

I.R. NO. 2003-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF WOODBURY,

Respondent,

-and-

Docket No. CO-2002-329

P.B.A. LOCAL 122,

Charging Party.

SYNOPSIS

A Commission Designee denies interim relief on the PBA's charge that the City changed police officers' work schedule without negotiations. The Commission Designee finds that the PBA has not demonstrated a substantial likelihood of success on the merits, since it appears that the City had a contractual right to change the work schedule.

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Appearances:

For the Respondent,
Louis Rosner, attorney

For the Charging Party,
Jennings Sigmond, attorneys
(James Katz, of counsel)

INTERLOCUTORY DECISION

On June 10, 2002, the Patrolmen's Benevolent Association Local 122 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Woodbury (City) violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} by

^{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. (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."

announcing that it would change the work schedules of police officers from 12 hour shifts to rotating 8 hour shifts.

The City admits changing the work schedule but denies committing an unfair practice. It maintains that it has a contractual right to make the change, and that the PBA has waived its right to negotiate by repeatedly acquiescing to similar schedule changes over the past ten years.

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On June 12, 2002, I executed an order to show cause scheduling the return date on the interim relief application for July 9. The parties submitted briefs and affidavits in accordance with Commission rules and argued orally on the scheduled return date.

PBA Local 122 represents the City's police officers and detectives. PBA and the City have been parties to a series of collective negotiations agreements covering these officers, the most recent contract was signed on May 1, 2002 and covers the period 2002-2004. The contract includes the following provisions:

ARTICLE XXII
WORK WEEK AND WORK YEAR

SECTION I

Except as operational needs dictate, there shall be no change in an employee's work schedule without prior written notice to the employee. Every reasonable effort will be made to give forty-eight (48) hours notice before the actual change; but in no event shall the notice be less than twenty-four (24) hours unless carrying forth the mission of the department requires less than the notice provision set forth herein.

SECTION 5

Work Week

The normal work week shall be forty (40) hours. The City reserves the right to assign overtime as necessary.

The Woodbury police department has a history of changing police shift schedules. The City submitted an affidavit from Police Chief Reed Merinuk stating:

3. The well established practice of the parties is that changes in Department work schedules and shifts are made unilaterally at the discretion of the Chief of Police. Over the years, various Chiefs of Police have switched back and forth between 12 hour shift schedules and 8 hour shift schedules. . . . Examples of these shifts and/or work schedule changes include the following:

a. By Personnel Order No. 409, dated December 6, 1991, Chief Hoelbinger switched the Department to 12 hour shifts from 8 hours shifts.

b. By Personnel Order No. 418, dated October 13, 1992, Chief Hoelbinger switched the Department back to 8 hours shifts from 12 hours shifts.

c. By Personnel Order No. 432, dated January 6, 1994, Chief Hoelbinger instituted various schedule changes including a 10 hour shift for the bicycle patrol.

d. By Personnel Order No. 374, dated December 19, 1995, Chief Kinkler switched the Department to 8.5 hour shifts from 12 hour shifts.

e. By Personnel Order No. 382, dated August 20, 1996, Chief Kinkler switched the Department to 12.25 hour shifts from 8 hour shifts.

f. By Personnel Order No. 390, dated December 1, 1997, a number of officers had their shift assignments changed. The shifts were reduced from 12.25 to 12 hours.

g. By Personnel Order No. 394, dated December 17, 1998, Chief Kinkler switched the Department from 12 hour shifts to 8 hour shifts.

h. In April, 2000, Chief Merinuk switched the Department to 12 hour shifts from 8 hour shifts.

i. By Personnel Order No. 407, dated June 3, 2002, Chief Merinuk switched the Department from 12 hour shifts to 8 hour shifts. (footnote omitted)

Since April 2000, the police have been working steady 12 hour shifts of either 6 a.m. to 6 p.m. or 6 p.m. to 6 a.m. They are assigned to work a 2-2-3 schedule (2 days on, 2 days off; 2 days on, 2 days off; then 2 days on, 3 days off) totaling 84 work hours over a two week period. Officers are paid for a 40-hour week and also receive 4 hours of compensatory time every two weeks.

In June 2002, the chief announced by personnel order number 407 that:

The schedule is a 5 on, 2 off - 5 on, 3 off rotation with a steady midnight shift for an approximate three month period. This office will determine the days off on the midnight shift. The three 8 hour periods will be 11 p.m. to 7 a.m.; 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.

The PBA then filed this charge and accompanying application for interim relief. The PBA also asked for temporary restraints. However, on June 11 the chief agreed to postpone the schedule change until this matter could be heard. The PBA asks that I restrain the City from implementing the announced schedule change pending a final decision before the Commission.

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 maintains it will succeed on the merits in that the City is unilaterally changing the work schedule in violation of a(5) of the Act. The City argues that the PBA has waived its right to negotiate the schedule change, both by the terms of the collective agreement and by its acquiescence to similar changes over the past ten years.

Employees' work hours are generally negotiable. See Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). The parties in this matter do not dispute that the police work schedule would be mandatorily negotiable.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate over employees terms and conditions of employment with the majority representative. This section of the Act further 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.

An employer may not unilaterally change an existing, negotiable condition of employment unless the employee representative has waived its right to negotiate. See Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1998), aff'd 166 N.J. 112 (2000); Barneqat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). A waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the change, or it impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). If the employer proves that the employee representative has waived its right to negotiate, it has the right to make the change unilaterally. Middletown, 24 NJPER at 30; State of New Jersey (Dept. of Human Services), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). A waiver of section 5.3 rights will only be found where the agreement clearly, unequivocally and specifically authorizes the change. Red Bank; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

Here, the parties have negotiated about work schedules. In Article XXII, Section 1, of the parties' recently signed agreement,

the parties agreed:

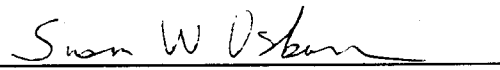
Except as operational needs dictate, there shall be no change in an employee's work schedule without prior written notice to the employee. . . .

The City relies on this language, asserting that it has discretion to change the work schedule. The PBA argues that this language was not intended to apply to the work schedule for the entire department, but rather, it was intended to cover individual officers' schedules. It appears that the City's reading of the contract language constitutes a reasonable interpretation of the clause; that is, that the language permits it to change work schedules provided there is adequate notice to employees. Moreover, it further appears from the unrefuted affidavit of the chief that the City has repeatedly used its contractual discretion to change the police officers' work schedules over the last ten years. Thus, it appears that the City has a colorable claim of contract waiver as well as a waiver by past practice.

Therefore, I find that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief. Accordingly, PBA's application for interim relief is denied. This case will proceed through the normal unfair practice mechanism.

ORDER

PBA Local 122's application for interim relief is denied.



Susan Wood Osborn
Commission Designee

DATED: July 12, 2002
Trenton, New Jersey