I.R. No. 2004-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Respondent,

-and-

Docket No. CO-2003-193

PASSAIC P.B.A. LOCAL NO. 14,

Charging Party.

SYNOPSIS

A Commission Designee grants interim relief and orders the employer to rescind the unilaterally imposed work schedule and restore the employees' prior work hours. The Designee found that the Charging Party demonstrated substantial likelihood of success on the merits and irreparable harm. The Designee rejected the employer's argument that the schedule change was a managerial prerogative, since the change was apparently made to reduce overtime costs.

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Appearances:

For the Respondent:
Scarinci & Hollenbeck, attorneys
(Mark Tabenkin, of counsel)

For the Charging Party:
Loccke & Correia, attorneys
(Michael Bukosky, of counsel)

INTERLOCUTORY DECISION

On January 31, 2003, P.B.A. Local No. 14 filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of Passaic violated 5.4a(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] when it unilaterally changed police work

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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; (3) Discriminating in regard to hire or tenure of employment or any term or conditions of employment to encourage or discourage employees in the exercise of the rights guaranteed to them (continued...)

schedules effective January 5, 2003. The PBA alleges that the motive for the City's decision to change the schedule was to avoid overtime costs. The PBA claims that the City refused to negotiate over the change. It maintains that the schedule change irreparably harms the negotiations process, that unit members will loose confidence in the PBA as majority representative, and that employees' personal lives will be harmed. It asks that the work schedule previously in effect be reinstated.

The employer denies that it committed an unfair practice. It asserts a managerial prerogative to change the work schedule to increase police coverage during the highest incident period of midnight to 4 a.m.

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On February 4, 2003, I signed an Order to Show Cause scheduling the return date on the interim relief application for February 28, 2003. The hearing was thereafter postponed with the agreement of the parties until March 5, 2003. The parties submitted briefs and affidavits in accordance with Commission rules and argued orally on the scheduled return date. At the conclusion of the Order to

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1/ (...continued)
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; and (7) Violating any of the rules and regulations established by the commission

Show Cause proceeding, the parties agreed to engage in further discussions over whether the schedule issue could be voluntarily resolved. By letter dated June 11, the PBA notified me that the parties were unable to resolve the issue and requested that I issue a decision on the application for interim relief. The following facts appear:

PBA Local 14 represents the City's approximately 150 police officers. The parties had a collective agreement for the period January 1, 1999 through December 31, 2002. That agreement contained no work schedule or work hours clause. The contract did include a "Mutual Preservation of Standards" clause at Article IV, which provides,

> Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations and conditions of employment applicable to any police Officer pursuant to any rules, regulations, instruction, directive, memorandum, statute or otherwise shall not be limited , restricted, impaired, removed or abolished.

For many years prior to 2002, police tours of duty were:

4 a.m. to 12 noon
12 noon to 8 p.m.
8 p.m. to 4 a.m.

In early 2002, the PBA and the Police Chief met and discussed the work schedule. After what both parties characterize as negotiations, the parties agreed to change the shift times to the following:

8 a.m. to 4 p.m.

4 p.m. to 12 midnight
12 midnight to 8 a.m.

Chief Stanley Jarensky states in his certification that he specifically advised the PBA that the new schedule would be in effect until October 2002, after which "the City would evaluate whether the schedule was successfully addressing the City's manpower problems." The PBA denies that the new schedule had any definite time limitations. Nothing was reduced to writing concerning the new schedule, which was implemented in March, 2002.

In October 2002, the Chief notified the PBA that it wanted to revert back to the old schedule. The City asserts that it sought to increase manpower on the streets during higher call volume periods from midnight to 4 a.m., when Passaic's taverns close. Although the City has 165 police positions, by fall 2002, the number of police officers on active duty had shrunk to approximately 150. The PBA President's certification states that 15 officers have retired during the past year, and the City has not yet replaced them. The Chief believed that the existing schedule made it difficult to maintain enough officers on each shift. The PBA President states that, through summer and fall of 2002, the City covered the staffing shortages during peak periods through the use of overtime which was funded through grant money. The PBA President states that the City no longer has the grant money to rely on to fund the overtime costs. By letter of

November 14, 2002, the PBA demanded that the City maintain the existing schedule and negotiate before making any changes. The PBA asserts by certification of its President that the City refused to negotiate about the schedule change. Chief Jerensky alleges that between October and December 2002, he and the PBA met on "numerous occasions" to discuss the problems with the existing shift and possible alternative schedules.

The Chief's affidavit states that the PBA asked that officers be permitted to bid for the three shifts based on seniority. The Chief agreed, and the Association conducted the bidding process.

On January 5, 2003, the announced schedule change was implemented. Police officers' work hours are now

4 a.m. to 12 noon
12 noon to 8 p.m.
8 p.m. to 4 a.m.

During the late fall of 2002, the City and the PBA engaged in negotiations for a successor collective agreement to the one expiring December 31, 2002. On January 10, 2003 the parties signed a Memorandum of Agreement, agreeing to the terms of a new four-year agreement, subject to ratification by the PBA membership and approval by the City governing body. The memorandum does not include any reference to the work shifts.

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).

The PBA alleges that the schedule change constitutes a unilateral change in a negotiable working condition during the parties' negotiations and therefore violates the Act. The City acknowledges that it made the change in the work schedule. However, it argues that the existing work schedule, implemented after negotiations with the PBA in March 2002, was a "trial program" which the City reserved the right to re-evaluate and change if it proved unsatisfactory to the City's needs. Second, the City asserts that there is a factual dispute concerning whether the parties engaged in negotiations before it changed the schedule in January, 2003. Third, the City claims, citing Borough of Atlantic Highlands, 109 NJ Super. 71,75 (App. Div.

