

I.R. NO. 2006-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-2006-172

JERSEY CITY POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designees denies an application for interim relief filed by the Charging Party, Jersey City Police Superior Officers Association.

The PSOA's unfair practice charge alleges that Jersey City violated the New Jersey Employer-Employee Relations Act when it announced, and thereafter implemented, unilateral changes in work schedules and work assignments of sergeants and lieutenants. Specifically, the PSOA alleged that "Tour commander" duties, normally assigned to Lieutenants and performed by Sergeants on an "out-of-title" basis, had been recast by the City as the normal duties of the Sergeant rank solely for economic reasons, i.e. to avoid paying Sergeants the higher pay of a Lieutenant when acting as a tour commander.

The designee found that the PSOA had not established that it had a substantial likelihood of prevailing on the merits of its charge given defenses raised by the City. The City asserted that the reassignment of most lieutenants from day to evening or midnight shifts was necessary to correct an imbalance in supervisory assignments. It also asserted, based on the Department of Personnel job description for the position, that assignment as a desk officer was a normal duty for sergeants and was not out-of-title work where a lieutenant was also present on that shift. The designee concluded that these contentions had raised disputed material factual issues bearing on whether the changes made by the City violated its statutory duty to negotiate over the terms and conditions of employment.

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso, and Kessler, attorneys, (Stephani C. Schwartz, of counsel, Rachel A. Davis and Natalie S. Schaefer on the brief)

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

INTERLOCUTORY DECISION

On January 5, 2006, the Jersey City Police Superior Officers' Association ("PSOA") filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of Jersey City ("City") violated subsections 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/} The PSOA alleges that in October

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
(continued...)

2005, the City announced, and thereafter implemented, unilateral changes in work schedules and assignments of sergeants and lieutenants in violation of a collective negotiations agreement and the parties' past practices. Specifically, the PSOA alleges that "Tour Commander" duties, normally assigned to lieutenants and performed by sergeants on an "out-of-title" basis, had been recast by the City as the normal duties of sergeants solely to avoid paying them the higher rate pay of a lieutenant. The PSOA also alleges that the City refused to negotiate over the changes.

The charge was accompanied by an application for interim relief seeking the issuance of an order directing that the City "be enjoined from eliminating the shift schedule of Lieutenants and the manner in which work assignments have been allocated to Lieutenants and Sergeants," as well as requiring that the City, during the pendency of collective negotiations, be ordered to continue all existing terms and conditions of employment.

An order to show cause was executed on January 13, 2006 and a return date was scheduled for February 1, 2006, and then rescheduled to February 7, 2006. I was assigned, as a Commission

1/ (...continued)
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 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."

designee, to hear the application. The parties submitted briefs, certifications and exhibits in accordance with Commission rules.

On February 7, 2006, I held a hearing at which both parties argued orally. At the end of the hearing, I denied the PSOA's interim relief application.

The PSOA represents the City's police superior officers from the rank of Sergeant up to Inspector. The PSOA and the City are parties to a series of collective negotiations agreements, the most recent of which expired December 31, 2005. On January 11, 2006, the PSOA filed a petition to initiate interest arbitration.

Since November 2004, Robert Troy has been Chief of Police. In October 2005, departmental orders were issued affecting the assignments and shifts of sergeants and lieutenants. PSOA President Joseph Delaney states in a certification that, prior to the changes, most lieutenants worked as tour commanders during the day shift. Many were then reassigned to the evening and midnights shifts and were given "garden variety patrol work and front line supervisory work previously performed by Sergeants." He asserts that sergeants have now been given desk assignments and administrative duties that were previously performed by lieutenants as tour commanders.

Prior to October 2005, sergeants filling in for lieutenants as Tour Commanders received premium pay for out of title work. Since the change, Delaney claims that the City has treated these

duties as part of a sergeant's normal job and is no longer considering these posts as "out of title" assignments warranting extra pay.

Chief Troy's certification states that he had observed that there were too many supervisors working days and too few on the evening and midnight shifts. As a result, sergeants were often used to fill in for higher ranking officers on those tours. Troy asserts that the changes challenged by PSOA's charge were a response to the deployment problems and were first discussed at meetings with the department's Deputy Chiefs and Captains before they were implemented. The City claims that the current duties of each position are part of the regular duties of these jobs as set by Department of Personnel job descriptions and, accordingly, Sergeants assigned as desk officers are not working out of title.

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).

Shift schedules are a component of work hours. Court and Commission case law holds that the work schedules of individual employees, including police officers, are as a general rule mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); see also Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003).

