

D.U.P. No. 2007-3

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF OCEAN,

Respondent,

-and-

Docket No. CO-2006-60

OCEAN TOWNSHIP PBA LOCAL 57,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on allegations that the Township unilaterally eliminated the steady midnight shift worked by the police in retaliation for PBA protected activity. The Director found that the Township had a managerial prerogative to eliminate the shift and that the allegations concerning retaliation were filed beyond the six-month statute of limitations.

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Appearances:

For the Respondent,  
Ruderman & Glickman, PC, attorneys  
(Mark S. Ruderman, of counsel)

For the Charging Party,  
Detzky & Hunter, LLC, attorneys  
(Stephen B. Hunter, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 22, 2005, PBA Local 57 (Local 57) filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) against the Township of Ocean (Township). The charge alleges that the Township violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)<sup>1/</sup>, when on or about March 1, 2005

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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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and  
(continued...)

it unilaterally eliminated a steady midnight patrol shift. The parties engaged in settlement discussions over several months that proved to be unsuccessful.

Local 57 alleges that for about two years prior to March 1, 2005, five Township police officers were assigned on a steady shift basis to work the midnight patrol shift from 11 pm to 7 am. All other patrol officers worked a rotational schedule involving the following three patrol shifts: 7 am to 3 pm; 3 pm to 11 pm; and 11 pm to 7 am. On or about March 1, 2005, the newly appointed Police Chief eliminated the steady midnight schedule and placed those officers in the same rotational schedule as all other officers. The Township did not negotiate this shift elimination with Local 57. Local 57 alleges that the unilateral elimination of the steady midnight shift represents a refusal to negotiate in good faith over a change in working conditions, and requests that the Commission require the Township to reinstate that steady midnight shift.

The Township acknowledges that it eliminated the steady midnight shift, but denies that it violated the Act. It argues that the decision to eliminate the midnight shift is a non-negotiable managerial prerogative implemented to effectuate the

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

significant government policy interests of improving officer supervision and operational efficiency. The Township claims that the midnight shift was experimental and the new Chief assessed that the experiment was not working. The Township further asserts that the parties' collective negotiations agreement does not mention a steady 11 p.m. to 7 a.m. shift, and the Agreement provides the Chief with the power to approve shifts and schedules.

By letter dated August 10, 2006, I advised the parties that I did not believe the Commission's complaint issuance standard had been met and that I was inclined to dismiss the charge. I also invited Local 57 to provide me with additional facts and argument for my consideration by August 21, 2006. Local 57 requested, and I granted, an extension to file materials by August 28, 2006.

On August 28, 2006, Local 57 filed an amendment to its charge claiming a violation of N.J.S.A. 34:13A-5.4a(3)<sup>2/</sup> by asserting that the elimination of the steady midnight shift was in retaliation for statements by former Local 57 President Laffan in 2005 and for the exercise of rights by Local 57 that are

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<sup>2/</sup> This provision prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

protected by the Act. Subsequently, Local 57 filed another amendment on September 5, 2006 which corrected several non-substantive errors contained in the August 28, 2006 amendment. Local 57's submissions do not take exception with my initial decision not to issue a complaint on the original 5.4a(1) and (5) allegations standing alone, but rather seeks to add new allegations which may constitute a violation of 5.4a(3) of the Act.

After receiving the August 28, 2006 amendment, the Township requested until September 21, 2006 to respond. I granted the Township's request.

In its response, the Township argued that the amendments filed by Local 57 contain new allegations and ones that occurred more than six months before the filing of the amendments and are, therefore, barred by the statute of limitations.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. Based upon the following, I am inclined to find that the complaint issuance standard has not been met.

**5.4a(1) and (5) allegations.**

Local 57 and the Township are parties to a collective negotiations agreement covering the time period from January 1, 2004 through December 31, 2007. Local 57 is the majority representative for a unit comprising all probationary and regular full-time police officers employed in the Township's Department of Police. The regular contractual shifts for patrol officers are: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; and 11 p.m. to 7 a.m. Officers rotate among these shifts. The steady midnight shift at issue here ran from 11 p.m. to 7 a.m. just like one of the regular rotational shifts mentioned above. However, it has been a "steady" shift instead of a "rotational" shift because the same officers work the same 11 p.m. to 7 a.m. shift rather than rotating among the three shifts.

