

H.E. NO. 2024-6

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LAVALLETTE,

Respondent,

-and-

Docket No. CO-2022-146

POLICEMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 372,

Charging Party.

**SYNOPSIS**

A Hearing Examiner grants Charging Party's motion for summary judgement and denies the Respondent's cross-motion. The Hearing Examiner finds that the Borough of Lavallette (Borough) violated N.J.S.A. 34:13A-5.4a(1) and (5) when it repudiated an arbitration award and refused to pay overtime to officers who are out of work on workers' compensation for related doctor's appointments that fell outside their normally-scheduled shift. Further, the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it changed the same officers' work schedules to an administrative one without prior negotiations.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,  
Crivelli & Barbati, LLC, attorneys  
(Frank Crivelli, of counsel)

For the Charging Party,  
Eric M. Bernstein & Associates, LLC, attorneys  
(Eric M. Bernstein, of counsel)

**HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION**

On December 29, 2021, Police Benevolent Association Local 372 (PBA) filed an unfair practice charge against the Borough of Lavallette (Borough). The charge alleges that starting in or around August 2021 through October 2021, the Borough failed to pay certain employees overtime for attending several doctor appointments, which were scheduled by the Borough's workers' compensation carrier without the employees' input, as required by a previous arbitration award. The charge further alleges that the Borough unilaterally changed terms and conditions of

employment when it issued an email indicating that employees on workers' compensation, or long-term medical leave, would be placed on an administrative schedule of Monday through Friday. The PBA asserts that the Borough's actions constitute a violation of 5.4a(1), (2), (3), (4), (5) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

On or about November 28, 2022, the Director of Unfair Practices issued a Complaint on the PBA's 5.4a(1), (3) and (5) of allegations and assigned the matter to me for a hearing.<sup>2/</sup> The Borough filed an Answer to the Complaint on December 7, 2022. In its Answer, the Borough denies violating the Act and asserts certain affirmative defenses.

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

<sup>2/</sup> Via email dated September 7, 2023, the PBA withdrew their 5.4 a(3) allegation.

On May 2, 2023, the PBA filed a motion for summary judgement pursuant to N.J.S.A. 19:14-4.8, together with a brief, and the certification of Ryan Greenhalgh, with exhibits.

On May 15, 2023, the Borough filed a cross motion for summary judgment pursuant to N.J.S.A. 19: 14-4.8, together with a brief, and the certification of Philip G. George, with exhibits.

On May 25, 2023, the PBA filed a response to the Borough's cross-motion for summary judgment.

On May 30, 2023, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter. Additionally, on September 7, 2023, I conducted oral argument. During oral argument, the PBA argued that the change to an administrative schedule for employees out on workers' compensation changed the amount of Murphy/compensation time (Murphy time) an employee would be entitled to under their collective negotiations agreement (CNA). The Borough was unable to provide a response to the PBA's claim and was given additional time to respond. On September 28, 2023, the Borough submitted a letter addressing the PBA's claim regarding Murphy time.

Based upon the record, I make the following:

**FINDINGS OF FACT**

1. The Borough and the PBA are, respectively, public employer and public employee representative within the meaning of the Act.

2. The PBA is the exclusive representative of all regular full-time police officers, including sergeants, employed by the Borough.

3. The PBA and the Borough are parties to a CNA effective from January 1, 2021 through December 31, 2023. The previous CNA was in effect from January 1, 2018 through December 31, 2020.

4. On April 19, 2018, an arbitration award was issued sustaining a PBA grievance, finding that the Borough violated Article XX of the parties' 2014-2017 collective negotiations agreement and past practice by refusing to pay an officer overtime for attending mandatory workers' compensation-related medical visits scheduled by the Borough's workers' compensation carrier, and by announcing it would discontinue approving similar payment for the entire negotiations unit. The Borough was ordered to pay the officer "for the three (3) overtime hours for his attendance at that appointment and **reinstate and maintain the practice.**" (emphasis added).

5. On December 28, 2020, Patrol Officer Gerard Capron (Capron) suffered a work-related injury while on duty.

6. On August 21, 2021, Patrol Officer Ryan Greenhalgh (Greenhalgh) suffered a work-related injury while on duty.

7. During the period August 2021 through October 2021, the Borough refused to pay Capron and Greenhalgh overtime for attending several workers' compensation-related doctor appointments which were scheduled by the Borough's workers' compensation carrier without the employees' input and fell outside of their normal shifts.

