I.R. NO. 2003-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF IRVINGTON,

Respondent,

-and-

Docket Nos. CO-2003-240
CO-2003-241

PBA LOCAL 29 AND
IRVINGTON POLICE SUPERIOR OFFICERS ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee denies interim relief on charges filed by the PBA and SOA that the Township changed police work schedules without negotiations. The Commission Designee finds that Charging Parties have not demonstrated a substantial likelihood of success on the merits, since the respective contracts contain sunset provisions on the experimental work schedules.

A claim that vacation selections were affected was unsupported and, in any event, appeared to be inextricably tied to the work schedules.

I.R. NO. 2003-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF IRVINGTON,

Respondent,

-and-

Docket Nos. CO-2003-240
CO-2003-241

PBA LOCAL 29 AND
IRVINGTON POLICE SUPERIOR OFFICERS ASSOCIATION,

Charging Parties.

Appearances:

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

For the Charging Party PBA Local 29
Laufer, Knapp, Torzewski & Delena, attorneys
(Frederic Knapp, of counsel)

For the Charging Party Irvington Police SOA
Uffelman, Rodgers, Kleinle & Mets, attorneys
(James M. Mets, of counsel)

INTERLOCUTORY DECISION

On March 19, 2003, PBA Local 29 and Irvington Police Superior Officers Association (PBA and SOA) filed unfair practice charges alleging that the Township of Irvington violated 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act,

---

1/ These subsections prohibit public employers, their representatives of 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

(continued...)

N.J.S.A. 34:13A-1 et seq. when it announced that effective April 3, 2003, all police work schedules would be changed and that all "vacation selection appoints" were cancelled.

The Township denies committing an unfair practice and asserts that the PBA and SOA contracts both permit the schedule change and that no vacations were changed.

The unfair practice charges were accompanied by applications for interim relief. On March 21, 2003, I signed an Order to Show Cause scheduling a return date for April 15, 2003. Thereafter, the return date was changed to April 3 so that the application for restraints could be heard before the schedule change was implemented. The PBA and SOA filed a brief and each submitted a certification from its president. The Township did not submit a brief or documents. At the April 3 hearing, the parties argued orally. The following facts are undisputed:

PBA Local 29 represents the Township's rank-and-file police officers; the SOA represents its superior officers. Both organizations had collective agreements covering their respective units for the period January 1, 1999 through December 31, 2002.

1/ (...continued)
condition of employment to encourage or discourage 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."

Although the Township negotiated for successor agreements with the PBA and SOA, neither reached a new contract, and by January 2003, both unions had filed for interest arbitration.

Article IX of each of the collective agreements provides for a 4/3 work schedule for non-patrol officers and a 4/4 schedule for the patrol division. Article IX (c) of the SOA contract states,

> The 4/3 and 4/4 schedules shall be implemented on or before June 1, 2001 on a trial basis through December 31, 2002. Absent the parties' agreement in writing on continuing the 4/3 and 4/4 scheduled (sic), or a new schedule being awarded, the parties shall return to the schedule as set forth in the 1996-1998 collective bargaining agreement.

Article IX, section (c) of the PBA's agreement contains similar language:

> The 4/3 and 4/4 schedules shall be implemented on or before June 1, 2001 on a trial basis through December 31, 2002. Absent the parties' agreement or the subsequent award of the schedule anew (sic) interest arbitration, the old schedule shall be returned. After this trial period, the parties can argue based on experience whether it has produced the promised benefits.

Both contracts contain the identical Article XIII concerning vacation leave:

> The vacation period shall be the calendar year from the 1st day of January through the 31st day of December. Vacation time shall be earned according to the employee's years of service completed as of December 31st, and such vacation must be taken within the succeeding calendar year.

On February 18, 2003, the Township's acting police chief issued this order:

> This memo is to advise you that effective April 3, 2003, the Irvington Police Department will be reverting back to its prior work schedule (4 days on and 2 days off) for the patrol division unit. All other units will revert back to the prior schedule as well.
>
> All police officers[']' vacation selections currently scheduled or being scheduled shall reflect this change. All vacation selection appoints are hereby cancelled. Anyone having already selected vacations should contact personnel concerning said pending vacation. New vacation will be forth coming (sic).

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 SOA and PBA maintain that they will succeed on the merits of the charges in that the Township's unilateral change of the work schedule, especially during the course of the interest

arbitration process, violates sections 5.4a(5) and 21 of the Act. The Township asserts that the contract language in Article IX explicitly gives it the right to revert back to the work schedule in effect prior to the experimental schedule permitted by the most recent contract.

Work schedules are generally negotiable. See Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). The parties in this matter do not dispute that the police work schedules would be mandatorily negotiable. Neither do they dispute that the schedules were changed. N.J.S.A. 34:13A-5.3 requires an employer to negotiate over terms and conditions of employment with the majority representative. This section of the Act further states, in relevant part:

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

An employer may not unilaterally change an existing, negotiable condition of employment unless the employee representative has waived its right to negotiate. See Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1998), aff'd 166 N.J. 112 (2000); 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); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). A waiver will be found if the employee representative has expressly agreed to a contractual provision

authorizing the change, or it impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). If the employer proves that the employee representative has waived its right to negotiate, it has the right to make the change unilaterally. Middletown, 24 NJPER at 30; State of New Jersey (Dept. of Human Services), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). A waiver of section 5.3 rights will only be found where the agreement clearly and unequivocally authorizes the change. Red Bank; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

Here, Article IX of each of the contracts only guarantees the continuation of the experimental schedule until December 31, 2002. The contract provides that, absent specific conditions - a written agreement or arbitrator's award - the schedule shall revert back to the pre-2001 schedule. The Township relies on this language, asserting that it is authorized to make the change. The City's reading of the contract language appears to constitute a reasonable interpretation of the clause; that is,

that the language permits it to change the work schedules after December 31, 2002.

The PBA and SOA maintain that, since the Township did not revert back to the old schedule on January 1, 2003, the Township abandoned that right and may not now change the schedule without negotiations. Nothing in the language of the collective agreement suggests such a result. Moreover, in Irvington Tp., I.R. No. 93-10, 19 NJPER 91, (¶24040 1992), the Commission designee denied interim relief where the Township unilaterally ended an experimental work schedule almost a year after the "sunset date," in a contract provision similar to this one. Further, where a collective agreement clearly sets a term and condition of employment, it is not an unfair practice for the employer to unilaterally end a divergent practice and return to the terms set by the agreement. Kittatinny Bd. of Ed., P.E.R.C. No. 93-34, 19 NJPER 501 (¶23231 1992)(where parties' contract fixed the length of the workday, employer not obligated to negotiate before discontinuing a practice of shorter summer hours); Burlington Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1992)(employer's decision to stop considering sick and vacation time when computing overtime was authorized by the contract).

With regard to the vacation selection issue, I am unable to discern a change severable from the work schedule issue. The PBA

and SOA's unfair practice charges, as well as the certifications signed by each of the union presidents, merely assert that the chief issued the order as described above. There is no claim that any employees had their vacations changed or that previously selected vacation choices were revoked. The chief's order appears to primarily concern vacation selections as it relates to the new work schedule. In any event, the unions have not articulated any irreparable harm to employees concerning the vacation selection part of the chief's order, nor has any particular relief been proposed separate from the work schedule issue.

Accordingly, I find that the PBA and SOA have not demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief. The application for interim relief must be denied. The case will proceed through the normal unfair practice mechanism.

ORDER

The Charging Parties' applications for interim relief are denied.

Susan W. Osborn

Susan Wood Osborn
Commission Designee

DATED: April 9, 2003
Trenton, New Jersey