

I.R. No. 2007-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PEMBERTON,

Respondent,

-and-

Docket No. CO-2007-270

PEMBERTON PBA LOCAL 260,

Charging Party.

TOWNSHIP OF PEMBERTON,

Respondent,

-and-

Docket No. CO-2007-274

PEMBERTON SUPERIOR OFFICERS'
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies applications for interim relief filed by the Charging Parties, Pemberton PBA Local #260 (PBA) and the Pemberton Superior Officers Association (SOA).

The PBA and SOA each filed unfair practice charges alleging that Pemberton Township violated the Act when it terminated a long-standing practice of allowing detectives represented by the PBA and lieutenants represented by the SOA to take home Township vehicles, refusing to negotiate over offsetting compensation except in the context of successor negotiations, and when the Mayor overruled the Chief's Step One grievance determination that the practices should be restored and continued.

The designee concludes that the charging parties are likely to succeed on the merits only on the portion of their charges alleging that the Township violated the Act when it failed to negotiate with the PBA and SOA over compensation to offset the officers' loss of the vehicles, prior to implementing the policy that ended the practices. The designee finds that while the Township, through its Mayor overturned the grievance decision of

the chief, because the grievance and his resolution of it involved a subject that is, at best permissively negotiable, he could not, in the absence of Commission precedent so holding, conclude that an employer violates the Act by repudiating a grievance determination made on a non-mandatorily negotiable subject.

Finally, the designee concludes that despite the employer's apparent violation of its obligation to refrain from changing working conditions during successor contract negotiations, no irreparable harm occurred to the charging parties or the negotiations process. Noting that the parties had not yet sought interest arbitration, and the Township's acknowledgment of its obligation to negotiate, the designee concludes that ordering negotiations over compensation to offset the loss of the use of the vehicles, separate and apart from the parties' successor contract negotiations, would be unnecessary and impractical.

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Appearances:

For the Respondent, (Archer & Greiner, attorneys
(Vincent P. Sarubbi of counsel; David A. Rapuano, of
counsel and on the brief)

For the Charging Parties, Klatsky, Sciarrabone & De
Fillipo, attorneys (David J. De Fillipo, of counsel and
on the brief)

INTERLOCUTORY DECISION

On March 26 and 28, 2007, respectively, Pemberton PBA Local
260 (PBA) and the Pemberton Township Superior Officers'
Association (SOA) each filed an unfair practice charge alleging
that Pemberton Township (Township) violated the New Jersey
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

specifically 5.4a(1), (2), (3), (5), and (7),^{1/} when it "unilaterally and improperly" rescinded a long-standing practice of allowing detectives represented by the PBA and lieutenants represented by the SOA to take home their Township-owned vehicles at the end of their shifts. The charges also assert that the Township violated the Act by refusing to negotiate with the PBA and SOA over the economic impact of its action,^{2/} and by repudiating the negotiated grievance procedure through the action of the Township's Mayor, who overruled decisions issued by the Chief sustaining grievances filed by the PBA and SOA.

The charges were accompanied by applications for interim relief. N.J.A.C. 19:14-9.1 et seq. On April 4, 2007, an order to show cause was executed and a return date was scheduled for April 25, 2006. The PBA and SOA submitted briefs and the

^{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 the majority representative; (7) Violating any of the rules or regulations established by the Commission."

^{2/} The charging parties state that the Township has asserted that the issue should be raised in negotiations over successor agreements.

affidavits, with exhibits, of their respective Presidents. The Respondent filed a brief in opposition and a responsive certification. After the parties argued orally, I denied the interim relief applications. This opinion contains my analysis.

The Township has separate agreements with the PBA and SOA that were effective from January 1, 2003 through December 31, 2006. The parties are engaged in negotiations for successor agreements but have not yet initiated interest arbitration proceedings. N.J.S.A. 34:13A-14 et seq.

The charging parties assert that, for more than 20 years, detectives represented by the PBA have been able to use their Township vehicles to commute and lieutenants represented by the SOA have had 24-hour use of their assigned vehicles.^{3/} Although these practices are not specifically referenced in the agreement, the charging parties assert that the use of the vehicles is part of the compensation package for these officers and qualifies as a past practice concerning a term and condition of employment.

On January 12 2007, shortly after he took office, Mayor David Patriarca issued a memorandum addressed to Department Heads and Supervisors concerning vehicle usage. It provided that, beginning on January 15, only one vehicle "per office, Police, Public Works and Water Department will be authorized to be taken

^{3/} The Chief of Police also had 24 hour use of a Township vehicle.

home each day for on-call purposes." It also: provided that no other vehicles could be taken home without prior approval of the Mayor or his designee; designated the areas for vehicles used during work hours to be parked at the end of a shift; and provided that other employees called in for an emergency would pick up their vehicles in the designated areas.

