I.R. NO. 2013-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY,

Respondent,

-and- Docket No. CO-2013-138

POLICE BENEVOLENT ASSOCIATION
LOCAL 199,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and the parties' collective negotiations agreements when it unilaterally added two new shifts while a representation election was underway.

The Designee found that the Respondent had an operational need to add the additional shifts to enhance the safety and security of the officers and inmates in the corrections facility.

The Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and denied interim relief.

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Appearances:

For the Respondent, Bauch Zucker Hatfield, attorneys (Kathryn Van Deusen Hatfield, of counsel)

For the Charging Party, Mets Schiro and McGovern, LLP attorneys (James M. Mets, of counsel and on the brief; Peter B. Paris, on the brief)

INTERLOCUTORY DECISION

On November 30, 2012, the Police Benevolent Association Local 199("PBA") filed an unfair practice charge against the Union County Department of Corrections ("County"), which was accompanied by an application for interim relief, a certification from Joe Krech, President of PBA Local 199, a brief and an exhibit. The charge alleges that the County violated the parties collective negotiations agreement ("CNA") when it unilaterally created two new shifts in mid-November of 2012 in addition to the three work shifts that had been in place for at least two

decades.[1/] The PBA asserts that the County's conduct allegedly violates 5.4a(1) and (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The application seeks an Order requiring the County to return to the status quo ante. The County responds that it had an operational need to add the additional shifts to enhance the safety and security of the officers and inmates in the corrections facility.

On December 4, an Order to Show Cause was issued. The County filed an opposition brief, a certification from Brian Riordan, Director of the County's Department of Corrections and exhibits. The parties presented oral argument via telephone conference call on December 18.

FINDINGS OF FACT

The parties' CNA has a term from January 1, 2010 through December 31, 2012 and includes the following relevant shift language in Article 7, Section 3:

1/ The negotiations between the parties for a successor contract was stayed and/or did not occur, based on a representation election that ultimately took place on November 29, 2012, in which the PBA was confirmed as the majority representative.

2/ 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."

> Effective January 1, 1997, the starting time will include a ten minute line-up before the shift and a ten-minute line up after the shift paid at straight time wages. Shifts shall commence as follows 7:50 a.m. to 3:50 p.m.; 3:50 p.m. to 11:50 p.m.; 11:50 p.m. to 7:50 a.m. starting times inclusive of muster (lineup) are as follows: 7:40 a.m. to 4:00 p.m.; 3:40 p.m. to 12:00 Midnight; 11:40 p.m. to 8:00 a.m.

The correction officers annually bid for their shift, post, days off and vacation schedules starting the third full week of November in what is known as the "pick process." The new schedules take effect the second Monday in January of the following year. The County unilaterally implemented two new tours: a 6:00 a.m. to 2:00 p.m. and one from 2:00 p.m. to 10:00 p.m. ("New Shifts"). Before the pick process, Director Riordan met with two corrections captains and a lieutenant who advised him that there were staffing deficiencies particularly on the midnight shift (11:40 p.m. to 8:00 a.m. including the lineup) and the afternoon shift (3:40 p.m. to 12:00 midnight including the lineup). The New Shifts overlapped periods of inmate movement. The inmates are locked down by 10:00 p.m. and begin movement at 7:00 a.m. Based on the original three schedules, inmate breakfast could not take place until after 8:00 a.m. and this interfered with the movement of inmates to court and other activities which usually begin at 9:00 a.m.

The number of posts was not decreased with the addition of the New Shifts.[3/] Director Riordan spoke to PBA President Krech about the addition of the New Shifts; President Krech did not agree with the addition of the New Shifts. Director Riordan certifies that he also spoke to PBA Delegate Ken Burkert and stated that if he (Burkert) could show how the addition of the New Shifts would not enhance the safety and security of the inmates, then he (Riordan) would immediately withdraw the New Shifts. Director Riordan certifies that he never received any response from Delegate Burkert.

CONCLUSIONS OF LAW

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[4/] 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); Burlington Cty., P.E.R.C. No. 2010-

3/ The Riordan certification states that the overtime procedures have not changed and the addition of the New Shifts will not have any economic benefit for the County.

4/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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). In Little Egg Harbor Tp., the designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The issue in this matter is whether the County was required to negotiate with the PBA regarding the implementation of the two New Shifts. Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly

> interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [88 N.J. at 404-405]

The scope of negotiations for firefighters and law enforcement officers is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for firefighters and law enforcement officers:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the

> exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

As set forth above, the Court set the test for law enforcement agencies to determine whether certain matters, even though generally negotiable, are inappropriate for negotiations in specific factual settings. The Court held that if negotiations over a particular matter, which would include work schedules as in the instant case, would significantly interfere with the determination of a governmental policy, the matter was not negotiable. Paterson. See also Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Education Association, 88 N.J. 582 (1980).

However, work schedules are not automatically excluded from negotiations; each case must be determined individually under the balancing test set forth in Local 195, supra; Teaneck Tp. and FMBA Loc. No. 42, P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in pt., rev'd in pt. and rem'd, 353 N.J. Super. 289, 303 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003).

Where there is no significant interference with management's ability to set policy, work schedules are negotiable. Teaneck, supra; Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 1987); Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd NJPER Supp. 2d 172 (¶152 App. Div. 1987), certif. den. 108 N.J. 198 (1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); Hamburg Boro., I.R. No. 2004-9, 30 NJPER 58 (¶172004); City of Passaic, I.R. 2004-2, 29 NJPER 310 (¶96 203); Bogota Boro., I.R. 98-23, 24 NJPER 237 (¶29112 1998).

Where negotiations over work schedules do interfere with management's policy on staffing levels and supervision, negotiations are not required. See Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982) mot. for recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980).

In the instant case, as set forth above, I find that the County created the two New Shifts because it had an operational need to add the additional shifts to enhance the safety and security of the officers and inmates in the corrections facility. I further find that the County did not make this decision based

on economic considerations. Under these facts, the County had a managerial prerogative to add the New Shifts.[5/]

Based on the above, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.[6/] The application for interim relief must be denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

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.

David N. Gambert
Commission Designee

DATED: January 8, 2013

Trenton, New Jersey

5/ The PBA also argues that the County violated the Act because it unilaterally created the New Shifts while negotiations could not take place based on the representation election and, additionally, that the County violated the Act because it appeared to be passively and/or actively assisting the other union in the representation election proceedings. The County denies these allegations. These are material facts that are in dispute, and as a result, this matter should proceed to a hearing on the merits and is not appropriate for interim relief. It should be noted that the PBA overwhelmingly won the election by a vote of 133 to 33 with two challenges.

6/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.