

I.R. NO. 2010-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY,

Respondent,

-and-

Docket No. CO-2009-436

FOP LODGE 39,

Charging Party.

SYNOPSIS

A Commission Designee denies interim relief on an unfair practice charge filed by FOP Lodge 39 of the Somerset County Sheriff's Office. The charge alleged that the County changed police work schedules during interest arbitration without negotiations. The Commission Designee finds that Charging Parties have not demonstrated a substantial likelihood of success on the merits, because of a material dispute over whether the parties' contract authorized the schedule and shift changes. The Designee noted that a previous order, I.R. No. 98-22 denied interim relief on a schedule change based upon the same contract language.

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Appearances:

For the Respondent, Ogletree, Deakins, Nash , Smoak and Stewart, PC attorneys (Evan J. Shenkman, of counsel)

For the Charging Party, Klatsky, Sciarrabone, DeFillippo, attorneys (David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

On May 26, 2009, Somerset County Sheriff's Office FOP Lodge #39 (FOP) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Somerset County Sheriff's Office, Somerset County Sheriff and County of Somerset (County), violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The FOP specifically alleged that effective January 1, 2009, the County eliminated weekend and holiday shift coverage in the Sheriff's Office, during interest arbitration proceedings and without prior negotiations with the FOP, in alleged violation of 5.4a(1) through (7) of the Act.

The charge was accompanied by an application for interim relief. An Order to Show Cause was signed on May 28, 2009, scheduling a June 18 return date, which was rescheduled to June 25 at the FOP's request and with the County's consent. Both parties submitted briefs, affidavits and exhibits and argued orally on the return date. The following facts appear.

The FOP is the collective bargaining agent for all non-supervisory Sheriff's Officers employed by the Somerset County Sheriff's Office. The most recent collective bargaining agreement between the County and the FOP expired on December 31, 2007. Following the expiration of the contract, the FOP filed for interest arbitration. That proceeding is pending before Arbitrator Jeffrey B. Tener.

The Somerset County Sheriff's office is comprised of two main divisions: the law enforcement division and the administrative division. The primary function of the Sheriff's officers assigned to the law enforcement division has historically been to provide security at the County court house. Prior to January 5, 2009, officers assigned to the court security and transportation function in the law enforcement division worked one of three shifts: Monday through Friday, 8:30 a.m. - 4:30 p.m.; 7:00 a.m. - 5:00 p.m. either Sunday to Wednesday or Wednesday to Saturday - termed a 4 x 3, 10 hour work schedule; or 2:00 p.m. to midnight either Sunday to Wednesday or Wednesday to

Saturday, also termed the "afternoon shift." All officers working the 4 x 3, 10 hour work schedule worked weekends and holidays.

Frank Provenzano is the Somerset County Sheriff. For several years, the Sheriff's department had been reevaluating the need to operate on weekends and holidays. With more County judges, frequently working longer days, the Sheriff often found himself shorthanded in the courthouse during the week, requiring him to routinely call in Sheriff's officers on overtime and reassign Sheriff's officer detectives away from their normal assignments in the detective bureau, in order to handle the overflow of Court security detail. The County argued that, on most weekends and holidays, when Courts are not in session, officers spend considerable time patrolling (mostly closed) County buildings and facilities (the courthouse, the County parking deck, the schools, mass transit) and serving process.

In late 2008, based upon a determination that less staffing was needed on weekends and holidays, and the need for increased staffing during the week when Courts were in session, the Sheriff decided that maintaining a law enforcement division weekend and holiday work schedule was unnecessary. The Sheriff decided that all officers, including those formerly on the 4 x 3, 10 hour shifts, would work a regular weekday 8-hour shift during the hours of 6:00 a.m. and 10:30 p.m. The schedule change included

the addition of one Law Enforcement Division officer for an additional hour each day, to provide security at the courthouse, beginning at 6:00 a.m. rather than 7:00 a.m., for the arrival and security screening of the daily cleaning crew.

