

I.R. No. 2006-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LITTLE FALLS,

Respondent,

-and-

Docket No. CO-2006-098

PBA LOCAL 346,

Charging Party.

SYNOPSIS

On September 30, 2005 the Mayor rescinded a 4-2 schedule which had been in place for twenty years. The PBA asserted that the Mayor's decision was in retaliation for its filing of two grievances in late August and a request for arbitration in September. The Designee granted interim relief and restrained the Township from implementing a new schedule. She found that the timing of the Mayor's decision to rescind the 4-2 schedule was suspicious and raised an inference of hostility, particularly since the decision was made over the strenuous opposition of the Chief who asked the Mayor to postpone his decision to consider the Chief's public safety and other concerns and at a time when the department was short staffed. Also, by ordering the change for November 1, it maximized the disruption to holiday and vacation schedules which are picked on a calendar year basis. Finally, the Township did not establish that it would have rescinded the 4-2 schedule even if the grievances were not filed.

The Designee found irreparable harm in the disruption to officers lives, specifically eight officers who would now have to work every weekend as well as the chilling effect the Mayor's actions have on the PBA's ability to file and process grievances. The Township asserted no harm to the public interest in maintaining the 4-2 schedule.

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Appearances:

For the Respondent, Laufer, Knapp, Torzewski & Dalena,
attorneys (Fredric M. Knapp, of counsel)

For the Charging Party, Fox and Fox, attorneys (David
I. Fox, of counsel)

INTERLOCUTORY DECISION

On October 14, 2005, the Little Falls Police Benevolent Association, Local 346 (PBA) filed an unfair practice charge with the Public Employment Relations Commission alleging that the Township of Little Falls (Township) violated 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The PBA alleges that the Mayor's decision to rescind the 4-2 work schedule which has been in effect for at least

^{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; (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."

twenty years was in retaliation for the filing of two grievances and a request for arbitration. The PBA further contends that the Mayor's stated rationale for making the change, namely saving money due to increased costs and budget caps imposed by the State, is pretextual. Additionally, the PBA asserts that the schedule change has a chilling effect on its ability to represent its membership. Finally, it contends that the work schedule change violated several provisions of the parties' collective negotiations agreement.

The unfair practice charge was accompanied by an application for interim relief. On October 14, 2005, I executed an Order to Show Cause establishing a return date for October 27, 2005. The parties submitted briefs, certifications and exhibits in accordance with Commission rules and argued orally on the scheduled return date. The following facts appear.

The PBA is the majority representative of the Township's approximately twenty police officers. The PBA and Township are parties to a collective negotiations agreement effective from January 1, 2005 through December 31, 2009. The parties executed the agreement in May 2005.

Article XI, entitled "Work Shifts", states:

A. The four (4) days on and two (2) days off shifts (4 and 2 shift) shall be maintained for all patrol staff. [emphasis added] The 4 and 2 shift shall not be applicable to members of the bargaining unit serving in the detective bureau and other approved personnel.

B. In consideration for the reduction of hours from an average of 40 hours per week to an average of 37.4 hours per week which results from the institution of the 4 and 2 shift, the Association agrees that each Employee shall compensate the Township for the reduction in hours in the following manner [emphasis added]:

Weapon Training	16 hours
Schooling	40 hours
[emphasis added]	

As such, all officers must take 40 hours of schooling per year, unless emergency conditions require otherwise, and only with the approval of the Mayor. In no event shall schooling, as it pertains to the forty (40) hours of required or "give back" time, exceed more than sixteen (16) hours within the last quarter of the calendar year.

There shall be no reimbursement for any expenses connected with attending classes. [emphasis added] Attendance shall normally be at times other than the officer's scheduled shift unless special circumstances exist. Scheduling shall be by written request to the Chief or his designated scheduling officer.

It is specifically agreed by the parties hereto that the 4 and 2 shift can be rescinded at any time by the Mayor, in its [sic] sole discretion. If the Mayor restores the previous shift schedule, there shall be a prorata adjustment. [emphasis added]

All officers who do not work the 4-2 shift shall receive three (3) leave days annually. [emphasis added]

C. Shift Schedules: The parties agree that each Employee shall receive notice of their scheduled shifts for the year on or about January 15th, but no later than January 30th. The Township reserves the right to change an Employee's shift so long as it

provides the employee and the Association thirty (30) days notice and abide by all other terms expressly set forth in the agreement to resolve the 1998 grievance arbitration on "short term notice-shift change."