On January 14 and 15, respectively, the PBA and SOA initiated grievances at Step One of their contractual dispute resolution procedures. Both grievances sought restoration of the practices and continuation of the "take home" vehicle policy "until and if the Township and the PBA come to an agreement in good faith negotiations."

On January 15, Chief Stephen A. Emery issued separate, but virtually identical, Step One grievance determinations stating:

Absent any negotiated actions between the Township [and the majority representatives] I am compelled to [sustain the grievances] and not change the current practice of allowing the [affected officers] use of their assigned vehicles.

In a January 15 memorandum to the Mayor labeled "personal and confidential," the Chief relayed the terms of his grievance determination and recommended that the Mayor lift the prohibition against the continuation of the practice allowing "the Chief and Police Lieutenants 24 hour use of the vehicles and to allow the detectives to commute from the police station to their home." The memorandum goes on to assert that there should be

negotiations, with input from the Chief, over taking away the "compensation" and regarding the use of police equipment and personnel.

On January 25, the Mayor issued a memorandum to the PBA/SOA overruling the Chief's determination. After addressing the merits of the dispute, the Mayor proposes that he would be willing to allow an interim modification of the policy whereby the Chief, one on-call detective and one on-call lieutenant would be allowed to take a vehicle home at the end of the day to be available for work purposes only. The memorandum threatens that, if any vehicles taken home under the terms of the proposal are used for personal business, disciplinary action, including termination, could result.

On January 30, the SOA responded to the Mayor asserting that he had no contractual right to overturn the Chief's decision and arguing that the Mayor's refusal to honor the decision of the Township's grievance representative violated the obligation to negotiate in good faith.

On February 2, counsel for the PBA wrote to the Mayor and Township Council, in response to the Mayor's January 25 memorandum, requesting that the Township reinstate the "take home" policy and demanding that the Township negotiate over compensation to offset the loss of the use of the vehicles. On February 13, the PBA's attorney sent a follow-up letter noting

that he had received no response to his prior correspondence. The unfair practice charges and interim relief applications ensued.

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. 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).

The use of Township-owned vehicles for commuting purposes is not mandatorily negotiable and a public employer has a prerogative to control how its vehicle fleet is deployed. See Morris Cty. and Morris Cty. Park Comm., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984).

However, the Appellate Division, in affirming the Commission's ruling also held:

[A]lthough the commutation use of the vehicles had never been the subject of negotiation and had never been expressly referred to in any collective negotiation agreement, it nevertheless constituted an existing regulation governing working conditions whose modification required prior negotiation pursuant to N.J.S.A. 34:13A-5.3.

PERC's accommodation of the managerial and compensation components of the directive was to affirm the right of the County to unilaterally modify its policy but to negotiate with Council #6 over "offsetting compensation for those employees who have lost the economic benefit of using a County vehicle to commute."

10 NJPER at 103

N.J.S.A. 34:13A-5.3 provides:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

I find that the PBA and SOA have established a substantial likelihood of success only on the portion of their charges that the employer violated the Act by removing the vehicles from the detectives and lieutenants without first notifying the PBA and SOA and offering to negotiate over the issue of off-setting compensation for the detectives and lieutenants who would no longer have "take home" use of the vehicles after January 15, 2007.

The Township's apparent willingness to negotiate, as part of successor contract talks, over possible compensation for the employees who can no longer regularly use the vehicles,

recognizes that the issue raised by the PBA is mandatorily negotiable. However, the Township's invitation was mistimed, because the Act requires negotiations prior to a proposed change that affects employee working conditions. The change in vehicle practices affected working conditions by taking away an economic benefit previously enjoyed by the affected officers.

While the ability to retain use of Township-owned vehicles during non-working hours, is not mandatorily negotiable, for purposes of this decision I will assume, without deciding, that the issue is permissively negotiable under the standards established by City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981). A permissively negotiable subject may be included in a collectively negotiated agreement covering police officers and can be enforced through the contractual grievance procedure. Id. at 88. However, N.J.S.A. 34:13A-5.4a(5) addresses changes in the "terms and conditions of employment." Accordingly, only mandatorily negotiable subjects fall under its protective umbrella barring unilateral modifications. An agreement on a permissively negotiable subject may not be enforced in an unfair practice proceeding. Montclair Tp., P.E.R.C. No. 93-28, 18 NJPER 492 (¶23225 1992). Thus, to the extent the PBA and SOA allege that ending the detectives' ability to use Township vehicles to commute and the lieutenants' 24 hour use of the cars violated the Act, I find that they do not have a substantial likelihood of

success on the merits of that issue and could not obtain reinstatement of the practices as a remedy.

The PBA and SOA do not argue that the use of the vehicles is a mandatorily negotiable subject. Instead, they seek interim relief and an unfair practice determination that the Mayor's rejection of the Chief's determination repudiated the contractual grievance procedure and violated N.J.S.A. 34:13A-5.4a(5). The charging parties cite Borough of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003) and Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985).

In Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), appeal pending, the Commission held:

An unjustifiable refusal to honor negotiated grievance procedures and binding decisions of authorized grievance representatives violates the obligation to negotiate in good faith. .
. If the parties are not bound by the results of the intermediate steps of a grievance procedure they intended to be binding, then the procedure will be ineffective in quickly and inexpensively resolving disputes.
32 NJPER at 327^{4/}

While this case, Keansburg and Preakness Hospital all involve the rejection of grievance determinations by management representatives, I cannot conclude that the PBA and SOA have established a substantial likelihood of prevailing on the merits

^{4/} The Commission dismissed the charge in Middletown because of irregularities during the processing of the grievance.

of the portion of the charges alleging that the repudiation of the contractual grievance procedure violated the Act.

The subjects of the grievances in Keansburg (extra-duty assignments, sick-time buy-back, longevity) and Preakness Hospital (sick leave) involved mandatorily negotiable terms and conditions of employment. The PBA/SOA grievances directly challenged an employer's decision on a subject that is, at best, permissively negotiable. The Chief's grievance determination directed that the use of the cars be restored to the detectives and lieutenants, a remedy that is not mandatorily negotiable.

If the practices of allowing the detectives to commute in their police vehicles and giving the lieutenants 24 hour use of them are permissively negotiable, then it is possible that the directive to resume the practices could be enforceable pursuant to the parties' contracts. However, to date, the Commission has not addressed an unfair practice charge alleging grievance procedure repudiation, where the subject of the grievance is not mandatorily negotiable. Absent a decision so holding, I cannot find that the charging parties are substantially likely to prevail on their charge that the Township violated the Act when it repudiated a grievance determination on a non-mandatorily negotiable subject.

It is likely that the PBA and SOA could prove that Township violated the Act by ending the take home vehicle practices

without offering to negotiate with the PBA and SOA over offsetting compensation before implementing the change in the vehicle use policy. However, under the circumstances of this case, I find that irreparable harm does not exist and no immediate remedy is required.

The only available remedy that the charging parties could obtain at the end of this case would be an order to negotiate over compensation to offset the detectives' and lieutenants' loss of the use of Township vehicles. Ordinarily, injunctive relief is not available when money damages are sought by the moving party. See In re Estate of Barrett, 30 N.J. Super. 331, 337 (Ch. Div. 1954). Cf. Zoning Bd. of Adjustment v. Service Electric Cable Television of New Jersey, 198 N.J. Super. 370, 381-382 (App. Div. 1985).

Commission designees have regularly issued interim relief awards that require the payment of money when employers have unilaterally changed working conditions during collective negotiations. See City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981); Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1978). The "irreparable harm" in those cases is not the monetary loss per se, but rather the disruption to the collective negotiations process that can occur when unilateral changes are made during successor collective negotiations. Withholding compensation due employees can

potentially pressure a majority representative to accede to the employer's negotiating positions to settle the contract in order to have the funds released. See Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). And, where law enforcement personnel and their employers have begun interest arbitration proceedings, N.J.S.A. 34:13A-21 provides that "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other."^{5/}

While the legal authority may exist to find irreparable harm and issue an interim remedy to negotiate over offsetting compensation for the change in the officers' ability to use the Township vehicles, under the circumstances and given the positions of the parties, I find that such an order would be impractical and unnecessary.

The parties are engaged in collective negotiations and the Township has acknowledged the negotiability of compensation to offset the economic impact of the end of the "take home" vehicle practices. It would not make sense to direct separate negotiations over that issue. And, such an order is unnecessary to preserve the ability of the PBA and SOA to effectively

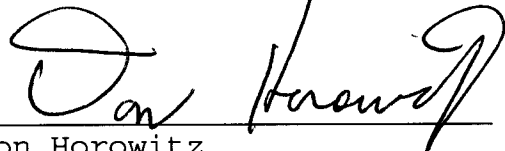
^{5/} Although the parties most recent agreement expired on December 31, 2006, a petition to initiate compulsory interest arbitration had not been filed as of the hearing on the PBA/SOA interim relief applications.

participate in successor collective negotiations and, if necessary, interest arbitration. If the parties cannot reach agreement on successor contracts, interest arbitrators will be appointed to resolve the impasses. The PBA and SOA will be able to advise the arbitrators of the "take home" vehicle practices that existed as of the end of the last contract and advance proposals and arguments to convince the arbitrators to make awards that will account for the economic impact of the changes made by the employer. The charging parties would also have the right to pursue their unfair practice charges and seek monetary or other appropriate relief if complaints are issued on these charges.

ORDER

The PBA and SOA applications for interim relief are denied.

BY ORDER OF THE COMMISSION



Don Horowitz
Commission Designee

DATED: May 3, 2007
Trenton, New Jersey