

I.R. NO. 2004-7

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 denies interim relief on a charge alleging the City unilaterally changed the shift bidding procedures from one based only on seniority to one that divided the police force by senior and junior staff and then permitted shift selection by seniority. The Designee found that the Charging Party had not demonstrated a substantial likelihood of success on the merits of its claim that the change was retaliatory. The Designee also found that the employer made a colorable claim that it had a managerial prerogative to require a minimum number of senior patrolmen on each shift.

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Appearances:

For the Respondent,  
Scarinci & Hollenbeck, attorneys  
(Sean Dias, of counsel)

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

**INTERLOCUTORY DECISION**

On November 21, 2003, P.B.A. Local No. 14 filed an amended 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.<sup>1/</sup> when, on October 10, 2003, it

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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...)

unilaterally changed the shift bidding procedures for police officers. The PBA alleges that this change was implemented to retaliate against the PBA for its success in obtaining an interim Commission order to restore the prior shift schedule. The PBA also claims that the new bidding procedures are contrary to the parties' collective negotiations agreement and past practice, which required shift bidding based on seniority alone. It maintains that the change has irreparably harmed unit members by disrupting their personal lives. It asks that the prior bidding procedure be reinstated.

The City denies that it committed an unfair practice. It asserts a managerial prerogative to change the shift bidding procedure in order to adequately staff each shift with a sufficient number of experienced police officers. It maintains that the straight seniority bid resulted in too many inexperienced officers during the highest call incident period of midnight to 8 a.m.

The amended charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On December 1, 2003, I signed an Order to Show Cause scheduling the return date

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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.

on the interim relief application for December 22, 2003. The parties submitted briefs and affidavits in accordance with Commission Rules and argued orally on the scheduled return date. The background of this matter is as follows:

P.B.A. Local No. 14 originally filed this unfair practice charge with the Commission on January 31, 2003. It then alleged that the City violated the Act by changing police work schedules on January 5, 2003. Specifically, the shift times had been 8 a.m. to 4 p.m., 4 p.m. to 12 midnight, and 12 midnight to 8 a.m. On January 5, 2003, the police chief implemented a new schedule, with work hours of 4 a.m. to 12 noon, 12 noon to 8 p.m., and 8 p.m. to 4 a.m. The City responded that it had a managerial prerogative to change the schedule.

The PBA applied for interim relief pursuant to N.J.A.C. 19:14-9. After hearing the parties' argument in an Order to Show Cause proceeding and receiving briefs and certifications, I granted interim relief. I ordered the City to reinstate the prior work schedule. City of Passaic, I.R. No. 2004-2, 29 NJPER 310 (¶96 2003). The City moved for reconsideration before the full Commission. On October 30, the Commission denied reconsideration, and ordered the City to restore the prior schedule. City of Passaic, P.E.R.C. No. 2004-21, 29 NJPER 483 (¶150 2003). On the PBA's motion, the New Jersey Superior Court

entered an order on September 19 ordering the City to comply with the Commission's interim relief order by October 12, 2003.

The parties apparently agree that, in order to restore the old work schedule, the shifts would have to be rebid. PBA President Anthony DeIntinis submitted a certification in support of the PBA's interim relief application in this matter. According to DeIntinis, immediately after the enforcement application was filed in court, unnamed "PBA representatives" "obtained knowledge" that the chief had threatened to make any return to the old work schedule as "painful and inconvenient as possible" by manipulating the bidding procedures. PBA Attorney Michael Bukosky called City Attorney Sean Dias to express his concerns about the rumor. The conversation between Bukosky and Dias is the subject of competing certifications. Bukosky did not raise the issue before New Jersey Superior Court Judge Passero in the enforcement proceeding because he apparently believed that the City would be following the regular bidding process.

The practice has apparently been that police officers bid by straight seniority for shift assignments in the patrol division. In addition, the parties' 2003-2006 collective agreement provides at Article III, "Policemen's Rights" that "Seniority shall prevail in choice of shifts, (if applicable) vacations, holidays or in the event of layoff."

During the last days of September, police officers were permitted to bid for shifts. The bidding was conducted by police officers in the patrol division picking shifts in straight seniority order, and on October 7, Personnel Order #03-36 was posted notifying officers of their new shift assignments to go into effect October 12. This order showed that there were 22 patrol officers on the midnight to 8 a.m. tour, 19 on the 8 a.m. to 4 p.m. tour, and 22 on the 4 p.m. to midnight tour. The PBA noticed that two seniority mistakes had occurred in the bidding. PBA Local President Anthony DeIntinis advised the chief of the errors. One error was acknowledged. In reviewing the announced schedule, the chief realized that 16 of the 22 police officers on the midnight shift were inexperienced, junior police officers, and 9 of those had less than one year experience. The City decided to redo the bidding process to better balance experienced officers with rookies. The chief determined that the bid would be conducted anew, with 12 "senior" police officers on each tour, and the remainder of each tour staffed with junior officers. He defined senior officers as those with 3 or more years of experience. Within these parameters, the bidding process took place again, and the City posted Personnel Order #03-37 on October 10 announcing the new schedule, which restored the old work hours and assigned officers to the tours pursuant to the

revised picks. This amended unfair practice charge and application for interim relief followed on November 22.

### 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 first argues that the City has not complied with the Commission's order, and that of the court, to reinstate the prior work schedule, since the customary shift bidding schedule is an integral part of the status quo.

Second, PBA argues that the City changed the shift bidding procedures in retaliation for the PBA's success in obtaining an interim relief order and court order to restore the prior work shifts, in violation of 5.4a(3). It maintains that the timing of the chief's actions in changing the bidding procedure at the last minute before restoring the schedule evidences the retaliatory

nature of the change. The PBA maintains that there could be no other reason to change a bidding system that had never been a problem.

