

I.R. NO. 94-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
BOROUGH OF PRINCETON,

Respondent,

-and-

Docket No. CO-94-17

PRINCETON BOROUGH PBA LOCAL 130,
Charging Party.

Appearances:

For the Respondent
Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin, attorneys
(Karen L. Cayci, of counsel)

For the Charging Party
Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

INTERLOCUTORY DECISION

On July 13, 1993, the Princeton Borough PBA Local 130 filed an unfair practice charge with the Public Employment Relations Commission alleging that Princeton Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, the Charging Party alleges that the Respondent violated subsections 5.4(a)(1), (2), (3), (4), (5) and (7) of the Act^{1/} when it unilaterally changed the work schedule for all unit

^{1/} These subsections 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

employees during negotiations for a successor collective negotiations agreement. Also on July 13, 1993, the PBA filed an application for interim relief with the Commission asking that the Respondent be required to show cause why an order should not be issued directing the Respondent to cease and desist from unilaterally altering the work schedule, pending a final decision and order by the Commission.

On July 19, 1993, I executed an order to show cause with a return date of July 30, 1993. On that date, I conducted an order to show cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties examined and cross-examined witnesses and argued orally at the hearing. The parties also submitted affidavits, briefs and other documents related to the unfair practice charge and interim relief request.

1/ Footnote Continued From Previous Page

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 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. (7) Violating any of the rules and regulations established by the commission."

The PBA contends that during negotiations for a successor to the contract between the parties which expired December 31, 1992, the Borough attempted to negotiate a change in the non-supervisory police officer work schedule. More specifically, the Borough sought to change the work schedule from a four-on/two-off, yearly rotation to a four-on/two-off, monthly rotation -- essentially from a four-on/two-off fixed schedule to a four-on/two-off rotating schedule.

The Borough then withdrew its shift schedule proposal on March 31, 1993. On May 5, 1993, the PBA filed a petition for interest arbitration. During June 1993, the Chief held a department-wide meeting and announced that effective July 6, 1993, the Borough would implement a 4-2, thirty-day rotation work schedule. These facts are uncontroverted.

The PBA contends that it objected to the unilateral change and sought to negotiate the change with the Borough. However, the PBA alleges that the Borough refused to negotiate concerning this matter. The PBA cites Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 352 (App. Div. 1977), rev'd 78 N.J. 25 (1978), for the proposition that a unilateral alteration of terms and conditions of employment during negotiations is an unfair labor practice. The PBA further argues that under Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982), a unilateral change in police work schedules during negotiations for a new contract is an unfair labor practice for which interim relief may be granted.

The PBA argues that it thus has a substantial likelihood of success on the merits of its case and that it would suffer irreparable harm if the Borough's action is not restrained. The PBA notes that such a unilateral change during contract negotiations -- here with the parties in interest arbitration -- will have a chilling effect on the employees' exercise of their rights to negotiate under the statute. The PBA also notes that its unit members have legitimate expectations and personal needs built around the old work schedule which would be damaged irreparably if the new shift is allowed to remain in place during the litigation of the pending unfair practice charges. The PBA represents a collective negotiations unit containing non-supervisory police officers and police sergeants employed by the Borough.

The Borough denies having committed an unfair labor practice. The Borough contends that its conduct in changing the shift rotation falls within its managerial prerogatives. Thus, the Borough argues it was not obligated to negotiate concerning this change. It further argues that the Charging Party has not demonstrated a substantial likelihood of success on the merits of its charge nor has it demonstrated that it would suffer irreparable harm if the requested relief is not granted. Accordingly, the Borough urges that Charging Party's requested restraint be denied.

The Borough asserts that the thirty-day shift rotation work schedule was instituted as an integral part of the Borough's efforts to increase efficiency and enforce discipline in the police

department. The Chief stated that there were discipline problems, attitude problems and morale problems concentrated on the midnight shift under the old steady-shift work schedule. The Chief stated that these problems derived from several sources, all of which were inherent in the steady-shift work schedule: (1) The midnight shift was unpopular (in the last two years, no one selected midnights as their preferred shift; midnight shift officers regularly requested transfers to other shifts; several midnight shift officers expressed their unhappiness with the midnight assignment to the Chief); (2) Midnight shift officers rarely had the opportunity to work with or be supervised and trained by command-level supervisory officers (lieutenants, captains and the chief); (3) Because shift picks were done in seniority order, the shifts were experientially unbalanced -- the day and evening shifts were staffed with officers who had, as a group, the greatest amount of work experience; the midnight shift was staffed with officers with the least amount of work experience; (4) Midnight shift officers had become isolated from the rest of the department and from the community at large.