While all shift schedules or rotations affect employee work hours, some are also intertwined with the nature of the duties performed or the efficient operation of the police department. When that is the case, a shift schedule proposal or provision may implicate the principle that an employer has a prerogative to match the best qualified employees to particular assignments or to improve efficiency by changing supervisory assignments. See Springfield Tp., P.E.R.C. No. 2006-27, 31 NJPER 328 (¶131 2005); Franklin Bor., P.E.R.C. No. 2006-20, 31 NJPER 305 (¶120 2006); Union Tp., P.E.R.C. No. 2003-81, 29 NJPER 214 (¶163 2003).

The PSOA has shown that the work schedules of lieutenants who were reassigned from day shifts to evening and night shifts have been changed. However, given the City's assertions concerning why the changes were made, I cannot say that the Commission would be substantially likely to conclude that the impact on the officers' work and welfare caused by the shift changes outweighed the managerial and operational concerns listed in the Chief's certification.^{2/} Therefore, I deny interim relief on this aspect of the PSOA's charge.

The other component to the PSOA's charge is that the City assigned duties to sergeants that were previously treated as the normal work of lieutenants and for which sergeants had received "out of title" pay under Article 26 of the agreement.

Compensation for temporary assignments to replace absent officers of higher rank is mandatorily negotiable. See Atlantic City, P.E.R.C. No. 2001-56; North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 108 (¶31044 2000); City of Hoboken, P.E.R.C. No. 96-7, 21 NJPER 280 (¶26179 1995).

Disputes over whether the duties an employer has assigned to a particular position or rank are within the established job classifications for such positions and whether pay rates are

^{2/} At a hearing the PSOA would have the ability to produce testimonial and other evidence to try to show that the changes were made for non-managerial or operational reasons.

consistent with negotiated salary rates concern mandatorily negotiable terms and conditions of employment. In E. Brunswick Principals & Supervisors Ass'n and E. Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992), an arbitrator ruled that the assignment of the duties of the position "Supervisor" to certain administrators who were given the lower level title "Department Chairman" violated the contract because the employees were performing the duties of Supervisors, but were not receiving the negotiated salary for that position. The arbitrator ordered that the employees be reclassified as Supervisors and paid accordingly. The Commission ruled that the award related to a mandatorily negotiable subject and the Appellate Division agreed.

East Brunswick is relevant to the portion of the PSOA's charge alleging that the employer required sergeants to perform Lieutenant's duties that had previously been considered "out of title" work for which the City paid premium rates. But, in seeking interim relief, the PSOA has the task of establishing a substantial likelihood that this reallocation of duties not only concerns negotiable working conditions, but also showing that the City violated the Act's mandate that a public employer negotiate with the majority representative before making the challenged changes in working conditions. See N.J.S.A. 34:13A-5.3. I conclude that the PSOA has not met its task.

The City's submissions include Department of Personnel job descriptions for Lieutenant and Sergeant. Among the "Examples of Work" for Sergeant is "Takes charge of a police desk operation where complaints are received and officers dispatched." (DOP Job Description 32334). Citing this document, Chief Troy asserts that working as a desk officer is a normal duty for a sergeant.

As Jersey City is a Department of Personnel jurisdiction these job descriptions are relevant to whether the withholding of out of title pay from sergeants assigned as desk officers is a legally significant change in an existing working condition.^{3/}

The City relies on a prior case between it and the PSOA, which held that the PSOA had not shown that sergeants received out of title pay when assigned to desk duties when a lieutenant also worked that tour. City of Jersey City and PSOA, H.E. No. 98-11, 23 NJPER 610, 614 (¶28300 1997).^{4/}

^{3/} N.J.A.C. 4A:3-3.4, part of the DOP's administrative rules provides:

No person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds, unless otherwise provided by law or these rules.

See also City of East Orange v. Civil Service Com., 132 N.J.L. 181 (Sup Ct. 1944)

^{4/} This decision was not reviewed by the Commission as the charge was withdrawn and the complaint dismissed after the Hearing Examiner's decision was issued.

The City's response to the interim relief application has raised sufficient doubt to prevent a finding that the PSOA is substantially likely to prevail on the merits of its charge. See Crowe v DeGioia, 90 N.J. at 133 (disputed material facts prevent the grant of injunctive relief). Accordingly, I decline to grant the PSOA's application. The case will proceed through normal unfair practice case processing.^{5/}

ORDER

The PSOA's application for interim relief is denied.

BY ORDER OF THE COMMISSION

Don Horowitz
Commission Designee

DATED: February 21, 2006
Trenton, New Jersey

^{5/} In its brief and at the interim relief hearing the City requested that the PSOA's charge be dismissed. That request is premature. See N.J.A.C. 19:14-1.6(a)2; N.J.A.C. 19:14-3.1; N.J.A.C. 19:14-4.1 et seq.