Third, the PBA contends that changing the bidding procedures from one based on seniority to this hybrid procedure altered long-standing past practice and repudiated the express terms of the PBA's collective negotiations agreement, in violation of 5.4a(5) of the Act.

The City denies that it changed the shift bidding procedure to retaliate against PBA members. Rather, it contends that the change was precipitated by the realization that too many inexperienced, junior officers ended up on the midnight shift when the bid was conducted by seniority. Further, the City argues that it has a managerial prerogative to ensure that the midnight to 8 a.m. shift is staffed with sufficient senior patrolmen to safeguard the City's residents during this high-crime period. It argues that requiring the City to assign shifts by seniority alone would sacrifice public safety.

The City alleges that there are disputes of fact and motive which undermine the PBA's likelihood of success on the merits of this case. It further contends that an interim order would jeopardize the public interest, but denial of the application would cause the patrolmen no harm.



I am not persuaded by the PBA's claim that it is entitled to relief on the shift bidding issue as an extension of the earlier interim relief order. The bidding issue was not raised before me, nor apparently before the Superior Court in the earlier proceeding. Therefore, a change in shift bidding must now be treated as a separate issue on its own merits.

PBA argues that the bidding procedure change was retaliatory. In Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the New Jersey Supreme Court set the standard for determining whether a public employer's action violates 5.4a(3) of the Act. Under Bridgewater, a charging party must show, by direct or circumstantial evidence, that the employer's adverse action was taken because of protected conduct. The employer may defeat such a finding by demonstrating that the same action would have been taken even in the absence of protected activity.

Claims of retaliation for protected activity in violation of 5.4a(3) do not normally lend themselves to interim relief since there is rarely direct, uncontroverted evidence of the employer's motives. The PBA cites Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), aff'd P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002), where a municipality was restrained from implementing a schedule change in retaliation for the police union's grievance. There however, the employer's own document

provided the charging party with a "smoking gun" to prove illegal motive. Conversely, here, the PBA was not able to provide any direct evidence that the chief's decision was motivated by the PBA's victory in obtaining a favorable interim relief decision or because the PBA complained about two employees who were misplaced on the seniority pick. The PBA President's certification showed only that unnamed members had heard rumors that the chief wanted to make their return to the old schedule difficult. Moreover, the City has presented a colorable claim that its reason to reject the bid selection by straight seniority was its concern over the high number of inexperienced officers on the midnight shift. The proofs concerning these conflicting motives will have to be tested in an evidentiary hearing. I am unable to find that the PBA has demonstrated a likelihood of success on the merits of its claims concerning retaliation.

The PBA also maintains that the City violated the Act by unilaterally changing an existing, negotiable term and condition of employment. There apparently is no dispute that the practice in Passaic has been to permit officers to select shifts by seniority alone. The contract language also refers to shift selection by seniority.

An employer may not unilaterally change existing, **negotiable** conditions 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); Barneqat 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). The PBA wants me to restore the shift bidding based on seniority only. Here, however, the City has made a colorable claim that it had a management right to change the shift bidding procedures, since seniority-only shift selections would result in an imbalance of experienced and inexperienced police officers on certain shifts.

Where negotiations over work schedule changes would interfere with management's policy on staffing levels, employee supervision or training, negotiations are not required. Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Irvington PBA Local No. 29 v. Township of Irvington, 170 N.J. Super. 539 (App. Div. 1979). That may be the case here. In City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391, 393-394 (¶25197 1994), the Commission found:

Police officers seek to negotiate over the right to choose shift assignments based on their seniority since those assignments dictate their work hours and affect their off-duty lives. Thus, we have stated that public employers and majority representatives may agree that seniority can be a factor in shift assignment where all qualifications are equal and managerial prerogatives are not otherwise compromised. However, the need to fulfill the employer's law enforcement mission means that other factors besides seniority must be allowed to come into play when management has special policy needs. Thus, contract proposals that base shift

assignments solely on seniority are not mandatorily negotiable. And contract proposals requiring seniority bidding must preserve management's right to deviate from a seniority system when necessary to accomplish a governmental policy goal -- for example, seniority bidding cannot compromise management's power to assign employees with special qualifications to special tasks, determine that employees with certain abilities perform better on certain shifts, train employees, strengthen supervision, determine staffing levels, or respond to emergencies (Citations omitted; emphasis added.)

The PBA claims that the City has not articulated a specific need - such as training, special skills, or supervision - of any particular assignment that would warrant deviating from seniority order. The City has. It has said that 16 rookies of 22 officers on the highest crime shift is too many inexperienced police officers for the highest crime shift. It is not for us to second guess how many is too many inexperienced officers. Rather, the City has made a colorable claim that it has a managerial prerogative to decide how many experienced police officers it needs on each shift. Thus, I cannot find that the PBA has a substantial likelihood of success on the merits of its charge that the City had a negotiations obligation before altering the bidding procedure.

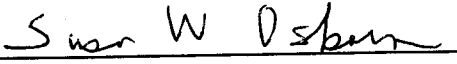
I am aware that the Passaic police officers' personal lives are again disrupted by being assigned to a possible different shift. However, I find that the PBA has not demonstrated that it is substantially likely to succeed on the merits of its amended charge. A plenary hearing is needed to find the facts. For the

reasons set forth above, interim relief may not be granted. The charge shall be processed in accordance with the Commission's normal unfair practice charge processing mechanism.

**ORDER**

The application for interim relief is denied.

BY ORDER OF THE COMMISSION

  
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Susan Wood Osborn  
Commission Designee

DATED: January 6, 2004  
Trenton, New Jersey