

I.R. NO. 2004-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Respondent,

-and-

Docket No. CO-2004-261

PLAINFIELD PBA LOCAL NO. 19,

Charging Party.

SYNOPSIS

A Commission designee denies interim relief concerning the employer's new work rules which allegedly changed employees' working conditions. The designee found that: (a) a directive requiring police to obtain permission from a superior officer before signing off duty to conduct union business did not materially differ from the existing practice; (b) a directive requiring police to log on a daily report the times that they were "off duty" to conduct union business does not appear to be a negotiable term and condition of employment; and (c) the claimed change in the officers' right to use a cell phone for union business was factually disputed.

The designee restrained the employer from reducing the number of police officers permitted on union leave. The employer's contract waiver argument was rejected. The employer was required to maintain the status quo during negotiations and interest arbitration.

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Appearances:

For the Respondent
Bernstein & Associates, attorneys
(Eric Bernstein, of counsel)

For the Charging Party
Klatsky, Sciarrabone & DeFillippo, attorneys
(David DeFillippo, of counsel)

INTERLOCUTORY DECISION

On February 25, 2004, Plainfield PBA Local No. 19 filed an unfair practice charge alleging that the City of Plainfield violated 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} when between December 2003 and February, 2004, the City

^{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."

(a) placed limits on the number of police officers permitted on vacation per shift; (b) directed PBA officers to obtain permission from their superior officers before signing out to conduct union business and to document their activities while on union leave time; (c) prohibited the use of cell phones to conduct union business; and (d) limited to one the number of police officers permitted on union leave. The PBA argues that these changes are unilaterally imposed work rules implemented without negotiations with the PBA.

Accompanying the charge was an application for interim relief. On March 1, 2004, a Commission Designee signed an Order to Show Cause scheduling the return date on the interim relief application for March 19. Thereafter, the parties agreed to postpone the return date to March 26. The parties submitted briefs and certifications in accordance with the Commission's rules. On the scheduled return date, the City agreed to rescind the vacation scheduling limitations and the PBA withdrew its request for interim relief on that issue. The parties argued orally with regard to the remaining issues. Thereafter, the parties requested a short period to attempt to resolve the dispute between themselves. On April 15, I was advised that the parties had not succeeding in working out their differences and a decision was required on the interim relief application. Accordingly, the following facts appear:

PBA Local No. 19 represents the City's rank-and-file police officers. The PBA's most recent collective negotiations agreement with the City expired on December 31, 2002. The parties have been in negotiations since then, and the PBA has initiated interest arbitration proceedings. An interest arbitrator has been selected.

On December 19, 2003, Police Captain Siddeeq El-Amin issued Directive No. 2003-02, directing members of the Community Policing Unit who wish to conduct PBA business (presumably while on duty) to first obtain permission from their immediate supervisors. The order also provided,

All Members of the [Community Policing] unit are to document ALL their activities, summonses issued, arrests, meeting attended, etc. on the Daily Activity report (DAR) including time spent on PBA business. [Directive No. 2003-02.]

PBA Local 19's Vice-President William Tyler is assigned to the Community Policing Unit, and is therefore immediately affected by Captain El-Amin's order. The PBA filed a grievance over Captain El-Amin's directive. On January 19, 2004, the PBA president and vice-president met with Police Chief Edward Santiago concerning the grievance.^{2/} On February 17, Crawford

^{2/} The specific details of that meeting are disputed but immaterial to the interim relief application here. The PBA claims that Santiago "sustained" the grievance which Local 19's Vice-President Tyler confirmed by memorandum of February 2. Chief Santiago states that he never sustained the grievance.

and Tyler again met with Chief Santiago and Sergeant Sharon Smith. At that meeting, the Chief reaffirmed the captain's directive and added two additional restrictions: (1) that only one officer would be released from duty to conduct PBA business; and (2) PBA officers would be prohibited from using cell phones while on duty to conduct union business.

There is no provision in the PBA collective agreement that directly guarantees employees' release time to conduct union business. Article V, section 5-6 of the 1999-2002 contract provides:

The PBA President or other single designee of the PBA shall have the option to be assigned to day hours to permit said Officer or designee to attend to PBA business.