8. On or about October 12, 2021, Greenhalgh filed a grievance on behalf of himself, Capron and other similarly-situated officers.

9. On or about October 19, 2021, the Borough Administrator sent an email to Greenhalgh indicating that the grievance was denied. However, the Borough agreed to pay Greenhalgh "for any time that he put in for through the date of this decision as to the grievance." The Borough indicated that a total of 21 hours were owed to Greenhalgh.

In the same email, the Borough Administrator indicated that

"[effective immediately, all department leaders will be instructed to that any employee out of work on Worker's Compensation, or long term medical leave, shall be placed on an Administrative Schedule of Monday through Friday, for the emergent needs and efficiency of the department operations. Representative from the Worker's Compensation carrier shall be provided with these schedules, and they shall strive to make all appointments on these dates. Employees shall work with their case

managers to ensure appointments are made on these days, and the employee must advise their department head in advance to confirm that the appointment will not create overtime."

10. Pursuant to Article VII, entitled Hours of Work & Overtime, Section 1 of the parties' CNA<sup>3/</sup>:

The time period covered by this agreement shall be divided into work cycles consisting of twenty-eight (28) consecutive calendar days. During each work cycle all employees of the unit shall work tours of duty which in the aggregate total one hundred and sixty (160) hours. Unless the shift schedule is modified by the Chief of Police or Public Safety Director, as applicable, due to emergent needs or as reasonably necessary in light of efficiency or other needs of the Department, all employees will work a twelve (12) hour per day shift.

The work year for all employees shall consist of 2,080 hours. Each employee whose planned work schedule results in him/her working in excess of 2,080 hours shall receive compensatory time at the rate of an hour for an hour for the excess of time scheduled. Due to the nature of the planned schedule, officers will be credited the excess hours scheduled to work on January 1<sup>st</sup> of that year in anticipation of continued employment. This will be referred to as "Murphy Time." Murphy Time must be used in the calendar year in which it is earned and may not be carried over unless by mutual consent of the parties.

11. The Borough indicated in its September 28, 2023 letter that an administrative shift is Monday through Friday from 9:00 am to 5:00 pm. Officers do not earn Murphy time while placed on

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3/ The language contained in this section is the same in both the current and previous CNAs.

an administrative shift. Rather, an officer is credited with 108 hours of Murphy time at the beginning of every year payable at 4.5 hours per pay period. Officers would not be paid 4.5 hours of Murphy time each pay period if the officers were on an administrative schedule. That amount and would be deducted from the 108 hours allotted at the beginning of the year.

12. The Borough has not paid Greenhalgh for the 21 hours it indicated in the October 19, 2021 email.

#### **ANALYSIS**

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

N.J.A.C. 19:14-4.8(d) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist.



N.J.A.C. 19:14-4.8(e); Brill; Judson. The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

The parties agree that the Borough did not pay Greenhalgh and Capron overtime for workers' compensation-related doctor visits scheduled outside their normal work schedule during the period of August 2021 through October 2021. The parties further agree that the Chief of Police changed the shifts of Greenhalgh and Capron to an administrative schedule without negotiation. Therefore, I find that no genuine issue of material fact exists with respect to this issue that would require a plenary hearing.

#### **Repudiation of Arbitration Award**

Where the parties each have a good faith dispute over the application of a particular contract term, the Commission usually will not exercise its unfair practice jurisdiction, but leave such disputes to be resolved through the parties' grievance procedure. State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). However, one exception to that policy is where the employer has acted in bad faith by repudiating a clear contractual obligation. Id. As the Commission explained in Human Services:

A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith

arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause.

[10 NJPER at 423 (citations omitted).]

The Borough argues that the arbitration award was not violated and does not apply to this matter as "the circumstances are entirely different when the Officer is out of work pursuant to doctor's orders and otherwise receives full salary and benefits from the Borough while assigned to an administrative tour which recognizes they are out of work and essentially eliminates overtime for doctor visits, since such visits will occur during their regular tour."

The PBA argues that the arbitration award "makes no mention of any factual distinction between an officer being paid overtime wages for attending workers' compensation appointments while he or she is working or not working." Further, as certified to by Greenhalgh, after the arbitration award was issued, Greenhalgh was paid overtime for workers' compensation physician appointments scheduled by the workers' compensation case worker outside his normal work shift while he was out of work.

