

I.R. No. 2019-22

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Respondent,

-and-

Docket No. CO-2019-255

ENGLEWOOD PBA LOCAL 216 (SOA),

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging that the public employer unilaterally changed separately "pooled" distribution of overtime opportunities to a distributions in which divisions draw officers from divisions other than those in which the overtime originated.

The Designee determined that the Charging Party had not demonstrated a substantial likelihood on success on the merits, specifically that the allocation of overtime opportunity to one sergeant assigned to a "sub-unit" of the division in which the overtime originated was an apparent unilateral change in a term and condition of employment, pursuant to City of Long Branch, P.E.R.C. No. 83-5, 8 NJPER 448 (¶13211 1982) and Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28247 1997), aff'd 25 NJPER 400 (¶30171 App. Div. 1999).

I.R. No. 2019-22

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Respondent,

-and-

Docket No. CO-2019-255

ENGLEWOOD PBA LOCAL 216 (SOA),

Charging Party.

Appearances:

For the Respondent,
Genova Burns, LLC
(Joseph M. Hannon, attorney)

For the Charging Party,
Loccke, Correia & Bukosky
(Michael A. Bukosky, attorney)

INTERLOCUTORY DECISION

On April 5, 2019, Englewood PBA Local 216 (SOA) filed an unfair practice charge against the City of Englewood (City), together with an application for interim relief, a brief, exhibits and a certification. The charge alleges that on February 20, 2019, the City unilaterally changed the distribution of overtime opportunities among superior officers from a separately "pooled" distribution among superiors within each discrete division (patrol, traffic, records, detectives, etc.), to a distribution, ". . . in which divisions draw supervisors from [divisions] other than those in which the overtime

originated."^{1/} The charge alleges that on February 20, 2019, the City added [superior] officer "Martin," normally assigned to the traffic division, to the pool of patrol division supervisor shift coverage. Previous postings of supervisor shift coverage in the patrol division allegedly did not include officer Martin and included only patrol division superiors.

The charge alleges that later on the same date, the SOA demanded negotiations on all aspects of the City's failure to negotiate over the re-distribution of overtime opportunities, to no avail. The charge also alleges that the parties are in collective negotiations for a successor agreement and that the City's conduct has chilled the negotiations process, violating section 5.4a(1), (2), (3), (4), (5), (6) and (7)^{2/} of the New

1/ The averred example of overtime distribution before February 20, 2019 is that the patrol division would distribute its superior officer overtime opportunities to superiors regularly assigned to the patrol division. After February 20th, for example, traffic division superiors are being offered overtime opportunities in the patrol division.

2/ 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a

(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The SOA seeks a remedy enjoining the City from eliminating or altering the overtime "pooled" distribution among unit employees.

On April 9, 2019, I issued an Order to Show Cause, setting forth dates for receipt of the City's reply, for the SOA's response and for argument in a telephone conference call. On May 1, 2019, Counsel argued their respective cases. Supplemental letter briefs were filed by May 3, 2019.

On April 22, 2019, the City filed a letter opposing the application, together with a certification from City Chief of Police, Lawrence Suffern. The City contends that no special skills are needed to fill an overtime vacancy in the patrol division and a traffic (superior officer) possessed the skills necessary to fill the vacancy, notwithstanding that the traffic division is a "sub-unit" of the patrol division. The City also contends that its action does not contravene any contractual provision.

2/ (...continued)
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 the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

The following facts appear:

The City and SOA signed a collective negotiations agreement extending from January 1, 2014 through December 31, 2017. The SOA represents all City superior police officers except the Chief and Deputy Chief (SOA exhibit "A," 2014-2017 collective negotiation agreement, Article 1). The parties are currently negotiating a successor agreement.

Article 10.6 "Voluntary Overtime," provides:

All available voluntary overtime assignments shall be posted at the desk in Headquarters by the Desk Officer immediately upon his/her receipt of the same. Overtime availability shall be offered using a perpetual rotating alphabetical roster of available personnel. When overtime is available then the Department shall, utilizing the alphabetical rotating roster, call Officers until one is available to take the posted overtime. In the event that an Off Duty Officer declines the voluntary overtime opportunity then said Officer's turn will be skipped and said Officer would have to wait for the rotational overtime wheel to come back to said Officer's position in the future. This does not apply to Superior Officers and they will be assigned on an as needed basis by the Chief.

Article 10.10 provides in a pertinent part:

. . . The Employer acknowledges that the overtime list shall be used where Officers are needed for overtime duty where no special skills are required. Article X of the collective bargaining agreement requires that all over-time assignments be filled by use of the overtime list or by having the job posted as an 'extra duty' assignment. The SOA acknowledges that where a special skill is needed for the overtime assignment, the Employer shall have the right to exclude

those members who do not possess that special skill.

