

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLE SHADE,

Respondent,

-and-

Docket No. CO-2011-245

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 267,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge alleging that a public employer unilaterally imposed limitations upon the number of unit employees who could be away from work on vacation leave, compensatory time off, and personal holiday leave. The charge also alleges that the employer imposed a notice requirement for unit employees seeking to be away from work on those leaves; and imposed changes in union delegate leave and sick leave. The alleged changes occurred during negotiations for a successor collective negotiations agreement.

The Designee granted the application on all alleged unilateral changes except the change concerning union/delegate leave, which may be preempted by State statute (and the specific provision has not been interpreted by the Commission). The Designee determined that the moving party had demonstrated the requisite standard for granting relief.

I.R. NO. 2011-33

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Appearances:

For the Respondent
Capehart Scatchard, attorneys
(Laurel B. Peltzman, of counsel)

For the Charging Party
Mets Schiro & McGovern, LLP
(Brian J. Manetta, of counsel)

INTERLOCUTORY DECISION

On December 24, 2010, Policemen's Benevolent Association, Local 267 (PBA) filed an unfair practice charge against the Township of Maple Shade (Township), together with an application for interim relief, a proposed Order to Show Cause, exhibits, a certification and brief. The charge alleges that on or about October 20, 2010, the Township, specifically Police Chief Gary Gubbei, issued a memorandum unilaterally imposing limitations on ". . . how and when certain leaves will be scheduled and granted." The charge alleges that the memo, ". . . permits only one officer to be out on vacation or personal holiday leave;

restricts the usage of compensatory time [off]; union/delegate leave; sick leave; and imposes a notice requirement for personal holidays, vacations and compensatory leave." The charge alleges that before the memo issued, ". . . officers were permitted to take leave provided that minimum staffing levels were met." The Township's conduct, occurring while the parties are engaged in negotiations for a successor agreement, allegedly violates 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The application seeks an Order enjoining the Township from unilaterally changing terms and conditions of employment during negotiations.

On January 6, 2011, I issued an Order to Show Cause, specifying February 3, 2011 as the return date for argument in a telephone conference call. I also directed the Township to file a response by January 27, 2010, together with proof of service upon the PBA. On the return date, the parties argued their cases. The following facts appear.

^{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 refusing to process grievances presented by the majority representative."

The parties signed a collective negotiations agreement extending from January 1, 2006 through June 30, 2010. Chapter 2, Article 5 (Vacation) of the agreement provides in a pertinent part:

A. The annual vacation shall be granted strictly according to the following schedule:

1. Between January 1 and March 31 inclusive of each year, vacations for said calendar year shall be granted upon request without priority of dates according to rank and then seniority within the unit. The Chief of Police or his designee shall notify the employee of approval or disapproval of said request by April 15 of each year.

2. On or after April 1 of each year, vacations for said calendar year shall be granted upon request with priority of dates conditioned on the order in which said requests are received. The Chief of Police or his designee shall notify the employee of approval or disapproval within ten (10) working days of said request.

B. The number of employees, who may be on vacation at the same time, whether scheduled pursuant to Sub-Sections 1 or 2 of Section A., shall be determined by the Chief of Police. However, such requests shall not be unreasonably denied.

Chapter 2, Article 8 (Sick Leave) provides an allotment of sick days per calendar year and circumstances for accrual; a definition of "immediate family;" a limitation on the number of payable sick leave hours in any 24 hour period; a notice requirement ("Sick leave will be paid only when an employee or a member of his family notifies his supervisor of his absence prior

to his starting time"); and circumstances under which "injury leave" may be taken.

Chapter 2, Article 9 (Overtime) provides in pertinent parts:

A. An employee who is required to work in excess of twelve (12) hours in one day or eighty-four (84) hours in any pay period, shall be paid at the rate of 1 1/2 times the regular rate. The pay week shall be those shifts ending between 12:01 A.M. on Monday to 12:00 Midnight on Sunday. In the event an employee is called in prior to the commencement of his regularly scheduled shift, he shall be paid at an overtime rate for those hours worked.

B. The working of overtime is not voluntary on the part of the employee. However, management has the obligation to be reasonable in the assignment of overtime. It is understood that unexcused failure of an employee to report for assigned overtime shall be deemed a refusal to work and shall constitute insubordination and neglect of duty if such failure is unexcused and adjudicated at hearing.

* * *

F. All accumulated and recorded compensatory time shall remain in force and effect.

G. In lieu of the payment of overtime as provided in Section A, an employee may elect to take the overtime worked in the form of compensatory time on an hour for hour basis. However, no employee shall be permitted to accumulate more than thirty-six (36) hours. All hours over this number shall be paid as overtime. The employee must make the election for compensatory time at the end of the shift in which the time is worked.

