

H.E. NO. 2024-5

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

In the Matter of

COUNTY OF PASSAIC

Respondent,

-and-

Docket No. CO-2022-241

POLICEMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 197,

Charging Party.

**SYNOPSIS**

A hearing examiner denies a motion and cross motion for summary judgment filed by the County of Passaic and the Policemen's Benevolent Association, Local No. 197. Preliminarily, the hearing examiner found that the County failed to show that the case was moot. The hearing examiner further determined that material factual disputes exist in the record which preclude the granting of summary judgment. Specifically, the hearing examiner was unable to determine whether the County's suspension of a longstanding reciprocal work program constituted a unilateral change to a term and condition of employment or a valid exercise of managerial prerogative. Further, a material factual dispute existed regarding whether the reciprocal work program was a true "alternate schedule" or a privilege granted on a case-by-case basis by administration. The hearing examiner determined that a more robust record developed during a hearing is necessary to resolve the material factual disputes.

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Appearances:

For the Respondent,  
Florio Perrucci Steinhardt Tipton & Taylor, LLC,  
attorneys  
(Christopher J. Buggy, of counsel)

For the Charging Party,  
Crivelli, Barbati & DeRose, LLC, attorneys  
(Frank Crivelli, of counsel)

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

On May 24, 2022, Policemen's Benevolent Association, Local No. 197 (PBA) filed an unfair practice charge against the County of Passaic (County). The charge alleges that, on or about February 10, 2022, the County violated sections 5.4a(5) and (7) of the New Jersey Employer-Employee Relations Act ("Act")<sup>1/</sup> by

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<sup>1/</sup> This provision prohibits public employers, their representatives or agents from: "(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 (continued...)"

announcing the unilateral cancellation of a longstanding "reciprocal work program" that allowed PBA members to work sixteen (16) hour and/or eight (8) hour shifts, rather than only eight (8) hour shifts, at the Passaic County jail. The charge alleges that the reciprocal work program was terminated by the County on March 11, 2022.

Regarding relief, the PBA requests: (1) a declaration that the County has engaged in an unfair practice in violation of the Act; (2) the issuance of an order requiring the County to retract the memorandum suspending the reciprocal work program and return to the status quo ante; (3) the issuance of a cease and desist order against the County; (4) an order requiring the County to pay attorney's fees and costs associated with this action; and (5) all other relief the Commission deems fair, equitable, and just.

On February 7, 2023, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the 5.4a(5) allegation<sup>2/</sup> asserted in the charge and assigned the matter to me as Hearing Examiner.

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(...continued)

grievances presented by the majority representative" and "(7) violating any of the rules and regulations established by commission."

2/ The Director determined that the PBA failed to meet the Commission's complaint issuance standard with respect to the 5.4a(7) allegation and dismissed that portion of the charge.

On February 17, 2023, the County filed an answer to the Complaint, denying any violation of the Act and setting forth affirmative defenses.

On May 16, 2023, a Pre-Hearing conference was conducted and the matter was scheduled for a hearing on July 26-27, 2023. On June 23, 2023, both parties advised me of their intention to file motions for summary judgment. As such, the hearing dates were adjourned pending disposition of the motions.

On July 21, 2023, the PBA filed a motion for summary judgment accompanied by a brief, a certification of PBA Local 197 President John Welsh and exhibits. Also on July 21, 2023, the County filed a motion for summary judgment accompanied by a brief, certifications of Christopher Buggy, Esq. and Correctional Deputy Police Warden John Arturi and exhibits. On July 31, 2023, the PBA filed a brief in support of its motion and in opposition to the County's motion, and on August 15, 2023, the County filed a brief in support of its motion and in opposition to the PBA's. On August 24, 2023, both motions were referred to me for decision.

Accordingly, I have reviewed the parties' submissions in this matter. The following material facts are not contested by the parties. Based upon the record, I make the following:

**FINDINGS OF FACT**

1. The PBA is the exclusive majority representative of a group of rank and file correctional police officers employed by the County.

