

H.E. NO. 2014-8

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

In the Matter of

TOWNSHIP OF HANOVER,

Respondent,

-and-

Docket No. CO-2009-284

HANOVER TOWNSHIP PBA LOCAL #128,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a motion for summary judgment filed by the Township of Hanover and denies a cross-motion for summary judgment filed by Hanover Township PBA Local 128. The unfair practice charge upon which the Complaint issued alleged that the Township Police Chief issued an Order unlawfully prohibiting police officers from reporting early for duty following their completion of off-duty assignments, thereby preventing them from receiving compensation from both the scheduled off-duty assignments and from being on-duty. The Township's action allegedly violates 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

In agreement with the Township, the Hearing Examiner determined that the Township exercised a managerial prerogative to determine staffing levels by discontinuing the practice of officers "reporting early" to duty assignments City of Long Branch; P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The Hearing Examiner disagreed with the PBA's arguments set forth in its cross-motion that the dispute concerned the mandatorily negotiable matters of overtime compensation and scheduling. No facts indicated that the Township's conduct was in retaliation for protected conduct; or interfered with any other rights protected by the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2014-8

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

In the Matter of

TOWNSHIP OF HANOVER,

Respondent,

-and-

Docket No. CO-2009-284

HANOVER TOWNSHIP PBA LOCAL #128,

Charging Party.

Appearances:

For the Respondent
Trimboli, Prusinowski, LLC
(Stephen E. Trimboli, of counsel)

For the Charging Party
Klatsky, Sciarrabone & De Fillippo
(David J. De Fillippo, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION AND CROSS-MOTION FOR
SUMMARY JUDGMENT

On February 13, 2009, Hanover Township PBA Local #128 (PBA) filed an unfair practice charge against the Township of Hanover (Township). The charge alleges that on January 26, 2009, Township Police Chief Stephen Gallagher issued a General Order prohibiting police officers from reporting early for duty immediately following their [actual] completion of an off-duty assignment, thereby preventing officers from receiving compensation from both the [scheduled] off-duty assignments, and from being on-duty. The Township's conduct allegedly violates

5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On July 22, 2011, a Complaint and Notice of Hearing issued. On December 1, 2011, the Township filed a motion for summary judgment, together with a certification from Police Chief Stephen Gallagher. On January 19, 2012, the PBA filed a brief opposing the motion, together with a cross-motion for summary judgment. On January 26, 2012, the Township filed a brief opposing the cross-motion.

On October 25, 2011, a Commission Deputy General Counsel wrote to the parties, advising that a draft decision granting the employer's motion for summary judgment ". . . did not obtain a majority vote," (i.e., 2 in favor; 2 opposed) in part owing to a

^{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 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."

requirement that three Commission members recuse themselves from considering and voting on the draft. The consequence, the letter continued, is "an unbreakable tie," and a remand of the case to the Hearing Examiner for "further processing."

On November 5, 2012, this case was reassigned to me. On February 13, 2013, I wrote to the parties, inquiring whether any material factual dispute warranted a hearing. On February 22 and 25, 2013, the Township and PBA respectively, filed letters advising that the material facts are undisputed. Supplemental briefs were filed by April 18, 2013.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for

summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying these standards and relying upon the pleadings and certification, I make the following:

FINDINGS OF FACT

1. Township Ordinance No. 24-07 establishes the off-duty employment program for the Township's police officers. Members of the police department are permitted to accept employment as safety or security personnel by private businesses, contractors, other public entities or quasi-public sector organizations during off-duty hours. Any such entity must secure the Chief's approval, sign a written agreement with the Township for a specified number of hours and pay the Township in advance the full amount of compensation for the scheduled work. The Township receives an administrative service fee and remits the remainder as payment to the officer. The ordinance also provides that hours worked ". . . for outside employment [shall not] be considered in any way compensation as overtime."

