

I.R. NO. 99-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DIVISION OF STATE POLICE),

Respondent,

-and-

Docket No. CO-99-151

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

After the expiration of a Letter of Understanding which provided for the Association's waiver to file grievances concerning supplemental or special overtime programs, the Division of State Police issued a standard operating procedure which, the Association alleges, unilaterally changed terms and conditions of employment by including a waiver of the right to file grievances concerning the supplemental or special overtime programs. The Association sought interim relief seeking to enjoin the Division from effectuating the grievance procedure waiver provision contained in the SOP. The Commission Designee denied interim relief on the grounds that the Association did not establish the requisite irreparable harm element in the interim relief standard.

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Appearances:

For the Respondent,
Peter Verniero, Attorney General
(William P. Flahive, Deputy Attorney General)

For the Charging Party,
Loccke & Correia, attorneys
(Joseph Licata, of counsel)

INTERLOCUTORY DECISION

On November 10, 1998, the State Troopers Fraternal Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Division of State Police (State or Division), committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleges that the State violated

N.J.S.A. 34:13A-5.4a(1) and (5).^{1/} The unfair practice charge was accompanied by an application for interim relief. On November 13, 1998, an order to show cause was executed and a return date was initially scheduled for December 7, 1998, and, subsequently, rescheduled to December 21, 1998. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules and argued orally on the return date. On December 21 and December 22, 1998, the Association filed amended unfair practice charges. The Association did not incorporate the amendments into its application for interim relief.

The Association alleges that the Division unilaterally promulgated a standard operating procedure (SOP) designated F2 which pertains to trooper special overtime assignments. Although the Association's unfair practice charge and amendments allege a number of actions by the Division violative of the Act, during oral argument, the Association modified its application for interim relief to focus on a single provision of SOP F2 which waives unit members' right to resort to the negotiated grievance procedure contained in the collective agreement if a dispute arises concerning the application of SOP F2. SOP F2, section IV. B. 9. E. states:

^{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.

Grievance procedures, as outlined in the agreements with the respective associations, are waived with the exception of disciplinary action.

The grievance procedure contained in the 1993-1996 collective agreement states the following:

The term "Grievance" shall mean an allegation that there has been:

1. A breach, misinterpretation, or improper application of the terms of this Agreement; or
2. A claimed violation, misinterpretation, or misapplication of the written rules and regulations, policy or procedures affecting the terms and conditions of employment.

It appears that over the years, the Division has established supplemental or special overtime programs to enhance the police presence in targeted areas. Apparently, such programs were often state or federally funded. Such programs included the Supplemental Construction Program, Driving While Intoxicated Surcharge Enforcement Program, Highway Occupancy Vehicle Traffic Enforcement Program, Meadowlands Sports Complex Program, the Aggressive Driver Program and the Holiday Sobriety Checkpoint Program. The Division issued operations instructions which detailed the mechanics by which the programs operated. It appears that the State and the Association communicated regarding the elements contained in the operations instructions which ultimately resulted in the Association expressing no objection to the provisions contained in the operations instructions issued pertaining to a particular program. Apparently, the parties periodically executed letters of understanding relating to the supplemental overtime

programs. For example, on March 7, 1997, the State and the Association executed a letter of understanding which, in relevant part, states the following:

It is understood and agreed that for the sole purpose of participating in a State funded project or Federal funded project such as DWI Surcharge Enforcement Program, K55 Program, High Occupancy Vehicle Enforcement program (HOV), Construction Overtime Program, and/or Meadowlands Overtime Program, to commence when funds are made available and to conclude on or about December 31, 1997, the provisions of the State Troopers' Fraternal Association of New Jersey, Inc. Agreement except grievance and arbitration and other contractual protections in connection with disciplinary action, are hereby waived and inapplicable for those personnel only during participating (sic) in said project while off duty. The members to be employed are shift supervisors and troopers who are fully qualified or certified for the duties to be assigned. Employees will be compensated for time worked at the premium rate of time and one-half. Additionally, all payments for travel to and from these patrol assignments are waived.

The Association contends that the above quoted letter of understanding was typical of those into which the parties periodically entered. The Association asserts that it agreed to waive its access to the grievance procedure because it had no objection to any element of the various supplemental overtime programs.

The Association contends that SOP F2 is not merely a compilation of previously agreed terms reflected in the various operations instructions. For example, the Association asserts that in the past, if a trooper failed to appear for an assignment to the supplemental construction overtime program, the trooper would be

suspended from additional supplemental construction overtime assignments for six months. Should the trooper fail to report a second time, the trooper would be indefinitely suspended from further supplemental construction overtime program assignments. However, the Association asserts that a trooper who failed to report for a supplemental construction overtime program assignment and, consequently, was suspended from that program, would nonetheless be eligible for assignments to other supplemental or special overtime programs. The Association contends that SOP F2 contains language which prevents troopers from receiving a supplemental overtime assignment in any program for a period of one year in the event such trooper fails to comply with any of the Division's administrative policies. The Association alleges this suspension provision is different from any other suspension provision that was found in the operations instructions. The Association argues that it is because of such changes reflected in SOP F2, to which it has not agreed, that it now refrains from again agreeing to waive its access to the grievance procedure.