The parties began collective negotiations for a new agreement on July 15, 2010. Negotiations are continuing.

Gary Gubbei became Township Chief of Police on May 1, 2010. He observed from officer schedules ". . . multiple instances when the department could not maintain its required minimum staffing due to officer absences, including last-minute absences and due to various new posts that officers had to assume due to new budgetary demands." One shift fell below mandatory minimum staffing at least 79 times between March 2010 and January 1, 2011.

On or about October 13, 2010, Chief Gubbei and a Captain Fletcher met with PBA President Robert Bennet. Gubbei advised that he needed to address staffing issues and intended to distribute a memorandum memorializing ". . . the rules for time off."

On October 20, 2010, Chief Gubbei issued a memorandum to all police personnel advising that ". . . the following rules apply to governing time off for the patrol division." All enumerated rules except numbers 5 and 6 are contested in this application.

They are:

1. Only one officer per shift is entitled to be off vacation or personal holiday regardless if there are other officers that are marked off Sick, PBA, Military, School, Funeral or Personal Priority Day.
2. Comp Time is discretionary time taken at the agency's leisure and may only be taken

when no one else is marked off vacation or personal holiday and when it does NOT create an overtime situation.

Example: If you are pre-approved for comp time for part of a shift and another officer (on the same shift) sick's out or calls in a personal priority day, you may still take the pre-approved comp time without penalty.

Example: If you have a shift with two officers marked off school and military respectively and an officer wants to leave the shift early using comp time, it will be approved as long as no other officers are marked off vacation, personal holiday or comp day and it does not create an overtime situation.

3. Comp Time will be capped at 36 hours in accordance with your collective bargaining agreement and should be used first in lieu of vacation or personal holiday time. Note: Comp time will be used in 1 hour increments not 1/2 hour increments.

4. The only Union/Delegate time that will be approved by this agency at the current time will be in accordance with N.J.S. 11A:6-10, 38:23-2 and 40A:14-177 as supported in current law/case law. Further and in accordance with these laws, you are required to submit to the Chief of Police a Certificate of Attendance as proof that you were present for the entire conference.

7. For the efficiency, effectiveness and practicality of managing personnel on shift work, anyone requesting a vacation day, personal holiday or a comp day should do so at a minimum of 3 days prior to the requested day. If the request is received by the appropriate authority with less than the requisite 3 day time frame, there is no guarantee the time off will be approved.

8. Unscheduled sick time will be monitored for abuse by this agency. Unscheduled sick time costs this agency thousands of dollars a year in overtime and frequently forces this agency to work with minimum staffing levels. If you frequently use unscheduled sick time to supplement these procedures, you are receiving notice now that this practice is not sanctioned by this agency and can lead to disciplinary action being taken against you. Further, after the use of 3 unscheduled consecutive sick days, you must produce a doctor's note indicating that you were seen by a physician for your illness and are clear to return to work. Lastly and at the agency's discretion, after using 5 unscheduled sick days in a calendar year, you can be asked at any time to produce a doctor's note documenting the fact that you were seen by a physician for your illness and are clear to return to work.

Example: Unscheduled sick time: If someone leaves work prior to completing 1/2 of their shift, the employee will be charged a full sick day. If someone leaves work after completing half of their shift but prior to completion of their full shift, the employee will only be charged for half of a sick day. However, if no other employee is marked off and it does not create an overtime situation, the affected employee may request to use comp time in lieu of sick time under these circumstances.

The Chief certifies that rule nos. 1 and 2 ensure that minimum staffing needs are met and that "operational efficiency" is promoted.

Before October 20, 2010, the parties' practice was that one or more officers were allowed a vacation day or personal holiday, regardless of whether other officers were using sick leave,

military leave, PBA leave, school leave, bereavement leave, personal priority time or compensatory time off.

Before October 20, 2010, requests for compensatory time off were granted in instances in which officers on shifts were taking vacation or personal holiday time, provided that minimum staffing levels were not disturbed. For example, on August 20, 2010, a Sergeant Wallace was granted three hours compensatory time off when Patrol Officer Weiss was out on vacation; on June 8, 2010, Wallace was granted three hours compensatory time off when Patrol Officer Thomas was on vacation leave and Patrol Officer Shaw was on school leave; on April 30, 2010, Patrol Officer Pacheco was granted four hours compensatory time off when Patrol Officer Woodland was on vacation leave and Sergeant Hasson was out on a personal holiday; on September 26, 2010 Patrol Officer Buchanan was granted compensatory time off when Patrol Officer Anyzek was on vacation leave and Patrol Officer Davis was on sick leave; on October 2, 2010, Patrol Officer Thomas was granted four hours compensatory time off when Sergeant Wallace was on vacation leave; on September 17 and 18, 2010, Patrol Officer Shaw was granted compensatory time off when Patrol Officer Capate was on vacation leave, etc.

