

I.R. NO. 2019-12

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY PROSECUTOR OF ESSEX  
COUNTY,

Respondent,

-and-

Docket No. CO-2019-145

ESSEX COUNTY PROSECUTOR'S  
INVESTIGATORS, NEW JERSEY  
POLICEMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 325,

Charging Party.

**SYNOPSIS**

A Commission Designee denies an application for interim relief filed together with an unfair practice charge alleging that since June, 2018 the Essex County Prosecutor has unlawfully changed work shifts of unit employee prosecutor's investigators; has more recently retaliated against unit employees contesting those changes (and exercising other rights) by reassigning them to the "Court Squad"; and has unlawfully sought "waivers" of a contractual 5 day notice period for shift changes from individual unit employees.

The Designee determines that material factual issues were raised by the charge and by the employer's reply, including its attached certifications, precluding the Charging Party from demonstrating a substantial likelihood of success on the merits, a necessary component for a grant of interim relief.

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Appearances:

For the Respondent,  
Courtney Gaccione, Essex County Counsel  
(Robin Magrath, of counsel and on the brief)

For the Charging Party,  
Law Offices of Nicholas J. Palma, attorneys  
(Valerie Palma DeLuisi, of counsel and on the brief)

**INTERLOCUTORY DECISION**

On December 11, 2018, Essex County Prosecutor's  
Investigators, New Jersey Policemen's Benevolent Association,  
Local 325 (PBA) filed an unfair practice charge against the  
County Prosecutor of Essex County (Prosecutor), together with an  
application for interim relief, exhibits and a brief. The charge  
alleges that since June 2018, the County has changed unit  
employees' shifts and hours on short notice, violating the  
parties' collective negotiations agreement and failing to

compensate the employees. The charge more specifically alleges that Article 15 of the agreement permits the Prosecutor to temporarily vary unit employees' schedules upon five working days' notice, except in emergent circumstances. The Prosecutor has allegedly required unit detectives change their shifts with less than five working days' notice, and, ". . . attempted to force [them] to waive the five-day requirement, in writing."

The charge alleges that the Prosecutor has retaliated against detectives who have refused to waive the five-day notice requirement or would not "voluntarily" change their work hours; or voiced concerns that they should be paid overtime compensation. The charge alleges that on October 4, 2018, named Prosecutor representatives, i.e., superior officers, asked detectives and unit employees Cosgrove, DeProspero and Rua (who also is a PBA vice-president) to change their normal daytime work hours the next day (by reporting at 5:00 a.m.) and were advised they would not receive overtime compensation. Soon after they refused to accommodate the request, they were advised to report to the "Court Squad" the next day, wearing a suit. The unit employees complied and on October 5<sup>th</sup> they inquired of a Lieutenant Foti the reason for their assignment. He allegedly replied that there was no "special reason" and they were, ". . . probably just being spanked."

Also on October 4, unit employees allegedly received a notice of a shift change, effective October 11, in which they were ordered to work from 1:30 a.m. - 9:00 a.m, assisting the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) with search and arrest warrants. Detective Rua allegedly objected, advising a lieutenant that the notice failed to provide five-days' notice; that no contractually mandated "joint scheduling committee" had convened a meeting; that the situation was not "emergent" and assisting an "outside" agency was inconsistent with the needs of the Prosecutor, thereby warranting their receipt of overtime pay. The next day, October 5, 2018, a Captain allegedly distributed a shift change notice to detectives, ordering their shift changes, together with ". . . a waiver, wherein detectives were compelled to waive their contractual rights of five days' notice." Some detectives allegedly refused to sign a waiver. On October 10, detectives Cosgrove, DeProspero and Rua were advised to again report to "Court Squad" the next day. On October 11, a detective and non-unit lieutenant assigned to the "ATF detail," received overtime pay for the day.

The charge also alleges that on October 16, 2018, Chief Mitchell McGuire issued a memorandum regarding "Operation Border Patrol," advising members of the narcotics unit and special prosecutions unit that commencing October 24<sup>th</sup>, detectives will

be assigned to a task force to address a recent spike in violence at the border of the Cities of Newark and East Orange. The memorandum advised of these detective schedule changes: October 24 - November 9; - 10:00 a.m. - 5:30 p.m.; November 12 - November 21; 4:00 p.m. - 11:30 p.m. and November 26- December 7; 10:00 a.m. - 5:30 p.m. The charge alleges that the task force was subsequently extended through December 21, 2018; that the assignment is not an emergency and it is not consistent with needs of the Prosecutor. The Prosecutor's action allegedly violate section 5.4a(1), (3), (5) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The PBA seeks a remedy enjoining the Prosecutor from changing unit employees' hours unless it complies with the collective negotiations agreement; prohibiting the Prosecutor from seeking unit employee "waivers" of contractual rights; and

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<sup>1/</sup> 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. (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."

ordering compensation to unit employees whose rights were violated.

