

I.R. NO. 2011-45

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ELMWOOD PARK,

Respondent,

-and-

Docket No. CO-2011-330

PBA LOCAL 185,

Charging Party.

SYNOPSIS

PBA Local 185 filed an unfair practice charge, accompanied by an application for interim relief, with the Public Employment Relations Commission, alleging that the Borough of Elmwood Park violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally altered procedures for implementing discipline by violating a Department Policy and Procedure and past practice regarding the use of the Borough's GPS Tracking System. The Borough denies that it violated the Act or past practice or that it altered the application of the Department Policy and Procedure concerning the GPS Tracking System.

The PBA asserts that the GPS Procedure provides that the main purpose of the system was to enhance dispatch capabilities and officer safety. The PBA notes that the Procedure allows GPS records to be utilized as part of an established internal affairs investigation but also provides that the GPS Tracking System should not be accessed in order to attempt to establish disciplinary action in the first instance. The PBA contends that the Borough is now changing how the GPS devices are utilized in the context of disciplinary procedures and that the system will now be utilized to initially establish disciplinary charges. The PBA demanded to negotiate this alleged change in procedures for the use of GPS devices in the discipline process. The PBA argues that the use of surveillance devices is generally mandatorily negotiable. Inasmuch as the PBA asserts that these actions constitute a unilateral change in existing terms and conditions of employment and a violation of past practice, the PBA contends that it has established a substantial likelihood of success on the merits of its case.

The PBA further argues that absent interim relief, it will suffer irreparable harm; that once the Borough utilizes the GPS records in the disciplinary process, it will "impose substantial new burdens" on employees, the results of which cannot be retroactively remedied at the conclusion of a plenary proceeding. Accordingly, the PBA argues that it has met its burden for procuring interim relief.

The Borough contends that it utilizes the GPS Tracking System to regulate, direct and deploy its workforce and that in that regard, this application is a managerial prerogative. Further, the Borough denies having changed GPS utilization in the disciplinary process.

The Borough further contends that if it is subsequently determined that its actions were improper and resulted in discipline or other negative consequences, those actions could be reversed with an appropriate remedial order. Accordingly, the Borough argues that the substantial likelihood of success and irreparable harm elements for interim relief have not been met.

The Commission Designee noted that the Commission has not previously addressed the negotiability issues raised in this matter. Further, the Commission Designee determined that various pertinent facts in this record -- regarding whether there was an alteration of how the GPS Tracking System has been utilized in relation to the disciplinary process -- are in conflict. Thus, the Commission Designee concluded that, given the abbreviated record of an interim relief proceeding, and given that the Commission has not addressed the negotiability issues raised herein, and that there are conflicting pertinent facts -- taken together, these factors create a circumstance which prevents finding that the Charging Party has established a substantial likelihood of success on the merits of the case.

Accordingly, as one of the requirements for securing interim relief -- a substantial likelihood of success on the merits of the case in a plenary proceeding -- has not been met, the application for interim relief was denied.

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Appearances:

For the Respondent
Giblin & Giblin, attorneys
(Brian P. Giblin, of counsel)

For the Charging Party
Loccke, Correia, Linsky & Bukosky, attorneys
(Lauren P. Sandy, of counsel)

INTERLOCUTORY DECISION

On February 23, 2011, PBA Local 185 (Charging Party or PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Elmwood Park (Respondent or Borough) violated subsections 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey

^{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

(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. More specifically, Charging Party contends that the Borough violated the Act when it unilaterally altered procedures for implementing discipline by violating a Police Department Policy and Procedure and past practice of the parties regarding the use of the Borough's GPS Tracking System. The Borough denies that it violated the Act or past practice or that it altered the application of the Departmental Policy and Procedure concerning the GPS Tracking System.

The charge was accompanied by an application for interim relief. An Order to Show Cause was executed on March 9, 2011, scheduling a return date for a hearing on the Order to Show Cause for March 31, 2011. The parties submitted briefs, certifications and exhibits^{2/} and argued orally on the hearing date.

1/ (...continued)
exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ Commission Exhibits C1-C7.