D Shift Bidding by Seniority **All full time Employees shall have the right to bid for shifts based upon their seniority within their rank.** [emphasis added] Each September the shift bidding shall take place for the new work schedule to take effect on January of the following year. The Chief of Police shall have the right to place officers within the schedule based upon any specialized skills that may be needed for the effective operation of a shift.

Sub-section B was modified in the current agreement to reflect the January 2005 change in the form of Township government from a Committee form to a Mayor and Council form of government. In the prior agreement (2001/2004), the Township Committee had the sole discretion to rescind the 4-2 schedule. Under the new government configuration, the Mayor became the head of all Township departments, and, therefore, was given the sole discretion to rescind the 4-2 schedule. The 4-2 schedule, however, has been in place for at least twenty years.

According to the certification of Township Administrator William Wilk, in 2004 discussions began concerning the high cost of the 4-2 schedule and possible changes to that schedule. In November 2004 Police Chief Hunter recommended a "Pitman" schedule (12-hour shifts) for the dispatchers in order to save money by

providing an additional 236 hours of manpower at no additional cost. The Mayor rejected this suggestion.

On August 25, 2005, PBA President Alfred Batelli submitted two grievances to the Township. One grievance asserted that under Article VII, entitled "Holidays", officers working on any of the fourteen paid holidays enumerated in the collective agreement were entitled to an equal amount of time off. The PBA interpreted this language to mean that officers working any paid holiday were entitled to time credited in addition to the holiday itself and/or payment for the day if not used by the end of the year. The other grievance asserted that under Article VI, entitled "Vacations", the Township improperly credited vacation time by not calculating the calendar week as consisting of seven days.

On September 1, 2005, the Township denied both grievances citing past practice and rejecting the PBA's interpretation of both Articles VI and VII of the collective agreement.

On September 7, 2005, the Mayor and Township Administrator William Wilk requested that Chief Hunter provide a breakdown of the schooling each officer received between September 1, 2003 and August 31, 2005 in accordance with Article XI, entitled "Work Shifts", at paragraph 3. According to Batelli's certification, this is the first time the Mayor had asked for a detailed breakdown of schooling completed by each officer. The Township

does not dispute this fact, but argues in its brief that the Mayor has a right to request such information.

On September 9, 2005, the PBA submitted two separate requests for a panel of arbitrators with the Commission pursuant to step four of the parties' grievance procedure. On September 13, 2005, Wilk requested clarification of what he termed ambiguities in the Holiday grievance.

In correspondence dated September 16, 2005, Mayor Kulick advised Chief Hunter that the 4-2 schedule was being rescinded and the 5-2 shift was reinstated pursuant to Article XI of the collective agreement. The Mayor explained that in response to Hunter's repeated calls for more manpower and without the funds to hire extra personnel, he reviewed the 4-2 schedule and determined that if officers and dispatchers (who are not represented by the PBA) worked a 40 hour week instead of the current 37.4 hours per week, the Township would gain an extra 135.2 hours annually per officer. The Mayor concluded as follows:

At this time of ever increasing costs, budget caps imposed by the State and more demands on the money we have available, I believe we owe it to our taxpayers to be more creative in how we spend their money, reduce expenses and increase productivity. I believe this schedule change is a step in that direction. We will have officers working more hours at no additional cost in salary and benefits.

On September 22, 2005, Chief Hunter responded to Mayor Kulick's September 16 letter. He stated in pertinent part:

I am disappointed you did not speak to me about this matter prior to your decision. I strongly oppose your proposed plan since it will have a negative effect on the Police Department. This negative effect will include increased costs, problems with regard to public safety and major problems in connection with manpower. Not to mention potential conflicts with the current PBA contract.

I am writing to you, even though I am leaving town for training tomorrow, because of the serious problems created by this plan. I therefore suggest that you postpone any notice of starting a new schedule until you thoroughly review it with me upon my return from training.

