P.E.R.C. NO. 2010-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS COUNTY SHERIFF'S OFFICE AND
COUNTY OF MORRIS,

Respondents,

-and- Docket No. CO-2009-118

MORRIS COUNTY POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL 298,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the Morris County Policemen's Benevolent Association, Local 298's cross-motion for summary judgment on an unfair practice charge it filed against the Morris County Sheriff's Office and County of Morris. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it issued a directive providing that staff who are assigned to positions normally closed on the weekend will no longer be permitted to work those positions on a holiday. The Commission denies the County's cross-motion on this unfair practice charge. The Commission holds that because the employer announced the change during the pendency of interest arbitration proceedings, it violated the Act. The Commission denies the PBA's motion on the ground that the employer repudiated the parties' contract.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondents, Daniel O'Mullan, Morris County Counsel; Knapp, Trimboli & Prusinowski, LLC, attorneys (Fredric M. Knapp, of counsel and on the brief; Alex Klein, on the brief)

For the Charging Party, Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys (Donald B. Ross, Jr. and Blake C. Width, on the brief)

DECISION

On May 8 and 20, 2009, the Morris County Sheriff's Office and County of Morris ("employer") and Morris County Policemen's Benevolent Association, Local 298, respectively, filed a motion and cross-motion for summary judgment. The employer seeks dismissal of an unfair practice charge filed by the PBA on October 7, 2008. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1

et seq., specifically 5.4a(1) and (5)[1/], when Undersheriff Ralph McGrane issued a directive providing that staff who are assigned to positions normally closed on the weekend will no longer be permitted to work those positions on a holiday. The PBA maintains that the policy changed a past practice embodied in the parties' collective negotiations agreement, unilaterally altered a clear and unequivocal contract provision without negotiations, and was issued during the pendency of interest arbitration.

Summary judgment will be granted if no material facts are in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 540 (1995). The parties have filed briefs, exhibits and certifications in support of their motions.

The employer argues that it has a managerial prerogative to institute the schedule change. The PBA argues that the directive repudiated the parties' contract during interest arbitration. These undisputed facts appear.

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."

The PBA is the exclusive representative of all correction officers employed in the Morris County jail. The parties' most recent collective negotiations agreement expired on December 31, 2006. The parties are currently engaged in interest arbitration for a successor agreement. We take administrative notice of the fact that an interest arbitrator was appointed on May 9, 2007.

Article 9 of the expired collective agreement is entitled "Holidays". Section 1 enumerates 13 paid holidays granted to all employees. Section 3 provides:

> Employees covered by this Agreement, who do not work on any of the holidays enumerated in Section 1, shall receive holiday pay computed at their regular straight-time hourly rate for the number of hours for which they are normally and regularly scheduled to work immediately prior to the holiday, up to a maximum of eight (8) hours.
>
> Employees, covered by this Agreement, who do work on any of the holidays enumerated in Section 1, shall receive holiday pay for work performed on said holidays within two (2) pay periods of the actual holiday worked. Said payment shall be calculated at the employee's straight time hourly rate of pay, not to exceed eight (8) hours. Such payments shall not become part of the employee's base salary structure.

Article 11 is entitled "Maintenance of Certain Practices". It provides that certain specified practices shall be maintained during the life of the agreement, including among others, at section (a), "request for approved holiday leave." In particular, section (a) provides:

> Request for holiday leave shall be made to the employee's supervisor at least three (3) days prior to the holiday date requested. Holiday leave will only be given upon request of the employee provided there is three (3) days prior notice and sufficient coverage during the tour of duty when the holiday allowances are to be used. The supervisor shall designate a replacement.

The jail operates 24/7. Correction officers work five days on and two days off. Days off are staggered to provide necessary coverage and maintain security in the jail facility. Article 23 of the collective agreement is entitled "Hours of Work-Week". It states, in pertinent part:

> The work week for all employees working at the Morris County Correctional Facility shall consist of forty-two and one-half (42 1/2) hours per seven (7) work days based on the current 5-2 day week which includes a one-half (1/2) hour unpaid lunch period per shift. . . .

Officers are assigned to various posts. Certain assignments require that the position be covered on holidays to maintain security. Under Article 9, officers who work a post on a holiday receive holiday (double time) pay for the day. If the holiday falls during an officer's regularly scheduled day off, the officer receives straight-time pay for the day. If the officer's normal work week includes a holiday, the officer may request a holiday leave day under Article 11 and, if granted, the officer receives straight-time pay for the day.

Leon Pollison is the PBA vice-president and grievance chairman. He has been a correction officer since 1996. Pollison states that there is nothing in Article 11 that permits the Sheriff to require officers to change their normal work schedule and take off a holiday that falls during their regular work week.

Undersheriff Ralph McGrane was employed by the County in 1998, but recently retired. Effective May 29, 2009, Warden Frank Corrente was appointed to the office of Undersheriff. He has also been a warden for the past six years and is responsible for administration of the facility.

