

I.R. No. 2019-17

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MANTUA,

Respondent,

-and-

Docket No. CO-2019-203

PBA LOCAL 122,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge alleging that the public employer unilaterally and unlawfully imposed a restriction that only one officer per patrol shall be permitted to use paid time off on sixteen designated holidays and occasions, even if minimum staffing levels are met. The employer asserted that the parties had negotiated over the matter and that it had asserted sufficient facts demonstrating a material dispute, precluding a determination that the Charging Party has shown a substantial likelihood of success, pursuant to interim relief standards.

The Designee determined that the Charging Party had met its burden on the likelihood of success, as well as the other requisites for granting relief. The employer was enjoined from implementing the restriction, pending a determination in a final Commission order.

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Appearances:

For the Respondent,
Brown & Connery, LLP
(William F. Cook, attorney)

For the Charging Party,
Spear Wilderman, P.C.
(James Katz, attorney)

INTERLOCUTORY DECISION

On February 7, 2019, PBA Local 122 (PBA) filed an unfair practice charge against Mantua Township (Township), together with an application for interim relief, a certification, exhibits and a brief. The charge alleges that on or about October 18, 2018, the Township's police department issued a memorandum advising that for sixteen designated holidays and special events during the year, only one officer per patrol shift will be permitted to use paid time off, even if minimum staffing levels are met. The charge alleges that the restriction applies, regardless of the number of officers assigned or available to work on any such

shift and regardless of the reason that the officer is absent. The charge alleges that in the past, if the department was able to meet the staffing minimum - three officers per shift - ". . . officers were generally allowed to take off up to that minimum. If the time off request was while the department was at minimum staffing, the department had a prerogative to permit the officers to be off and to call for overtime." The charge alleges that the change was not negotiated with the PBA.

The charge also alleges that Township patrol officer Cody Mroz was denied a vacation day on February 3, 2019 (a "blackout day," i.e., Super Bowl Sunday), when squad "D," with a normal complement of five officers, had only four available, including Mroz, because one officer was assigned to light duty on another shift, as a result of a medical condition. The charge alleges that although minimum staffing would have been met if Mroz had been granted leave, he was denied his request. Upon the PBA's further request for approval, the Township allegedly again refused.

The Township's actions allegedly violate section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The PBA seeks an Order enjoining the Township from unilaterally changing terms and conditions of employment by establishing a per se rule that during numerous days throughout the year, only one officer per patrol shift shall be granted time off, even if minimum staffing is available on those shifts.

On February 8, 2019, I issued an Order to Show Cause, setting forth dates for the submission of the Township's reply and for argument in a telephone conference call. On February 26, 2019, the parties argued their respective cases.

The Township contends that its "time off guidelines" were not unilaterally imposed; that they were "discussed and reviewed" with officers before it was implemented; that the minimum staffing level "guidelines were finalized and issued in December, 2017;" that no grievances or complaints were filed regarding implementation and that a "genuine dispute [exists] over whether negotiations did, in fact occur" (brief at 12). It asserts that under the "totality of circumstances," it did not violate the Act and that the PBA has waived any alleged unlawful conduct. 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. (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."

Township specifically disputes that the alleged implementation date of the policy was October 18, 2018; that the restriction of no more than one officer per patrol shift applies regardless of the reason that the officer is absent is correct; and that there has been a general practice that officers could take time off until the minimum staffing requirement is reached. It also disputes that the PBA can demonstrate irreparable harm and that a balancing of equities favors a grant of interim relief.

The following facts appear:

The Township and PBA have signed a series of collective negotiations agreements, the most recent of which extends from January 1, 2016 through December 31, 2019 (cna). The PBA represents about 24 officers in any of six "job classifications" (Lipsett cert.; Art. II of 2016-19 cna). Patrol officers work 12-hour shifts, 6 a.m. to 6 p.m. and 6 p.m. to 6 a.m. on a "2/2/3" schedule (two days on; two days off; three days on; two days off; two days on; three days off), alternating one month of days, then one month of nights (Article V).