I can only be general about the problems. . . Some of the immediate issues I have include the following:

1. You refer to givebacks when you re-establish the 5 and 2 schedule, which was last in effect 20 years ago. The givebacks themselves could be overwhelming. The 135.2 extra hours to which you refer represents a great increase in hours. The Township would perhaps be responsible for this increase in pay.
2. I am familiar with the previous 5 and 2 schedule as I have worked that schedule in the past. That schedule will create significant problems with regards to the Fair Labor Standards Act such as mandatory overtime.
3. Not only would that Act create problems, but there would be other reasons for the increases in monetary obligations such as minimum staffing standard and shift differential.
4. There would be problems with regard to existing vacation selections which would need to be disrupted and changed. Perhaps you are

unaware that vacations are picked for the calendar year.

5. The change of shifts further would impact upon the many other personnel practices, which could adversely impact the current labor contract.

6. The safety issues to which I refer are paramount. I simply cannot safely operate my Department with this new schedule. As you know, crime rates have down generally since the implementation of the 4 and 2 schedule, while productivity has increased. I can demonstrate specifically what I mean by this. I can also demonstrate that this 5 and 2 schedule, which you are suggesting, will decrease productivity and could easily lead to an increase in criminal activity.

I hope you are aware that I am just briefly stating my thoughts since I feel that this is important enough to bring to your attention in writing before I leave. I urge you to have an in depth discussion with me, on all of these issues, so that we can all best serve the interest of the residents and employees of our community.^{2/}

By letter dated September 30, 2005, Mayor Kulick responded to Chief Hunter. The Mayor reiterated the need to decrease costs and increase productivity by rescinding the 4-2 schedule and reestablishing the 5-2 schedule. He informed Chief Hunter that pursuant to Article XXIII which gives the Police Department sole discretion to establish or discontinue extra shifts, he also planned to eliminate the 4th or relief shift (7 p.m. to 3:00

^{2/} According to Batelli's certification, Chief Hunter told Batelli and two other officers that he (Hunter) believed the rescission of the 4-2 schedule was retaliatory. Hunter did not provide a certification. I cannot find as a fact that Hunter made this statement.

a.m.). The Mayor pointed out flaws in the proposed schedule Hunter submitted to him, namely that it reflected the previous 5-2 rotating schedule while the current collective agreement required permanent shifts and that some officers were scheduled to work eight consecutive days, thus, creating unnecessary overtime. The Mayor attached a proposed schedule containing three eight hour shifts and explained that each shift would have five officers and two sergeants. He admitted that to be fully staffed, the proposed shifts should have five officers and two sergeants, but conceded that the department was short one sergeant and two officers. The Mayor anticipated the shortage would be resolved with two more officers from the February/March 2006 Academy class.

The Mayor then instructed the Chief to fill in the schedule with the names of officers taking care to honor as much as possible the seniority shift bidding process as well as vacation and holiday requests already submitted and informed him that the 5-2 schedule also applied to dispatchers. Finally, the Mayor ordered the Chief to notify the PBA membership that the new schedule would take effect on November 1, 2005.

On September 30, 2005, on behalf of Chief Hunter and by order of the Mayor, Lt. Calafiore notified officers and dispatchers that effective November 1, 2005 the 4-2 schedule was rescinded and the 5-2 schedule would be implemented. He attached the new schedule to the notification and requested that the

officers review their previously approved vacation days and advise him of any changes or adjustments that would be needed. The attached schedule reflected three shifts: 7:00 a.m. to 3 p.m., 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m. Individual officers and superiors were placed into slots on the schedule.

According to the certification of Township Administrator William Wilk, no officer has raised any concerns or problems regarding holidays or vacation scheduling as the result of the change to a 5-2 work schedule. He states that if any officer brought such issues to his attention, he would work with the officer to determine a way whereby he/she would receive the originally anticipated time off.

