

I.R. NO. 2011-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY,

Respondent,

-and-

Docket No. CO-2010-508

MONMOUTH COUNTY CORRECTIONS
PBA LOCAL 240,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief restraining the County from unilaterally implementing a limit on the amount of overtime compensation corrections officers can earn annually. The cap on required overtime would have been instituted during negotiations for a successor agreement and would have irreparably harmed the employees and collective negotiations process.

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Appearances:

For the Respondent
Steven W. Kleinman, Esq.

For the Charging Party
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
(Robert A. Fagella, of counsel)

INTERLOCUTORY DECISION

On June 24, 2010, the Monmouth County Corrections PBA Local 240 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that Monmouth County and Warden William Fraser (County) violated 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations

^{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. (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
(continued...)

Act (Act), N.J.S.A. 34:13A-1 et seq. when it announced that corrections officers could only earn 650 hours of overtime compensation per year retroactive to January 1, 2010. The charge alleges that in the past, an individual officer could work an uncapped amount of overtime, annually.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the imposition of the 650 hour cap until the issue is negotiated. The parties are negotiating a successor agreement and have initiated compulsory interest arbitration. An Order to Show Cause was executed on June 30, 2010, scheduling a return date for August 6, 2010. The parties submitted briefs, certifications and argued orally on the return date.

The PBA contends that the County has violated the Act by announcing that it will unilaterally cap the amount of overtime an individual can earn per year. Historically, there has been no limit on the amount of overtime an individual officer is allowed to earn. This change, the PBA argues, would modify an existing mandatorily negotiable term and condition of employment and repudiate provisions of the parties' contract.

1/ (...continued)
refusing to process grievances presented by the majority representative."

The County maintains that it has a managerial prerogative to institute the annual 650 hours per officer overtime cap and also relies on a broad management rights clause in the parties' contract for authorization to make such a change. The County argues that the working of excessive overtime raises health and safety concerns of correction officers, visitors and inmates, and impacts productivity and the efficient operation of the jail.

The following facts appear:

The County runs a maximum security correctional facility. It operates 24 hours a day, 365 days per year. The daily operations of the facility are overseen by Warden William Fraser. Security at the jail is provided by about 300 corrections officers. The rank-and-file officers are represented by the PBA.

The County, Sheriff and PBA are parties to a collective negotiations agreement which expired on December 31, 2008. The parties have been negotiating a successor agreement and have filed for interest arbitration.

The parties' expired agreement provides a system for allocating overtime amongst negotiations unit members. Article 13, Section 1(d) of the contract states, "Overtime shall be assigned on a voluntary seniority rotation basis first and, if there are insufficient volunteers to meet manning requirements, it shall be assigned on an involuntary inverse seniority basis. . ." Section 5 of Article 13 goes on to provide that:

A preferred list of volunteers for overtime shall be developed between the Administration of the jail and the PBA specifying the following.

- a. Officers who wish to work beyond their shift; and
- b. Officers who wish to work on their scheduled days off;
- c. The preferred list of volunteers and the forced overtime list shall be administered by the PBA and distributed by the PBA to the scheduling supervisor. On a semi-annual basis, the PBA will administer post-bids and day-off bids on a seniority basis.

In the event volunteers for overtime cannot be secured, then the Warden shall require officers on the shift to be held over until the shift can be filled with qualified personnel. Officers shall be held over in the inverse order of seniority with the officers with the least seniority being first until the shift is rotated through.

The agreement does not limit the amount of overtime an individual officer can work per annum. For example, in 2009, thirty-one corrections officers worked 650 or more hours of overtime. Nine of those officers worked at least 1,000 hours of overtime and three of those officers worked between 1,500 and 1,671 hours of overtime. As of July 13, 2010, ten corrections officers have already worked 500 hours of overtime or more with one officer already having worked 1,288 hours.

The parties' agreement also contains the following management rights clause in Article 4:

Section 1. It is recognized that the Employer has and will continue to retain the rights and responsibilities to direct the affairs of the Monmouth County Correctional Institution in all of its various aspects.

Section 2. Among the rights retained by the Employer are the rights to direct the working forces; to plan, direct and control all operations and services of the jail; to determine the methods, means, organization and personnel by which such operations and services are to be conducted; to contract for and subcontract out services; to relieve employees due to lack of work or for other legitimate reasons; to make and enforce reasonable rules and regulations to change or eliminate existing methods, equipment, or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement and that a grievance may be filed by the Association alleging such conflict.

On unspecified dates, Warden William Fraser asked PBA President Anthony Anderson if the PBA would agree to cap the amount of overtime per year an officer could work. The subject was also discussed by the parties during contract negotiations, but they did not come to an agreement.

By memo dated June 2, 2010, Warden Fraser advised PBA President Anderson that it was his intention to implement a 650 hour overtime cap per officer per year "in order to establish a fair and equitable distribution of overtime." The memo advises that the cap will go into effect on July 1, 2010 and be retroactive to January 1, 2010.

The Warden's overtime cap policy will not reduce the amount of overtime which is required to be worked at the jail. It addresses the allocation of necessary work.

Monmouth County Sheriff's Office, Department of Corrections Rules and Regulations provide in a pertinent part, "A Correction Officer shall be constantly alert while on duty, observing everything that takes place on the post within sight of hearing and shall constantly patrol the post during the tour of duty." (Rule 7.05.080). There have been no incidents thus far at the Monmouth County Correctional facility that have been directly attributable to a fatigued or overworked corrections officer.