[SOA exhibit "A"]

The City police department's promulgated February, 2019 table of organization headed by Chief Suffern shows that "traffic" is a "sub-unit" of the larger "patrol" division, with the former comprised of only one superior officer - Sergeant L. Martin - and the latter comprised of eight superior officers, including five sergeants (with two other superior officer vacancies). Similarly, "records" is a "sub-unit" of the "professional standards" division that also oversees internal affairs, evidence, the communications center and the police academy. A lieutenant oversees all of professional standards and two sergeants command the records sub-unit (City exhibit "A").

Sub-units traffic and records do not provide overtime opportunities because they, ". . . function appropriately when the superior officer is not present." Also, superior officers regularly assigned to "traffic" and "records" are not replaced when they are on vacation, out sick or using any other leave time (Suffern certification, no. 6).

The table of organization also provides a "criminal investigations" division that includes a captain, lieutenant and two detective sergeants (with one other superior officer vacancy in the youth services "sub-unit"). The detective division requires "special skills;" only detectives qualify for overtime

in that division (Suffern certification, no. 7; City exhibit "A").

The patrol division does not require "special skills" (Suffern certification, no 8).

On or about February 20, 2019, Sergeant Martin for the first time was included among eight other "patrol" division superior officers listed for "supervisor shift coverage" (SOA exhibits C, D; SOA President Fred Pulse certification, nos. 15, 18-21).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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 Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer 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 City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), the Commission established a rule that the allocation of overtime earning opportunities among qualified

employees is mandatorily negotiable, with exceptions ensuring that governmental policy needs can be met, e.g., that if an urgent situation does not permit enough time to comply with negotiated allocation procedures, the employer may deviate from those procedures. Long Branch also establishes that an employer may assign an employee with special skills or qualifications to work overtime, even if a contractual provision would entitle another employee to that work. Long Branch also states that employers can deny overtime work to unqualified employees. See also City of Camden, P.E.R.C. No. 94-63, 20 NJPER 50 (¶25017 1993).

In Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28247 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999), relied upon by the SOA, the employer modified the overtime policy to provide that a lower-ranking officer could cover for a superior officer in an acting capacity, rather than call in an off-duty superior officer of the same rank to fill the vacant post. The Commission found the issue to be mandatorily negotiable because officers have a negotiable interest performing work in their own job titles, work for which they are presumably the most qualified, before that work is offered to officers working out of title. The employer's interest in using lower-ranked employees in an acting capacity is primarily in saving money; an interest that can be addressed in the collective negotiations process.

Town of Kearny is insufficiently supportive of the SOA's legal contention because that case concerned officers working out of rank. In this case, it appears that the City merely added one sergeant from the traffic "sub-unit" of the patrol division to a current overtime roster of eight superior officers, including five sergeants, assigned to the patrol division. It is not clear to me that the City's admittedly unilateral act changed a term and condition of employment, notwithstanding a likelihood that regularly assigned and consistently available patrol division sergeants will receive a proportionate reduction in overtime pay.

Another case cited by the SOA, State of New Jersey (Dept. of Corrections), P.E.R.C. No. 93-11, 18 NJPER 439 (¶23196 1992), adopting H.E. 91-42, 17 NJPER 324 (¶22143 1991), is inapposite because it concerned a repudiation of a contractual provision mandating that overtime work shall be shared by all employees in an occupational classification within "any work unit" without discrimination. No contract provision appears to have been repudiated in this matter. Also unlike the cited case, the facts here are not based on a complete record that would permit a full understanding of the organizational relationship of the traffic "sub-unit" of the patrol division (from which the disputed sergeant was determined to be eligible for overtime pay) to the patrol division.

The SOA also relies on County of Somerset, P.E.R.C. No. 2015-6, 41 NJPER 97 (¶33 2014), in which two exclusive overtime lists of bus drivers were combined for the first time, with some drivers appearing on both lists, resulting in some drivers being assigned two overtime shifts and other available drivers not being assigned any overtime shifts. The Commission, citing the Long Branch holding that allocation of overtime is generally mandatorily negotiable and legally arbitrable, declined to restrain arbitration of a grievance contesting a violation of a contractual provision that incorporated "overtime rotation procedures" for using both lists of drivers.

The facts in Somerset County showed that the allocation of overtime system was apparently changed, leaving some qualified and available employees bereft of overtime opportunities. In this case, the City arguably has not altered the allocation of overtime but merely added a qualified unit employee to the overtime-eligible roster.

Accordingly, I deny the application because the SOA has not demonstrated a substantial likelihood of success on the merits of the case.

This unfair practice charge shall be assigned for further processing.

/s/Jonathan Roth
Jonathan Roth
Commission Designee

Dated: May 3, 2019
Trenton, New Jersey