In 2008, County Administrator John Bonanni instructed then Undersheriff McGrane to reduce costs in the jail facility due to the current economic climate. As a result, McGrane drafted a directive entitled "Morris County Correctional Facility Strategy for Controlling Overtime and Operational Expenses." McGrane certifies that the directive was drafted to "decrease overtime expenditures and enhance the overall security and safety of the facility, affording staff more rest between shifts, and more equitably distributing overtime hours." The rationale stated in the directive itself is "to reduce our overtime and operational expenses."

The portion of the directive at issue in this proceeding is effective January 1, 2009 and is entitled "Elimination of Discretionary Overtime." It states, in pertinent part:

> As you know, correctional facilities traditionally operate on holidays the same way as they do on weekends. Currently, our officers and Lieutenants working on a holiday earn double time and our Sergeants earn triple time. Therefore, effective January 1, 2009, the practice of staff members who are assigned to positions that are normally closed on the weekend will no longer be permitted to work those positions on a holiday.

The directive then lists 17 officer posts and 12 supervisory posts as being affected.

In the past, officers were allowed to staff the posts now closed on holidays that fell during their regular Monday-to-Friday work week and collect holiday (double time) pay or they could request holiday leave under Article 11. According to McGrane's directive, these posts will no longer operate on holidays, and officers assigned to these posts will have the day off with pay at straight-time rates as per Article 9 of the collective agreement.

The directive does not affect other posts that are traditionally staffed on weekends nor does it prevent officers who work these staffed-on-holiday posts from being paid the contractual holiday (double time) rate. Similarly, under Article 11, holiday leave requests are not impacted by the directive for officers whose assignments require that they work holidays. They may still request the day off.

According to Corrente, officers are scheduled to ensure minimum staffing both on holidays and regular work days. Therefore, only if minimum staffing levels are exceeded will scheduled-officers' holiday-leave requests be considered. These requests are granted first on the basis of seniority and then on a first-come, first-served basis. Corrente maintains that the collective agreement does not give officers the discretion whether or not to work a holiday nor is there such a practice. Only if their holiday-leave requests are granted, are officers who are assigned to posts operating on holidays permitted to take the holiday off. Minimum staffing, Corrente explains, is based on operational needs, not on the number of officers who wish to work on any given day.

On January 13, 2009, the PBA filed a grievance contesting the directive. Corrente denied the grievance that same day.

The employer argues that the holiday directive implicates its non-negotiable managerial prerogative to determine staffing levels. Specifically, the employer explains that the Undersheriff closed non-essential posts on holidays, thus, eliminating the need to cover those posts on an overtime basis.

The PBA disagrees. It argues that holiday pay is negotiable and that the holiday directive repudiates a clear and unequivocal contractual provision regarding the use of or compensation for

working on holidays when the holiday is part of the normal work week.

N.J.S.A. 34:13A-5.3 requires a public employer to negotiate before setting or changing mandatorily negotiable employment conditions. In addition, police officers and firefighters may enter into enforceable agreements over permissive subjects of negotiations, but it is not an unfair practice for an employer to refuse to negotiate before setting or changing permissively negotiable employment conditions. See Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78 (1981).

The employer argues that McGrane's directive primarily implicates a staffing decision and is, therefore, a non-negotiable managerial prerogative. It cites several cases in support of its position, but those cases are distinguishable. In City of Jersey City, P.E.R.C. No. 94-30, 19 NJPER 542 (¶24256 1993), we determined that the City had a managerial prerogative to create a separate shift to increase police coverage and improve police response. We found that an agreement that precluded the City from establishing a special tactical unit to provide coverage necessary to deliver essential police services would represent a substantial limitation on government's policymaking powers. Here, McGrane's directive decreases the number of officers working on holidays to save money. It does not implicate any policy considerations that would hamper the

delivery of services in the jail facility. See Clinton Tp., P.E.R.C. No. 2000-3, 25 NJPER 365 (¶30157 1999), recon. granted P.E.R.C. No. 2000-37, 26 NJPER 15 (¶31002 1999) (while gaps in coverage significantly interfere with a public employer's ability to provide police protection, proposal that would result in overstaffing did not implicate the same concerns and was not per se non-negotiable)

Similarly, Passaic Bd. of Ed., P.E.R.C. No. 90-3, 15 NJPER 490 (¶20200 1989), is distinguishable because it addressed management's prerogative not to staff a temporarily vacant position. The posts at issue here are not vacant, but are ordinarily staffed on holidays.

Hunterdon Cty., P.E.R.C. No. 88-103, 14 NJPER 331 (¶19123 1998), is also distinguishable. There, the union filed a grievance challenging the City's decision to have one snow plow operator on a truck, not two, as per the parties' collective agreement. We determined that the contract provision constituted a non-negotiable minimum staffing requirement and restrained arbitration. See also City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. denied 88 N.J. 476 (1981) (proposal regarding Health and Safety Committee non-negotiable where Committee determined number of employees that would report to a fire).

Minimum staffing is not implicated by McGrane's directive that certain posts will no longer be staffed on holidays.

