

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

In the Matter of

BOROUGH OF MOONACHIE,

Respondent,

-and-

Docket No. CO-83-267

MOONACHIE PBA LOCAL 102,

Charging Party.

SYNOPSIS

A Commission designee, in an interim relief proceeding, restrains the Respondent from making future changes in the work schedule of police officers to cover for officers on vacation, absent an emergent condition. The Charging Party established irreparable harm and a substantial likelihood of success on the merits as to the facts and the law under Borough of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (1983) and Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (1982).

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Appearances:

For the Respondent

Andora, Palmisano, DeCotiis & Harris, Esqs.  
(Robert J. Romano, Jr., Esq.)

For the Charging Party

Loccke & Correia, Esqs.  
(Manuel A. Correia, Esq.)

INTERLOCUTORY DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 6, 1983 alleging that the Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1), (2), (5) and (7) (hereinafter the "Act") when the Respondent unilaterally and without negotiations with the Charging Party altered the work schedule of Mark Torciello from the 7:00 a.m. to the 3:00 p.m. shift on April 12, 13, and 14, 1983 in order to replace Ron DeNichilo, who was scheduled for vacation, and the Respondent has stated that it will continue to use Torciello to fill in for individuals on approved leave on a regular basis, all of which is alleged to be not only a violation of the Act, but of an Arbitration Award involving the same issue and dated July 12, 1982. The Respondent answers that the utilization of Torciello is on a temporary and emergent basis and is, thus, consistent with Commission precedent.

An Order To Show Cause was executed on April 12, 1982 and a hearing was held on April 15, 1983, at which the parties argued orally on written submissions.

Decision was reserved.

\* \* \* \*

In order to obtain the requested interim relief, restraining the Respondent from altering the work schedule of Torciello, or anyone like situated, the Charging Party must meet the twofold test of (1) demonstrating a substantial likelihood of success on the merits as to the legal and factual allegations under Commission and court precedent, and (2) demonstrate that irreparable harm will occur if the requested relief is not granted: New Jersey Department of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425 (1982) and Harrison Township, I.R. No. 83-3, 8 NJPER 462 (1982).

\* \* \* \*

The Hearing Examiner is satisfied that the Charging Party has met the "likelihood of success" standard and cites as applicable Commission precedent its recent decision in Borough of Maywood, P.E.R.C. 83-107, 9 NJPER 144 (1983), which in turn relied heavily on Township of Middletown, P.E.R.C. No. 82-90, 8 NJPER 227 (1982), appeal pending App. Div. Docket No. A-3664-81T3. See also, the Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (1982).

In Maywood, supra, the Chief of Police issued an order, which stated that if an individual requested time off and the request resulted in his shift having less than four men the request would be denied unless the individual arranged to exchange shifts with another person or the individual took a "priority holiday" with another employee covering the absence. The PBA grieved, alleging that the order denied officers contractually agreed upon time off that they had earned and changed their work schedules. The PBA sought a return to the status quo and compliance with a "priority for overtime" provision in the contract in order to replace absent police officers when the employer needed four officers on a shift. The Borough countered that it had a management prerogative to determine the staffing needs of the Department and that the Chief had the sole right to determine when

an emergency existed.

The Commission in Maywood noted that Middletown, supra, establishes that an employer "...does not have a non-arbitrable right to determine... which police officers will fill in on other shifts when officers on those shifts are temporarily absent..." The Commission then went on to say:

"...The Borough may legally agree that, as a general rule, it will use employees to temporarily fill in on a given shift in accordance with contractual seniority or overtime provisions... If time limitations prevent the Borough from complying with the negotiated system for determining which officer works what hours and still meeting its manpower needs, it may exercise its reserved non-arbitrable right under such circumstances to make the necessary assignments despite the negotiated system... This approach accomodates the interests of both the employer and the employees without placing any substantial limitations on the Township's (sic) policy-making powers: the Township (sic) can be assured that it will have a sufficient number of employees for each shift and that it will retain the right to determine which employee to assign temporarily when special qualifications are needed for that assignment while the employees will have some say in determining their hours of work and compensation..." (citations omitted) (9 NJPER at 145, 146).

In Atlantic Highlands, supra, one of the contractual provisions in issue, which the Commission held could go to arbitration, provided that a "master schedule" would be posted for a one-year period and that the schedule was to be strictly adhered to "...unless the employee agrees to any shift change..." The Commission relied, inter alia, on Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (1980), aff'd. App. Div. Docket No. A-3329-79 (1981) in holding that a change in a work schedule such as the "master schedule" therein involved was mandatorily negotiable and arbitrable. The Commission noted that, as always, the employer retained the inherent right to make temporary personnel assignments to meet emergent manpower requirements: Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (1981).

The Hearing Examiner, considering Maywood and Atlantic Highlands, supra, together, concludes that the Charging Party has established a substantial likelihood of success on the facts and the law in its Unfair Practice Charge. The Hearing Examiner rejects the Respondent's contention that a temporary emergent situation

is involved herein, based on what was demonstrated at the hearing and in the opposing papers. Clearly, vacation scheduling and replacement can be anticipated sufficiently in advance to remove the matter from that of an "emergent situation."

Considering now the question of irreparable harm, the Hearing Examiner again finds that the Charging Party has satisfied its burden, in that when police officers, such as Torciello, are the subject of implemented shift changes there is no way in which the status quo can be restored after the shift change occurs. Further, the Respondent has indicated that the Chief intends to continue what occurred on April 12-14 in the future. Thus, it can be anticipated that the situation will recur unless it is restrained.

\* \* \* \*

Based upon the foregoing, the Hearing Examiner enters the following:

ORDER

The request of the Charging Party for interim relief during the pendency of Unfair Practice Charge before the Commission <sup>1/</sup> is GRANTED, and the Respondent is restrained from implementing shift changes of the type and kind alleged in the Unfair Practice Charge subject, of course, to the arising of a truly "emergent" condition.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Alan R. Howe  
Hearing Examiner

Dated: April 19, 1983  
Newark, New Jersey

1/ There is nothing to preclude the Respondent from filing a petition for Scope of Negotiations Determination during the pendency of the Unfair Practice proceeding.