

I.R. NO. 2002-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CHESTER,

Respondent,

-and-

Docket No. CO-2002-180

CHESTER BOROUGH POLICE
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants the Association's application for interim relief on its charge that the Borough announced its intention to change police officers' work schedules without negotiations and in retaliation for employee grievances. The Commission Designee restrains the Borough from implementing the schedule change.

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Appearances:

For the Respondent,
Sears, Sweeney & Marcickiewicz, attorneys
(Richard Marcickiewicz, of counsel)

For the Charging Party,
Klatsky & Klatsky, attorneys
(David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

On December 26, 2001, the Chester Borough Police Officers Association (Association) filed an unfair practice charge with the Public Employment Relations Commission alleging that the Borough of Chester (Borough) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5),

(6) and (7).^{1/} The Association alleges that the Borough announced it will change police work schedules without negotiations effective January 1, 2002. The Association further alleges that the schedule change is being implemented in retaliation for grievances filed by its members.

The unfair practice charge was accompanied by an application for a temporary restraining order and interim relief pursuant to N.J.A.C. 19:14-9. The Borough voluntarily agreed to stay implementation of the new schedule until the interim relief application could be heard. On December 31, 2001, the Order to Show Cause was executed scheduling the return date on the interim relief application. The parties submitted briefs and affidavits in accordance with Commission rules. The parties argued orally on the January 28 return date, but requested that I reserve a ruling on the

^{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 an agreement; (7) Violating any of the rules and regulations established by the commission."

interim relief application for a few weeks to permit the parties an opportunity to settle the dispute. However, settlement ultimately proved unsuccessful and the Borough intends to implement the new schedule March 3, 2002. The following facts appear.

The Association is the majority representative of the Borough's patrolmen, detectives and sergeants. The most recent collective agreement between the Borough and the Association expired on December 31, 1999. The parties were engaged in negotiations for a successor agreement. The parties apparently reached impasse, and the Association invoked interest arbitration pursuant to N.J.S.A. 34:13A-16. The appointed arbitrator conducted a hearing on April 26, 2001. The parties submitted briefs to the arbitrator on June 15, and are now awaiting the arbitrator's award.

Regarding work schedules, the expired contract provides,

Article VII - Duty Assignments

A. Normal Work Week

The normal work week for all members of the CPA shall be determined in accordance with the rotating shift schedule prepared in advance by the Chief of Police. This schedule will be based upon 2080 hours in a 365 day work cycle....

Until February 2001, the police worked eight-hour rotating shifts in a cycle consisting of five days on afternoon shift, three days off; five days on midnight shift, three days off; and five days on day shift, four days off.

In early 2001, Neil Logan was appointed as the new police chief. Logan and the Association agreed to modify the schedule to

12-hour tours, as follows:

7:00 am to 7:00 p.m.
1:00 p.m. to 1:00 a.m.
7:00 p.m. to 7:00 a.m.

It was agreed that patrol officers would rotate shifts every two weeks, working the following schedule: two days on duty, two days off; three days on duty, two days off; two days on duty, three days off.

Chief Logan prepared and all Association members signed a document entitled "Agreement", which provided, in part,

Agreement between the Chester Borough Police Department and the Chester Borough Police Officers Association, to amend conditions of the contract for the implementation of a 12-hour schedule....

What follows is a six-point plan relating to integrating the new schedule with existing terms.

The 12-hour schedule as described above has been in effect since February 12, 2001. Neither the Association, nor the Borough made any proposals in negotiations or before the interest arbitrator concerning work schedules.

