedule shall be considered unless they have been brought before this Committee and the Committee has written its findings and responses thereto and brought those written findings back to [the] Mayor and the P.B.A. President respectively and simultaneously.

Officers assigned to the CIB are classified as non-tour officers. The CIB is divided into units including: detective squad (general investigations), burglary unit, vice/narcotics unit, juvenile unit and BCI. The schedule for the officers in the CIB in the past was a 4-3 schedule consisting of 9 hour and 40 minute tours. This 4-3 schedule was applicable primarily to the CIB squads except for the BCI.

The Township no longer employs a chief of police. The Township recently amended its police ordinance to create the position of police director. Subsequent to the enactment of the ordinance, the Township appointed Brian Collier as the police director. Deputy Chief Bryan now oversees the daily operations of the department as the highest ranking sworn law enforcement officer.

On April 28, 2008, Deputy Chief Bryan issued Personnel Order PA-08-038 that established a new unit within the CIB entitled the Rapid Response Unit ("RRU") effective May 8. Officers Michalski, Wilson and Freund were assigned to this unit and consequently had their work schedule changed to a 5-2 schedule, Monday through Friday commencing at 8:00 a.m. and ending at 4:00 p.m.

On May 2, 2008, Deputy Chief Bryan issued Memorandum PA-08-078 that changed the work schedule of the special enforcement section of the CIB from a 4-3 schedule to a 5-2 schedule from 5:00 p.m. to 1:00 a.m. He stated the changes were "necessary to

meet my obligation to ensure the safe and efficient operation of the Police Department." The Burglary Unit was assigned to work a 5-2 schedule from 8:00 a.m. to 4:00 p.m. The memorandum also states that "all hours will be flexible in order to meet the operational demands of the tasked assignments." BCI technician's schedule and hours remained the same.

According to the Certification of PBA President Michael Schwarz: the schedule and hour changes were not negotiated with the PBA as had been the practice in the past; the RRU officers were not given four days notice of their change; and the WSRC did not consider the proposed changes as required by the contract. Schwarz sent a memorandum on May 9, 2008 to Deputy Chief Bryan demanding negotiations as to any work schedule change and requesting every reason "why the new work schedule is being put into effect" and requested "more specific reasons as well as a detailed explanation as to how the new work schedule change will meet this objective."

Bryan responded by memorandum dated May 12, 2008 that stated:

In order to meet my obligation to ensure the safe and efficient operation of the Police Department, I must maximize all available resources that will enhance operational flexibility. At this point in time, employing the contractually recognized (5-2) schedule does in fact enhance the operational flexibility of the Criminal Investigations Bureau.

Bryan's certification states that the police department has lost 25 officers since January 2004 and has seen an increase by over 20 percent in calls for service. He further states that officer leave time has increased thus creating a staffing shortage that poses a challenge to the continued safe and efficient operation of the department. To address this challenge, Bryan states that he changed the work schedule to achieve greater coverage since the former 4-3 schedule required four squads to operate and the 5-2 schedule requires two squads thus creating better coverage on the shifts and less impact on the department from staffing losses.

The PBA argues that the change in work schedule was made without negotiations as was the prior practice with the WSRC; the new hours will drastically and adversely affect many of the CIB officer's personal and family affairs as they are required to report to work one additional day each week as well as for different hours; the unilateral change is a repudiation of the parties' contractually agreed work schedule; and the change will hamper the PBA's bargaining position in negotiations for a successor contract.

The Township denies that the PBA demanded negotiations and disputes whether the WSRC has ever been utilized. It responds that the shift changes were made pursuant to the express language of the parties' agreement and were necessary to ensure adequate

staffing due to upcoming retirements effective July 1, 2008. It asserts a managerial prerogative to change the work schedules to cover the gaps in coverage in the old schedule.

The PBA responds that the Township's refusal to negotiate the work schedule change constitutes a repudiation of the terms of the parties' agreement because the parties agreed to negotiate the work schedule change through the WSRC; the agreement provided that the officers would work the same schedule in effect (4-3) at the time of the agreement; the parties have negotiated work schedule changes in the recent past including a 2004 traffic bureau schedule change; the Township's staffing crisis is self-created; and the PBA members will suffer irreparable harm if the status quo is not restored.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).



In Little Egg Harbor Tp., the designee stated:

[t]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982). That rule applies in cases involving the work schedules of police officers. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); see also Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003). But a particular work schedule may not be mandatorily negotiable if it would significantly interfere with a governmental policy determination. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (employer proved

need to correct discipline problem on midnight shift, increase continuity of supervision, and improve training). Each case must be decided on its own facts. Teaneck; Mt. Laurel.

The PBA argues that this matter is similar to Borough of Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002) and Borough of Ramsey, I.R. No. 92-8, 19 NJPER 282 (¶24144 1992), where Commission designees restrained the employers from implementing a proposed change to the work schedule. I find the facts of this matter to be distinguishable from Chester and Ramsey. In Chester, there was documentary evidence from the police chief issued during the pendency of interest arbitration proceedings threatening to change the work schedule if police officers' grievances were not withdrawn. The designee found this evidence sufficient to establish a substantial likelihood of success on the merits of the charge. This case does not have such concrete evidence and timing.

In Ramsey, the Borough stated its motivation for changing the work schedule was to minimize overtime which is an economic reason. Here, the Township produced evidence of an operational need to change the work schedule to deliver police services. To counter the Township's contention, the PBA has not proffered any concrete proof to rebut the validity of the Township's claim. The parties also disagree as to whether the current contract provides for the new 5-2 work schedule. The Township argues that

the new work schedule was negotiated in the existing contract. The PBA responds that the contract required the prior 4-3 schedule and that any change had to be negotiated. These are disputes as to the material facts of the charge that will require a plenary hearing. Thus, at this early stage of the case, I find that the PBA has not established a substantial likelihood of success on the merits, a requisite element to obtain interim relief. I need not reach analysis of the irreparable harm standard. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The PBA's application for interim relief is denied.

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Mary E. Hennessy-Shotter  
Commission Designee

DATED: June 24, 2008