The matter before us is factually similar to Borough of Wharton, P.E.R.C. 89-100, 15 NJPER 259 (¶20108 1989). There, we determined that a police chief's decision to cut labor costs by ordering that certain officers and detectives not report for work on certain holidays was negotiable and arbitrable. In Wharton, the union filed a grievance on behalf of the officers who were regularly scheduled to work the holidays but who were ordered not to work, asserting that the Borough deprived the officers of their contractual right to determine whether to receive cash as holiday compensation in lieu of taking the day off. The Borough argued that it had a managerial prerogative to set staffing levels and to control assignments to premium pay shifts.

The parties' collective negotiations agreement provided for 12 holidays per year and for compensation in accordance with the practice wherein employees working on a holiday could take off a different day or receive payment for the unused holiday at straight time rates in the last pay period of the year. The chief's order effectively eliminated the cash payment option for holiday compensation.

In denying the Borough's request for a restraint of binding arbitration, we stated:

> While staffing decisions can involve issues pertaining to governmental policy, this

> record shows that the Borough was simply trying to cut its labor costs. . . . The Borough rearranged schedules to temporarily drop staffing below normal levels on holidays. An employer has the right to reduce its work force through layoffs to effectuate savings or reduce its level of services, but it cannot unilaterally reduce the amount of time retained personnel work.
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> Providing employees who are assigned to work in premium pay situations the choice of receiving time off or cash as compensation for working those special hours is mandatorily negotiable. [citation omitted] On this record, we do not believe that providing this choice here (if the contract so requires) would substantially fetter governmental policy-making. As the predominant issue is the alleged loss of compensation or scheduling of time off, the grievance is at least permissively negotiable and, thus, arbitrable.
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> [Id. at 260]

As in Wharton, McGrane's directive effectively eliminated the officers' choice to come to work and receive holiday pay or request the day off. Moreover, the directive was issued, as it states in the preamble, to reduce overtime and operational costs. Although McGrane certifies generally that he also issued the directive to enhance overall security and safety by affording staff more rest between shifts, it is unlikely that reducing personnel in the jail facility would accomplish this goal. Nor would staff necessarily get more rest between shifts because officers who can no longer work the holidays on their own posts

can apply to work holidays for other officers who were granted holiday leave. The primary purpose for the directive was to cut labor costs.

McGrane effectuated the County's cost-cutting goal by directing officers not to come to work on a regularly scheduled work day. This directive not only changed officers' work schedules, but appears to have changed their total annual compensation.

Here, if the employer had demonstrated a particularized need to preserve or change the work schedule to support or implement a governmental policy determination, such as a need to improve supervision, enforce discipline, train rank-and-file officers, or align a unit's schedule with the time services are most needed, it might have been able to act unilaterally. See, e.g., 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. Super. 293 (1984); Jersey City; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997) and the cases cited therein. The employer has not demonstrated such a particularized need in this instance. Accordingly, we find that the change involved a mandatorily negotiable term and condition of employment and deny the employer's motion for summary judgment.

The PBA's cross-motion asserts that McGrane's directive repudiated a clear and unequivocal contract provision regarding use of or compensation for working on holidays, which work is part of the normal work schedule. This change, it asserts, was implemented during interest arbitration.

N.J.S.A. 34:13A-5.3 requires the employer and majority representative to negotiate in good faith over terms and conditions of employment and to embody their agreement in writing. N.J.S.A. 34:13A-5.4a(5) prohibits an employer from refusing to negotiate in good faith. 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.

Where the parties expressly agree to a term and condition of employment and incorporate that agreement into a collective negotiations agreement, the Act is violated if either party repudiates that agreement. In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), we held that a mere breach of contract is not an unfair practice, but a specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to 5.4(a)(5). A claim of repudiation may be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to

honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. Id.

The parties' contract specifies compensation rates employees are to receive when they work holidays and when they do not. It also specifies the procedures for requesting holiday leave. The contract does not clearly prohibit the employer from requiring employees to take off on a scheduled holiday.

Since there is no clear and unequivocal contractual right to work Monday to Friday regardless of when a holiday falls, we deny the PBA's motion for summary judgment on the ground that the employer repudiated the contract. However, the employer indisputably changed the practice of staff members who are assigned to positions that are normally closed on the weekend being permitted to work those positions on a holiday. This change during interest arbitration proceedings contravenes N.J.S.A. 34:13A-21 and therefore violates 5.4a(5). Accordingly, we grant summary judgment for the PBA on this ground and order the employer to restore the status quo.

ORDER

The employer's motion for summary judgment is denied. The PBA's motion for summary judgment is denied on the ground that the employer repudiated the parties' contract. The PBA's motion is granted on the ground that the employer changed a term and

condition of employment during the pendency of proceedings before an interest arbitration. The employer is ordered to cease and desist from changing terms and conditions during interest arbitration and to restore the status quo. The employer is also ordered to notify the Chairman within 20 days of the steps it has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioners Colligan and Branigan recused themselves.

ISSUED: September 24, 2009

Trenton, New Jersey