

H.E. NO. 2011-10

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and-

Docket No. CO-2010-144

PBA LOCAL 44A,

Charging Party.

SYNOPSIS

A Hearing Examiner denied the Respondent's motion for summary judgment finding that there is a material dispute of fact. Charging Party alleges in its charge that the Township unilaterally changed a longstanding past practice of allocating overtime when a watch commander is absent, namely that the on-duty lieutenant and other lieutenants are given first opportunity for the assignment before it is offered to a sergeant. The Township asserts that the practice is that captains approve overtime and that when it issued a memo on April 29 requiring approval by a captain, it was only reaffirming that practice. The Township explains further that lieutenants were circumventing the practice, and that it was trying to equalize the overtime assignments between lieutenants and sergeants. What, if any, practice exists and whether it was changed, are disputed facts best determined in a full plenary hearing. The Hearing Examiner rejected the Township's reliance on a recent Commission decision in Edison finding that it is distinguishable from the instant matter.

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Appearances:

For the Respondent,  
Genova, Burns and Giantomasi, attorneys  
(Brian Kronick, of counsel)

For the Charging Party,  
(Marc D. Abramson, Labor Relation Consultant)

**HEARING EXAMINER'S DECISION**  
**ON MOTION FOR SUMMARY JUDGMENT**

On October 26, 2009, the PBA Local 44A (Charging Party or PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Township of Maplewood (Respondent or Township) violated 5.4a(1), (2) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act),

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<sup>1/</sup> 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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of

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N.J.S.A. 34:13A et seq. The PBA alleges specifically that on or about May 1, 2009, the Chief of Police instructed his captains to call in a sergeant on overtime to fill in for an absent watch commander and to only call lieutenants when a sergeant is not available. This action, it is alleged, violates the parties' longstanding past practice of calling in lieutenants first on overtime when watch commanders are absent.

On June 17, 2010, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the 5.4a(1) and (5) allegations dismissing the 5.4a(2) alleged violation as not meeting the Commission's complaint issuance standards.

On June 30, 2010, the Township filed its Answer generally denying the allegations in the charge and raising various affirmative defenses. A hearing was scheduled for January 27, 2011, but on January 19, 2011, I received a request from the Township with the consent of the PBA for a stay of the proceedings pending the filing of a motion for summary judgment. On January 24, 2011, the Township filed its motion together with brief and a certification of Police Chief Robert Cimino. After several requests to extend the time to file its opposition papers, on March 31, 2011, the PBA filed its brief and

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1/ (...continued)  
employment of employees in that unit, or refusing to process grievances presented by the majority representative."

certification of Lieutenant Vincent Cuzzo in opposition to the motion for summary judgment. On April 12, 2011, pursuant to N.J.A.C. 19:14-4.8, the Chair referred the Township's motion for summary judgment to me for disposition.

The Township asserts that no term or condition of employment was changed. On April 29, 2009, a memorandum was issued stating that all E-Days (emergency duty days) and holdovers to cover manpower shortages must be approved by a captain. The Township argues that its action in this instance was merely a reaffirmation of a longstanding policy and procedure with respect to overtime approval, namely that captains had to approve overtime. The Township contends that after the change from a 4/3 to a Pitman schedule, lieutenants were ignoring protocol. It asserts, specifically, that when lieutenants became aware of an overtime opportunity on a subsequent shift, they were either holding over themselves on an overtime basis or offering the shift to a fellow lieutenant, thus largely cutting the captains out of the approval process and creating a disproportionate share of overtime opportunities going to lieutenants as opposed to sergeants.

The Township explains that the goal of the April 29 directive was to re-establish the Township's managerial prerogative to allocate and approve overtime opportunities based on need, while establishing a more equitable overtime

distribution system. Relying on Edison Township, P.E.R.C. No. 2010-39, 35 NJPER 442 (¶145 2009)<sup>2/</sup>, the Township contends that in this instance it had a managerial prerogative to approve and allocate overtime.

The PBA concedes that the Township has a managerial prerogative to approve overtime and to determine who is qualified to act as watch commander on an overtime basis. The PBA contends, however, that the Township has determined that both lieutenants and sergeants are equally qualified. It argues that its charge implicates a change in a longstanding past practice, namely the negotiable issue regarding allocation of overtime among qualified candidates, whether sergeants or lieutenants, to fill in for an absent watch commander.

The practice for over 20 years, according to Lieutenant Cuozzo's certification, is that if a watch commander calls in sick for a shift, the watch commander on duty, usually a lieutenant, takes the overtime. If he does not chose to do so, the overtime is then offered to the road supervisor sergeant if available, and, if not, the watch commander calls a qualified employee to fill the overtime. After May 1, 2009, this overtime allocation practice, the PBA argues, was unilaterally changed so

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<sup>2/</sup> This case is cited incorrectly in the Township's brief. There were two related Commission decisions. In Township of Edison, P.E.R.C. 2010-81, 36 NJPER 167 (¶62 2010), the Commission considered and denied a motion to reconsider P.E.R.C. 2010-39.

that the on-duty watch commander who is notified that the next shift watch commander is not coming in must call all sergeants first before either the watch commander or another lieutenant is permitted to take the overtime slot.

The Township asserts in the Chief's certification that the longstanding practice is that overtime will be monitored and assigned by a captain. It denies that the April 29 memo orders or prevents lieutenants from getting overtime.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). Here, there are material facts in dispute regarding whether there is a past practice regarding the allocation of overtime opportunities among qualified candidates, namely sergeants and lieutenants filling in for absent watch commanders. What, if any, past practice exists regarding allocation of overtime opportunities for the watch commander position and whether there was a unilateral change without negotiations is more appropriately determined after a full plenary hearing.<sup>3/</sup>

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3/ It is not necessary to address the Township's argument that the PBA did not object to any new overtime allocation procedure or that it failed to demand to negotiate over perceived changes in overtime. These arguments can be  
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Also, the Township's reliance on Edison to support that it has a managerial prerogative to approve and allocate overtime is misplaced. The case is distinguishable. In Edison, the Commission considered whether a policy permitting the senior sergeant on duty to serve as watch commander rather than call in a lieutenant on overtime violated the parties' collective negotiations agreement. It also considered whether by unilaterally changing the replacement procedure for the post, the Township wrongfully eliminated overtime opportunities for lieutenants. The Commission granted a partial restraint of arbitration holding that the Township had a managerial prerogative to determine the rank qualifications for the watch commander position, but permitted the PBA to pursue its claim that the City should first use lieutenants on overtime to fill vacant watch commander positions.

Here, there is no question that the Township has a prerogative to use sergeants as well as lieutenants to fill in for an absent watch commander; it has determined that both are qualified to fill the watch commander position. That is not being challenged by the PBA. Also, unlike Edison, there is no question raised as to whether the Township can use an on-duty sergeant rather than a lieutenant on overtime to fill in for the

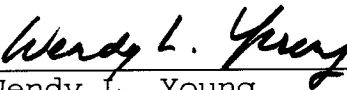
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3/ (...continued)  
considered at the plenary hearing in this matter.

watch commander. The issue as presented in the charge before me is whether the Township unilaterally changed a longstanding practice of offering the watch commander overtime opportunity first to lieutenants and then to sergeants. The practice implicates a negotiable term and condition of employment, namely allocation of overtime among qualified candidates. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Accordingly, the Township is not entitled to relief as a matter of law.

ORDER

The Township's motion for summary judgment is denied.

  
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Wendy L. Young  
Hearing Examiner

DATED: May 9, 2011  
Trenton, NJ

For Summary Judgement

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by May 23, 2011.