2. The County and the PBA are parties to a Collective Negotiations Agreement (CNA) covering the period of January 1, 2019 through December 31, 2023. (Welsh Cert. at ¶7, Ans. at ¶5).

The CNA contains the following provisions:

Article IV - Management Rights

The County and Sheriff retain the rights, in accordance with applicable laws and procedures, to:

1. Direct employees.

...

4. Maintain the efficiency of the government operations entrusted to the County and Sheriff.

5. Determine the methods, means, and personnel by which such operations of the Sheriff's Department are to be conducted . . . .

Article V - Work Week & Hours of Work

...

2. As a condition of employment, employees must be available to work any and all shifts as needed to maintain the efficient operation of the Passaic County Sheriff's Office.

...

5. The parties agree to meet for the purposes of considering alternative schedules. Such alternative schedules shall be implemented upon mutual agreement . . . .

Article XV - Miscellaneous

...

3. Except as otherwise provided herein, all benefits, which Employees have heretofore enjoyed and are presently enjoying, shall be maintained and continued by the County during the term of this agreement. The personnel policies and regulations of this department, established for

all Employees of all divisions, which have mutually agreed upon (sic) and are in effect, shall continue to be applicable to all officers except as otherwise provided herein . . . .

3. Between approximately 2002 through March 11, 2022, PBA unit members were permitted under certain circumstances to utilize reciprocal work schedules. Reciprocal work schedules allowed members to elect to be "reciprocal work partners" with one another, and to work three shifts per week (i.e., two 16-hour shifts and one 8-hour shift) rather than five 8-hour shifts per week. (Welsh Cert., at ¶¶8-9; Ans. at ¶1).

4. The reciprocal work schedule provides benefits to unit members, as it allows them to plan personal schedules to spend more time with family and less money on childcare and commuting costs. (Welsh Cert. at ¶10).

5. On February 9, 2021, Deputy Warden John Arturi issued a memorandum to all personnel regarding the reciprocal work program. The memorandum states, in part, that the reciprocal program "is not a contractual benefit" and provides the mechanism by which employees may request a reciprocal work schedule. The memorandum also states that the program could be revoked or suspended by jail administration if deemed necessary. (Arturi Cert. at ¶10, Ex. 3).

6. On February 10, 2022, Undersheriff Nart Hapatsha issued a memorandum, approved by Sheriff Richard Berdnik, suspending the

reciprocal work program effective March 11, 2022. The memorandum provides, in part:

After careful consideration of employee staffing levels that will be changing in the near future, it has become necessary to suspend the reciprocal program. The suspension of the program will occur for several reasons. First, the jail is currently undergoing a reorganization as it transitions inmates to Bergen County through a shared services agreement. Second, staff members will be attending the Police Academy beginning February 17, 2022 and with the number of staff attending, this will lower current staffing levels beyond a level that will permit the reciprocal program to continue in an efficient manner. Third, it is intended that as the agency restructures staffing due to the jail reorganization, some jail staff will be sent to a GAP class which will further lower staffing levels at the jail. Lastly, the reciprocal program requires 50 percent of on-duty staff to be available to work any mandatory overtime onto the following shift and the pending reduction in staff for the reasons mentioned above significantly reduces the overall number of staff beyond the threshold that the 50 percent originally intended to encompass.

The memorandum further provided that the suspension of the program would go into effect on March 11, 2022. (Welsh Cert. at Ex. A; Arturi Cert. at Ex. 4).

7. The February 10, 2022 memorandum was issued by the County unilaterally, without notice to or negotiation with the PBA. (Welsh Cert. at ¶12).

8. Since its inception, the reciprocal work program was never suspended or revoked prior to March 11, 2022. (Welsh Cert. at ¶11).

9. The reciprocal work program has not been reinstated since March 11, 2022. (Welsh Cert. at ¶13).

10. As a result of a restructuring plan, the Passaic County jail currently houses no inmates. The County has entered into shared services agreements ("SSAs") with Hudson County and Bergen County for the provision of inmate housing. Bergen County houses approximately 556 inmates, and Hudson County approximately 92 inmates, on behalf of Passaic County. (Arturi Cert. at ¶¶20-22).