On December 12, 2018, I issued an Order to Show Cause, setting forth dates for the receipt of the City's response and for argument in a telephone conference call. On January 8, 2019, Counsel argued their respective cases.

The City disputes facts alleged by the PBA; contends that the PBA has not submitted any "supporting evidence" of employee coercion; asserts that an "emergency" arose, pursuant to the agreement; and that it did not retaliate against unit employees.

The following facts appear:

The PBA represents a unit of all non-supervisory investigators employed by the Prosecutor. The parties' most recent agreement extended from January 1, 2014 through December 31, 2017. The parties also signed a memorandum of agreement extending from January 1, 2017 through December 31, 2019.

Article XV, "Hours of Work," provides in pertinent part:

Section 1: The Prosecutor shall have the right to schedule the hours of work in the work week and to vary the daily weekly schedule consistent with the needs of the office and consistent with the terms of this agreements. Except in emergent circumstances, the Prosecutor will provide reasonable advance notice of not less than 5 working days of any temporary change in the normal work schedule. When such change is required, the Prosecutor shall advise the expected duration of such temporary change.

Section 4: Consistent with the foregoing, the normal workday shall commence at 8:30 am and shall conclude at 4:00 pm with the following modification: The Prosecutor reserves the right to vary the hours of work for the Court, Pre-Grand Jury and PTI squads by one hour before or after the normal work day without additional cost. For example, . . .

Section 5: The parties shall form a joint scheduling committee to meet and discuss the feasibility of any proposed change to the existing work schedule including its implementation and administration and any compensation related issues.

Article VII, "Additional Compensation," provides in a pertinent part:

Section 1: Compensation for special shift duty will be paid to any member required to work a tour of duty other than the customary 8:30 am to 4:00 pm workday or modified workday as provided for in Article XV, Hours of Work . . . The compensation will consist of an hourly rate 7.5% higher than that existing under the regular straight time hourly rate for hours worked between 4:00 pm or the modified workday as provided under Article XV, and 11:30 pm and an hourly rate 15% higher . . . for hours worked between 11:30 pm and 8:30 am.

Mitchell McGuire III has been Chief of detectives for the Prosecutor since February, 2018. He certifies that on October 4, 2018, he directed his supervisory staff that [unit] members of the special prosecutors unit were needed to assist the narcotics unit with search/arrest warrants on October 5<sup>th</sup>. An unspecified number of unit members were directed to report to work at 5:00 am on October 5<sup>th</sup>, rather than the usual reporting time, 8:30 am.

Such assistance is common when additional staffing is needed. He certifies:

October 5<sup>th</sup> was an emergent situation. More specifically, the Prosecutor was notified by an informant on October 4, 2018 that the target would be moving within a day or two and as a result, the Prosecutor needed all manpower available to execute search warrants at three different locations on October 5, 2018.

He certifies that the Prosecutor was unable to provide five working days' notice to employees for the October 5<sup>th</sup> warrant execution, ". . . due to the emergent circumstances surrounding it."

McGuire also certifies that he learned on October 4<sup>th</sup> that unit employee detectives Cosgrove, DeProspro and Rua informed a Lieutenant Shawn Clark of their respective personal unavailability for October 5 shift change. He certifies that their supervisor, Clark, was unavailable to supervise the unit because he was assigned to the "special detail." McGuire directed that the detectives should report to the "Court Squad" on October 5<sup>th</sup>. He certifies that "Court Squad" needed "additional manpower to assist with the delivery of subpoenas and other functions," and that detectives reporting to "Court Squad" must wear suits.

Lieutenant John Foti filed a certification that he is lieutenant in the Court Squad to whom detectives Cosgrove, DeProspro and Rua reported on October 5, 2018. He certifies that



he recalls their brief conversation on that date and denies stating to them that they, ". . . were probably just being spanked."

McGuire certifies that on October 4<sup>th</sup>, he directed another shift change for unit employees, effective October 11<sup>th</sup>, pursuant to advice he received that date through a representative of the ATF about a "wire take-down" scheduled for October 11<sup>th</sup> between 1:30 am and 9:00 am. McGuire certifies that the shift change notification was issued on October 4 and 5, 2018 and that notice was given, ". . . as soon as possible after it was received and the details were worked out for the wire take down." He described these events as an "emergent nature of the need for the October 11 shift change." He certifies that in the absence of the five working days' notice of the shift change, ". . . detectives were not required to agree to the shift change, but rather were asked if they would volunteer to accommodate the shift change," a "normal practice for several years" in such situations. Lieutenant Clark certifies that he ". . . requested that detectives sign a receipt of notification of the shift change."

Clark certifies that on October 5, 2018, detectives Cosgrove, DeProspero, Rua and Gonzalez notified him of their unavailability for the October 11 shift change and he in turn notified his supervisors. Clark assisted in the October 11 "wire

take down," again leaving him unavailable to supervise the detectives. McGuire ordered that the detectives report to Court Squad on October 11, 2018. He certifies that Court Squad was again needful of "manpower to assist with the delivery of subpoenas and other functions."