The Chief cited a number of specific incidents which occurred on the midnight shift. These incidents included: rude, intolerant and inappropriate conduct by officers toward the public; difficult dealings between midnight shift officers and Princeton University Department of Public Safety Officers; mishandling of recovered property; and errors and omissions in police department reports and other required paperwork. The Chief stated that he

studied this problem for an extended time after he became Chief. He concluded that these problems were specifically related to items 1-4 listed above -- essentially, that the midnight shift officers, as a group, were generally unhappy with the shift; were isolated from the department and the community; lacked a sufficient level of interaction with command level supervisory staff; and required more training and supervision by the command staff.

The Chief stated that the department attempted to initially address the midnight shift problems by assigning a relief sergeant to the midnight shift on days when the regular midnight shift sergeant was off. Although this measure helped, it did not satisfactorily remedy all of the various midnight shift problems. Eventually, the Chief concluded that the best way to address these problems would be to change the shift structure for non-supervisory officers so that all officers would rotate shifts monthly.

The Borough notes that after identifying the operational problems discussed above, it did initially try to negotiate concerning the shift schedule issue. However, upon subsequent consultations with Borough labor counsel, the Borough was advised that the shift schedule issue fell within its managerial prerogatives.

The Borough cites several cases to support its contention that the shift rotation change made here is a managerial prerogative and therefore, is not negotiable. (Irvington PBA Local 29 v. Tp. of Irvington, 171 N.J. Super. 539 (App. Div. 1979); and Somerset Cty., I.R. No. 93-1, 18 NJPER 405 (¶23184 1992)).

ANALYSIS

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.^{2/}

Although work hours are generally negotiable (Bd. of Ed. of Englewood v. Englewood Teachers' Ass'n, 64 N.J. 1 (1973)), where negotiations over work/shift schedules interfere with established managerial prerogatives, negotiations are not required. Irvington PBA Local 29 v. Tp. of Irvington, 171 N.J. Super. 539 (App. Div. 1979); Bor. of Atlantic Highlands and Atlantic Highlands PBA Loc. 242, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982), recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984). In Irvington, the employer had changed the shift schedule for police officers from a schedule where one-third of the officers worked

^{2/} Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

steady midnights and two-thirds of the officers worked rotating day and evening shifts to a schedule where all officers worked rotating shifts. The employer made this change to enhance departmental efficiency, particularly the supervision of its officers. The employer noted that superior officers were unable to enforce discipline and follow-up on disciplinary matters because their rotating schedule did not permit them to supervise non-supervisory officers who are on a permanent midnight shift for more than a short period of time.

The Court viewed the "fundamental issue" as "...whether the change of shifts...is a term or condition as to which mandatory negotiations would significantly interfere with the exercise of the Town's managerial prerogative." Irvington at 543. The Court held that the shift change was not mandatorily negotiable because negotiations on this issue could impede the Town's ability to increase departmental efficiency, particularly as it related to providing continuous and consistent supervision, and to address departmental discipline. In Atlantic Highlands, the PBA sought to negotiate a change in the shift schedule from a 5-2 work schedule to a 5-2, 5-2, 5-3 work schedule. The employer contended that the proposed shift change was not mandatorily negotiable because -- citing the small size of the department, coverage gaps in the schedule and increase police costs -- it intruded on the employer's managerial prerogative to plan for "the most efficient utilization of its existing manpower." Atlantic Highlands, at 75. The Court held that negotiations concerning the proposed work schedule change

...would significantly interfere with the exercise of inherent managerial prerogatives necessary to the proper operation of a police force.

Atlantic Highlands at 77.

In Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd 215 N.J. Super. 108 (App. Div. 1987), the charging party sought to negotiate a contract provision which retained an existing work schedule (a 5-2, 5-2, 5-2, 5-1 schedule) concerning which the Township had neither expressed dissatisfaction nor an intent to change. The Township argued only that the establishment of a police work schedule is a managerial prerogative. The Court stated:

...nothing in these decisions [Irvington and Atlantic Highlands] should be read as establishing a per se rule of exclusion for police scheduling issues. The most that can...be said of them is that in each case the statutorily prescribed balance as articulated in Local 195 and Paterson Police was properly struck in favor of the government employer.... PERC...properly concluded that

No matter of significant managerial prerogatives has been placed on the scale to counterbalance the direct and intimate effect of work schedules on employees.

Mt. Laurel at 114-116. (emphasis added).

The Court held the proposed work schedule provision was mandatorily negotiable.