* * *

In its charge, the PBA contends that the Borough notified the PBA that it intends to alter terms and conditions of employment concerning the procedures governing the department's use of the Global Positioning Tracking System (GPS) devices on patrol cars, including using the GPS for instituting disciplinary actions. The PBA asserts that the Borough's GPS Policy provides that the main purpose of the system is to enhance dispatch capabilities and officer safety. The PBA further notes the Policy provides that GPS records may be utilized as part of an established internal affairs investigation but should not be accessed in order to attempt to establish a disciplinary action in the first instance. The PBA contends there is a past practice which provides that GPS devices are only to be used after a disciplinary charge has been issued, in conjunction with an internal affairs investigation. The PBA argues that the Borough is changing how the GPS devices are utilized in the context of disciplinary procedures, wherein the Borough will now access the GPS system to initially establish disciplinary charges. The PBA contends the Borough has now begun to review all GPS tapes of all marked patrol cars for the purpose of implementing discipline against officers. The PBA also argues that the use of surveillance devices generally, is a mandatory subject of negotiations. The PBA further asserts that it demanded to

negotiate concerning this unilateral change in the procedures for use of the GPS devices in the discipline process; the PBA received no response to its demand. The PBA argues that these actions constitute a unilateral change in existing terms and conditions of employment and a violation of the parties' past practice. The PBA contends that it has thus established a substantial likelihood of success on the merits of its unfair practice claim.

The PBA further asserts that absent interim relief, it will suffer irreparable harm. The PBA contends that once the Borough accesses and utilizes the GPS records in the disciplinary process, it will "impose substantial new burdens" on employees, the results of which cannot later be undone. Charging Party cites several cases in support of this argument, including New Jersey Transit, I.R. No. 2006-7, 31 NJPER 313 (¶122 2005), in which a Commission Designee restrained New Jersey Transit from changing disciplinary review procedures concerning minor discipline of New Jersey Transit Police. In that matter, the Designee concluded that employees required to proceed with their disciplinary matters through the altered disciplinary procedure may suffer consequences which cannot be retroactively remedied at the conclusion of a plenary proceeding.

In its response in this matter, the Borough contends that utilization of the GPS system is a managerial prerogative. The

Borough asserts that it utilizes GPS information to regulate, direct and deploy its workforce in an efficient manner. Further, the Borough denies that it has changed GPS utilization in the disciplinary process; and it denies that it is utilizing GPS information as a basis for instituting disciplinary action in the first instance. Accordingly, the Borough contends that the Charging Party has not established a substantial likelihood of success on the merits of the charge. The Borough further argues that Charging Party has not established that irreparable harm will result without an interim relief order. The Borough contends that if it is subsequently determined that its actions in this matter were improper and resulted in discipline or other negative employment consequences to employees, those consequences could be reversed by an appropriate remedial order.

* * *

The following facts appear.

PBA Local 185 is the statutory majority representative of a unit comprised of all police officers employed by the Borough of Elmwood Park. The Borough and the PBA are parties to a series of collective negotiations agreements covering the above-referenced unit. Article II of the parties' agreement, Retention of Benefits, states:

Except as otherwise provided . . . all rights, privileges and benefits which all employees have . . . shall be maintained . . . by the Borough during

the term of this Agreement.

All marked patrol cars are equipped with GPS tracking devices. Unmarked police cars used by detectives are not equipped with GPS devices. The GPS system shows the real-time positioning of patrol cars and makes a taped record of that data. Generally, access to that information is only available with the Chief's approval. The GPS tracking system has been in operation for at least four years, since (approximately) 2006-2007. (Ingrasselino Certification, paragraph 2).

In December 2009, the Chief of Police promulgated the Borough of Elmwood Park Police Department Global Positioning System Policy and Procedures (GPS Procedure or Procedure). The Procedure provides that its purpose is to regulate the use of the GPS tracking system and to ensure that it is not utilized in a selective or punitive manner. The Procedure states that the system is there to enhance officers' safety, to analyze and to improve patrol models, and to serve as an additional tool for training officers. The GPS Policy and Procedure further states:

All employees should be aware that the GPS tracking system is in place in marked patrol vehicles for the express purpose of tracking and documenting vehicular movement. . . .

Shift supervisors and platoon commanders may and should utilize the system on a regular basis to analyze the work product of the officers under their command. The information gleaned from the reports should be shared with the various officers in a

training environment in order to effect improvement in the patrol functions and techniques utilized by the officers. . . .

Utilization of GPS tracking records for disciplinary action will be limited in scope. Said records may be utilized as part of an established internal investigation. . . .

Should a minor infraction be uncovered during the normal course of utilizing the system, the supervising officer should address the breach in an appropriate manner; emphasis should be placed on improvement and training of officers.

Whenever a credible complaint is received . . . the GPS tracking system may be accessed by the I. A. Investigator for the sole purpose of the investigation.

To this end, Internal Affairs Investigators may utilize the GPS system as part of an official investigation when such has been expressly approved by the Chief of Police. . . .

GPS records should never be accessed in order to attempt to establish a disciplinary action.

