

I.R. NO. 2011-30

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

FRANKLIN TOWNSHIP,
Respondent,

-and-

Docket No. CO-2011-065

FRANKLIN TOWNSHIP PBA LOCAL #154,
Charging Party.

FRANKLIN TOWNSHIP,
Respondent,

-and-

Docket No. CO-2011-066

FRANKLIN TOWNSHIP SOA,
Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief and restrains Franklin Township from implementing work schedule changes for police officers. The Commission Designee finds that the police unions will be irreparably harmed in collective negotiations if the work schedule changes are permitted to be made while the parties are participating in interest arbitration proceedings.

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Appearances:

For the Respondent
DeCottis, Fitzpatrick & Cole, LLP
(Louis N. Rainone, of counsel)

For the Charging Party
Klatsky, Sciarrabone & De Fillippo, attorneys
(David J. De Fillippo, of counsel)

INTERLOCUTORY DECISION

On December 6, 2010, the Franklin Township PBA Local #154 (Local 154) and the Franklin Township SOA (SOA) jointly filed an application for interim relief seeking to restrain Franklin Township (Township) from unilaterally implementing work schedule changes. The application is based upon previously filed charges by Local 154 and SOA. On August 10, 2010, Local 154 and SOA

(SOA) each filed an unfair practice charge with the Public Employment Relations Commission (PERC or Commission) alleging that the Township violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1) through (7)^{1/} when it announced its intention to unilaterally change the work schedules of police and superior officers effective January 1, 2011. Since the filing of the charges, the Township has modified the effective date of the work schedule changes to be late January and early February, 2011.

The parties have been negotiating successor agreements. On June 29, 2010, Local 154 and SOA filed petitions to initiate compulsory interest arbitration (IA-2011-2 and IA-2011-1 respectively).

^{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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On August 9, 2010, the Township petitioned for a scope of negotiations determination that the work schedule of police officers represented by Local 154 is non-negotiable in light of an express contract provision and governmental policy (SN-2011-11). The Commission ruled, however, that the current work schedule and any proposed change is mandatorily negotiable and that the issue may be submitted to interest arbitration.

Franklin Tp., P.E.R.C. No. 2011-48, ___ NJPER ___ (November 23, 2010).

The unfair practice charges continued to be processed. At an exploratory conference held by PERC on December 1, 2010, the Township indicated that it still plans to implement the work schedule changes in late January and early February, 2011. Consequently, Local 154 and SOA jointly filed this application for interim relief. An Order to Show Cause was executed on December 15, 2010, scheduling a return date for January 21, 2011. The parties submitted briefs, certifications and other supporting documents. Due to inclement weather, oral argument was presented on January 24, 2011.

The following facts appear.

Local 154 represents police officers below the rank of sergeant and SOA represents officers in the rank of sergeant and lieutenant in Franklin Township. The parties entered into collective negotiations agreements effective from January 1, 2007

through December 31, 2009. On June 29, 2010, Local 154 and SOA petitioned for interest arbitration.

Article 6 of the Local 154 agreement provides, in pertinent part:

It is understood that at the present time and at the time of this agreement, most members of the PBA are working a four (4) day on, four (4) day off shift. It is understood that the rate of overtime compensation becomes effective at an hourly threshold lower than that called for in the Fair Labor Standards Act. The 4 & 4 shift is for example purposes only and it is understood that management reserves the right to change shifts as needed.

Similarly, Article 7 of the SOA agreement provides, in pertinent part:

At the present time and at the time of this Agreement, most members are working a four (4) day on, four (4) day off shift. It is understood that the rate of overtime compensation becomes effective at an hourly threshold lower than that called for under the Fair Labor Standards Act. The 4 & 4 shift is for example purposes only and it is understood that management reserves the right to change shifts as needed.

The 4-4 work schedule has been in effect since 2004. A new work schedule was negotiated when the parties settled the 2004-2007 contracts. Before implementation of the 4-4 schedule, most officers worked a 4-2 schedule with shifts of 8 hours and 15 minutes. Also, before a new 4-3 work schedule, officers in the Detective Bureau worked a 5-2, 8 hour schedule.

