

I.R. NO. 2004-9

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAMBURG,

Respondent,

-and-

Docket No. CO-2004-192

HAMBURG PBA LOCAL NO. 138,

Charging Party.

**SYNOPSIS**

Hamburg PBA Local No. 138 filed an unfair practice charge accompanied by an application for interim relief with temporary restraints claiming that the Borough of Hamburg violated the New Jersey Employer-Employee Relations Act by unilaterally altering terms and conditions of employment and repudiating the express terms of the collective agreement when it altered unit employees' work schedules from a 10-hour tour of duty to an 8-hour tour. The Borough argued that the 8-hour tour was more efficient and would improve public safety. It also asserted that substantial amounts of overtime would be saved and that as a small municipality it retains a managerial prerogative to unilaterally modify the work schedule. The Commission Designee found that the Borough was primarily motivated by the economic benefits that would accrue as the basis for changing the work schedule. The Designee found that the PBA established a likelihood of success on the merits and that the charging party would suffer irreparable harm since the change was implemented during the midst of the interest arbitration process. The Commission Designee granted the PBA's application for interim relief.

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Appearances:

For the Respondent  
Richard J. Clemack, attorney

For the Charging Party  
Loccke & Correia, attorneys  
(Charles E. Schlager, Jr., of counsel)

INTERLOCUTORY DECISION

On December 29, 2003, Hamburg PBA Local No. 138 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Hamburg (Borough) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act) by violating N.J.S.A. 34:13A-5.4a(1), (2) and (5).<sup>1/</sup>

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<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of

(continued...)

The PBA alleges that the Borough unilaterally altered terms and conditions of employment and repudiated the collective negotiations agreement during interest arbitration by improperly altering unit employees' work schedules from the contractually mandated 10-hour tour of duty to an 8-hour tour. The unfair practice charge was accompanied by an application for interim relief with temporary restraints. On December 31, 2003, I executed an order to show cause directing charging party to file its brief by the close of business, January 8, 2004, and further directing the respondent to file its brief by the close of business on January 13, 2004, and established a return date for oral argument on January 16, 2004. The PBA requests that the Borough be ordered to return to a work schedule providing for a 10-hour tour of duty as reflected in the recently expired collective agreement. The parties submitted briefs, affidavits and exhibits and argued orally on the scheduled return date. The following facts appear.

The Borough of Hamburg has a population of 3105 residents according to the 2000 census and consists of 1.7 square miles. The Borough is essentially residential. The police department consists of nine members; the chief, one sergeant, one detective and six patrol officers.

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1/ (...continued)  
employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The Borough and the PBA have been signatories to a series of written collective agreements. The most recently expired collective agreement covered the period January 1, 2003 through December 31, 2003. Article V, A., of the agreement reads as follows:

All members of the Police Department are required to work a ten (10) hour tour, forty (40) hour work week on a shift basis, Monday through Sunday inclusive, in a schedule approved by the Police Chief. In times of emergency as called by the Chief of Police, all members of the Department are subject to recall unless they are on sick leave. In times of an emergency the Chief of Police has the right to change the ten (10) hour shift to an eight (8) hour shift for a period of two (2) weeks. After a two week period he must receive the approval of the Borough Council to continue an eight-hour shift. The Employer, by agreeing to this work schedule for the term of this Agreement, does not waive its right to contend at the conclusion of the term of this Agreement that the work schedule is within the employer's prerogative.

On or about July 28, 2003, the parties commenced negotiations for a successor collective agreement. Work schedules are at issue in the negotiations. On or about November 13, 2003, the PBA received notification that the Borough intended to implement an 8-hour work schedule effective January 1, 2004. On or about December 18, 2003, the PBA was again notified by the Borough of its intention to unilaterally institute an 8-hour schedule on January 1.

The PBA contends that the Borough violated the Act by unilaterally changing a mandatory subject of negotiations without prior negotiations with the majority representative. Moreover,

the PBA asserts that by changing the work schedule, the Borough has expressly repudiated Article V, A., of the collective negotiations agreement.

The Borough argues that there are numerous advantages to the 8-hour schedule as compared to the 10-hour schedule. It asserts that under the 8-hour schedule, police efficiency will be vastly improved resulting in greater public safety. Since more officers will be on duty more often, greater security for the officers and enhanced police presence can be achieved. The 8-hour schedule ". . . will result in a continuous adequate level of coverage even when there are absences due to vacation, schooling, illness or court appearances." (Borough's brief at p.7). The Borough further claims that the new schedule will significantly reduce overtime because the chief will no longer be compelled to bring in otherwise off-duty officers to provide coverage at overtime rates. The Borough anticipates saving at least 712 hours of overtime under the 8-hour schedule. The Borough also claims that since the 8-hour schedule allows for additional officers per shift, certain officers can be designated to monitor their fellow officers resulting in greater levels of supervision.

The Borough contends that the 8-hour schedule provides important benefits to the officers. Officers will rotate shifts less frequently. Moreover, while the Borough concedes that officers will work more days per year under the 8-hour schedule,

officers will work the same number of hours annually as under the 10-hour schedule. The Borough asserts that as a small municipality it retains the managerial prerogative to unilaterally modify work schedules in the interest of efficiency and discipline and need not submit the work schedule change issue to the collective negotiations process.