Thus, patrol officers were put on notice that superior officers will utilize the GPS System to detect deficient patrol techniques, mistakes or minor infractions and then will counsel officers as appropriate. Further, the GPS Procedure indicates that the system will be utilized in conjunction with certain circumstances implicating discipline. The GPS tracking system has been in effect and has been utilized for several years. The GPS Policy and Procedure was drafted in 2009 and was then discussed with PBA representatives. Elmwood Park police officers

and the PBA have been aware of the GPS and how it has been utilized. In the past -- prior to the incidents which gave rise to the filing of this charge -- the GPS has been utilized in various disciplinary matters (Ingrasselino Certification, paragraphs 2, 8).

In this matter, "an investigation arose due to other factors that led to an official Internal Affairs investigation being promulgated at my (the Chief's) direction to further the investigative process as specified in the policy/procedure. The scope of the investigation was increased as necessary as additional wrongdoing was uncovered." (Ingrasselino Certification, paragraph 5).

After an "exhaustive" investigation was conducted concerning the initial officer whose conduct the Borough determined to be problematic, the Chief instructed investigators to expand the investigation, including utilizing the GPS to determine the extent of the problematic conduct. This further investigation indicated that one other officer had engaged in similar problematic conduct during the same period of time. (Ingrasselino Certification, paragraph 6).

The information that was uncovered with regard to first one officer and then a second officer indicated misconduct of such a serious nature that to have ignored and not acted upon such information would have constituted a neglect of duty. The

conduct in question left areas of the Borough unpatrolled and unprotected for long periods of time; the officers were off their assigned posts, were not performing their patrol functions, and were not then available for back-up calls. ". . . [A]nd in at least one case, a burglary occurred while an officer was not patrolling his sector as assigned." (Ingrasselino Certification, paragraph 7). The Chief concluded that these actions ". . . left other officers and the public in jeopardy of their safety." (Ingrasselino Certification, paragraph 7).

* * *

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 (1983); 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).

The obligation to negotiate derives from N.J.S.A. 34:13A-5.3 which provides to majority representatives the right to negotiate

on behalf of unit employees concerning terms and conditions of employment. It also provides that proposed new rules or modifications of existing rules governing working conditions must be negotiated with the majority representative before they are established. Thus, the Act prohibits employers from establishing new working conditions or changing existing working conditions without prior negotiations.

Rules governing working conditions may be established through the parties' contract or past practice. Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997). Whether an employer has an obligation to negotiate concerning certain terms and conditions of employment depends upon whether the term and condition at issue is mandatorily negotiable. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). Whether or not a subject is mandatorily negotiable is determined by balancing the impact on employees' work and welfare against any interference with the determination of governmental policy. Under the Supreme Court's negotiability balancing test, a subject is mandatorily negotiable if it intimately and directly affects employee work and welfare; is not preempted by statute or regulation; and if an agreement over the subject would not significantly interfere with the determination of governmental policy. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J.

78 (1981). Where interference is significant, the subject is not mandatorily negotiable.

One of the issues in dispute in this matter -- whether or not the employer's use of a Global Positioning Tracking System (GPS) relative to employee disciplinary procedures is mandatorily negotiable -- has not been previously addressed by the Commission. The Commission has addressed the installation and utilization of various devices and systems which may affect employee working conditions such as, for example, time clocks and video surveillance cameras. The cases in which the Commission has addressed issues most analogous to those raised in this matter are two cases involving the installation and utilization of video camera surveillance systems.

In City of Paterson, P.E.R.C. No. 2007-62, 33 NJPER 143 (¶50 2007) (Paterson I), the City installed overt video cameras in its public safety complex for the primary purpose of enhancing security -- protecting employees, the public and public property -- although the City acknowledged that if employee misconduct was recorded, it would not be ignored. No impact negotiations were requested by the majority representative. The Commission held that in these circumstances, the installation of overt video cameras in non-private areas of the workplace (entrance areas and corridor areas accessible to the public) was not mandatorily negotiable and, therefore, the City's refusal to negotiate same

did not breach the duty to negotiate under subsection 5.4a(5) of the Act.

In City of Paterson, P.E.R.C. No. 2011-5, 36 NJPER 300 (¶114 2010) (Paterson II), the City installed video cameras in the Public Safety Complex Radio Room without prior negotiations with the majority representative. The Radio Room was a work area in the Public Safety Complex which was not accessible to the public and had generally restricted access. In that matter, the Commission held that placing restrictions on the employer's ability to install surveillance cameras would significantly interfere with the determination of governmental policy -- to monitor and supervise its workforce to ensure that employees do not fight or sleep in the Public Safety Complex Radio Room, where 911 calls are received and police and fire services are dispatched.

