

I.R. No. 2006-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF LODI,

Respondent,

-and-

Docket No. CO-2006-199

PBA LOCAL 26,

Charging Party.

SYNOPSIS

A Commission Designee grants the PBA's request for interim relief where the employer unilaterally changed its practice of permitting two police officers per tour to simultaneously take vacation or holiday time. The employer did not show that it could not meet its minimum staffing requirements if the prior practice was reinstated. Further, the change occurred during interest arbitration. Accordingly, the PBA demonstrated that it had a substantial likelihood of success on the merits of its charge and that it would be irreparably harmed if the employer was not restrained from implementing the new vacation limitations.

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Appearances:

For the Respondent, Giblin & Giblin, attorneys
(Brian Giblin, of counsel)

For the Charging Party, Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

INTERLOCUTORY DECISION

On February 7, 2006, the Lodi PBA Local No. 26 filed an unfair practice charge with the Public Employment Relations Commission alleging that the Borough of Lodi violated 5.4a(1), (3) (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} when it implemented a policy limiting

^{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 condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (5) Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit
(continued...)

the number of police officers simultaneously permitted on take vacation to one officer per shift per day and imposing "black-out" dates when no vacations or holidays would be permitted.

The charge was accompanied by an application for interim relief, requesting that the Commission restrain the Borough from implementing the vacation restrictions and demanding restoration of the previous vacation leave policy. An Order to Show Cause hearing was scheduled for February 27, 2006. The parties filed briefs and supporting affidavits and argued orally on the scheduled return date.

The Borough admits to implementing the new policy but denies it violated the Act. It asserts a managerial prerogative to impose the new restrictions on vacation leave, arguing that the restrictions are needed to maintain minimum staffing levels for each shift. It contends that therefore, it has no obligation to negotiate with the PBA before implementing the new policy.

The following facts appear:

PBA Local 26 represents the Borough's police officers including superiors, except the Chief. There are 41 members of the negotiations unit. The officers work 12-hour shifts, and

1/ (...continued)
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.

there are two shifts on per day. The PBA has an expired collective negotiations agreement with the Borough covering unit employees through December 31, 2005. The parties have engaged in negotiations for a successor agreement and are now in interest arbitration. The expired contract includes a vacation leave provision that provides police officers with vacation leave of between 11 and 30 working days annually, depending upon the employee's length of service. Article 20, Section B provides that vacation time not granted by reason of "pressure of police activity" shall accumulate and shall be granted during the next succeeding year. Section E states,

Vacation shall be selected on a rotating seniority basis which shall be established by the Department. Vacations are to be selected and posted within the schedule pursuant to the present practice. (Emphasis added).

At the Chief's direction, on January 8, 2006, Deputy Chief Robert Kelly, issued a departmental memo to all tour commanders concerning vacation scheduling. The memo provides that for calendar year 2006, only one person per day per squad would be permitted to take vacation leave. In addition, the memo established certain "black-out" days^{2/} when no vacation or selected holidays could be taken.

The parties agree that prior to 2006, the department

^{2/} The black-out days established were July 4, October 30, October 31, November 22, and December 31, 2006.

permitted two police officers per squad to simultaneously take vacation time.^{3/}

On January 13, the PBA filed a grievance with Chief Vincent Caruso and also demanded to negotiate over the announced change in vacation leave policy. By letter of the same date, Chief Caruso denied the grievance and asserted that the decision to limit vacation selections was a managerial prerogative, not subject to negotiations with the PBA. In his letter, Caruso explained that "staffing problems, due to manpower issues, as well as evidence of patterns of abuse of sick time . . ." precipitated the policy change in vacation selection.

Chief Caruso submitted an affidavit on behalf of the Borough, together with his response to the PBA's grievance. He acknowledged that the past practice had been to permit two officers per squad per day to take vacation leave. However, he explained that because the police force had experienced some retirements and anticipated additional retirements, the patrol squads would each be reduced in number from eight scheduled officers to seven. He believed that if he permitted two officers

^{3/} The Chief's affidavit states that two officers were permitted on vacation at once; PBA President Roger Stahl stated in an affidavit that "as many as three or four officers were routinely authorized to take vacation on any given day . . ." At oral argument, the parties stipulated that the practice had been that two officers per shift per day were permitted simultaneous leave time.

on vacation simultaneously, that would reduce the shift complement to five. Thus, if any officer called then in sick or took an "E day", that officer's scheduled tour would have to be filled by calling another officer in on overtime in order to maintain a minimum staffing level of five per squad. In his affidavit, Caruso stated, "until such time as staff is added to the department, I could not afford to permit overtime to go unchecked."

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 the Borough unilaterally changed a term and condition of employment which it was required by the provisions of the contract and by past practice to maintain. It argues that the Borough's implementation of a new policy

concerning vacation leave violated its duty to negotiate and therefore violated 5.4a(5) of the Act. It further argues that the Chief's expressed motive for implementing the policy was to retaliate against unit members for using their contractually guaranteed sick time, thus violating 5.4a(3). The PBA contends that the scheduling of vacation leave is mandatorily negotiable even if the employer incurs overtime costs in order to allow employees to use such vacation leave. It cites Town of Secaucus, P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000); Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp. 2d 141 (125 App. Div. 1984); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); and Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987).

The Borough acknowledges that it implemented the new policy limiting vacation selection without negotiations but maintains that it needed to do so to guarantee it would have minimum staffing levels on each shift. It cites Pennsauken Tp. holding that minimum staffing decisions are managerial prerogatives. Thus, the Borough argues that it had no obligation to negotiate before implementing the new vacation selection policy.