The Borough's failure to make overtime payments to Greenhalgh and Capron for workers' compensation-related doctor's appointments from August 2021 through October 2021 which were scheduled during their normal shifts repudiated the terms of the

April 19, 2018 arbitration award and thus, violated 5.4a(1) and (5) of the Act. See State of New Jersey (Dept. of Human Services). The arbitration award does not make any factual distinction between an officer able to work while on workers' compensation and an officer who is unable to work while on workers' compensation. It is clear from the award that in making the determination, the Arbitrator relied in part on the testimony of Capron. Capron testified that he had been "absent from work because of his injuries for between four and five months" and he "was never questioned nor denied the overtime compensation he submitted." The Arbitrator found that "the PBA proved the parties had a practice of paying officers at overtime rates when their required workers' compensation-related medical visits occurred beyond their normal work shifts." In making this finding the Arbitrator relied on "nine examples of the practice", one of those examples being Capron's testimony. Therefore, the Borough's refusal to pay overtime to officers out of work on workers' compensation is a clear repudiation of the arbitration award which makes no distinction as to whether an officer was working or not while on workers' compensation.

#### **Change in Work Schedule**

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment and requires an employer to negotiate

before changing working conditions. In 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), the Commission explained that unilateral action undermines the employment relationship and violates the terms and goals of the Act. While the Act does not define what a "term and condition of employment" is, the New Jersey Supreme Court has defined negotiable terms and conditions of employment as ". . . those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy." Paterson PBA Local 1 v. City of Paterson, 87 N.J. 78, 86 (1981) quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978).

A subject is negotiable between public employers and employees when

(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

In re Local 195, IFPTE, 88 N.J. 393, 404-405. This balancing test must be applied to the facts and argument in each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998). Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a general rule, negotiable. See, e.g., Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

There are exceptions to the general negotiability of work schedules when the facts prove a particularized need to preserve or change a schedule in order to protect a governmental policy determination. Township of Edison and PBA Local 75, P.E.R.C. No. 2009-051, 35 NJPER 72 (¶29 2009).

The Borough, relying on Morris County Sheriff's Office v. Morris County Policemen's Benevolent Association, Local 298, 418 N.J. Super 64 (App. Div. 2011), argues that the change of shifts to minimize overtime and manage employee time is non-negotiable and not subject to mandatory negotiations as the Borough has a duty to conserve public funds. The Court in Morris County held that the decision to not staff positions which have no function

on holidays was a managerial prerogative because it implicates the essential duty of government to "spend public funds wisely." There, officers chose to work holiday shifts receiving an overtime rate of pay and performed no services. The Court found that the Morris County policy that ended the practice did not adversely affect any officers' contractual rate of pay or diminish annual weekly work hours, but rather the newly-enacted policy merely eliminated an unnecessary, abusive overtime practice.

The Borough further relies on Rutgers, State University of New Jersey v. Union of Rutgers Administrators, 2015 N.J. Super. Unpub. Lexis 1198 (App. Div. 2015) to support its argument. In Rutgers, the Commission found that the University established staffing levels it deemed necessary for efficient performance of the boiler-monitoring services on campus and that these staffing assignments dictated the amount of overtime that was necessary. The Court found that the Commission "reasonably found that the University's staffing determinations are within its managerial prerogative." Further, the Court found that the case did not concern a reduction in any contractually-negotiated work days, and it did not alter the number of hours an employees was required to work for the same pay.

The PBA argues that when the reason for a change in schedules is for "purely economic" reasons, there is no

significant interference with management's ability to set policy, and work schedules have been found to be negotiable. See Township of Mt. Laurel, 215 NJ Super 108 (App. Div. 1987).

The cases relied on by the Borough are distinguishable from the issue in this matter. Here, by placing officers on an administrative schedule, the Borough did not "merely eliminate an unnecessary abusive overtime practice" like in Morris County. Unlike in Rutgers, the Borough has failed to indicate any staffing issue as the reason for the change in officers' schedules. The officers in this matter were out of work on workers' compensation, not working any shift.