11. Passaic County jail is currently used only for processing new arrestees. The current staffing level at the jail is 74 correctional officers.

#### **STANDARD OF REVIEW**

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. Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).<sup>3/</sup> In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of

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<sup>3/</sup> N.J.A.C. 19:14-4.8(e) provides: "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 that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered."



the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Public employers are prohibited from "[r]efusing 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 . . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "has the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

**ANALYSIS**

A case will be found moot where "continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur. See, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n, P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994). See also Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., H.E. No. 87-69, 13 NJPER 517 (¶18195 1987), adopted P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp. 2d 225 (¶196 App. Div. 1990) (dismissing a complaint based, in part, upon the fact that during the processing of the unfair practice charge, the board rescinded unilateral workload increases for the subsequent school year and provided no

indication that it was contemplating making future changes in unit members' work schedule, and an arbitration award was issued compensating unit members for workload increases during the prior school year; finding that this aspect of the charge was now "a mere academic issue"); Union Cty. Reg. H.S. Bd. of Ed., D.U.P. No. 79-23, 5 NJPER 158 (¶10088 1979) (refusing to issue a complaint based upon the board's "prompt and dispositive actions" which convinced the Director that there was "minimal likelihood of occurrence of the aggrieved conduct . . . in the future and that litigation . . . for the purpose of securing a cease and desist order and a posting for the benefit of the employees is not appropriate.").

As a preliminary matter, I disagree with the County that the matter is presently moot given its assertion that a return to the reciprocal program is not feasible. For one, a material factual dispute exists (precluding the grating of summary judgment) regarding whether a return to the reciprocal work program is possible given the jail reorganization<sup>4/</sup>. However, even if I accept the County's argument that a return to the reciprocal work schedule is impossible, the PBA has requested additional relief, including a declaration that the County has

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<sup>4/</sup> As noted above, the PBA requests relief including the issuance of an order requiring the County to retract the memorandum suspending the reciprocal work program and return to the status quo.

violated the Act and an order to rescind the February 10, 2022 memorandum. If a violation of the Act was found, such relief could be properly ordered regardless of whether a return to the reciprocal work schedule is operationally possible. Further, given that the County claims it has the right to suspend the reciprocal work program unilaterally, I cannot conclude that the conduct asserted in the charge (i.e., the unilateral suspension of the program without negotiations) is unlikely to reoccur in the future. As such, based on the record, I cannot conclude that the matter is moot.

At issue in this case is whether the County's suspension of the reciprocal work program constitutes a unilateral change to a term and condition of employment without negotiation, or a non-negotiable exercise of the County's managerial prerogative to determine staffing levels and the provision of governmental services. Based on the record in this case, I find that material factual disputes exist which preclude the ability to resolve this question, and that a full plenary hearing in this matter is therefore necessary.

The Act requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established" and that the majority representative and public employer "shall meet at reasonable times and negotiate in good

faith with respect to . . . terms and conditions of employment.” N.J.S.A. 34:13A-5.3; See Galloway Twp. Bd. Of Educ. V. Galloway Twp. Educ. Ass’n, 78 N.J. 25, 48 (“Our Legislature has [] recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees.”)

The New Jersey Supreme Court has set forth a three part test to determine whether a subject involving public employment is properly negotiable: “(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.” City of Jersey City v. Jersey City Police Officers Benev. Ass’n, 154 N.J. 555, 568 (1998) (quoting In re Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982)). “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.” Id. at 404-05.

As a general rule, hours of work, work schedules, shift schedules, and such matters are held to be mandatorily

negotiable. Id. at 411-413; Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 199-200 (quoting Troy v. Rutgers, 168 N.J. 354, 384 (2001) ("In recognition of the preeminence of pay and working hours as quintessential terms and conditions of employment, New Jersey decisions hold that '[a]lthough the establishment of a school calendar is a managerial prerogative, a decision that directly impacts the days worked and compensation for those days implicates a term and condition of employment' rendering that decision one that involves 'a mandatorily negotiable term of employment.'").