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).

Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) established a test for police departments to determine whether certain matters, even though generally negotiable, are inappropriate for negotiations in specific factual settings. The Court held that if negotiations over a particular matter, including work schedules, would significantly interfere with the determination of a governmental policy, the matter was not

negotiable. See also Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Education Association, 88 N.J. 582 (1980); Local 195 IFPTE, AFL-CIO v. State, 88 N.J. 393 (1982). Thus, where negotiations over work schedules interfered with management's policy on staffing levels and supervision, negotiations were not required. See Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982) mot. for recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div 1983), certif. den. 96 N.J. 293 (1984); Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980). But where there was no significant interference with management's ability to set policy, work schedules are negotiable. Township of Mt. Laurel and Mt. Laurel Police Officers Ass'n., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 1987); Township of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd NJPER Supp. 2d 172 (¶152 App. Div. 1987), certif. den. 108 N.J. 198 (1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of Vineland, P.E.R.C. No. 94-69, 20 NJPER 60 (¶25023 1993); City of Linden, P.E.R.C. No. 92-127, 18 NJPER 362 (¶23158 1992); Borough of Union Beach, P.E.R.C. No. 92-129, 18 NJPER 366 (¶23160 1992); Borough of

Carteret, P.E.R.C. No. 88-81, 14 NJPER 238 (¶19086 1988); Borough of Paulsboro, I.R. No. 88-6, 14 NJPER 30 (¶19010 1987).

In the instant case, the parties have previously engaged in collective negotiations regarding work schedules. The result of those negotiations was memorialized in the collective agreement at Article V, A., of the collective agreement. The contract provision expressly requires employees to work a 10-hour tour. Although, from the Borough's perspective, there may be many advantages to implementing the 8-hour work schedule, it appears that the economic benefit obtained from reducing overtime is a key motivating factor in the Borough's determination to revise the work schedule. While the Borough argues that the 8-hour schedule would be an operational improvement, it does not claim that the 10-hour shift is unworkable. Since it appears that the Borough's decision to change the work schedule flowed from economic concerns rather than an inherent policy decision, it appears that the change in the work schedule constitutes a unilateral alteration in a term and condition of employment.

The Borough contends that in small municipalities which employ a small police workforce, such as itself, it retains the right to modify work schedules without submitting that issue to the collective negotiations process. It relies upon Atlantic Highlands and Irvington in support of its position. However, in Township of Teaneck and FMBA Local No. 42, P.E.R.C. No. 2000-33,



25 NJPER 450 (¶30199 1999) aff' in pt. rev'd in pt and rem'd 353 N.J. Super. 289 (App. Div. 2002), aff'd 177 N.J. 560 (2003), the Court stated that

In [Mt. Laurel] we refused to interpret Atlantic Highlands and Irvington 'as establishing a per se rule of exclusion for police scheduling issues' and declared that each case must be determined individually under the balancing test set forth in Local 195, supra., 88 N.J. at 401-405. We also noted the comment in Local 195 that 'rates of pay and working hours' were 'prime examples of subjects' that were negotiable. Id. at 403. [Teaneck, 353 N.J. Super. at 303.]

In considering the interest of the public employees and the public employer in this instance, it appears that the Borough's dominant concern is not its managerial prerogative to determine policy but rather the achievement of economic savings from a schedule which, in addition, may result in other ancillary benefits desired by the Borough. Consequently, I find that the PBA has established the requisite likelihood of success necessary for the grant of interim relief.

The parties are currently in the midst of collective negotiations for a successor agreement. 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, undermines labor stability and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn. 78 N.J. 25 (1978). Further, a unilateral change of a term or condition of employment during the pendency

of interest arbitration constitutes a violation of N.J.S.A. 34:13-21. Therefore, I find that the Borough's apparent unilateral change in terms and conditions of employment during the course of collective negotiations and interest arbitration undermines the PBA's ability to represent its members and results in irreparable harm.

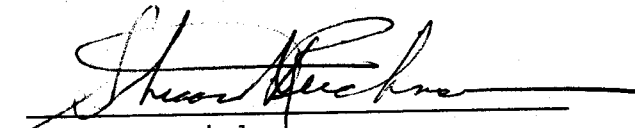
In consideration of the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and, thus, promotes the public interest.

In assessing the relative hardship to the parties, I find that the scales tip in favor of the PBA. The Borough experiences a lesser degree of hardship by being required to return to the status quo ante during the processing of the instant matter. It appears that the 10-hour tour of duty conforms to the express terms of the collective agreement and has been in effect for many years. However, the PBA will be irreparably harmed as the result of the unilateral change in the work schedule during the pendency of collective negotiations and interest arbitration.

This case will proceed through the normal unfair practice processing mechanism.

ORDER

The Borough is restrained from unilaterally modifying the work schedule set forth in Article V, A., of the collective agreement and is directed to return to the work schedule providing for a 10-hour tour of duty. This interim order will remain in effect pending a final Commission order in this matter.

  
Stuart Reichman  
Commission Designee

DATED: January 30, 2004  
Trenton, New Jersey