Wilk disagrees that the schedule change has violated any contractual provisions. For instance, he asserts that officers were given the required 30-day notice, and shift bidding took place after the announced change as per the parties' collective agreement. Additionally, Wilk disagrees with the PBA's contention that the 5-2 schedule will cost the Township more money. Wilk maintains that officers will not be entitled to three additional personal days nor does he believe that there will be an additional cost associated with the increased work hours (37.4 currently under the 4-2 versus 40 hours per week under the 5-2 schedule).

ANALYSIS

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. DeGoia, 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).

The PBA argues that the Township retaliated after it filed two grievances by changing a work schedule (4-2) which has been in place for twenty years. The timing of the decision, it contends, evidences hostility to the exercise of protected activity. The PBA further asserts that the reason advanced by the Mayor for the change - to alleviate the tax burden - is pretextual and will have the opposite effect by increasing costs. Specifically, it argues, the new schedule will require the Township to provide three extra personal leave days and compensate each officer for the extra 135.2 hours worked annually. Finally, the PBA contends that the schedule change has a chilling effect on its ability to represent its membership because officers fear retaliation for filing grievances.

The PBA states that it is irreparably harmed in the following manner: two officers will lose shift differentials; four officers will have a complete life style change due to the 5-2 fixed schedule including eight officers who will now have to work every weekend; the change violates various articles of the collective agreement such as seniority shift bidding, vacation and holiday bidding, convention leave, and work week. Also, there will be diminished overtime opportunities.

The Township contends that the timing of the change in work schedule does not evidence hostility. Discussions concerning the high cost of the 4-2 schedule and a possible change began in 2004 well before the filing of the two grievances. After the decision was made to change to the 5-2 schedule by November 1, 2005, the collective agreement required 30-day notification, thus, requiring the Mayor to notify the Chief in September so that formal notification could be sent to officers by October 1, 2005.

The Township also disagrees that the 5-2 schedule will increase costs. It asserts that the change increases manpower without any additional costs in compensation or benefits. No officer, it asserts, is irreparably harmed. Specifically, it contends that no grievances have been filed over any contractual violations nor has any officer expressed concerns over lost vacation or holiday time as a result of the change. The Township insists that it is willing to discuss and accommodate such concerns. Finally, the Township disagrees with the PBA's claims

that it has or will violate the collective agreement by changing the work schedule.

It is undisputed that the Township intends to change the schedule unilaterally on November 1, 2005. Police work schedules are generally mandatorily negotiable unless the employer demonstrates a particularized need to preserve or change a work schedule to protect a governmental policy determination.

I.F.P.T.E. Local 195 v. State of N.J., 88 N.J. 393, 404-405 (1982); Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); Township of Mt. Laurel v. Mt. Laurel Police Officers Assn., 215 N.J. Super. 108 (App. Div. 1987). Here, the parties negotiated. The collective agreement gives the Mayor sole discretion to change the work schedule. However, even where an employer has a managerial prerogative or contractual right to take a personnel action without first engaging in negotiations, it still may not do so for illegal reasons. Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), aff'd P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002).

The PBA argues that the change in work schedule was retaliatory. In Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the New Jersey Supreme Court set the standard for determining whether a public employer's action violates 5.4a(3) of the Act. Under Bridgewater, a charging party must prove that the protected conduct was a substantial or motivating factor in the employer's adverse action. This may be

done by direct or circumstantial evidence showing that the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. The timing of events is an important factor in determining whether or not hostility or union animus can be inferred. Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999). The employer, however, may defeat such a finding by demonstrating that the same action would have been taken even in the absence of protected activity.

Claims of retaliation for protected activity in violation of 5.4a(3) do not normally lend themselves to interim relief since there is rarely direct, uncontroverted evidence of the employer's motives. In Chester Borough, the Commission Designee restrained the change in work schedule finding a Chief's memorandum directly linking the filing of a grievance to the work schedule change retaliatory. She also found that the Borough did not demonstrate it would have taken the same action anyway. Contrast City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004) (interim relief denied where City presented colorable claim that its reason to reject bid selection by straight seniority was due to high number of inexperienced officers on the midnight shift.)