Before the 2004-2007 contracts, all officers worked 2080 hours per year. Under the 4-4 and 4-3 schedules, officers worked approximately 1950 hours per year. In June 2004, the work schedule of the Patrol Division was reduced to 1946 hours as a result of the parties' subsequent negotiations over training days. The contract language that states, "is for example purposes only and it is understood that management reserves the right to change shifts as needed" was carried over from prior agreements dating back to 1991.

In 2009, the Township retained Matrix Consulting Group to conduct an operational audit of the Township's departments. The study was designed to provide an assessment of the efficiency and effectiveness of Township operations, identifying strengths and improvement opportunities relating to organization, staffing and management. The Report compared three shift schedules, 4-2, 5-2 and the current 4-4 and found the 4-4 was "the least efficient of the three shifts, requiring approximately 7 officers to staff one patrol car 24-hours each day." It found the 4-2 shift to be more efficient, although slightly less efficient than a 5-2 schedule, requiring five officers to staff one patrol car 24 hours per day. The project team made these recommendations concerning the police department:

Under the current schedule, three (3) fewer officer positions were needed to maintain targeted service levels;

The current shift schedule also creates the need for more officers than needed under an 8-hour or 12-hour shift. Analysis of an 8-hour shift schedule indicates that 19 fewer officers would be needed at recommended proactive time levels and to meet the current minimum staffing plan. Some of these officers could be used for additional street level proactive enforcement. However, 14 officer positions can be reduced.

Under the 4-2 8-hour shift schedule, the Township should reduce the number of sergeant positions from 11 to 8 or continue with the current number of sergeants and reduce the number of lieutenant positions from 5 to 3.

By resolution dated March 23, 2010, the Township Council voted to implement all of the Matrix recommendations involving the police department. On March 30, the Township Manager advised union representatives that the Township intended to unilaterally change the Patrol Division's work schedule from a 4-4 to a 4-2 schedule effective January 1, 2011. If implemented, the work year for these officers would be increased to 2080 hours per year. In a meeting with union representatives, the Township Manager indicated that the reasons for the change are financial. On June 17, 2010, Local 154 and SOA indicated their opposition to any change in the patrol work schedule. Local 154 and SOA then petitioned for interest arbitration. The unions also filed unfair practice charges challenging the Township's intent to change the work schedule and increase the work year of its officers. The Township filed a scope of negotiations petition

seeking a determination on the negotiability of work schedule changes.

On November 23, 2010, the Commission issued a determination on the scope of negotiations petition finding that the work schedule and proposed work schedule changes were negotiable subjects. Nevertheless, the Township set up the 2011 work schedule and squad assignments based on the 4-2 schedule. Shift bidding and vacation schedules for 2011, too, were based upon the new 4-2 work schedule. The new work schedule is to go into effect January 31, 2011 for in-house personnel (Investigative Division and Professional Services) and February 3, 2011 for the Patrol Division.

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).

Local 154/SOA contend that they have met their burden to obtain interim relief. They assert that the Township is about to impose a change of a term and condition of employment, namely work schedule, while the parties are participating in interest arbitration. They assert that they have a substantial likelihood of prevailing in a final Commission decision and will suffer irreparable harm if the Township is not restrained from unilaterally changing the work schedule from a 4-4 to a 4-2. I agree and grant the requested relief.

The Township argues that Article 6 and Article 7 of the unions' respective agreements allows it to change shifts. It also maintains it has a managerial prerogative to set the overall work schedules, even if financial considerations partially motivate its actions.