Former Police Chief Robert Swannack first instituted the steady midnight shift on an experimental basis in 2003. The shift was implemented as a temporary one-year experiment aimed at improving efficiency and reducing crime. Five patrol officers and one sergeant volunteered for the steady midnight shift for one year, at which point the experiment was to be evaluated. Squads 1, 2 and 3 are assigned to regular rotating schedules, which apparently rotate once a month. Squad 4 worked the steady midnight shift of 11 to 7.

When planning the 2004 schedule, former Chief Swannack informed staff he was unsure about continuing the steady midnight shift because he did not have enough data to determine if it had been beneficial. Also, by then, only four officers and no supervisors had volunteered for the steady midnight shift, leaving squad 4 without supervision. However, Chief Swannack agreed to continue the steady midnight shift for another year.

On January 1, 2005, following Swannack's retirement, Chief Antonio Amodio was appointed. Chief Amodio determined that the lack of supervision on the steady midnight shift impaired the Department's ability to supervise and evaluate Squad 4. Accordingly, he eliminated the steady midnight shift and reassigned its four officers back to the three other squads on a regular rotating schedule. Squad 4 was thereby eliminated.

#### ANALYSIS

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those determinations, work schedules of individual employees are, as a general rule, negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003). That rule applies in cases involving the work schedules of police officers. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div.

1987); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990). However, a grievance protesting a work schedule change is not legally arbitrable if enforcement of a particular work schedule agreement would substantially limit a governmental policy determination. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002).

For example, we have restrained arbitration over work schedule changes effected to address supervision or operational problems or to adjust officers' schedules to conform to the employer's judgment about when services should be delivered. See, e.g., City of Trenton, P.E.R.C. No. 2005-60, 31 NJPER 59 (¶28 2005) (employer had prerogative to change vice unit's hours to align unit's schedule with the time services were most needed); Millville (employer's unrebutted evidence that 12-hour shift had resulted in staffing, supervision, and fatigue problems - and had compromised officer safety because of reduced number of officers on evening shift - justified a mid-contract change from a schedule with 12 and 8-hour shifts to one with 8-hour shifts only); City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997) (employer had prerogative to change a deputy chief's and captain's work schedule to provide a command-level



presence on weekends); Township of Springfield, P.E.R.C. No. 2006-27, 31 NJPER 328 (¶131 2005) (employer had prerogative to require new shifts for lieutenants in order to implement its new command structure to improve supervision by having an officer of lieutenant rank or higher on duty at all times); Borough of Roselle Park, P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005) (employer had prerogative to implement a rotational schedule for four sergeants to ensure that each is regularly supervised by a day-shift lieutenant, to ensure that each becomes familiar with night and day shifts to allow for substitutions, and to prevent supervisory/disciplinary problems associated with officers and sergeants who become too close through longstanding work relationships by working the same shift).

Similar to the shift changes in Irvington, Millville, Springfield, and Roselle Park, the shift changes here were implemented to correct perceived supervision and evaluation problems under the prior system. The Township had a managerial prerogative to eliminate the steady midnight shift in order to best allocate its staffing and have adequate supervision during all shifts.

Furthermore, the parties' agreement provides the Township with a contractual defense. Article XII, Section 2 of the Agreement provides: "The work week shall consist of forty (40) hours on a shift basis on a schedule to be approved by the Chief

of Police or his designee." It is not alleged that any officer is working more than 40 hours as a result of the elimination of the steady midnight shift. Therefore, Chief Amodio's decision to eliminate the steady midnight shift appears to be a valid exercise of his right under the parties' agreement.

Accordingly, taking 5.4a(1) and (5) allegations alone (elimination of steady midnight shift), the Commission's complaint issuance standard has not been met, and I decline to issue a complaint on those allegations of this charge.