The Borough does have a managerial prerogative to establish minimum staffing levels, and has no obligation to negotiate with the PBA as a prerequisite to doing so. Here, the Chief determined that he needed a minimum of five officers on each squad. That decision is not negotiable.

However, the scheduling of vacation leave is mandatorily negotiable provided the employer can meet its staffing requirements. Pennsauken Tp.; City of Elizabeth; Town of West New York; City of Orange Tp., Middle Tp.; Marlboro Tp. While an employer may deny a requested vacation to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take a vacation day even though doing so would require it to pay overtime compensation for a replacement employee. City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996); Town of Secaucus.

An employer does not have a right to limit employees' vacation selection absent a showing that minimum staffing requirements would be jeopardized. Pennsauken Tp.; City of Trenton; Logan Tp., I.R. No. 95-23, 21 NJPER 243 (¶26152 1995). Here, the Borough has not demonstrated that it cannot achieve its minimum staffing requirements and still maintain the existing practice of two officers on the same shift simultaneously taking vacation or holiday time off. The Chief's affidavit states that

his minimum staffing per tour is five officers. Thus, permitting two of the seven officers on a tour to simultaneously take vacation, in and of itself, would not compromise minimum staffing needs. The Chief's expressed concern, however, was that if an additional officer was out sick or on injury leave, the Borough would then incur overtime expenses to backfill the slot on that tour. Noteworthy is the absence of a claim that staffing shortages could not be filled by calling in unscheduled officers or temporarily reassigning officers from another squad. To the contrary, the Chief's concern was to control overtime costs. Based upon the facts in this case, I find that the vacation selection policy is negotiable.

N.J.S.A. 34:13A-5.3 provides,

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

Further, 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

Employees "terms and conditions" of employment exist both under the express terms of the written collective agreement and by the parties' past practice. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd. 166 N.J. 112 (2000).

It is undisputed that the Borough changed the practice of permitting up to two officers per shift per day to simultaneously take vacation or holiday leave time. Further, the parties' most recent contract provides for a vacation selection process "pursuant to the present practice." Accordingly, I find that the PBA has demonstrated a substantial likelihood of success on the merits of its claim that the Borough's new vacation policy was implemented without negotiations in violation of 5.4a(5) of the Act.

As to the unilaterally imposed black-out days, the Borough does not dispute that that is a new rule not negotiated with the PBA. The Borough has not set forth any rationale for that policy. Accordingly, I cannot find that minimum staffing levels will be jeopardized by permitting employees to take leave time which include the dates set forth as "black-out" days in the January 9 order.^{4/} However, the contract appears to permit the Borough to deny time off requests due to the "pressure of police activity." If emergent conditions prevail which would prevent the department from meeting its minimum staffing requirements if it permitted leave time, the Commission's caselaw cited above permits such an exception.

^{4/} The Borough has not expressed the need for additional staffing beyond the normal shift complement on those days.

Citing Borough of Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002) the PBA contends that unilateral changes made during the parties' negotiations and interest arbitration process chills the process and undermines labor stability, resulting in irreparable harm. It also points out that vacation leave time, once denied, cannot be restored at the conclusion of the case.

I find that the PBA has established irreparable harm. Leave time which is denied represents leave opportunities which are lost forever and are not capable of an effective remedy at the conclusion of the case. City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004); City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); No. Bergen Tp., I.R. No. 97-16, 23 NJPER 249 (¶28119 1997).

In addition, the parties are engaged in negotiations and interest arbitration for a successor contract. Unilateral changes in terms and conditions of employment during any stage of negotiations can shift the balance of power in the collective negotiations process and therefore have a chilling effect on employee rights guaranteed under the Act and undermine labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978). Such changes are unlawful and, where appropriate, will be rescinded if the standards for obtaining interim relief have been met. City of Passaic, P.E.R.C. 2004-21, 29 NJPER 483 (¶150 2003); Borough of Closter, P.E.R.C. No. 2001-

75, 27 NJPER 289 (¶32104 2001). Further, N.J.S.A. 34:13A-21 prohibits unilateral changes during the pendency of the arbitration process.

In assessing the relative hardship to the parties, I find that the scale tips in favor of the PBA. The interim order merely returns the parties to the status quo ante. Requiring the Borough to maintain the practice of permitting two officers on the same tour to simultaneously take vacation or holiday time would only result in overtime expenses if additional officers are also absent. The Borough will still be able to maintain its minimum staffing levels. But PBA members who would be denied the choice of leave time to which they were entitled would suffer harm because the vacation selection denied cannot be restored at the conclusion of the case. In addition, denying relief would injure the PBA in the negotiations/interest arbitration process and cause employees to lose confidence in their majority representative.

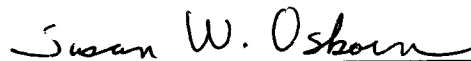
Considering the public interest in granting or denying interim relief, I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. In addition, the Borough still has the ability to maintain its minimum staffing levels and thus the

public continues to enjoy the level of police protection the Borough has determined is appropriate.

Based upon the above, I find that the Commission's interim relief standards have been met, and the PBA's requested interim relief has been granted. The case will proceed through the normal unfair practice processing mechanism.

ORDER

The Borough of Lodi is restrained from implementing new restrictions on police officers' selection of vacation time by limiting the number of officers permitted to be simultaneously on vacation to one officer per shift per day; and by imposing "black-out" days during which officers are prohibited from taking vacation. The Borough will reinstate the previous policies concerning the selection of vacation time to permit two officers per shift per day to be on vacation simultaneously, with no black-out days. This order will be in effect pending a decision by the Commission at the conclusion of the case or until the parties negotiate the issue to a resolution or the issuance of an award by the interest arbitrator.



Susan Wood Osborn
Commission Designee

Dated: March 13, 2006
Trenton, New Jersey