The PBA filed certifications of Local 19's President Andre Crawford, Vice-President William Tyler, and immediate past President Daniel Nolan, all stating that PBA officers have for many years conducted union business while on duty without restrictions. All three certify that they have never been required to "obtain prior approval" before conducting PBA business, although they acknowledge that when they wanted to be released from duty to engage in PBA related business, they notified supervisors, who would then determine that no emergency conditions existed so that their absence would create an "unreasonable interference" with police duties.

The City submitted a certification of Chief Edward Santiago. Santiago agrees that the long-standing practice has always been to permit PBA officers to conduct PBA business upon notification to their immediate supervisor, and that superior officers have routinely permitted PBA officers to conduct union business, absent exigent circumstances.

With regard to the completion of Daily Activity Reports, all three of the PBA officers state that they have never been required to "document" their time spent on PBA activities. The Chief's certification states that all police officers have long been required to document the time spent on their activities during their tour of duty. The Chief further states, "On matters relating to PBA business, we only require the documentation of the time an officer is away from his or her regularly assigned duties, not the specifics of the meetings."

The parties do not disagree that more than one PBA officer has been released from duty to conduct PBA business. PBA President Crawford states in his certification that for at least the past five and ½ years, both the president and vice-president of Local 19 regularly conducted union business while on duty, and often simultaneously. Former President Nolan states that both he and then Local 19 Vice-President Crawford were permitted release time to conduct PBA business, sometimes simultaneously, and without objection from police supervisors. Tyler states in his

certification that since he became vice-president in July 2002, he and President Crawford have both been permitted to conduct union business while on duty and have sometimes done so simultaneously.

The certification of Chief Santiago does not deny the asserted past practice that more than one employee was permitted union leave at a time. The chief acknowledges that he told Crawford and Tyler that he believed Article 5-5 of the PBA agreement granted either Crawford or another designee, but not both, the right to be released from duty to conduct union business.

Regarding cell phones, President Crawford and Vice-President Tyler both state in their certifications that it has been their long-standing practice to use their cell phones to conduct union business while on duty. The chief asserts in his certification that it is the written policy of the police department to prohibit officers from carrying cell phone while on duty. The Chief further states that the PBA President has been permitted to use his cell phone for "emergency situations" or "rare instances" where a patrol officer needs to obtain the immediate representation of a PBA official, such as for a disciplinary hearing.

ANALYSIS

The PBA argues that the City unilaterally changed existing past practices and imposed new work rules without first negotiating the changes, and that it did so while the parties were in interest arbitration. The PBA alleges that the City therefore violated 34:13A-5.4(a)(5) and 34:13A-21 of the Act. It asks that the City be restrained from implementing the changes, and that the status quo be maintained.

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).

Union Leave Time Limited to President

The PBA asserts, and the City does not deny, that there is a long-standing practice of permitting at least two of its officers release time to conduct union business. The City

contends that contract Article 5-5 permits the PBA to have only one designated representative released from duty to conduct union business.

N.J.S.A. 34:13A-5.3 provides,

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

N.J.S.A. 34:13A-21 provides,

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

Employee "terms and conditions" of employment exist both under the express terms of the written collective agreement and by the parties' past practice. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, (¶29016 1997), aff'd. 166 N.J. 112 (2000). There is no dispute that the PBA has long been permitted two Local 19 officers released from duty for union business. Time off from duty for union business is ordinarily a negotiable condition of employment, and the negotiability of the issue is not disputed here. See City of Jersey City, P.E.R.C. No. 97-6, 22 NJPER 279 (¶27150 1996); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394, 396 (¶21164 1990).

An employer may not unilaterally change existing, negotiable conditions of employment unless the employee representative has waived its right to negotiate. See Middletown

Tp.; Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). A waiver of the right to negotiate will only be found if the waiver is clear and unequivocal. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). I find here that the language of Article 5.5 does not set the number of employees permitted time off for union business; it merely guarantees the PBA a designee on the day shift. The collective agreement does not give the City the right to modify the existing practice concerning release time for PBA business. Accordingly, I find no evidence of a contractual waiver. The PBA has demonstrated its likelihood of success on the merits concerning its claim that the City unilaterally changed the practice of releasing the PBA President and the Vice-President from duty to conduct PBA business.