Here, although discussions concerning the cost of the 4-2 schedule and possible changes to it began in 2004, the timing of the Mayor's decision is suspicious and lends itself to an inference of hostility. Morris Tp. Bd. of Ed., P.E.R.C. No. 56-

69, 12 NJPER 16, 18 (¶17005 1985). The Mayor's decision followed shortly after two grievances were filed and over strenuous opposition from Chief Hunter. Indeed, in his September 16 letter to the Chief announcing the decision, the Mayor stated that he was responding to the Chief's own repeated requests for more manpower, but the Chief responded a week later expressing his disappointment that the Mayor had not spoken to him prior to deciding to change the schedule. Also, in expressing his opposition, the Chief, who had worked the 5-2 schedule twenty years before, recited very specific public safety concerns about the proposed change, and requested that the Mayor postpone his decision until safety and other concerns could be reviewed.

The Mayor's September 30 response is remarkable in its failure to address the Chief's specific concerns, especially those related to public safety. Nor did the Mayor provide a reason for his refusal to postpone implementation. There is no evidence of a recent change in the Township's financial picture which added such urgency to the decision-making process - a process which began over a year before - that prevented the Mayor from delaying the implementation of the new schedule to accommodate the Chief's request.

Moreover, the decision to change the schedule came at a time when the department's manpower was short by two officers and at least one sergeant (another sergeant was due to retire within a month). The Township concedes the shortage but responds that the

shortage in staffing would have been resolved in 2006 with the graduation of two officers from the February/March 2006 Academy class and the promotion of two sergeants from a planned promotional exam in early 2006. The Township argues that this fact is a "red herring" and not an issue before me. The Township, however, provides no explanation for the urgency to implement the 5-2 schedule when by delaying implementation until 2006, there would have been no staffing shortage to address. This fact adds to the suspicion regarding the timing of the Mayor's decision.

Absent the filing of the two grievances, the Township has not demonstrated that it would have made or needed to make the schedule change by November 1. The Township maintains that increasing the hours of officers annually will not increase the compensation of officers and, thus, the cost to taxpayers. This conclusion is unsupported by the parties' collective agreement. Under the 4-2 schedule, officers work 37.4 hours per week. Under the 5-2 schedule, officers will be working a 40 hour week or 135.2 hours more annually. The collective agreement clearly states that if the Mayor exercises his discretion to rescind the 4-2 shift and restore the previous shift schedule (5-2), there shall be a prorata adjustment. That adjustment may require additional compensation and/or adjustment for other give backs negotiated in exchange for the 4-2 schedule.

Based on the above, I find that the PBA has demonstrated a substantial likelihood of success on the merits of its 5.4a(3) claim.

The PBA alleges that it and its members will be irreparably harmed if the schedule change is not restrained. Irreparable harm is by definition harm that is not capable of an adequate remedy at the conclusion of the case. I find such harm exists here. Any remedy at the conclusion of the case cannot make employees whole for the months of having to work the changed work schedule, specifically eight officers who will be working every weekend due to the change from a 4-2 rotating to a 5-2 fixed schedule.

Although the PBA asserts irreparable harm from loss of anticipated vacation and holidays for November and December 2005, the Township in its papers has committed to ensure that anticipated vacation and holiday time for the remainder of 2005 is honored if officers make known their time off. I expect the Township to honor its commitment.

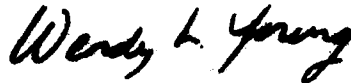
The PBA also asserts a chilling effect on employees' statutory rights to initiate and pursue grievances, namely that its members will hesitate to enforce contractual rights through the grievance process for fear of retaliation. I find that the timing of the Mayor's decision to rescind the 4-2 schedule in place for twenty years presents a substantial likelihood of success that hostility existed to the filing of grievances and

has a significant chilling effect on employees' statutory rights to initiate and pursue grievances and irreparably harms that process. The Township has not asserted any harm to the Township or the public interest if the 4-2 schedule is maintained.

Accordingly, I find that the PBA has met its burden to obtain interim relief in this matter.

ORDER

The Township of Little Falls is restrained from implementing the proposed schedule change. The Township is ordered to maintain the 4-2 schedule currently in effect. This interim order will remain in effect pending a final Commission order in this matter.



Wendy L. Young
Commission Designee

Dated: October 31, 2005
 Trenton, New Jersey