The Borough's decision to change the schedules of officers who are out of work on workers' compensation to an administrative one changes the number of hours an employee is required to work in a day. Although the officers' salaries have not been affected by the decrease in hours, the amount of Murphy time an officer receives has been affected. Township of Franklin v. Franklin Township PBA Local 154, 424 N.J. Super. 369, 37 A3d. 1162 (App. Div. 2012) (Township had proposed modifications to the work schedules of police officers that would have increased the hours they were required to work; the Court affirmed the Commission finding that the modification required mandatory negotiation of the current work schedule and any proposed changes to that schedule). By changing the work schedules of officers who are

out of work on workers' compensation, the Borough has reduced the number of hours an officer would work, thereby eliminating their ability to receive Murphy time under the CNA. Therefore, the Borough did not have a managerial prerogative as the change affected contractually-negotiated work hours and the benefits of those work hours, i.e. Murphy time.

### **CONCLUSION**

For these reasons, I grant the PBA's motion for summary judgement and deny the Borough's cross-motion for summary judgement. I find that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it repudiated the April 19, 2018 arbitration award and refused to pay overtime to officers who are out of work on workers' compensation for related doctor's appointments that fell outside of their normally-scheduled shift. Further, the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it changed the same officers' work schedules to an administrative one without prior negotiations.

### **RECOMMENDED ORDER**

I recommend that the Commission **ORDER** that the Borough:

A. Cease and desist from:

1. Interfering with, restraining or coercing PBA unit members in their exercise of the rights guaranteed to them by the Act, particularly by repudiating the express terms of the April 19, 2018 arbitration award and refusing to pay overtime to



officers who were out of work on workers' compensation for related doctor's appointments that fell outside of their normally-scheduled shift.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by changing the schedules of officers who were out of work on workers' compensation to an administrative schedule.

B. Take the following affirmative action:

1. Restore the status quo ante by rescinding the email of October 19, 2021 that unilaterally placed officers out of work on workers' compensation on an administrative schedule and reinstate overtime payments to officers out of work on workers' compensation when their doctor's appointments fall outside of their normally-scheduled shift as found in the April 19, 2018 arbitration award.

2. Make whole officers Greenhalgh, Capron and any other similarly-situated officer for overtime they would have earned as a result of workers' compensation-related doctor's appointments that fell outside of their normally-scheduled shifts during the period August 1, 2021 through October 19, 2021.

3. Make whole any officer who was out of work on workers' compensation that did not receive overtime they would

have earned had they not been placed on an administrative schedule after the email of October 19, 2021 to the present.

4. Negotiate in good faith with the PBA over any proposed change(s) to work schedules of officers who are out of work on workers' compensation.

5. Post in all places where notices to employees are customarily posted copies of the attached notice marked as "Appendix A." Copies of such notice on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

6. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

/s/ Stephanie D'Amico  
Stephanie D'Amico  
Hearing Examiner

DATED: November 29, 2023  
Trenton, New Jersey

**Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed,**

this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 11, 2023.



# NOTICE TO EMPLOYEES

## PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

**We hereby notify our employees that:**

**WE WILL** cease and desist from interfering with, restraining or coercing PBA unit members in their exercise of the rights guaranteed to them by the Act, particularly by repudiating the express terms of the April 19, 2018 arbitration award and refusing to pay overtime to officers who were out of work on workers' compensation for related doctor's appointments that fell outside of their normally-scheduled shift.

**WE WILL** cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by changing the schedules of officers who were out of work on workers' compensation to an administrative schedule.

**WE WILL** take the following affirmative action:

1. Restore the status quo ante by rescinding the email of October 19, 2021 that unilaterally placed officers out of work on workers' compensation on an administrative schedule and reinstate overtime payments to officers out of work on workers' compensation when their doctor's appointments fall outside of their normally-scheduled shift as found in the April 19, 2018 arbitration award.

2. Make whole officers Greenhalgh, Capron and any other similarly-situated officer for overtime they would have earned as a result of workers' compensation-related doctor's appointments that fell outside of their normally-scheduled shifts during the period August 1, 2021 through October 19, 2021.

3. Make whole any officer who was out of work on workers' compensation that did not receive overtime they would have earned had

Docket No. CO-2022-146

Lavallette Borough  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

they not been placed on an administrative schedule after the email of October 19, 2021 to the present.

**WE WILL** negotiate in good faith with the PBA over any proposed change(s) to work schedules of officers who are out of work on workers' compensation.

**WE WILL** post in all places where notices to employees are customarily posted copies of the attached notice marked as "Appendix A." Copies of such notice on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

**WE WILL** notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.