2. An approved off-duty employment program assignment carries a minimum of three hours of compensation to the officer. If the off-duty employment assignment ends earlier than scheduled, the officer is compensated in accordance with the

scheduled time. (For example, if an off-duty job is scheduled for eight hours but completed after four hours, the officer will be paid for eight hours).

3. An officer released early from an off-duty assignment ". . . often report[ed] to his regularly scheduled shift before the actual time for his shift's commencement" (certification of Township Police Chief Stephen W. Gallagher). The officer reporting early ". . . has been compensated for his on-duty time," resulting in the officer receiving "double pay" (i.e., compensated for being on-duty and for the off-duty assignment that ended earlier than scheduled). The "overlap period" did not effect the officers' "hours of work" as defined in the collective negotiations agreement. (Gallagher certification).

4. On January 23, 2009, the Township Police Chief informally inquired of the Morris County Prosecutor its advice on the legality of the "practice." On an undisclosed date near the end of January, 2009, a representative of the Prosecutor issued a reply to the Chief, writing that the practice is not illegal, but "ill-advised" nevertheless, because it does not pass the "public perception test" and it raises "ancillary legal issues," such as indemnification in the event of injury.

5. On January 26, 2009, the Chief issued General Order 2009-03. It provides: "Employees who are being monetarily compensated by an outside employer will not report to duty with

the Township of Hanover until such time as their outside compensation ceases."

6. The applicable collective negotiations agreement signed by the parties extended from January 1, 2008 through December 31, 2008. Article II (Hours of Work) provides:

The normal work week shall commence at 12:01 on Monday and end at 12:00 midnight the following Sunday.

Regular hours of work shall consist of forty (40) hours within this work week with the specific work schedule for each officer to be determined by the Chief of Police or his designated representative.

The schedule shall be posted for the information of all officers at least two (2) weeks in advance. The posted schedule, however, shall not prevent the Chief of Police or his appointed representative from making revisions in the schedule for reasons such as illness, accident, or other unexpected events which might require a modification of the schedule after posting.

Article XV (Maintenance of Standards) provides in a pertinent part:

Section 1 - It is agreed that those rights, privileges and benefits that were regularly exercised which the officers covered by this agreement enjoyed prior to the date of this agreement are retained by the officers except as those rights, privileges and benefits are specifically modified by this agreement.

ANALYSIS

The issue raised by the PBA's charge is whether the Township's Order prohibiting police officers from reporting early for duty immediately following their actual completion of off-duty employment assignments violates Section 5.4a(5) and derivatively a(1) of the Act.^{2/}

The Township argues that it has a managerial prerogative to determine staffing levels and to control the police department's off-duty employment program. It also contends that the Chief's Order was an exercise of the Township's contractual authority under Article II of the agreement.

The PBA asserts that the dispute concerns the mandatorily negotiable subjects of work schedules and eligibility for overtime compensation. It also disputes that Article II empowers the Chief to unilaterally implement the restriction set forth in General Order 2009-03.

N.J.S.A. 34:13A-5.4a(5) prohibits a public employer from refusing to negotiate in good faith with a majority representative concerning mandatorily negotiable terms and conditions of employment. In determining whether a disputed item is mandatorily negotiable, the Commission applies this test set

^{2/} The PBA's brief underscores that the Township's conduct allegedly violates these subsections. No facts suggest a violation of 5.4a(2), (3), (4), (6) or (7) of the Act. I recommend that these allegations be dismissed.

forth in Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 92-98

(1981):

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.

In the context of resolving an unfair practice charge, the Commission will determine only whether the disputed item is mandatorily negotiable. See, e.g., Town of Kearny and Kearny SOA, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999); Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594, 597 (¶12265 1981).