Article V also provides at no. 3:

The patrol shift shall consist of two platoons, each with two squads, with a sergeant and a corporal assigned to each shift. Once the department returns to full staff, all officers will be assigned to a patrol squad with four squads of five officers and three-officer minimum, unless an emergent situation shall arise, then there shall be a two-officer minimum.

Article IX (Vacation Entitlement) establishes graduated vacation time off for 12-hour and 8-hour shift officers, depending upon years of service. Officers are also provided four "personal days" each year (Article XVIII). The predecessor collective negotiations agreement (2012-2015) also included a substantially similar three-officer minimum staffing provision (Art. XXVIII).

On an unspecified date in late 2017, Township Chief of Police Darren White issued a proposed and modified "Minimum Staffing Levels Policy" (MSLP) that was initially drafted by his predecessor, Chief Sawyer. White certifies that unspecified officers expressed to him their concern that,

. . . on various occasions the [Township] would need to deny vacation time due to special events or circumstances that occur on an annual basis where there are special law enforcement needs justifying a denial of such time. Instead of addressing these annual events on a scattershot, ad hoc basis every year, before formal vacation selections, so that they would know which dates would be implicated by potential vacation denials [White cert., para. 9]

White certifies that, "during these discussions, there was no request to negotiate or amend the contract but rather a request for clearer guidelines. In response, the method chosen, with the full knowledge, input and acceptance from the Union, was through a SOP" (White cert., para 10). White certifies that the "proposed MSLP was issued to officers in late 2017, before it was finalized, for input or comments." "At all times," White

certifies, "good faith and full disclosure was exercised to ensure that the officers and the PBA had a full say in what they sought in the MSLP." In the absence of any complaints and ". . . after allowing sufficient time for the officers and the PBA to review the proposed MSLP provisions, the MSLP was finalized and implemented in December 2017" (White cert., para. 11-14). The policy was sent to officers through the Township "Power DMS" system (a computer entry system through which officers individually acknowledged receipt of the policy).

An attached exhibit, "Document - V2 C22 - Minimum Staffing Levels" (bearing the same volume and chapter numbers and title as the later-issued [10/18/2018] Township policy and procedure "revision" document) shows only that 33 named officers (including Jason Lipsett, the PBA representative, who "signed" on December 29, 2017) "signed" or acknowledged receipt on various dates between December 19, 2017 and September 10, 2018 (Township exhibit "C"). The purported policy itself was not among the Township's exhibits.

From the December, 2017 implementation through 2018, the Township received no complaints or grievances regarding the MSLP. From January, 2018 through May, 2018, ". . . the three-officer minimum manpower provision had not yet come into play because the Township police department was not at full manpower. In June, 2018, the Township took over coverage for the Borough of Wenonah

[pursuant to a shared services agreement], at which time the three-officer minimum manpower provision went into effect" (White cert., para. 18).

On October 18, 2018, Chief White issued a three-page Township police department "policy and procedure" "revision" of "minimum staffing levels." In outline format, the document provides in pertinent parts:

A. Minimum Staffing Levels

1. General Minimum Staffing Levels for the Patrol Division

- a. When at full staff, three (3) patrol officers as per the collective negotiations agreement.
- b. In emergent situations, two (2) patrol officers
- c. When not at full staff, two (2) patrol officers, contingent upon an Administrator or Detective is schedule and available to assist on the road.

* * *

3. Minimum Staffing Levels for Holidays, Special Events and Emergencies. Notwithstanding the above general minimum staffing levels, the below rules shall apply to officers in the Patrol Division during holidays, special events and emergencies as described herein.

- a. Only one officer per patrol shift shall be granted time off during each of the following occasions, unless specifically approved by the Chief of Police or his/her designee.

- i. Any portion of a shift beginning on New Years's Day, Easter, Memorial Day,

Independence Day, Thanksgiving, the day after Thanksgiving (black Friday), and Christmas.

ii. Any portion of the PM shift starting on St. Patrick's Day, Cinco de Mayo, Mischief Night (October 30), Halloween, the day before Thanksgiving, Christmas Eve, or New Year's Eve.

iii. Super Bowl Sunday between 1200-2400 hours.

iv. Patriots Day (9/11) between 0600-1200 hours.

v. Dates on which there are events in or around the Township that may or will, in the sole discretion of the Chief of Police, result in the need for additional law enforcement resources above the general minimum staffing levels.