These are the same arguments that the Township presented to the Commission in support of its scope of negotiations petition. The Commission wrote:

We cannot conclude from the recommendations of the Matrix Consulting Group that either the current work schedule or negotiations over a different work schedule would significantly interfere with the Township's ability to meet its governmental policy need to provide effective law enforcement services. Absent an employer's showing of a compelling need to remove a work schedule proposal from the arena of collective negotiations, our approach, approved in 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), is to have

the parties present their arguments and supporting evidence to the interest arbitrator. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 114 (¶28054 1997); see also Atlantic Cty., P.E.R.C. No. 2011-19, 36 NJPER 328 (¶128 2010); Monmouth Cty., P.E.R.C. No. 2010-30, 35 NJPER 393 (¶132 2009); City of Trenton, P.E.R.C. No. 2010-20, 35 NJPER 361 (¶121 2009). [Franklin Tp., P.E.R.C. No. 2011-48, ___ NJPER ___ (November 23, 2011)]^{2/}

In that decision, the Commission gave the parties clear guidance on what to do: put the issue of work schedule before the interest arbitrator if at impasse. It also ruled that the current work schedule and any proposal to change it is mandatorily negotiable. Franklin Tp.

The Township relies in part on Morris Cty. Sheriff's Office v. Morris Cty. PBA Local 198, A-3174-09T (App. Div. 1/13/11) for the proposition that an employer can implement a schedule change while the parties are involved in interest arbitration proceedings. In Morris Cty. Sheriff's Office, the Court emphasized that the negotiability of work schedules must be decided on its own particular facts on a case-by-case basis. The Court found that the County had a managerial prerogative to cease holiday assignments at premium pay for non-operational posts. The change in work assignments during interest arbitration was

^{2/} In Franklin Tp., the Commission only considered Article 6 of Local 154's agreement. For the purpose of my analysis, I find Article 7 of the SOA agreement substantially the same as Article 6 of the Local 154 agreement.

permitted because the Court found that terms and conditions of employment were not implicated in that case.

The facts of this case involves regular shifts only and does not involve the "featherbedding" that concerned the Court in Morris Cty. Sheriff's Office. Under the particular facts here, the Commission has determined that the work schedule and the proposed changes are mandatorily negotiable. Franklin Tp. Accordingly, I find that Local 154/SOA would likely prevail in a final Commission decision should the Township unilaterally implement a work schedule change ahead of an interest arbitration determination.

I also find that irreparable harm will occur if the requested relief is not granted. The Township submits that Local 154/SOA will not suffer irreparable harm because it was given extended notice of the Township's intention to change the work schedule. The Township also maintains that the officers will not be working significantly more under the new 4-2 schedule and therefore not entitled to additional compensation. It also argues that negotiations will not be chilled by the change.

N.J.S.A. 34:13A-21 provides in pertinent part:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other,

A unilateral change of a term and condition of employment during the pendency of interest arbitration violates N.J.S.A. 34:13A-21. Moreover, such a change during negotiations has a chilling effect on the rights guaranteed under the Act and irreparably harms the process. See Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009); Franklin Tp., P.E.R.C. No. 2006-103, 32 NJPER 246 (¶102 2006); City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004). Under established case law, I find that Local 154 and SOA will be irreparably harmed if the Township unilaterally institutes the 4-2 work schedule during interest arbitration.

In considering the public interest and the relative hardship to the parties, I find that the public interest is furthered by requiring the parties to negotiate prior to implementing changes in terms and conditions of employment as required by the Act. In assessing the relative hardship to the parties, any hardship that the Township will experience by maintaining the 4-4 work schedule while the issue is being considered by the interest arbitrator is self-created. The Township avers that it will be a "nightmare" to undo the 4-2 schedule now. Shift and vacation schedules are in place and payroll is set up for the new 4-2 schedule. However, the Township has had notice since August 2010 that Local 154 and SOA were challenging its right to unilaterally change the work schedule by virtue of the unfair practice filings. Additionally, the Township has had guidance on this subject from

the Commission since November 2010 by way of the scope of negotiations decision. On the other hand, the unions will be irreparably harmed by the unilateral change in work schedule during the pendency of collective negotiations.

Accordingly, I find that Local 154/SOA have satisfied the standard to obtain interim relief.

ORDER

Local 154 and SOA's request to restrain the Township from implementing a new work schedule is granted. The Township is ordered to maintain all existing working schedules of the police department until the Commission in a final decision orders, an interest arbitrator decides or the parties agree otherwise. The unfair practice charges will be processed in accordance with Commission procedure.



Perry O. Lehrer
Commission Designee

DATED: January 25, 2011
Trenton, New Jersey