This change saved money for Somerset since the officers working on the 10 hour shifts earned time and one-half for any holidays, and the officers filling in for them (due to vacation or other days off) earned time and one-half for any weekend or holiday shifts. In the event of any emergency necessitating Sheriff's officers on weekends or holidays, officers would be called in from the primary or secondary duty team or from the overtime list.

In or around December 2008, Sheriff Provenzano appeared at a morning lineup and advised that the Sunday to Wednesday and Wednesday to Saturday shifts would be eliminated effective January 5, 2009. The FOP alleges that the Sheriff advised those present, including FOP President Dominick Albanese, that the schedule change was being implemented as a cost-saving measure.

On December 10, 2008, the Sheriff posted new bidding sheets, containing the schedule changes and new shift. Sheriff's officers currently work the following schedules: 6:00 a.m. - 2:00 p.m. (the new schedule effective January 2009); 7:00 a.m. - 3:00 p.m.; 8:30 a.m. - 4:30 p.m.; or 2:30 p.m. - 10:30 p.m.

Shortly after the morning lineup, Albanese wrote to Provenzano on behalf of the FOP requesting "a detailed explanation as to why the shift work schedule" for coverage "on weekend and holidays" was being eliminated, expressing the FOP's understanding that said changes were being made "due to financial cut-backs" and requesting that the weekend and holiday schedule be reinstated.

Provenzano responded by memo dated January 22, 2009, stating that the Sheriff's office "felt the change was necessary."

Article XXVI of the parties most recent collective agreement provides:

NOTICE OF SHIFT CHANGE

26.1 Whenever the County, through its authorized agents, seeks to change the shift of any officer covered by this agreement, then, in those cases where the employment on the new shift will be for one week or more, the County will give two weeks notice of the change in shift to the officer.

On May 21, 2009, the FOP filed this unfair practice charge.

The FOP argues that the schedule change constitutes a blatant violation of the Sheriff's duty to negotiate in good faith as well as to maintain the status quo during the expired agreement and pending interest arbitration proceedings, pursuant to N.J.S.A. 34:13A-33 and N.J.S.A. 34:13A-21, respectively.^{1/}

^{1/} N.J.S.A. 34:13A-33 provides:
Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an
(continued...)

The FOP argues that since police work schedules are mandatorily negotiable, the Sheriff must be compelled to reinstate the prior 4 x 3, 10 hour work schedule. The FOP asserts that the schedule change was not a legitimate attempt to address a particularized managerial need or operational objective, but was simply designed as a cost saving measure. The FOP further argues that as the parties are in the midst of interest arbitration proceedings, the County's unilateral change will cause a chilling effect on employee rights guaranteed under the Act and undermine labor stability. Finally, the FOP argues that restraining any work schedule change while the parties

1/ (...continued)
exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

N.J.S.A. 34:13A-21 provides:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

continue to work toward a successor agreement will not adversely affect the public interest.

The County argues that the Sheriff has both a managerial prerogative and a contractual right to cease regular law enforcement division operations on weekends and because "public employers have the unfettered prerogative to determine the hours and days during which a service will be provided." Further, the County asserts, "the Commission has previously found that Article XXVI in the parties' collective bargaining agreement affords the Sheriff the unilateral right to change Sheriff's officers' work schedules for any reason upon two weeks' notice, and such notice was provided here." County of Somerset and Somerset County Sheriff and Somerset County Sheriff's Officers FOP Lodge No. 39, I.R. No. 98-22, 24 NJPER 300 (¶29143 1998). The County further argues that since the FOP waited over five months from the implementation of the change to file its charge and request for interim relief, it cannot establish that irreparable harm will result if interim relief is denied. The County requests that the FOP's application for interim relief be denied and that the unfair practice charge be dismissed without further Commission processing.

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).

N.J.S.A. 34:13A-5.3 requires an employer to negotiate over terms and conditions of employment with the majority representative. This section of the Act further states, in relevant part:

Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

An employer may not unilaterally change an existing, negotiable condition 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); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Barneget 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). If the employee representative has expressly agreed to a contractual provision

authorizing the change, then there is nothing further to negotiate and the employer is free to make the contractually permitted change. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987).