Public employers have the inherent power to determine staffing levels for a police department as a whole and for each position to be filled or each duty to be performed. Paterson at 97; Town of Kearny. In City of Long Branch, P.E.R.C. No.83-15, 8 NJPER 448, 449, (¶13211 1982), the Commission explained:

These [staffing] determinations in turn may interrelate to dictate the amount of overtime which will be worked. For example, a decision that no one is needed to replace an officer who is on vacation will mean that no off-duty officers will have the opportunity to work overtime by replacing the absent officer. Or, a decision that additional officers are or are not needed to meet a specific emergent situation will determine whether off-duty officers are called in for overtime. Because the determination of when overtime must be worked is inevitably controlled by the relationship between management's [staffing] determinations and its obligation to deliver government services efficiently, a public employer may mandate that a certain number of employees will work overtime.

The Commission has approved a public employer's decision to eliminate all non-emergent overtime opportunities. Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983).

Only when an employer determines that a position must be filled will questions arise concerning which employee will work overtime. Long Branch establishes a rule that allocation of overtime earning opportunities among qualified employees is mandatorily negotiable. 8 NJPER 450.

The "inevitable" interplay of staffing and overtime is missing from the facts of this case. Before the Chief issued his disputed General Order, officers ". . . reporting early" to their shifts upon their actual completion of off-duty work assignments were apparently neither called in for overtime, nor were they replacing absent employees. Stated another way, the Township accommodated those officers by allowing them to start working earlier than their scheduled shifts required and paying them overtime. In discontinuing that practice,^{3/} the Township merely asserted its prerogative to determine its staffing needs. Long Branch.

The PBA asserts that in the past, those officers were "entitled" to report (early) for duty and were "eligible" for overtime assignments (brief at 8). Both entitlement to and eligibility for overtime compensation presuppose the Township's stated and/or demonstrated need to fill a position. Again, no facts on this record demonstrate that staffing need.

The PBA also asserts that police work schedules, including the starting and ending time of shifts, are mandatorily negotiable. See e.g., Teaneck Tp. and Teaneck FMBA Local No. 42,

3/ In finding that the Township exercised its managerial prerogative I decline to find that a "past practice" or "existing working condition" has been proved. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

353 N.J. Super. 289 (App. Div. 2002), aff'd o.b., 177 N.J. 560 (2003); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Edison Tp., P.E.R.C. No. 2010-4, 35 NJPER 281 (¶97 2009).

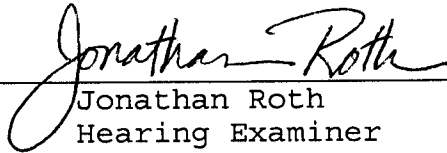
It is undisputed however, that the Chief's General Order does not concern the officers' regular work hours or schedules. Also, the instances of "reporting early" to a shift depended on whether the off-duty assignments ended earlier than scheduled, a presumptively unpredictable determinant of on-duty scheduling.

For the reasons set forth above, I find that the Township exercised a managerial prerogative to determine staffing levels by discontinuing officers' "early reporting" to duty following any unscheduled early completion of off-duty employment assignments.^{4/} Accordingly, I grant the Township's motion for summary judgment and deny the PBA's cross motion. The Complaint is dismissed.

^{4/} In light of this recommendation, I do not need to decide that the Chief's contested General Order was within his authority under Article II of the parties' agreement. I specifically decline to find however, that any facts demonstrate or suggest that the Township was victimized by "featherbedding" or "make-work" assignments. Morris Cty. Sheriff's Office v. Morris Cty PBA, Local 298, 418 N.J. Super 64 (App. Div. 2011); But Cf. Franklin Tp. v. Franklin Tp. PBA Local 154 and PBA Local 154 SOA, 424 N.J. Super 369 (App. Div. 2012).

RECOMMENDED ORDER

The Township's motion for summary judgment is granted. The PBA's cross-motion for summary judgment is denied. The unfair practice complaint is dismissed.


Jonathan Roth
Hearing Examiner

DATED: February 25, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exception are filed this recommended decision will be come a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any request for appeal is due by March 7, 2014.