The Township conceded that in instances when two officers took compensatory time off or vacation time off, it mistakenly permitted the shift to fall below "mandatory minimum staffing."

Before October 20, 2010, unit employees were allowed to use compensatory time off in one-half hour increments. Exhibit "L" shows compensatory time accrual for unit employees on November 1, 2010. About 12 of 43 employees accrued compensatory time in one-half hour increments ranging from 1/2 hour to 40 1/2 hours.

Before October 20, 2010, PBA officials and delegates could attend PBA meetings and negotiations sessions "on PBA time." The PBA president certified that in all of his years as a PBA officer, he ". . . has not had to submit a certificate of attendance when [he] attended PBA conventions or meetings."

The Chief certifies that his October 20 directive was not intended to "prohibit" PBA representatives from attending PBA meetings and that since that date, ". . . all officers who indicated that they would like to attend PBA meetings have been permitted to do so."

Before October 20, 2010, the Township did not impose "a notice requirement" upon unit employees wishing to take vacation days off. The Township has asked officers to request vacation days off "in advance."

Before October 20, 2010, officers starting their shifts who became ill and left work were charged one-half sick day leave.

ANALYSIS

A charging party may obtain interim relief in certain cases. 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 public employer has a non-negotiable managerial prerogative to determine staffing levels for police officers and firefighters. Minimum staffing levels are not permissively negotiable. City of Orange Township, P.E.R.C. No. 2011-10, 36 NJPER 310 (¶119 2010). Within the framework of staffing levels however, an employer must negotiate over the granting and scheduling of time off. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-81T3 (3/23/84). For example, the scheduling of vacations, including the amount of vacation time, and procedures for selection is mandatorily negotiable. Town of West New York, P.E.R.C. No. 89-

131, 15 NJPER 413 (¶20169 1989); Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009).

The Township has acknowledged a minimum staffing level of four officers and has filed documents demonstrating that on one shift, minimum staffing fell below four officers numerous times. The Chief's remedy -- a unilaterally imposed, categorical limitation of one officer per shift on either vacation leave or personal holiday -- oversteps a prerogative ". . . to deny leave requests if granting them would prevent [the Township] from deploying the specific number of police officers required for a particular shift." Town of Secaucus, I.R. No. 2000-6, 26 NJPER 83, 85 (¶31032 1999); Teaneck Tp., P.E.R.C. No. 89-12, 14 NJPER 535 (¶19228 1988); Bor. of Bradley Beach, P.E.R.C. No. 90-60, 16 NJPER 43 (¶21020 1989) (grievance arbitrable to the extent it alleged that denials of vacation requests were unreasonable given staffing levels).

I do not believe that Chapter 2, Article 5 of the agreement provides the Chief unfettered discretion to determine how many unit employees may be away on vacation. The provision also prohibits "unreasonable" denials of vacation requests.

The allocation and scheduling of compensatory time off is in general, mandatorily negotiable. Bergen Cty. Prosecutor, P.E.R.C. No. 96-81, 22 NJPER 237 (¶27123 1996); Essex Cty., P.E.R.C. No. 88-123, 14 NJPER 403 (¶19159 1988). A public

employer has a managerial prerogative to deny a compensatory leave request if granting it would prevent it from obtaining its minimum staffing requirement for any particular shift. In this case, the Township has apparently and unilaterally limited compensatory time off to instances when ". . . no one else is marked off vacation or personal holiday and when it does not create an overtime situation." The Chief's directive, like the one limiting vacation leave, oversteps the Township's prerogative.

I also note that a unilateral imposition of a 3-day notice requirement for requesting vacation leave, personal holiday leave or compensatory time off is procedural and consequently, mandatorily negotiable. West New York; Edison. Also, the October 20, 2010 directive limiting compensatory time off to ". . . one hour increments not one-half hour increments" apparently changes the parties' practice of logging compensatory time off for unit employees in one-half hour increments (and implicitly, allowing employees to use that time in one-half hour increments). The Township relies upon Chapter 2, Article 9G, which allows employees ". . . to take the overtime worked in form of compensatory time on an hour for hour basis." This provision may refer to a formula for conversion that does not preclude an accounting of one-half hour increments. I cannot conclude that the parties' practice conflicts with the contract provision.