In Borough of Ramsey, I.R. No. 93-8, 19 NJPER 282 (¶24144 1992), the Borough unilaterally changed the police work schedule (from a 4-2 schedule to a 5-2, 5-2, 5-1 schedule) during

negotiations for a new collective negotiations agreement. The Borough submitted affidavits stating that it changed the work schedule to increase departmental efficiency and provide better police coverage in the Borough. However, the Charging Party PBA submitted affidavits which indicated that the Borough changed the schedule to reduce overtime costs. The Commission Designee concluded that the charging party had demonstrated a substantial likelihood of success of prevailing on the merits before the Commission inasmuch as the respondent had not effectively rebutted the charging party's demonstration that the reasons for the shift change was to reduce overtime costs and not to effect a non-negotiable managerial prerogative. See also Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982).

However, in Somerset County, I.R. No. 93-1, 18 NJPER 405 (¶23184 191992), the Commission Designee declined to restrain the employer from changing the shift schedule during negotiations. The employer stated that it changed the work schedule due to an emergency at the Somerset County Trash Recycling Center which threatened the operation's survival. Although the charging party argued that no emergency existed, the Commission Designee concluded that the charging party had not met its heavy burden of establishing a substantial likelihood of success on the legal and factual allegations in a decision by the full Commission.

In the record of the instant interim relief matter, several significant factual disputes exist. Although the employer admits

that the parties were in negotiations and that it did change the work schedule from a 4-2 fixed schedule to a 4-2 rotating schedule, the employer contends (through the affidavit of Chief Michaud) that the PBA did not object to the schedule change when made and did not seek to negotiate concerning the schedule change prior to the filing of this charge. However, State PBA Delegate Agins testified that during contract negotiations, representatives of the PBA told the Borough's negotiators that they (the PBA) did not want the rotating schedule and if the Borough implemented it without PBA agreement, the PBA would file an unfair practice charge.

However, even assuming arguendo that the Borough was on notice that the PBA sought negotiations concerning the shift schedule rotation, the Borough contends that under the circumstances of this matter, the issue was non-negotiable. Through the affidavit and testimony of Chief Michaud, the Borough has squarely raised the type of managerial prerogative issues raised in Irvington, Atlantic Highlands and Somerset County.

Michaud's affidavit and testimony review the various problems which the department has experienced with the midnight shift -- problems with the morale of officers assigned to the midnight shift, performance problems, problems with how officers have interacted with and treated the public and problems in effecting proper supervision for the midnight shift.

The Borough argues that given the small size of its department, the limited number of senior supervisory officers it has

and the duties performed by those senior supervisory officers which make their regular assignment to the midnight shift impractical, it had few viable choices in addressing these problems but to begin rotating shifts.

The PBA has raised questions about the Borough's reasons for effecting the shift schedule change when it did -- it questions whether there really were a lot of disciplinary matters flowing from the midnight shift and whether the Borough could not effectively supervise the midnight shift by regularly assigning senior supervisory officers to the midnight shift.

In reply, Chief Michaud testified that many of the midnight shift disciplinary incidents did not result in formal disciplinary charges being filed. Accordingly, the PBA might not necessarily have become aware of those situations (something which Agins admitted could be the case).

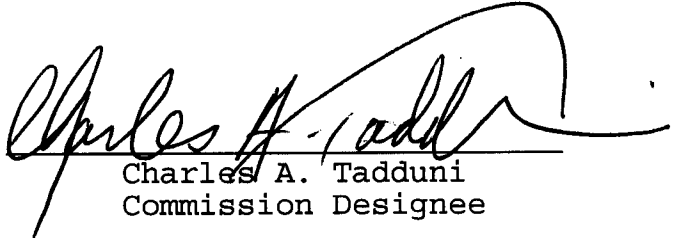
Further, the Chief testified that because senior supervisory officers perform myriad duties which require their working during regular business hours, regularly assigning them to the midnight shift was operationally not feasible.

Thus, in this matter, the Borough has set forth reasons for its implementation of the shift schedule change which implicate "diminished departmental efficiency, disciplinary problems and questions as to the continuity and consistency of supervision by superior officers...." Mt. Laurel at 114. These are managerial prerogative issues. The Courts and the Commission have held that

under circumstances where such managerial prerogative issues are implicated, a shift schedule change is not mandatorily negotiable.

Although the PBA has raised serious questions about the Borough's asserted reasons for this shift schedule change, they have not factually rebutted the Borough's asserted reasons. Applying the rigorous standard which a charging party must satisfy in an interim relief proceeding in order to obtain relief, I am unable to conclude in the context of this abbreviated proceeding that the Charging Party has demonstrated a substantial likelihood of success on the legal and factual allegations of the case in a final Commission decision.

Accordingly, inasmuch as Charging Party has not demonstrated a substantial likelihood of success on the merits of its unfair practice charge, the application for an interim relief order requiring Respondent to restore the 4-2 yearly rotation shift schedule pending a final Commission decision is denied.



Charles A. Tadduni
Commission Designee

DATED: August 17, 1993
Trenton, New Jersey