The Association points out, and the State agrees (State brief at p.2) that the latest letter of understanding which incorporates the Association's waiver of its access to the grievance procedure for supplemental or special overtime programs expired on or about December 31, 1997. Neither party has indicated that since the expiration of the letter of understanding, any grievance concerning the supplemental or special over-time programs has been

filed. The Association argues that upon the expiration of the letter of understanding, its waiver to access the grievance procedure likewise expired. The Association asserts that absent the execution of a specific agreement waiving access to the grievance procedure for special and supplemental overtime programs, the existing term and condition of employment reverts to that which is contained in the parties collective agreement. The Association contends that since SOP F2 contains provisions waiving access to the grievance procedure, and since no agreement has been executed by the parties providing for such a waiver of the grievance procedure, the Division's incorporation of language waiving access to the grievance procedure constitutes a unilateral change in terms and conditions of employment in violation of the Act.

The State contends that SOP F2 is merely a standardization of procedures that have been in effect since at least 1991. The State asserts that any of the supplemental or special overtime programs are voluntary and the trooper can choose not to participate. The State claims that it has historically established restrictions on procedures applicable to the special overtime programs in order to ensure compliance with federal mandates needed to maintain funding. The State asserts that since November, 1978, the parties have entered into letters of understanding similar to the one which expired in December 1997, and such letters have traditionally included a waiver by the Association to all provisions of the collective agreement, including the grievance procedure, except for grievances concerning disciplinary actions.

Moreover, the State asserts that the terms governing the supplemental overtime programs are reflected in the Division's operations instructions which for the supplemental construction overtime program dates back to September 1996; the DWI program dates back to April 1993; the HOV enforcement program dates back to April 1994; and the Meadowlands supplemental overtime program dates back to November 1991. The State points out that each of the operations instructions for the various programs includes waivers by the Association to the grievance procedure contained in the collective agreement. The State concludes that the Association has knowingly waived its access to the grievance procedure concerning these supplemental and special overtime programs for a considerable period of time. Consequently, it argues that SOP F2 reflects the existing conditions of employment as they pertain to supplemental and special overtime programs and no unilateral change has occurred.

Additionally, the State asserts that since the procedures reflected in SOP F2 have been in effect since as early as 1979, the Association cannot show that it will be irreparably harmed. Further, the State argues that there will be no irreparable harm to the Association because any overtime assignment that is denied to one Association member will be provided to another. Thus, the Association, as a whole, cannot claim irreparable harm. The State contends that the Association must show actual harm rather than just that there is potential, theoretical harm.

Finally, the State contends that the Association has not shown that it has a substantial likelihood of success on the merits. The State argues that the policies reflected in SOP F2 have been in existence for years, well beyond the six month statute of limitations provided in the Act for filing an unfair practice charge.

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).

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. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

Thus, under the Act, before an employer can change a term or condition of employment, it must negotiate with the majority representative.

The parties have negotiated a grievance procedure which is contained in their collective agreement. Pursuant to the terms of the grievance procedure, a claimed violation, misinterpretation or misapplication of SOP F2 appears to fall within the definition of a grievance and may be processed in accordance with the negotiated procedure. The parties to the collective agreement may at any time jointly agree to modify its terms. Middlesex Bd. of Ed., H.E. No. 93-26, 19 NJPER 279 (¶24143 1993), adopted P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993). It appears that the parties have a history of entering into fixed-term letters of understanding; the last of which expired on or about December 31, 1997. That letter of understanding clearly and unequivocally modified the grievance procedure contained in the collective agreement. However, upon the expiration of the letter of understanding, it would appear that the jointly agreed upon modification in terms and conditions of employment created by the letter would likewise dissolve, and the parties would again be bound by the express elements contained in their collective agreement. Accordingly, language contained in SOP F2 which unilaterally modifies the established grievance procedure appears to violate provision 5.4a(5) of the Act.

The State contends that the unfair practice charges were filed beyond the six months statute of limitations. The State asserts that since the policies implicated in the charge have been in existence for years, the Association's unfair practice charge is not timely filed. The Association argues that SOP F2 was dated May 11, 1998, yet not received by the Association until sometime later.

The initial unfair practice charge was filed November 10, 1998. It appears that the operative date for determining the application of the six months statute of limitations is no earlier than May 11, 1998, the date SOP F2 was issued. The allegation at issue in the Association's application for interim relief, i.e., repudiation of the contractually established grievance procedure, was contained in the Association's initial unfair practice charge. Consequently, I find that the issue before me appears not to be time barred. Consequently, I find that the Association has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations that the State has violated the Act.

However, I find that the Association has not established the requisite irreparable harm element of the standard to obtain interim relief. Apparently, no grievance concerning a supplemental or special overtime program has been filed by the Association or its membership since the issuance of SOP F2 and none is currently pending. Consequently, it appears that the Association's claim that it will be irreparably harmed because of the language pertaining to access to the grievance procedure contained in SOP F2 is currently more hypothetical than actual. To obtain injunctive relief, the Association must show that it is in imminent danger of being irreparably harmed. See Crowe v. De Gioia; J.H. Renarde, Inc. v. Simms, 312 N.J.Super. 195, 203 (1998). The Association has not shown that the harm is imminent and, therefore, has not established the requisite irreparable harm element of the standard.

ORDER

The Association's application for interim relief is denied. This case will proceed through the normal unfair practice processing mechanism.


Stuart Reichman
Commission Designee

DATED: January 5, 1999
Trenton, New Jersey