Detectives who worked during the October 11, 2018 shift change were eligible for the 15 per cent wage differential and those working in excess of a seven and one-half hour regular shift were eligible to receive overtime compensation.

On October 16, 2018, Chief McGuire issued a memorandum to the narcotics and special prosecutions units, advising of an "operation" to quell violence at the border of the cities of Newark and East Orange, ostensibly necessitated by ". . . a fight for territory between two gangs." The schedule was set forth as alleged in the charge, with unit employees being eligible for the 7.5 per cent wage differential. McGuire certifies that on or about November 20, 2018, he was asked to extend the operation, ". . . because two detectives identified two subjects in an active investigation who were also identified as suspects in another homicide." McGuire ordered the extension, providing a work schedule from December 10 through 21, 2018 and distributed for detective signatures a "Narcotic Task Force sign-off sheet" that was signed and dated by numerous detectives on November 29,

2018 (exhibit "E"). Detectives working under the added schedule were eligible for the 7.5 per cent pay shift differential.

On December 21, 2018, McGuire ordered the issuance of a shift change for detectives in the Special Prosecution Unit commencing January 2, 2019 through January 18<sup>th</sup>. The rescheduled hours are 10:00am to 5:30 pm. McGuire certifies that he is unaware of any "joint scheduling committee."

On or about October 1, 2018, the PBA requested binding arbitration of its grievance contesting assignments of detectives to the Court Squad. The hearing is scheduled for February 26, 2019.

#### **ANALYSIS**

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate 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. DeGioia, 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).

Shift schedules are a component of work hours. Court and Commission case law holds that the work schedules of individual employees, including police, are in general, mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App Div. 1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of Jersey City, I.R. No. 2006-13, 32 NJPER 35 (¶17 2006).

Collectively negotiated notice of assignment change provisions are mandatorily negotiable, provided they do not restrict management's prerogative to make emergency assignments. Tp. of Nutley, P.E.R.C. No. 88-90, 14 NJPER 254 (¶19095 1988). Our decisions have upheld the negotiability of notice periods of varying lengths. See, e.g., Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16022 1985) (10 days); Bor. of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) (72 hours). Article XV appears to allow notice to be suspended in "emergent circumstances." In Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338, 340 (¶17129 1986), the Commission approvingly cited a dictionary definition of "emergency:"

- (1) an unforeseen combination of circumstances or the resulting state that calls for immediate action;
- (2) a pressing need.

The PBA alleges in its charge that no emergencies existed on October 4 and 11, 2018 warranting a ceding of the respective contractual five working days notice periods. The Prosecutor's Chief of Detectives certifies with specific facts that on October 4<sup>th</sup>, he learned of an emergent police circumstance likely to occur on October 5<sup>th</sup> that did not permit the notice period. He also certifies of his learning of another circumstance on October 4<sup>th</sup> requiring a schedule change for unit employees on October 11, 2018. Whether these circumstances are emergent within the agreement's meaning are both material and contested, precluding a determination that the PBA has a substantial likelihood of success of prevailing on its allegations.

The PBA alleges that the Prosecutor retaliated against unit employees, including its vice president, for expressly objecting to the inadequacy of notice or refusing to change normal work hours or refusing to waive the contractual notice period, by assigning them to the Court Squad. The Prosecutor's Chief of Detectives and Supervising Lieutenant certified that on October 5 and 11 (dates that the unit employees were assigned to the Court Squad), those unit employees would not have otherwise been supervised and that the Court Squad needed "additional manpower." The City's motive for assigning unit employees to the Court Squad is another material issue of fact, (highlighted by a dispute of whether Lieutenant Foti told unit employees when reporting to the

Court Squad that they, “. . . were probably being spanked”), precluding a determination that the PBA has demonstrated a substantial likelihood of success on these allegations.

Bridgewater Tp. v. Bridgewater Public Works Ass’n, 95 N.J. 235 (1984).

Section 5.4a(1) prohibits public employers from interfering with, restraining or coercing employees in the exercise of their rights. The Commission first determines whether a disputed action tends to interfere with the statutory rights of employees. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). If the answer to that question is yes, we must then determine whether the employer has a legitimate operational justification. If it does, the Commission then weighs the tendency of the employer’s conduct to interfere with employee rights against the employer’s need to act. Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

Another material issue warranting a more complete record is whether the Prosecutor’s solicitation of waivers from employees tends to interfere with a unit employee’s right to refuse to work a shift, even if such solicitations are not “threatening” and have been ongoing for years.

For all of these reasons, the PBA has not demonstrated a substantial likelihood of success on the merits of the charge. Accordingly, I deny the application for interim relief.

This case shall be processed in the normal course.

/s/ Jonathan Roth  
Jonathan Roth  
Commission Designee

DATED: January 11, 2019  
Trenton, New Jersey