For the reasons described above, I find that the PBA has a substantial likelihood of succeeding in a final Commission decision on allegations that rule nos. 1, 2, 7 and the "note" in no. 3 of the Chief's October 20, 2010 directive unilaterally changes terms and conditions of employment in violation of 5.4a(5) and (1) of the Act.

Convention leave and other paid leave absences and release time for representational purposes are mandatorily negotiable. Town of Kearny, P.E.R.C. No. 2002-77, 28 NJPER 264 (¶33101 2002); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). The Township Chief's October 20 directive in no. 4 merely reiterates his adherence to N.J.S.A. 11A:6-10 and 40A:14-177. Both statutes provide in a pertinent part: "A certificate of attendance at the convention [to the State convention] shall upon request, be submitted by the representative so attending." In the absence of Commission decisions interpreting these provisions, I cannot conclude that the PBA has a substantial likelihood of succeeding on the merits of its allegation that the required submission of certificates of attendance unlawfully changes a term and condition of employment. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 44 (1982); Bernardsville Bor., I.R. No. 2006-15, 32 NJPER 60 (¶31 2006). See also, New Jersey Law Enf. Supv. Ass'n. v. State of N.J.,

(App. Div. Dkt. No. A-2839-08T1) (6/21/10), 36 NJPER 271 (¶102 2010).

The Chief's October 20, 2010 directive at no. 8 cautions against unscheduled sick leave and advises of a requirement to produce a doctor's note following certain sick leaves. The Commission has held that sick leave verification, including a requirement of a physician's note is a prerogative. City of Camden, P.E.R.C. No. 89-4, 11 NJPER 504 (¶19212 1988); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). Attendance policy provisions which do not automatically impose discipline are generally lawful. Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984).

The PBA specifically contests the "example" in no. 8, which for the first time charges a unit employee a "full sick day" if he or she completes less than one-half of his or her shift. The "practice" has been that officers who became ill after starting their shifts and left work were charged a one-half sick day. The Chief certifies that rule no. 8, ". . . puts in writing a department procedure that an officer who is present for less than half a shift will be marked as taking a full sick day." No facts permit me to delineate whether the "procedure" is a historical policy or a rephrasing of the example in rule no. 8. I will rely upon the certification setting forth a "practice."

In Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992), the employer implemented an order providing that officers who claim sick leave three or more times during the last two hours of a shift without submitting medical verification will be charged with one-half of a sick leave day for each absence beginning with the third one. The Commission wrote: "In effect the order honors the officers' claims that they were sick, but charges them sick time at a fixed rate regardless of the amount of time taken." Id. at 19 NJPER 19. The Commission declined to restrain arbitration on this portion of the scope petition and held:

An employer has a right to establish a reasonable policy requiring that employees verify their illness and announcing that employees will be denied sick leave benefits for failing to comply with the policy. But an employer does not have an inherent prerogative to establish a sick leave verification policy that charges employees more sick time than they have taken as a penalty for not complying with the policy. [Teaneck at 19 NJPER 19]

In this case, the "example" in rule no. 8 unilaterally sets a term and condition of employment and is distinguishable from the "text" of that rule. The new policy appears to charge an officer more sick time than he or she has taken as a penalty. Such a change may not be implemented unilaterally. Teaneck Tp. I find that the PBA has demonstrated a substantial likelihood of success on this allegation of its charge.

I find that the PBA has demonstrated irreparable harm. The parties are in negotiations for a successor collective negotiations agreement. Any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability. Rutgers, the State University and Rutgers University Coll. Teachers Ass'n., et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981).

The Township argues that it would be harmed by an order requiring it to pay overtime costs, in the event that officers "take leaves of absence at the last minute, causing the department to fall below its mandatory minimum staffing requirement on each shift" (brief at 14). If the Township determines that a vacated post should be covered, it could agree to pay overtime rates to officers of the same rank. City of Newark, P.E.R.C. No. 98-102, 24 NJPER 126 (¶29064 1998); Bound Brook Tp., P.E.R.C. No. 88-30, 13 NJPER 760 (¶18287 1987). It can also deny vacation or compensatory leave requests in order to provide minimum staffing on any particular shift. City of Elizabeth.

The public interest is advanced when the parties adhere to the tenets of the Act, which require collective negotiations before any implementation of changes in terms and conditions of employment. The negotiations process advances labor stability.

ORDER

The Township is restrained from implementing rule nos. 1, 2, 3, 7 and the "example" in rule no. 8 set forth in the Chief's October 20, 2010 directive. This Order shall remain in effect until the charge is resolved by the Commission. The charge shall be processed in the normal course.


Jonathan Roth
Commission Designee

DATED: February 7, 2011
Trenton, New Jersey