

I.R. NO. 2018-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROCKAWAY TOWNSHIP,

Respondent,

-and-

Docket No. CO-2018-111

ROCKAWAY TOWNSHIP FRATERNAL ORDER
OF POLICE LODGE NO. 31,

Charging Party.

SYNOPSIS

A Commission designee denies a motion for reconsideration of Rockaway Township, I.R. No. 2018-6, 44 NJPER 200 (¶58 2017) filed by FOP Lodge No. 31. The designee concludes that the alleged "errors, misunderstandings, or misinterpretations," the FOP asserts were made in I.R. No. 2018-6, do not constitute "extraordinary circumstances" warranting reconsideration.

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Appearances:

For the Respondent, Laddey, Clark, & Ryan, LLP,
attorneys (Thomas N. Ryan, of counsel)

For the Charging Party, Loccke, Correia, & Bukosky,
attorneys (Corey M. Sargeant, of counsel and on the
brief)

DECISION DENYING RECONSIDERATION

On November 30, 2017, the Rockaway Township Fraternal Order of Police Lodge No. 31 (FOP) moved for reconsideration of I.R. No. 2018-6, 44 NJPER ____ (¶____ 2017). In that decision I denied an application for interim relief filed by the FOP based on an unfair practice charge it filed against Rockaway Township. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act when the Chief of Police terminated a program allowing officers to pair up to work steady shifts for three months, rather than rotating between the day and night shift every four weeks.

On December 5, 2017, the Township filed a letter memorandum

opposing the motion for reconsideration. The Township's submission incorporates by references the arguments it made in opposition to the FOP's interim relief application. It focuses on the parameters of the shift exchange program: (1) that the maintenance of steady shifts required the approval of the Chief, and (2) that officers could only remain on steady shifts for a maximum of three months.

Reconsideration will be granted only in extraordinary circumstances which, as explained below, are not present here. N.J.A.C. 19:14-8.4. In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), the Commission wrote that the designee in interim relief cases acts on behalf of the full Commission and that "in rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her decision." Id. at 67.

Here the FOP argues that the Commission designee made errors, misunderstandings, or misinterpretations that warrant reconsideration. It asserts:

- a. That the dispute was inaccurately characterized as involving "shift swaps or exchanges" as opposed to a change in the shift schedule;
- b. That the procedure allowing officers to pair up to work steady shifts was "formal" rather than "informal" as characterized in I.R. No. 2018-006;
- c. That an officer approved for steady shifts could work that tour "for a designated amount of time;"

- d. That the officer who was indicted for sexual misconduct while on the night shift was actually a rotating shift officer;
- e. That the so-called "normal work schedule" is not memorialized in either a collectively negotiated agreement between the FOP and the Borough nor in any memorandum of agreement;
- f. That because the parties are in contract negotiations, unilateral employer changes in working conditions are prohibited;
- g. That the procedure used in the Borough is the same as the procedure for shift swaps in Tp. of Teaneck, P.E.R.C. No. 85-51, 10 NJPER 644 (¶15309 1984) that was deemed mandatorily negotiable.

None of these alleged mistakes, either separately or collectively, establish the presence of extraordinary circumstances warranting reconsideration.

Neither the characterization of the issues (a.) nor the formality of the approval procedure (b.) obscures the nature of the parties' dispute, which is the placement of all officers back on rotating shifts.^{1/}

The FOP's statement that an officer could work a steady

^{1/} With its reconsideration motion the FOP submitted the form used by employees seeking to pair up with another officer so both could work a steady shift. The document was not submitted by the FOP as part of its original interim relief filing. Normally documents or evidence in existence at the time of the interim relief proceeding, but not submitted, will not support a motion for reconsideration. See Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28 NJPER 86 (¶3031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002). See discussion of the form at p.5 infra., including footnote 3.

shift "for a designated amount of time," ©.) does not contradict the Chief's affidavit that the outer limit on the steady shift policy was three months. Several officers certified they have remained on steady shifts for a period of years, far exceeding the time parameters of the program. See I.R. No. 2018-6 at 7-8, including footnote 5.

That the indicted officer may have normally worked rotating shifts (d.) does not alter the fact that his activities occurred on the night shift, when supervision is lessened.^{2/} In any event his alleged transgressions are simply a background event.

When a charging party alleges that an employer has unilaterally changed a working condition, it bears the burden of proving what the working condition was before the change, and what it became after unilateral action by the employer. In an interim relief proceeding, the standard is showing a substantial likelihood of success on the legal and factual merits. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). An assertion (e.) that there is no mention of a "normal," pre-November 1, 2017, work schedule in any writing between the parties is of no moment as the status quo can be demonstrated by an existing practice in the absence of an explicit writing. Middletown Tp. and Middletown

^{2/} The acknowledgment that the indicted officer worked rotating shifts runs contrary to the FOP's assertion that steady shifts were the existing work schedule status quo prior to the Chief's declaration that all officers would "resume" working rotating shifts on November 1, 2017.

PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). Here the FOP has not demonstrated that steady shifts were the normal work schedule. First, because an officer needed the Chief's permission to work a steady shift for up to three months, that fact strongly indicates indefinite steady shifts were not the authorized existing status quo.^{3/} Second, the Chief's memorandum of September 21, 2017 states in pertinent part:

[T]he Patrol Division shall be resuming a rotating four (4) week schedule of four (4) days on, four (4) days off. Shift hours shall remain P1 (6am to 6pm) and P2 (6pm to 6am) for the present time.

Any exceptions and/or modifications previously granted in regards to steady patrol shifts are hereby rescinded as of November 1, 2017.

[Emphasis supplied]

Thus the phrase "resuming a rotating . . . schedule" and the reference to "exceptions . . . previously granted . . ." tends to show that the status quo was a rotating shift system, and officers who had been working steady shifts, were doing so based upon the granting of exceptions. In any event, those facts prevent the FOP from demonstrating, in an interim relief

^{3/} The section of the approval form labeled "Request for a Change of Assigned Shift/Hours" submitted by the FOP with its motion for reconsideration is formatted to last from a beginning month to a later month, rather than a starting year to a later year or years.

proceeding, that it is substantially likely to succeed on the merits of its claim.

The prohibition against changing working conditions during collective negotiations or interest arbitration (f.) is premised on a showing that a change has been made in a mandatorily negotiable term and condition of employment. That showing has not been made by the FOP. Its assertion that officers, who have been on steady shifts for years, should be allowed to maintain them absent a negotiated agreement, distinguishes this case from Tp. of Teaneck, P.E.R.C. No. 85-51, 10 NJPER 644 (¶15309 1984) where shift exchanges, even with the Chief's approval, were a maximum of 18 tours of duty per year. Thus the similar approval mechanisms, in Teaneck and here, do not overcome the differences between requests to be indefinitely exempt from rotating shifts and requests for approval of temporary shift exchanges.

ORDER

The motion for reconsideration is denied.

Don Horowitz
Commission Designee

DATED: December 6, 2017

Trenton, New Jersey