The courts have also held that public employers generally have a non-negotiable managerial prerogative to determine staffing levels. See Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 97 (1981) ("Municipal decisions about how to organize and deploy their police forces to comply with economic needs are unquestionably policy decisions and affect the public welfare."); See also Morris County Sheriff's Office v. Morris County Policeman's Benev. Ass'n Local No. 298, 418 N.J.Super. 64, 78 (App. Div. 2011) (" . . . because scheduling and assignment-setting to avoid non-operational posts is a managerial prerogative involving staffing determinations and is intimately linked to the conservation of the public fisc, it is not mandatorily negotiable.").

The County asserts that suspending the reciprocal work program was necessary because the jail was undergoing a reorganization whereby inmates were sent to Bergen and Hudson counties. Further, the County anticipated a reduction in staffing due to employees attending the police academy and a "GAP class." However, there is a dispute as to whether the reorganization or the anticipated staffing shortages necessitated suspension of the program. The uncontested facts do not indicate, for example, a specific number of correctional officers (or inmates) that must be present at the jail for the reciprocal program to operate. While the County contends "the reciprocal program requires 50 percent of on duty staff to be available to work any mandatory overtime," there is no evidence specifying what percentage of on duty staff are currently available to work overtime, or how many additional correctional officers are needed to reach the "50 percent" threshold. Also, while the County asserts that current circumstances make a return to the reciprocal program "not feasible" (Arturi Cert. at ¶23), it does not specify why an increase in staffing once unit members conclude attendance at the Police Academy/GAP class would not result in a change of circumstances.<sup>5/</sup> Therefore, based

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<sup>5/</sup> There is no allegation, for example, that unit members have been laid off pursuant to the restructuring plan, such that staffing would not increase after the academy/GAP class concludes.

on the undisputed facts in the record and in light of Commission precedent, I cannot presently conclude that suspension of the program was pursuant to the County's managerial prerogative to set staffing levels and/or provide governmental services.

While the PBA asserts that the unilateral suspension of the reciprocal work program violates the Act, it does not contest that the County may ". . . amend, suspend, or even revoke the reciprocal work program" if it does so appropriately. The Union does not dispute the legitimacy of the County's stated reasons for suspending the program (i.e., the jail reorganization and staffing issues related to the police academy and GAP class), nor the allegation that Passaic no longer houses inmates pursuant to SSAs with Hudson and Bergen Counties. While the PBA contends that the County's conduct violates the Act, it fails to assert facts sufficient to determine the specific impact that the reorganization and staffing issues have on the ability to operate the reciprocal work program. The PBA does not explain, for example, how the reciprocal work program can continue to operate despite the jail reorganization, lack of inmates, and staffing issues asserted by the County. Given the absence of this information in the record, I cannot conclude that the PBA has set forth facts sufficient to determine that the County violated the Act by unilaterally suspending the reciprocal work program.



I also find a material factual dispute exists with respect to whether the reciprocal work program is a true "alternate schedule", or a privilege that is granted by administration on a case by case basis. The Union has set forth facts showing that the reciprocal program (which provides numerous benefits to unit members) was utilized without interruption for approximately 20 years. The PBA contends that contract language requiring the County to meet and discuss "alternative schedules" is applicable, and required the County to negotiate prior to suspending the reciprocal program. The County, on the other hand, emphasizes that reciprocal shifts must be requested and will only be approved by the County if operational needs of the facility permit. The County states that the February 9, 2021 memorandum clearly provides that "[t]he reciprocal work schedule is not a contractual benefit," and notes that the Union did not file a grievance or otherwise object to this memorandum. I find that a more robust record developed during a plenary hearing, complete with testimony and documentation regarding the operation of the reciprocal work program, is necessary to resolve this dispute.

Accordingly, I deny both motions for summary judgment as set forth below.

**CONCLUSION**

For the reasons asserted above, the PBA's Motion for Summary Judgment and the County's Motion for Summary Judgment are denied.

/s/James R. Glowacki  
James R. Glowacki  
Hearing Examiner

DATED: November 15, 2023  
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 exceptions are filed, this recommended decision will become 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 exceptions are due by November 27, 2023.