

I.R. NO. 2002-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST CALDWELL,

Respondent,

-and-

Docket No. CO-2001-271

WEST ESSEX P.B.A. LOCAL 81
(WEST CALDWELL UNIT),

Charging Party.

SYNOPSIS

A Commission Designee denies the Charging Party's application for interim relief on its charge that the Township unilaterally changed police lieutenants' work schedules from an eight-hour steady day shift to twelve-hour rotating shifts. The parties' collective agreement specifically provided for twelve-hour rotating shifts. Therefore, the Charging Party did not show it would likely prevail on the merits when the Township ended a practice at variance with the contract. In addition, the claimed unilateral change in the practice of permitting unit members to regularly use accumulated compensatory time in half-hour increments was factually disputed, prohibiting interim relief.

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Appearances:

For the Respondent,
Podvey, Sachs, Meanor, Catenacci
Hildner & Coccoziello, attorneys
(Marianne C. Tolomeo, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Merick H. Linsky, of counsel)

INTERLOCUTORY DECISION

On March 29, 2001, West Essex P.B.A. Local 81 (West Caldwell Unit), filed an unfair practice charge with the Public Employment Relations Commission alleging that the Township of West Caldwell violated 5.4a(1), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} when

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or

it unilaterally implemented a shift change for police lieutenants from a steady day shift to rotating twelve-hour shifts. The PBA claims that this change ended a longstanding practice of lieutenants working the day shift, notwithstanding a contractual provision providing for rotating shifts. The PBA further alleges that the Township unilaterally changed the practice of using accumulated compensatory time when it denied a lieutenant's request to use his accumulated compensatory time in half-hour increments on a daily basis. The PBA argues that the changes were made while the parties were in negotiations for a successor agreement.^{2/}

The Township denies committing any unfair practice, asserting it has a managerial prerogative to implement rotating shifts for lieutenants. It also argues that its collective

1/ Footnote Continued From Previous Page

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. and (7) Violating any of the rules and regulations established by the Commission."

2/ There were two additional counts to the charge alleging that (1) the Township denied a grievance over the scheduling issue because it was filed by individuals, not by the PBA; and (2) Lieutenant Theobald was given retaliatory work assignments after he grieved the work schedule. However, these issues were not included in the application for interim relief. Accordingly, they are not considered here.

agreement with the PBA specifically provides for rotating twelve-hour shifts for all unit employees. With regard to the compensatory time issue, it denies that police had ever been permitted to regularly use compensatory time in half-hour increments. It also argues that the contract gives the chief discretion to approve compensatory time use.

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On March 30, 2001, Commission Designee Stuart Reichman issued an order to show cause scheduling the return date on the interim relief application for May 1, 2001. Thereafter, at the PBA's request, the order to show cause was postponed to permit the parties to discuss the possibility of settlement. When settlement efforts proved unsuccessful, the PBA requested to be heard on the interim relief request. The case was reassigned to me as Commission designee and the return date was set for July 11, 2001. The parties submitted briefs and certifications in accordance with Commission rules and argued orally on the scheduled return date. The following facts appear.

West Essex P.B.A. Local 81 represents the Township's police officers, sergeants and lieutenants. The PBA's most recent collective agreement covered the unit employees for the period January 1, 1999 through December 31, 2000. The parties are negotiating a successor contract. The contract provides in relevant

part:

Article III - Overtime; Section A

(1) Employees covered by this Agreement shall work a twelve (12) hour tour of duty based upon a shift rotation as demonstrated in Exhibit A annexed hereto. [not attached]

(2) Employees shall receive one hundred four (104) hours per annum as compensatory time due as a result of the increased work year under Section A. Said compensatory time due shall be earned at the rate of one (1) tour every six (6) weeks. A regular shift will consist of between eighty (80) and eighty-four (84) hours every two (2) weeks at the discretion of the chief....

Neither party submitted exhibit A referred to in Section A(1) above.

Until recently, all members of the PBA unit have worked the rotating twelve-hour shifts except the lieutenants and the detective bureau. For years, the two lieutenants have been working an eight-hour, steady day shift, Monday to Friday, with weekends off.

In June 2000, the Township appointed Charles Tubbs as the new chief of police. On December 1, 2000, Chief Tubbs appointed two additional lieutenants and directed that all four lieutenants work rotating twelve-hour shifts, consistent with the other police ranks.

After the shift change went into effect, Lieutenant Theobald requested to use one-half hour of accrued compensatory time daily to take his children to school. The chief denied this request, stating that he could not permit an officer to use compensatory time in such small increments on a daily basis. The PBA alleges that this denial of the use of compensatory time constitutes a unilateral change in a term and condition of employment. The Township contends that it has never been the department's practice to permit employees to regularly use compensatory time in one-half hour increments.

The PBA contract, Article III, section B, provides that compensatory time "can be used upon five (5) days advance written notification and upon approval by the Captain or Chief of Police."

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 (1982); 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 PBA argues that it has a substantial likelihood of success on the merits since the Township does not dispute that it changed employees' hours and shift schedule without negotiations. The PBA acknowledges the contract language on this issue but asserts that the longstanding past practice takes precedence over the contract language.

N.J.S.A. 34:13A-5.3 states, in relevant part:

Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); County of Cumberland, P.E.R.C. No. 97-116, 23 NJPER 236, 237 (¶28113 1997). However, a past practice does not establish the condition of employment in the face of contrary express language contained in the parties' collective agreement. Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Here, it appears that the Township has already negotiated with respect to the issue of work shifts for all ranks of police covered by the agreement. Article III clearly provides for twelve-hour rotating shifts. An employer does not violate its negotiations obligation by ending a practice at variance with the contract and returning to the express terms set forth in the contract. Kittatinny Bd. Ed., P.E.R.C. No. 93-34, 18 NJPER 501 (¶23231 1992); Kittatinny Bd. Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991).

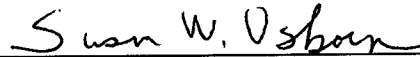
Based upon the above, I find that the PBA has not demonstrated a substantial likelihood of success on the merits concerning the schedule change. Therefore, interim relief must be denied.

As to the alleged change in the practice of using compensatory time, I find that there is a factual dispute concerning what the practice had been. The PBA states that the Township had

permitted the use of compensatory time in half-hour increments before; the Township's certification from Chief Tubbs asserts no such practice was ever permitted on a daily basis. Given the conflicting assertions, the PBA has not demonstrated a substantial likelihood of success on the merits concerning the use of compensatory time. Accordingly, interim relief must be denied.^{3/}

ORDER

The PBA's application for interim relief is denied.



Susan Wood Osborn
Commission Designee

DATED: July 16, 2001
Trenton, New Jersey

^{3/} Given my findings on the first part of the interim relief test, there is no need to rule on the Township's managerial prerogative claim, or to decide whether there is irreparable harm.