**5.4a(3) allegations.**

In its August 28, 2006 and September 5, 2006 amended charges, Local 57 alleges that the disbandment of the steady midnight shift was in retaliation for public statements made by former Local 57 President Laffan in January 2005 and other Local 57 protected activity.<sup>3/</sup> In January 2005, Laffan was allegedly quoted as saying that the Township Manager, not the Chief, was running the police department. Shortly thereafter, the Chief advised Local 57's executive board that effective March 1, 2005 the midnight squad would be eliminated. Laffan, at the time, worked the steady midnight shift.

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<sup>3/</sup> The amendments to the charge reference another unfair practice charge concerning long-term tour switches, Docket Number CO-2005-296. In June 2006 that charge was deferred to the parties' grievance procedure.

The Township argues that I should refuse to issue a complaint on the new allegations contained in the amendments as they were filed out of time and nothing had prevented Local 57 from asserting them in its original charge. Local 57 argues that the additional allegations simply refer to the motivation behind the personnel action which was timely pled. Additionally, Local 57 argues that two other unfair practice charges (Docket Numbers CO-2006-143 and CI-2006-17) pending before the Commission already assert anti-union animus on behalf of the Township and therefore the Township will not be prejudiced by having to litigate another retaliatory claim involving Local 57.

The Act requires that an unfair practice charge be filed within six months of the date the unfair practice occurred.

N.J.S.A. 34:13A-5.4c states, in relevant part:

no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The statute of limitations normally begins to run from the date the alleged unfair practice occurred, provided the affected party is aware of the action. The date of the action is known as the "operative date," and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must normally be filed within six months of the operative date.

Charges filed after that date are generally untimely unless the Charging Party demonstrates that it was "prevented" from filing the charge prior to the expiration of the limitations period.

The standard for evaluating statute of limitations issues was established in Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue their litigation diligently and to prevent the litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on its rights. But the Court still expected charging parties to diligently pursue their claims.

Here, the Chief announced sometime in early 2005 that he was eliminating the steady midnight shift effective March 1, 2005. The latest operative date therefore is March 1, 2005, when the shift was, in fact, eliminated. Local 57 did not file its a(3) retaliatory claims until August 28, 2006 which were corrected on September 5, 2006. The new allegations were asserted well beyond the six-month statute of limitations. To have been timely, the retaliatory claims needed to be filed by September 1, 2005.

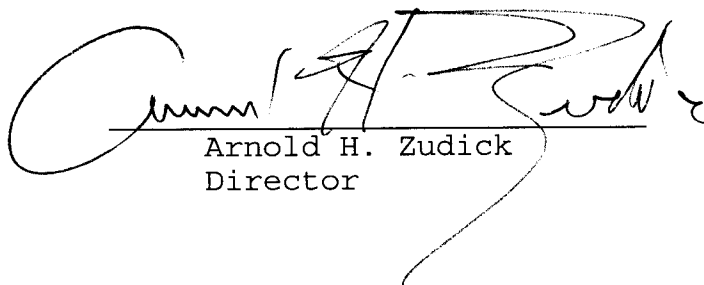
The a(3) retaliatory allegations are not merely a clarification of the original allegations, but represent a new

theory of the case that, if filed timely and proven, could constitute an entirely separate violation of the Act. Local 57 has not alleged or presented evidence that it was prevented from including these new allegations in its original charge which was filed within the limitations period. The fact that other claims of anti-union animus between the parties are pending before the Commission does not convert the untimely allegations in this case into timely allegations.

Based upon the foregoing, I find that Local 57's a(3) allegations against the Township are outside the Commission's statute of limitations. Therefore, no complaint may issue on those allegations. Consequently, I dismiss the charge. N.J.S.A. 34:13A-5.4(c). Kaczmarek; County of Mercer (Cooks), D.U.P. No. 2003-4, 29 NJPER 23 (2002).

ORDER

The unfair practice charge is dismissed.



Arnold H. Zudick  
Director

DATED: October 27, 2006  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by November 8, 2006.