Chief White acknowledges that, ". . . [the October 18, 2018] revision was made to the MSLP due to the fact that making certain minimum manpower provisions of the MSLP were no longer applicable because such provisions were covered by the contract" (White cert., para.18). He certifies:

. . . the MSLP was revised to tie the time off restrictions to certain shifts and hours, not the entire day for affected days [as was the case that former Chief Sawyer originally developed]. During the 2018 revision, with more input from the officers, we narrowed things down even further to allow them to take as much time as possible while maintaining adequate coverage during times when I feel it may be necessary. [White cert., para.19].

The vast majority of 32 named Township officers, including officer and PBA representative Lipsett, individually acknowledged on the Township's DMS system their receipt of the revised MSLP in October, 2018 (Township exhibit "D").

In late December, 2018 or early January, 2019, the 2019 schedule of MSLP-affected dates was posted. The schedule charts by date, holiday and shift times in the calendar year that, "only one officer off . . ." was permitted. The chart sets forth sixteen "holidays," seven of which limited one officer permitted paid time off, "all day;" seven limited the restriction to the "p.m. shift;" Super Bowl Sunday's restriction was "12-12" and Patriots Day's was "6 a.m. -12 noon" (Township exhibit "E").

On or about January 28, 2019, Chief White was asked if officer Mroz's request for time off on February 3, 2019 (Super Bowl Sunday) was properly denied. On January 29th, PBA Counsel wrote to White, providing a legal opinion that permitting only one officer paid time off on selected dates when minimum staffing is available is unlawful and that officer Mroz had fallen victim to that formulation. Counsel wrote that an officer on "light duty" should not be considered part of available minimum staffing because he hadn't requested time off. Counsel sought reconsideration of Mroz's request. Finally, the letter advises that the PBA wishes to work with the Township to resolve staffing issues (Township exhibit "E").

On the same date, Chief White replied to PBA Counsel, advising that he would inquire about the matter and that he hoped to resolve it. It was determined that, “. . . [Mroz’s] request was denied because another officer on his shift was on light duty. The scheduling system interprets an officer on light duty as being off, thus causing Mroz’s time off request to be denied” (White cert., para. 28). No grievance has been filed.

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 Gloucester Cty. Sheriff’s Department, P.E.R.C. No. 2019-19, 46 NJPER 205 (¶53 2018), the Commission wrote about the negotiability of vacation or other time off. It elaborated:

'Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation.' Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Therefore, the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment, and a public employer does not have a managerial prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements or other managerial prerogatives would be jeopardized. Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶199 2016) (limits on numbers of officers per squad who could use vacation days were arbitrable, but limits on sergeant and watch commander taking vacation on same day implicated managerial prerogative to meet supervision needs); Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991) (limit of two weeks summer vacation leave was negotiable; employer may review individual vacation requests in light of its staffing requirements). 'Once an employer has determined its staffing requirements, the method of allocating available vacation time among employees is mandatorily negotiable.' Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989) (limits on length of vacation leave and the times of year when vacation leave could be used were arbitrable); see also Borough of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989) (holding seniority vacation preference clause negotiable and that 'arbitrability of a grievance filed under this article can be assessed in light of any alleged staffing shortages when a vacation request is denied.'). [Id., 46 NJPER at 207]

The Township does not assert an inability or difficulty achieving and maintaining its minimum staffing requirement of three officers per shift with or without the changes to the availability of paid time off set forth in its October 18, 2018

"policy and procedure." See Teaneck Firefighters Mut. Benevolent Ass'n, Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd 41 NJPER 293 (¶97 App. Div. 2015) (an agreed-upon system for scheduling time off preventing the public employer from meeting its staffing requirements found not to be mandatorily negotiable).