The parties were unable to resolve the capping of overtime dispute. However, the County has delayed implementing the overtime cap pending the outcome of this interim relief proceeding.

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).

A) Substantial Likelihood of Success

The PBA argues that it has a substantial likelihood of prevailing in a final Commission decision. It contends that the imposition of a 650 hour cap on overtime repudiates the negotiated procedure for distributing overtime in the parties' contract and modifies the longstanding practice of the ability to earn offered overtime without limit. The County believes that it has a managerial prerogative to cap the amount of overtime an officer can annually earn based upon health and safety concerns and to ensure the efficient operation of the jail. The County also relies on Article 4 of the parties' agreement for the proposition that the Warden has the authority to relieve corrections officers from duty for legitimate reasons such as fatigue.

For the reasons discussed below, I find that the PBA has a substantial likelihood of success in prevailing in a final Commission decision on its legal and factual burdens of proof.

Both parties rely on City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). In that case, the City's Director of Public Safety issued a directive which among other things, restricted the amount of overtime an officer could work per week.

The reasons for the directive were to maintain an optimum level of efficiency of the police force and avoid potential deleterious effects on the health or effectiveness of the few officers who repeatedly volunteer and perform much of the overtime work. In permitting this issue to go to binding arbitration the Commission wrote that "the allocation of overtime is a mandatory subject of negotiations, provided that the employer remains assured that it will be able to obtain enough qualified and physically sound employees to perform the tasks at hand." The Commission also noted that the parties' past practice of first having volunteers work the overtime did not interfere with the City's ability to deliver police services and there were no specific instances cited by the City in which a volunteer was physically unable to perform overtime.

Similarly here, the County has announced that it intends to unilaterally change a mandatorily negotiable term and condition of employment by imposing a 650 hour annual overtime cap. If implemented, it would change the practice of having no limitation on the amount of overtime an individual officer could earn and directly change the negotiated system for allocating overtime set forth in the parties' agreement by not strictly following seniority on the voluntary list and potentially mandating overtime for those officers who do not wish to work it.

Though concern for the health and safety of its employees, visitors and inmates, as well as striving for the most efficient operation of the correctional facility are laudable goals, like the City in City of Long Branch, the County has not provided specific instances demonstrating that the current system of distributing overtime is adversely effecting the efficient operations of the jail. In fact, the Warden has certified that there have been no incidents at the jail which are directly attributable to the fatigue or overwork of corrections officers. (Contrast, City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002), where the Commission restrained binding arbitration of a grievance challenging the unilateral assigning of police officers to an 8 hour shift from a 12 hour shift based in part on unrebutted evidence presented by the City of fatigue, safety and supervision concerns). The absence of incidents may be due to the fact that those who volunteer know that they are fit for duty. Who is to say that a junior officer held over from working his regular shift and compelled to work a double overtime shift will be any fresher or alert than a senior officer who volunteers? The County always retains the right to deny overtime to any officer who is not fit for duty for any reason.

The subject of allocation of required overtime is negotiable. The County does not have a managerial prerogative to unilaterally institute an annual cap on overtime. The parties

are in negotiations for a new agreement. They should avail themselves of the process and resolve this issue in that context.

I find that the PBA has satisfied the first condition of obtaining interim relief.

B) Irreparable Harm

I also find that the PBA has demonstrated the requisite standard of irreparable harm. If the overtime cap is implemented, it will be very difficult to remedy after a final Commission decision. First, it will be hard to determine which employees should have been working the overtime if the voluntary list had been followed with uncapped overtime opportunities. Second, it could result in the County having to pay twice for the same overtime in fashioning a make whole remedy at a later time. The County could not take the overtime pay back from the employee who worked it, but might have to pay the officer who missed overtime opportunities if the change had not been implemented. Third, the change will be instituted in the midst of the parties negotiating for a successor agreement, which includes the interest arbitration process. A change in a term and condition of employment during negotiations irreparably harms the process. See, Franklin Tp., P.E.R.C. No. 2006-103, 32 NJPER 246, 247 (¶102 2006) and Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009). The more prudent course under the circumstances is to restrain the implementation of the overtime cap.

C) Public Interest/Relative Hardship

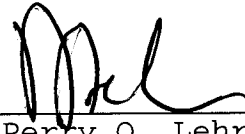
In deciding whether to grant or deny interim relief, I must also consider the public interest and relative hardship to the parties. The County has not cited a single instance where working too much overtime resulted in a problem in the workplace. The announced overtime cap will not reduce the amount of overtime that needs to be worked and there is no evidence that its imposition would result in any meaningful savings to the taxpayers. A cap will prevent officers wanting to continue to work overtime from working it and may require other officers to work overtime who have no interest in doing so. On balance, I find that the hardship to the officers outweighs the hardship to the County.

On the other hand, a unilateral change during contract negotiations harms the process and public interest. The public interest is furthered by requiring the parties to adhere to the Act, which requires 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.

Accordingly, I find that the PBA has met the burden to obtain interim relief.

ORDER

The PBA's request to restrain the County from restricting the number of overtime hours an officer can work annually is granted. The County is ordered to maintain the existing system of distributing required overtime until the Commission orders, an interest arbitrator decides or the parties agree otherwise. The unfair practice charge will be processed in accordance with Commission procedure.



Perry O. Lehrer
Commission Designee

DATED: August 9, 2010
Trenton, New Jersey