In County of Somerset and Somerset County Sheriff and Somerset County Sheriff's Officers FOP Lodge No. 39, I.R. No. 98-22, 24 NJPER 300 (¶29143 1998), a Commission Designee denied interim relief on an unfair practice charge filed by FOP Lodge #39. The charge alleged that the then-Sheriff unilaterally changed the established work schedule without negotiations when he instituted "one additional work shift and concomitant work schedule of 10 p.m. to 8 a.m., four days on three days off and then a return to the normal rotation." The purpose of the new shift and schedule was to provide security for County-owned buildings, a duty not previously performed by Sheriff's officers. The parties were engaged in interest arbitration for a new contract at the time of the alleged change.

The Commission Designee in that case noted that the contract provided at Article XXVI that two weeks notice was required prior to any shift change for any employee, as well as articles providing for a wage differential for certain shifts and the parties' agreement that the contract could be reopened to

negotiate compensation if additional shifts were created. The designee found that the latter article seemed to give the County the right to create a new shift, but also gave the FOP the right to negotiate compensation. The designee found irreparable harm in the County's refusal to negotiate such compensation during the pendency of interest arbitration proceedings in repudiation of the contract and in apparent violation of N.J.S.A. 34:13A-21. The designee ordered the County and the Sheriff to negotiate in good faith with the FOP concerning compensation for the creation of the new 10 p.m. to 8 a.m. shift for Sheriff officers, but otherwise denied the application for interim relief.

The County does not dispute that its decision was motivated in part by a desire to avoid overtime costs; I note that since the County plans to call in officers from primary or secondary or overtime lists to provide services as needed on weekends/holidays, it does not appear to have truly discontinued weekend/holiday operations.

The FOP relies upon Borough of Ramsey, I.R. No. 93-8, 19 NJPER 282 (¶24144 1992) and Borough of Bogota, I.R. No. 98-23, 24 NJPER 237 (¶29112 1998) as examples of instances in which interim relief was granted for an alleged schedule change made just prior to or during negotiations or interest arbitration proceedings. In both of those cases, interim relief was granted because the employer's goal of reducing overtime was not disputed. In

Ramsey, the employer asserted a managerial prerogative based upon case law, but the Commission Designee found no substantial dispute of fact since the employer acknowledged that the goal of the change was in part the reduction of overtime. In Bogota, the parties' collective agreement specified work schedules for patrolmen and provided that detectives' work schedules would not be changed except in case of emergency declared by the Chief of Police. There was no factual dispute that the change was made to avoid overtime costs. The Commission Designee found that since no emergency was declared, the detectives' schedule change was in apparent repudiation of the parties' agreement.

Here, from an examination of the previous interim relief decision involving these parties, interpreting identical contract language, it appears that the parties' agreement permits the schedule change and the establishment of the new 6:00 a.m. - 2:00 p.m. shift. The County, however, may be required to negotiate compensation for that shift.

I find that the FOP has failed to establish a substantial likelihood of success on the merits of its application because of the material dispute over whether the parties' contract authorized the schedule and shift changes. If the parties' agreement authorized the change, the County had no obligation to negotiate before changing the schedule. Interim relief is not the forum to resolve the meaning of the contract. See e.g.,

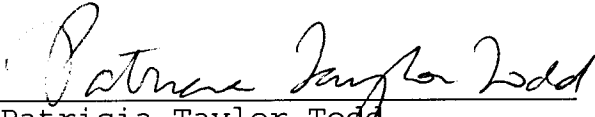
State of New Jersey (Dept. of Human Services), P.E.R.C. No.

84-148, 10 NJPER 419 (¶15191 1984).

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

ORDER

The application for interim relief is denied. This matter shall be returned to the Director of Unfair Practices for further processing.


Patricia Taylor Todd
Commission Designee

DATED: July 2, 2009
Trenton, New Jersey