

D.U.P. No. 2008-6

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

In the Matter of

BOROUGH OF ATLANTIC HIGHLANDS,

Respondent,

-and-

Docket No. CO-2008-013

PBA LOCAL 242,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by PBA Local No. 242 alleging that Borough of Atlantic Highlands unilaterally assigned work previously performed by off-duty unit officers to on-duty officers thereby reducing off-duty work and increasing the workload of on-duty officers without an increase in pay. Additionally, the PBA alleged that the Borough was angry with the PBA for raising this issue after the Borough agreed to a new work schedule requested by the PBA. The Director concluded that: the Borough had a managerial prerogative to reassign the work to on-duty employees; and, had not transferred the work outside the unit. Finally, the Director concluded that the Borough had no obligation to negotiate over the decision or the asserted effects of the decision.

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Appearances:

For the Respondent,
Dowd and Reilly, attorneys
(Bernard M. Reilly, of counsel)

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

REFUSAL TO ISSUE COMPLAINT

On July 13, 2007, Atlantic Highlands PBA Local No. 242 (PBA) filed an unfair practice charge against the Borough of Atlantic Highlands (Borough). The charge alleges that in May, 2007, the Borough unilaterally assigned jobs previously performed by off-duty unit officers to officers on-duty, thereby reducing off-duty work opportunities and increasing the workload of employees on-duty, with no change in pay. The PBA alleges that it demanded negotiations over the change, and that the Borough refused. It also alleges that Borough Counsel had stated that the Borough was angry with the PBA for raising concerns over the loss of off-duty

assignments, particularly after it agreed to a new work schedule sought by the PBA. The employer's conduct allegedly violated 5.4a(1), (2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The Borough denies violating the Act. It asserts that it has a managerial prerogative to assign work site traffic protection duty to on-duty patrol officers and that it has no obligation to negotiate over that decision. The Borough also contends that the disputed remarks between counsel were part of a confidential settlement discussion about which no complaint should issue.

We have conducted an administrative investigation. On February 25, 2008, we wrote to the parties, advising them of our findings and tentative conclusion, and invited their responses. On March 10, 2008, the PBA filed a reply and on March 12, the

^{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 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. (7) Violating any of the rules and regulations established by the commission."

Borough filed a letter supporting our tentative conclusion to dismiss the charge.

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. I find that the complaint issuance standard has not been met.

PBA Local 242 represents the Borough's police officers, including superiors, except the captain and the chief. The parties' most recent collective agreement expired on December 31, 2006. The PBA and the Borough are negotiating a successor agreement. The expired contract includes a "maintenance of benefits" provision.

Sometime in the late 1980's the State Attorney General approved a model ordinance for municipalities to provide off-duty security and other police services to private vendors. The model called for off-duty officers to be paid either directly by the private contractor or through a dedicated fund administered by the municipality. The off-duty officer would be engaged by the vendor but supervised by the police chief. Atlantic Highlands adopted an ordinance based upon the model in 1992. The ordinance

allows police officers to work "special duty assignments" for private vendors and to be paid for such services through a dedicated municipal fund. The ordinance has since been amended to increase the pay rate, which is currently \$50 per hour. The monies paid by the private contractors into the dedicated municipal fund are not compensation for purposes of accrual to officers pensions and are not subject to overtime rules inasmuch as the hours worked by Borough officers during special assignment for contractors is not considered "employment for or by the Borough." No provision in the PBA's collective agreement concerns special duty assignments.

Sometime in May, 2007, a private paving contractor performing road reconstruction for the Borough did not engage off-duty police officers to perform traffic duty. Instead, the Borough assigned on-duty police officers to perform traffic control at the work site.

ANALYSIS

The PBA alleges that the Borough changed working conditions by transferring certain work from an off-duty assignment to on-duty personnel without first negotiating the change with the PBA. It also asserts that the Borough violated the Act by failing to negotiate over the increased work for on-duty personnel.

N.J.S.A. 34:13A-5.3 prohibits a public employer from unilaterally establishing or changing mandatorily negotiable

terms and conditions of employment. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1975); Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Mandatory negotiability is determined by balancing the impact on employees' work and welfare against any interference with the determination of governmental policy. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981).