On November 5, 2001, Sergeant Andre Kedrowitsch, a unit member filed a grievance concerning off-duty assignments, claiming a violation of Article IX of the collective agreement, which concerns restrictions on "special duty" assignments. On November 9, the chief responded stating that it was untimely. Chief Logan met with the Association representatives over the issue on November 19. Logan explained his position to Association President Campbell. On November 23, 2001, Kedrowitsch wrote to the chief about the

grievance, requesting a written response at step 1 or that the grievance be moved to step 2. On November 24, Kedrowitsch sent Borough Administrator Robert Glass a memorandum apprising him of the pendency of the grievance. On November 27, Logan responded to Kedrowitsch's grievance, acknowledging that he had violated the contract's special duty provision, but noting that the Association acquiesced. Logan added that, from then on, the provisions of Articles 8, 9 and 11 would be enforced to the letter.^{2/}

On December 4, Chief Logan sent Campbell a memo attaching an eight-hour schedule. In relevant part, Logan wrote,

Attached is a copy of an 8-hour schedule. I will share this with you so that you may relay this to the other officers. I have not completely made my mind up as to the exact schedule. But I will tell you that a schedule change is coming if there is not a resolution by Sgt. Kedrowitsch to this matter.

The Sergeant wants to have his cake and eat it too. While the losers here are the 6 other officers.

The Sergeant and the other members acknowledge that Article IX (special duty) has been broken by management and mutually by the other members for the good of both sides. The Sergeant wishes to make a point, but fails to see that he is also guilty of violating the contract and now wishes it to be held to the way it is written. Management is prepared to do that but not just one section....

Well he (i.e., Kedrowitsch) wants me to be held to the contract as it is written and now he and unfortunately the rest of the members will have to also.

^{2/} These articles concern holidays, vacation and personal days, and sick leave time.

This can be corrected by the Sergeant acknowledging to me in writing that as the chief, and per the contract and the Chief is the person who assigns overtime and special duty assignments. In doing so the Sergeant realizes that yes a violation occurred but it was in the best interest for all and that as a result of his actions he did not know that it would affect other areas of the contract which have been changed (illegally) for the best interest of both sides and he wishes to withdraw his grievance so that the matter can be handled in the future as it has in the past.

Good luck!

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).

Likelihood of Success

The Association alleges that the Borough changed the police work schedule unilaterally and in retaliation for Kedrowitsch's grievances in violation of 5.4a(3) and (5) of the Act. The Borough maintains that the chief has a managerial prerogative to implement a

different schedule. It contends that the chief's desire to implement an eight-hour schedule was merely an effort to comply with the terms of the contract.

It is well settled that after a contract expires, existing terms and conditions of employment must continue until the negotiations obligation is satisfied. An employer violates 5.4a(5) of the Act by unilaterally modifying or eliminating existing negotiable benefits during collective negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). N.J.S.A. 34:13A-21 also expressly prohibits changes in terms and conditions of employment while the parties are engaged in the interest arbitration process.

It is beyond dispute that the Borough intends to change the schedule unilaterally on March 3, 2002. Police work schedules are generally mandatorily negotiable unless the employer demonstrates a particularized need to preserve or change a work schedule to protect a governmental policy determination. See N.J.S.A. 34:13A-14 et seq.; N.J.S.A. 34:13A-16g(2) and (8); Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997) and the cases cited therein.

Here, the Borough asserts a managerial prerogative to change the schedule based on its generalized assertion that the

12-hour schedule reduces efficiency and productivity, lacks flexibility for coverage, and adversely impacts supervision and communication. I need not consider the Borough's rationale for its claimed managerial prerogative. Even where an employer has a managerial prerogative to take a personnel action without first engaging in negotiations, it still may not do so for illegal reasons. See, e.g., Old Bridge Tp., P.E.R.C. No. 90-102, 16 NJPER 307 (¶21127 1990), aff'd NJPER Supp.2d 283 (¶28 App. Div. 1992) (employer may not transfer employee in retaliation for filing grievance); Gloucester Tp. Fire Dist. No. 4, P.E.R.C. No. 94-36, 19 NJPER 534 (¶24250 1993) (reassignment of duties to remove position from the bargaining unit violates the Act); Glassboro Housing Auth., P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989) (subcontracting services to avoid negotiating with union violates the Act).

In Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the New Jersey Supreme Court set the standard for determining whether a public employer's action violates 5.4a(3) of the Act. Under Bridgewater, a charging party must prove that the protected conduct was a substantial or motivating factor in the employer's adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. However, the employer may defeat such a finding by demonstrating that the same action would have been taken even in the absence of protected activity.

Claims of retaliation for protected activity in violation of 5.4a(3) do not normally lend themselves to interim relief since there is rarely direct, uncontroverted evidence of the employer's motives. Ordinarily, the evidence is circumstantial and the facts are disputed. See, e.g., Somerset Hills Bd. of Ed., I.R. No. 2001-15, 27 NJPER 271 (¶32097 2001); and Middlesex Cty., I.R. No. 91-11, 18 NJPER 142 (¶23067 1991). Here, the chief's memorandum to Association President Campbell makes his motive clear. In essence, he advises the Association that there will be a schedule change, and it is Kedrowitsch's grievance which is to blame. The chief goes on to suggest that the Association can still retain the existing schedule -- by Kedrowitsch's withdrawal of his grievance.

The right to initiate and process a grievance is protected by the Act. Old Bridge Tp. It appears that it was Kedrowitsch's grievance which directly triggered the chief's December 4 memorandum announcing the schedule change. Further, the Borough has not demonstrated that it would have taken the same action anyway had Kedrowitsch not grieved. The Borough's defense is that the chief was merely trying to bring the contract into compliance by reverting back to an eight-hour schedule. However, the contract did not expressly provide for an eight-hour schedule. Moreover, Kedrowitsch's grievance was not about the work schedule; it was about special duty assignments.

Based on the above, I find that the Association has demonstrated a substantial likelihood of success on the merits of its 5.4a(3) claim.^{3/}

Irreparable Harm

The Association alleges that it and its members will be irreparably harmed if the schedule change is not restrained. It cites Borough of Bogota, I.R. No. 98-23, 24 NJPER 237 (¶29112 1998), in which the Commission's designee found that a unilateral schedule change during the parties' interest arbitration process constitutes irreparable harm under N.J.S.A. 34:13A-21. The Association also notes that the change from 12-hour tours to eight-hour tours will require employees to work significantly more workdays and impact on their ability to attend to family matters, personal needs, and off-duty employment. The Association further asserts that the blatant threat to employee rights constitutes irreparable harm to employees.

The Borough avers that the interest arbitration process was concluded with the submission of the parties' post-hearing briefs. It cites Borough of Closter, I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001), in which the Commission designee found no chilling effect on negotiations since the interest arbitration and negotiations process had ended with a tentative agreement.

^{3/} I need not decide whether the Association is also likely to prevail on its claim that the Borough's unilateral action violates 5.4a(5) of the Act.

I find that the Association has demonstrated irreparable harm if the schedule is not restored. I find that the chief's memorandum threatening to change the schedule if the grievance was not withdrawn has significant chilling effect on employees' statutory rights to initiate and pursue grievances. I also find that the parties' negotiations and interest arbitration process continue at this time, since no agreement has been reached nor has the arbitrator's jurisdiction ended. See Borough of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) reversing I.R. No. 2001-11. Unilateral changes in terms and conditions during negotiations chill negotiations and undermine labor stability. Galloway. In addition, N.J.S.A. 34:13A-21 provides,

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

Here, the Borough's change in work schedules occurs during the pendency of interest arbitration, and therefore chills the parties' rights in the negotiations/arbitration process.

I am satisfied that the Association has demonstrated irreparable harm in this matter. The Borough has not asserted any harm to the Borough or the public interest if the 12-hour schedule is maintained.

Accordingly, I find that the Association has met its burden to obtain interim relief in this matter. I grant the Association's

application for interim relief. This case now will proceed through the normal unfair practice process.

ORDER

The Borough of Chester is restrained from implementing the proposed schedule change. The Borough is ordered to maintain the 12-hour shift schedule currently in effect. This interim order will remain in effect pending a final Commission order in this matter.

Susan W. Osborn

Susan Wood Osborn
Commission Designee

DATED: February 28, 2002
Trenton, New Jersey