In Niagara Frontier Transit Metro Systems, Inc., 36 NYPER 3108 (¶3036 2003), aff'g 36 NYPER 4639 (¶4538 2003), the Board determined that the Transit Authority violated its negotiations obligation under the New York Public Employees' Fair Employment Act when it refused to negotiate concerning the union's demand to negotiate the impact of the Authority's decision to use video footage from bus surveillance cameras in disciplinary proceedings. The Transit Authority had never before used bus video camera footage in disciplinary proceedings. The Authority

refused to negotiate concerning the use of the video footage, contending it was not mandatorily negotiable. In Nortech Waste and Operating Engineers Local Union No. 3, 336 NLRB 554 (2001), an Administrative Law Judge determined that the employer's refusal to negotiate concerning the use of surveillance cameras and the impact of that use on working conditions was a violation of Section 8a(5) of the NLRA. Finally, in St. Barnabas Medical Center, 1999 NLRB Lexis 582 (1999), the employer installed a new communication system for nurses which was comprised, in part, of transmitter badges worn by each nurse. The badges enabled a monitor system to track the real-time movements of the nurses while they were in their work unit. The tracking data from the system had been utilized in two circumstances to exonerate nurses from patient complaints. There, the Administrative Law Judge determined that the critical factor in this matter was that the tracking capability of the system could affect or could be used to (adversely) affect employment matters. Accordingly, the Administrative Law Judge concluded that the unilateral implementation and use of the nurse tracking/communication system was mandatorily negotiable and the employer's failure to negotiate concerning same violated Sections 8(a)(1) and (5) of the NLRA.

In response to Charging Party's contention that the Borough violated the Act when it unilaterally changed an existing term

and condition of employment -- by changing the utilization of the GPS Tracking System in the disciplinary process -- the Borough asserts (1) that its use of the GPS Tracking System here falls within its managerial prerogative to deploy, regulate and supervise its workforce; and (2) that in the circumstances of this matter, it did not alter how the GPS Tracking System has been used under the GPS Policy & Procedure, relative to the disciplinary process.

The issue here is not the installation of the GPS Tracking system but whether its use by the Borough has been changed and thus has impacted the parties' disciplinary procedures.

There is no assertion of preemption here. Procedures for discipline intimately and directly affect employees' work and welfare. The critical element of this analysis turns upon whether negotiations and agreement over this subject (the alleged changed use of the GPS Tracking System) would significantly interfere with the determination of governmental policy.

The facts in this record concerning this element conflict. Charging Party contends the Borough is utilizing the GPS Tracking System to establish disciplinary charges in the first instance, contrary to the GPS Procedure and the parties' past practice. The Borough denies that it has violated the GPS Policy and Procedure or past practice in this matter. It denies conducting random GPS searches. The Borough notes that an Internal Affairs

investigation was undertaken concerning one officer based upon "other" (non-GPS) factors. Pursuant to the GPS Procedure, the GPS System was utilized in that Internal Affairs investigation. That led to information concerning misconduct which the Chief determined required further investigation (including use of the GPS Tracking System) to determine the extent of any such similar problematic conduct.

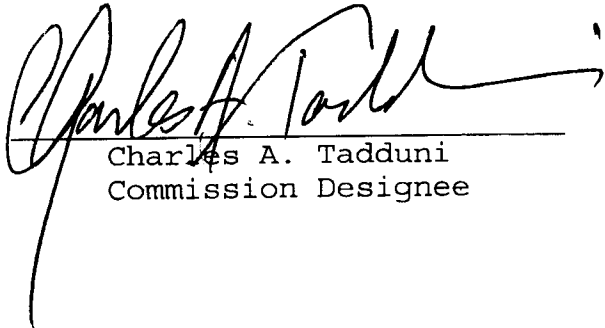
Given that the Commission has not addressed the negotiability issues implicated by this matter, and given the abbreviated record in an interim relief proceeding, it appears that the interim relief process may not be the most appropriate forum in which to address such negotiability policy issues as are raised herein. Various pertinent facts in this abbreviated record are in conflict and thus, would indicate that a decision on such issues should be reserved to the Commission at the conclusion of a plenary proceeding. Further, the conflicting pertinent facts herein -- regarding whether there was an alteration of how the GPS Tracking System has been utilized in the context of the disciplinary process -- create a circumstance which prevents finding, based upon this record, that Charging Party has established a substantial likelihood of success on the merits of the case.

Having considered all of the facts and arguments presented in this matter, I conclude that one of the requirements for

securing interim relief -- a substantial likelihood of success on the merits of the case in a plenary proceeding - - has not been met.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.



Charles A. Tadduni
Commission Designee

DATED: June 3, 2011
Trenton, New Jersey