Citing Borough of Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002) and Borough of Bogota, I.R. No. 98-23, 24 NJPER 237 (¶29112 1998), the PBA contends that unilateral changes made during the parties' negotiations and interest arbitration process chills the process and undermines labor stability, resulting in irreparable harm. It also points out that union leave time, once denied, can never be restored at the conclusion of the case and is forever lost.

A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978). Further, a unilateral change of a term and condition of employment during the pendency of interest arbitration constitutes a violation of N.J.S.A. 34:13A-21. I find that the reduction in the number of PBA officers - from two to one - permitted to be released for union business potentially impairs the PBA's right to represent its members, resulting in irreparable harm. Moreover, any failure to maintain existing working conditions during the interest arbitration process appears to cause irreparable harm to the negotiations process and the rights of unit employees. I also agree that a denial of union leave time does not appear to be capable of an effective remedy at the conclusion of the case.

Considering the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. In assessing the relative hardship to the parties, I find that the scale tips in favor of the PBA. The City experiences a lesser degree of hardship by being required to maintain the existing practice concerning employees released for

union business. However, the PBA will be irreparably harmed as the result of a unilateral change in a term and condition of employment during the pendency of collective negotiations.

Notice of Union Release Time and
Completion of Daily Activity Report

Captain El-Amin's directive orders members of the community police unit to report all daily activities, including meetings attended and time spent on PBA business, on the police daily activity report form. That directive also requires police officers to request "permission" from a superior officer before engaging in PBA business. However, in the City's brief, as well as at oral argument and in El-Amin's certification, the City makes it clear that it is merely seeking to have PBA officers advise their superior officer when going "off duty" to attend to PBA business, and determine whether the superior is aware of any exigent circumstances which would require the PBA union officer to remain on duty at that time. This procedure is consistent with that already in practice by the PBA president and vice-president. Accordingly, I do not find that the Captain's directive requiring PBA officers to seek the consent of a superior before going off duty to engage in union business constitutes a change in terms and conditions of employment.

Further, the City maintains that its directive merely requires PBA officers to document "PBA time" on their daily logs. The City confirmed that it is not asking PBA representatives for

the details of officers' grievances investigated, meetings attended, and so forth. Rather, the City is merely seeking to have the PBA officers note on the Daily Activity Report that during a particular period of their tour, they were away from duty and engaged in union activities.

It appears that the City has a managerial prerogative to know when police officers are "on duty" and when they are not, and what police activities they engaged in while they were on duty. Once the police officer is "off duty" to conduct union business, then the City has no legitimate interest in the specifics of that union business. Here, the City is not demanding such an accounting from the PBA officer. Accordingly, I find that the PBA has not demonstrated that it will succeed on the merits of its charge that the City changed a negotiable procedure concerning notice and reporting time for PBA officers released from duty to engage in PBA activity. Accordingly, interim relief must be denied concerning this issue.

Use of Cell Phones

The PBA contends that its officers have always been permitted unlimited use of their cell phones while released from duty to conduct PBA business. The City denies such a practice, and the chief's certification states that PBA officers have only been permitted to use cell telephones in rare, emergent

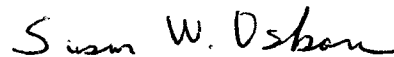
circumstances, when there was an immediate need for the PBA member to contact the PBA designee.

Based upon the competing certifications of fact, I am unable to determine what the practice had been and, therefore, whether there was a unilateral change. Where there is a significant factual dispute, we cannot find a substantial likelihood of success on the merits. Accordingly, interim relief must be denied concerning the use of cell phones by PBA officers.

ORDER

The City is restrained from unilaterally changing the practice of permitting the PBA President and Vice-President to be released from duty to conduct PBA business. This interim order will remain in effect pending a final Commission order in this matter.

The PBA's application for interim relief concerning the remaining issues is denied. This case will proceed through the normal unfair practice processing mechanism.



Susan Wood Osborn
Commission Designee

DATED: May 6, 2004
Trenton, New Jersey