

I.R. No. 2007-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLOSTER,

Respondent,

-and-

Docket No. CO-2007-246

PBA LOCAL 233,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain the Borough of Closter from refusing to negotiate over patrolmen work schedules for 2007. The Designee concluded that a material factual dispute existed over the parties practice and whether the parties had negotiated over schedules in the past or whether the Chief historically set the schedules after discussions with employees. Consequently, the Designee concluded the charging party could not establish a substantial likelihood of success on the merits of the case.

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Appearances:

For the Respondent, Edward Rogan & Associates, LLC
(JoAnn Riccardi, of counsel)

For the Charging Party, Loccke, Correia, Schlager,
Limsky & Bukosky, attorneys (Marcia J. Tapia, of
counsel)

INTERLOCUTORY DECISION

On February 26, 2007, the Policeman's Benevolent Association Local 233 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Closter (Borough) acted in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge specifically alleges that 5.4a(1), (2), (3) and (5)^{1/}

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the
(continued...)

of the Act were violated when the Borough failed and refused to negotiate with the PBA over the 2007 work schedule of rotations and assignments for patrolmen.

The charge was accompanied by an application for interim relief. An Order to Show Cause was signed on March 1, 2007 scheduling a telephone conference call return date for March 27, 2007, which was rescheduled by agreement for April 12, 2007. Both parties submitted briefs and affidavits and argued orally on the return date.

The following facts appear:

The parties collective agreement which expires on December 31, 2007, includes the following relevant workday/workweek language:

8.00 WORK DAY, WORK WEEK AND OVERTIME

8.01 The normal work day tour shall be eight (8) hours in a twenty-four (24) hour period which shall include within the eight (8) hour span, forty-five (45) minutes of mealtime per day as well as appropriate rest periods.

8.02 There shall always be sixteen (16) hours of time off between tours of work. The normal work week shall be forty (40) hours in a seven (7) consecutive day period. Work in excess of the Employee's basic work week or tour for a day is overtime.

1/ (...continued)
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."

The contract also includes the following shift change language:

14.01 Where tours of work are changed with less than forty-eight (48) hours notice, the Employee shall receive two (2) hours of straight time pay for each change. (One payment per change - single day or block of day). This Article shall not apply to Full Departmental Mobilization.

and a yearly calendar article (39.02) providing that the yearly schedule rotations and assignments be posted no later than February 1 of each year, and included a preservation of rights article (5.01) and a grievance procedure (32.01 et seq) which concludes with binding arbitration.

In 2006, the Police Chief implemented a work schedule for patrolmen including a twelve person rotation with 8 hour shifts and five "drop" shifts. A drop shift apparently is a practice that allows the Borough to change a patrolman's schedule without the 48-hour notice required by Article 14.01. A thirteenth patrolman was added for 2007.

Union representative Matthew Thornhill's affidavit contains the following statement:

For a number of years, going at least as far back as 1997, PBA members have been negotiating with Chief of Police David Berrian over yearly patrolman schedules.

Chief David Berrian in his affidavit said he has discussed scheduling issues with patrolmen, welcomed their input and considered their suggestions but has "always reserved the right

to make the final decision" and said there has "never" been negotiations on the scheduling issue.

On or about January 20, 2007 a PBA representative questioned the Chief's aide, Sgt. Winters, regarding the 2007 schedule. Sgt. Winters proposed two schedules which the PBA did not find acceptable and demanded negotiations. No negotiations took place. By January 29, 2007, the Chief posted a 2007 schedule which included a 13 person rotation with 8 hour shifts with seven drop shifts and more coverage on the 11 p.m. - 7 a.m. shift. On February 6, 2007, the PBA filed a grievance over the new schedule alleging it was a unilateral change from the method and manner schedules were made in the past. On February 12, 2007, the Chief denied the grievance. His response included his position of what the practice has been in creating schedules. It states:

The 2006 patrol officer's schedule had a twelve-person rotation and the 2007 schedule, now with thirteen patrol officers, necessitated a thirteenth week rotation. It has long been the accepted practice that schedules (officers or patrol officers) are increased or reduced; more specifically a schedule is increased when a member is added to a schedule or reduced when a member is removed from a schedule.

By letter of February 14, 2007, the PBA again demanded negotiations over the shift schedules. No such negotiations has been held.

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).

In addition to its arguments disputing pertinent facts, the Borough, relying on the Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 393 (1982) balancing test argued that it had a managerial prerogative to set the schedule. In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), the Court 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. Thus, where negotiations over work schedules interferes with management's policy on staffing levels and supervision, negotiations are 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. Tp. of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 1987); Hamilton Tp., 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); Borough of Hamburg, I.R. No. 2004-9, 30 NJPER 58 (¶172004); City of Passaic, I.R. 2004-2, 29 NJPER 310 (¶96 203); Bor. Of Bogota, I.R. 98-23, 24 NJPER 237 (¶29112 1998).

The Borough believes it had the prerogative to add more drop shifts and/or more personnel on drop shifts to reduce expenses it believed were caused by overtime. Reducing overtime and other

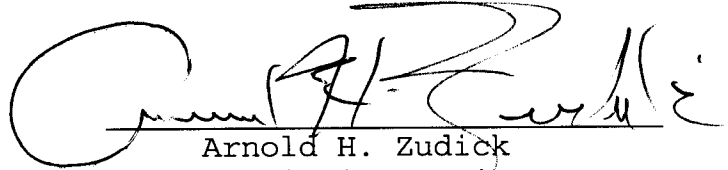
financial considerations are not normally an element upon which a prerogative is determined.

In evaluating this application, however, I need not resolve the negotiability of the work schedules because even assuming they are negotiable here, the request for interim relief must be denied. The record shows a dispute on a material fact regarding the parties practice for implementing work schedules. PBA facts claim the Chief has engaged in negotiations over work schedules in the past, but the Borough's facts show there have only been discussions and the Chief has regularly set the schedules. Although the facts show that the 2007 schedule is somewhat different and changed from the 2006 schedule, and was implemented without negotiations in 2007, with opposing affidavits on the practice for how the schedules are determined and set, it is not possible to conclude at this step of the process that the PBA has a substantial likelihood of success on the merits of its charge. Thus, at least one element of the interim relief standard cannot be met and this application must, therefore, be denied. The underlying issue in this case may be resolved through the grievance already filed on this subject, or if necessary, after a plenary hearing in the unfair practice case. This charge will be sent to conference for further processing.

Accordingly, based upon the above findings and analysis, I issue the following:

ORDER

The application for interim relief is denied.

A handwritten signature in black ink, appearing to read "Arnold H. Zudick", written over a horizontal line.

Arnold H. Zudick
Commission Designee

DATED: April 17, 2007
Trenton, New Jersey