1983), certif den. N.J. 293 (1984), that it had a managerial prerogative to change the schedule to "plan for the efficient utilization of its existing manpower."

First, while there is a factual dispute about how many times the PBA and the chief met to discuss the work schedule issue in fall of 2002, there is no dispute about the material fact that the parties did not negotiate to an agreement on the issue. While the parties may have discussed alternative schedules and may have agreed on a bidding procedure, in the end, the schedule the chief implemented was not the product of an agreement between the parties. Therefore, I find that the change was made unilaterally.

Second, while the 1999-2002 contract did not include a work hours provision, it did provide for a maintenance of benefits clause. Employee "terms and conditions" of employment exist both under the express terms of the written collective agreement and in 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 can be no dispute that the schedule negotiated in the spring of 2002, once implemented, became the parties' practice. Whether the City conceived of that schedule as a "trial" or it intended to re-evaluate the new schedule later that year is not reflected in any written agreement between the parties, nor was any evidence provided that the parties' had that mutual intent.

An employer may not unilaterally change existing, negotiable condition 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). There is no evidence here of either a contractual waiver or a waiver by conduct. Therefore, I find that the January 2003 schedule change amounts to a change in the past practice without negotiations.

The City also maintains that its implementation of the new work schedule was the exercise of a managerial prerogative. Where negotiations over work schedule changes would interfere with management's policy on staffing levels, employee supervision or training, negotiations were not required. Atlantic Highlands; Irvington PBA Local No. 29 v. Township of Irvington, 170 N.J. Super. 539 (App. Div. 1979). But where the reasons for the change are purely economic, there is no significant interference with management's ability to set policy, and work schedules have been found negotiable. Township of Mt. Laurel, 215 N.J. Super. 108 (App. Div. 1987); Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996); Borough of Carteret, P.E.R.C. No. 88-81, 14 NJPER 228 (¶19086 1988); Hamilton Tp., P.E.R.C. No.

86-106, 12 NJPER 338 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87), certif. den. 108 N.J. 198 (1987); Borough of Paulsboro, I.R. No. 88-6, 14 NJPER 30 (¶19010 1987). I find that, in this case, the change in work hours is negotiable. I recognize the City's dilemma in having a shortage of filled police positions, combined with officers off duty because of sick or injury leave, and the resulting holes in police coverage. City has a need to put qualified officers on the street between midnight and 4 a.m., when the City's liquor establishments close. However, the PBA asserts, and the City does not deny, that prior to January, 2003, the City was filling the same staffing shortage through the use of overtime, which was being funded through grant money. The PBA points out that the City no longer has the grant money to rely on to fund the overtime costs associated with the schedule combined with the staffing shortage.

Thus, while the City argues that it changed the schedule to efficiently use its existing manpower, it takes more than just a label to make an issue one of policy instead of one of economics. In Borough of Ramsey, I.R. No. 93-8, 19 NJPER 282 (¶24144 1992), the Borough changed the police schedule, contending that it needed to increase departmental efficiency and provide better police coverage. However, the Charging Party submitted affidavits demonstrating that the Borough changed the schedule to reduce overtime costs. Because the employer did not effectively

rebut the union's demonstration that the reasons for the schedule change were purely economic, the Commission Designee found substantial likelihood of success on the merits and granted interim relief. See also, Borough of Bogota, I.R. No. 98-23, 24 NJPER 237 (¶29112 1998); Town of Harrison, I.R. No. 83-3, 8 NJPER 462 (¶13217 1982). This is the case here: while the Town contends that it sought to improve staffing efficiency, it makes no factual demonstration to rebut the PBA's certifications that the change was purely to reduce overtime costs.

Accordingly, based on the foregoing, I find that the PBA has demonstrated a substantial likelihood of success on the merits in showing that the City unilaterally changed a mandatorily negotiable work schedule.

The PBA asserts the schedule change irreparably harms the negotiations process and employees' personal lives. Although the PBA has not submitted affidavits from specific individuals claiming particularized incidents of harm which one would ordinarily expect to see, it does claim that the four-hour shift of employees' tour of duty hours disrupts the employees' personal lives and affects child care issues, family time, and other personal time concerns. The City makes no argument about irreparable harm, nor any claim about whether granting interim relief would create a hardship to the City.

Irreparable harm is by definition harm that is not capable of an adequate remedy at the conclusion of the case. This is the case here. Any remedy at the conclusion of the case cannot make employees whole for the months of having to work the unilaterally imposed, revised work schedule.

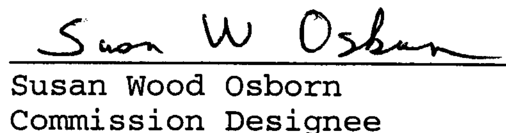
Further, the harm to the employees in the disruption to their personal lives outweighs the additional costs to the City in having to pay overtime for increased manpower on the streets during peak periods.

Accordingly, I find that the PBA has met the burden to obtain interim relief.

ORDER

The City of Passaic is hereby ordered to restore the work schedule of 8 a.m. to 4 p.m., 4 p.m. to 12 midnight and 12 midnight to 8 a.m., pending good faith negotiation with PBA Local 14. This interim order is in effect until the Commission orders or the parties agree otherwise. The charge shall be processed in accordance with the Commission's normal unfair practice charge processing mechanism.

BY ORDER OF THE COMMISSION



Susan Wood Osborn
Commission Designee

DATED: July 8, 2003
Trenton, New Jersey