The Township asserts that it negotiated in good faith with the PBA over the MSLP "guidelines," or minimally, raised, ". . . a genuine dispute over whether negotiations did in fact occur, warrant[ing] a denial of interim relief" (brief at 12). The Township contends:

Here, looking at the totality of circumstances, including the officers' request for clear guidelines, management's extensive efforts to consider and review the issues with the officers, the absence of any prior complaints or grievances whatsoever with the manner in which the time off restrictions were implemented, and the establishment of ongoing, good faith practices to administer both the 2017 and 2018 versions of the MSLP, the Township did not violate any duties under the Act. [brief at 14]

The Township relies on City of Trenton, I.R. No. 2004-10, 30 NJPER 60, 61 (¶18 2004), in which the Designee determined that the parties' submissions, particularly the public employer police director's affidavit that the disputed employment action was the product of discussions and negotiations with PBA officials, raised a "dispute over a material fact" that precluded a

determination that the charging party PBA demonstrated a substantial likelihood of success on the merits.

Chief White's twelve-page certification does not aver that he or another Township representative met or negotiated with PBA representative(s) before or after the disputed October 18, 2018 MSLP "revision." That in 2017, the Chief discussed guidelines with officers desirous of "certainty" of dates that vacation requests potentially would be denied; that the PBA was "fully aware" of the Chief's 2017 review of a proposed MSLP; that no complaint or grievance was filed after the MSLP was implemented in December, 2017, despite its dissemination among unit employees;^{2/} that before October, 2018, unspecified officers had unspecified "input" to revisions of the MSLP; and that afterwards, ". . . no complaints or charges of any kind [were filed] regarding [the revised, disputed MSLP's] implementation" fails to adduce facts arguably demonstrating that the Township collectively negotiated with the PBA over the October, 2018 MSLP revisions, specifically, the sixteen 2019 calendar holidays and occasions when only one unit employee per shift will be allowed paid time off, even if the minimum staffing threshold is not

^{2/} Both parties acknowledge that the three-officer minimum staffing requirement wasn't implicated or triggered until June, 2018, when the Township police department became fully staffed, pursuant to its shared services agreement with Wenonah Township.

jeopardized. These circumstances distinguish this matter from City of Trenton.^{3/}

Unilateral action undermines the employment relationship and violates the terms and goals of the Act. Middletown Tp., P.E.R.C. No 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App Div. 1999), aff'd 166 N.J. 112 (2000). Accordingly, section 5.3 provides that a public employer has a duty to negotiate before changing working conditions:

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

In the absence of apparent facts showing that the Township negotiated with the PBA before implementing the revised MSLP in October, 2018, I believe that the PBA has demonstrated a substantial likelihood of succeeding on the merits of its charge. City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995) (fire union's request for interim relief restraining town from altering vacation policy established under status quo terms of expired agreement granted where town's restriction of number of employees

^{3/} Nor do the Township's factual allegations of the PBA's conduct amount to acquiescence to the October 18th "policy and procedure." Assuming that it does, I find that the PBA's waiver of a right to negotiate ended when it contested the denial of officer Mroz's request for paid time off and subsequently filed this charge. See UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

permitted on vacation at same time was more severe than necessary to meet minimum staffing requirements).

I also find that the PBA has established irreparable harm. Leave time that may be wrongfully denied represents leave opportunities that are lost forever and cannot be remedied later in a Commission order. City of Trenton; North Bergen Tp., I.R. No. 97-16 23 NJPER 249 (¶28119 1997); Essex Cty. I.R. No. 90-2, 15 NJPER 459 (¶20188 1989).

In weighing the relative hardship to the parties resulting from a decision granting or denying interim relief, I find that the scale favors the PBA. This order will return the parties to the status quo ante, enabling the Township to maintain minimum staffing while prospectively permitting unit employees to obtain paid leave or time off as they had before October 18, 2018. Officer Mroz has suffered some irreparable harm.

Finally, the public interest is not injured by an interim relief order in this case. The Township shall maintain minimum staffing levels on officer shifts, thereby assuring the public of the level of protection to which the Township has assented. The public interest is also benefitted when the parties-in this case, the Township-adhere to the tenets of the Act.

ORDER

The Township is enjoined from continuing to implement that portion of the October 18, 2018 "policy and procedure" limiting

paid time off to one officer per shift on sixteen designated holidays and occasions when minimum staffing requirements are not jeopardized.

This interim order will remain in effect, pending a final Commission order in this case. The underlying unfair practice charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: February 28, 2019
Trenton, New Jersey