A public employer, however, has a managerial prerogative to decide to eliminate off-duty work and assign that work to on-duty personnel. Borough of Belmar, P.E.R.C. No. 2003-52, 29 NJPER 30 (¶10 2003), recon. den. P.E.R.C. No. 2003-61, 29 NJPER 102 (¶30 2003); City of Salem, P.E.R.C. No. 2006-48, 31 NJPER 405 (¶160 2005).

In Belmar, the employer assigned an on-duty officer to direct traffic around a paving project rather than use an off-duty police officer. The Commission restrained arbitration over the resulting grievance, finding that the Borough had a managerial right to decide when an on-duty officer would be assigned to a public safety post.

In Salem, the City entered into an agreement with the State to provide police services at a motor vehicle facility in a nearby municipality. Salem also had a collective agreement with its police union which included a provision regarding off-duty

assignments. Initially, the police service was provided by City police officers as extra-duty assignments. The City later decided to assign on-duty police to work the detail and eliminated the extra-duty assignments. The Commission found that how on-duty police officers will be deployed is generally a governmental policy decision reserved to management. The Commission ruled that the City had a managerial prerogative to deploy its on-duty officers, thus eliminating the need for extra-duty assignments. Id. at 407.

These precedents indicate that public employers, including the Borough, do not have an obligation to negotiate before assigning work previously performed by an off-duty officer to on-duty personnel. See also, Union Tp., D.U.P. No. 2008-7, 32 NJPER 109 (¶53 2006).

The PBA's March 10, 2008 reply to my letter characterized the Borough's conduct as a "transfer of unit work" and asserted that the impact of the Borough's change in assignment was mandatorily negotiable. The PBA's reply inaccurately defines the unit work doctrine, with which this case is not concerned.

The unit work doctrine refers to a shifting of work from employees within a negotiations unit to employees outside the unit. City of Jersey City v Jersey City POBA, 154 N.J. 555 (1998). The "work" in this matter was performed by unit members, not by employees outside the unit. The "work" was compensated by

private vendor contributions to a dedicated municipal fund, and no provision in the parties' collective agreement concerned any aspect of special duty assignments. Even if those assignments are properly termed "unit work", no "transfer" has occurred; i.e., the work has remained within the unit, and was merely assigned from off-duty unit members to on-duty unit members. Accordingly, I find that the Borough has not transferred unit work.

The PBA has also demanded to negotiate over the "impact" of the Borough's decision to assign on-duty officers to perform work previously done in special duty assignments. In Union Tp., I found that an employer had a non-negotiable managerial prerogative to cease providing an off-duty special assignment program ("jobs in blue"), even though the compensation issues which were generated intimately and directly effected the work and welfare of police officers. That case is analogous to the Borough's exercise of its prerogative in this matter. The PBA seeks to negotiate the impact of the Borough's decision, including the asserted loss of compensation and overtime opportunities. As found in Union Tp., requiring the Borough to maintain special duty assignments would significantly interfere with the exercise of its non-negotiable prerogative to cease the special assignment program by assigning off-duty special assignments to on-duty employees. Stated another way, the

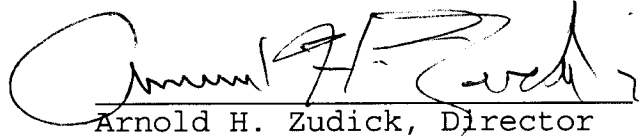
Borough's non-negotiable decision and its effect are inextricably intertwined and cannot be separated without infringing on the Borough's exercise of its non-negotiable managerial prerogative. Accordingly, I find that the Borough does not have an obligation to negotiate over either its decision or any impact of its decision to eliminate formerly special duty work and to assign the work to on-duty officers. The 5.4a(5) allegation is dismissed.

The PBA also alleges that the Borough violated 5.4a(1) and (3) when "certain Borough representatives" expressed anger upon learning that the PBA demanded negotiations over the loss of off-duty work. An employer violates 5.4a(1) if its actions tend to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

The alleged remark was admittedly conveyed to PBA counsel, not to unit employees. A public employer is entitled to comment about a union's behavior so long as the statements are not coercive. Black Horse Pike Bd. Of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). I find that Borough Counsel's conduct did not tend to interfere with employee rights under the Act.

No facts suggest that section 5.4a(2), (3) and (7) were violated. Those allegations are also dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: May 9, 2008
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 May 19, 2008.