

P.E.R.C. NO. 2010-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PARSIPPANY-TROY HILLS,

Respondent,

-and-

Docket No. CO-2008-096

PBA LOCAL 131A, SUPERIOR OFFICERS
ASSOCIATION,

Charging Party,

TOWNSHIP OF PARSIPPANY-TROY HILLS,

Respondent,

-and-

Docket No. CO-2008-100

PBA LOCAL 131,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommendation that the Township of Parsippany-Troy Hills violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it unilaterally changed terms and conditions of employment for certain police officers and police superior officers who engaged in off-duty employment (road jobs). The unfair practice charge was filed by PBA Local 131 and PBA Local 131A, Superior Officers Association. The Commission holds that the Township violated its obligation to negotiate before eliminating "extra benefits" that were paid to police officers on road jobs that were in addition to those provided for in the Township's ordinance.

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 Respondent, Knapp, Trimboli and Prusinowski, LLC, attorneys (Stephen E. Trimboli and Fredric M. Knapp, of counsel and on the brief; Molly S. Marmion, on the brief)

For the Charging Parties, Courter, Kobert and Cohen, attorneys (Howard A. Vex, of counsel)

DECISION

On December 23, 2009, the Township of Parsippany-Troy Hills filed exceptions to a Hearing Examiner's Report and Recommended Decision. H.E. No. 2010-4, 36 NJPER 1 (¶1 2009). In that decision, Hearing Examiner Stuart Reichman found that the Township 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 it unilaterally changed terms and conditions of employment for certain police officers and police superior officers who engaged in off-duty employment (road jobs). After an independent review of the record, we adopt the Hearing Examiner's recommendation.

PBA Local 131A, Superior Officers Association and PBA Local 131 filed unfair practice charges against the Township on October 17 and October 18, 2007, respectively. On February 5, 2008, a Complaint and Notice of Hearing issued.^{2/} On April 1, the Township filed its Answer admitting that it changed the rate of pay for off-duty work, but asserting that it did so to comply with the terms of its ordinances. The Township further asserted that any unilateral action approving or setting rates of pay for off-duty work by any former police chief was ultra vires.^{3/}

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. "

2/ The Director of Unfair Practices determined that an alleged violation of 5.4a(3) did not meet the Complaint issuance standard.

3/ On June 26, 2008, we denied cross-motions for summary judgment in this case because there were material facts in dispute. P.E.R.C. No. 2008-66, 34 NJPER 253 (¶88 2008).

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-12). We offer a brief summary of the essential facts.

Since November 15, 1988, the Township's police department has had a written Policy and Procedure pertaining to off-duty police employment. No Township administrator had seen that Policy and Procedure.

On June 23, 1999, a new written Policy and Procedure became effective. That new Policy and Procedure was revised numerous times with a final revision effective August 28, 2007. In addition to specifying that the hourly rate is set by municipal ordinance, the new Policy and Procedure stated that:

all road jobs will be scheduled for a minimum of four (4) hours in duration;

the rate of pay will be straight time for all work up to and including eight (8) hours, and any hours in excess of eight will be billed in two hour brackets at the premium rate of time and one-half;

holidays to be paid at the premium rate of time and one-half with time worked over eight hours on a holiday to be paid at two times the hourly holiday pay rate;

job cancellations affected within one (1) hour of the scheduled start time will result in four hours of pay for the officer;

and employers who fail to notify the police department of a cancellation, or make notification after the job's scheduled start, will pay the entire amount of the scheduled job to the assigned officer provided that officer has arrived at the job site.

The Hearing Examiner termed these elements of the policy "extra benefits." Neither the mayor nor any other Township administrator was aware of the Policy and Procedure or involved in any discussion concerning revisions to it.

Township Ordinance 2000:44, Section 1 states:

The salaries for Police Officers of the Township of Parsippany-Troy Hills for off-duty services shall be as follows:
(Per Hour Range)

| | Minimum | Maximum |
|-----------------|----------|----------|
| Security | \$ 25.00 | \$ 35.00 |
| Traffic Control | \$ 35.00 | \$ 45.00 |

An additional \$5.00 per hour shall be added to the salary of those Police Officers working the "night shift." "Night Shift" shall be defined as that period of time between 6:00 p.m. and 7:00 a.m.

Subsequently, the Township adopted Ordinance No. 2001:02, which provided for an outside vendor employing off-duty police officers to pay an additional charge of \$2.00 per hour as an administrative fee to the Township. Neither of these ordinances contained any reference to the "extra benefits" enjoyed by officers working off-duty assignments.

On September 24, 2007, after an auditor stated that police officers were being paid in a manner inconsistent with the ordinance, the Township's CFO sent a memorandum to the police chief stating that effective immediately, all future off-duty

work must be billed and paid at the rate established in the current ordinance.

From that date until January 2, 2008, officers were paid in accordance with Ordinance 2000:44 and no "extra benefits" were paid until Ordinance 2007:34 became effective on January 2, 2008. That ordinance was adopted after discussions with PBA representatives. The parties never engaged in negotiations over the elimination of the "extra benefits" between September 24, 2007 and January 2, 2008. According to a Township-prepared document, the lost compensation for "extra benefits" during that period totaled \$10,066.25 (CP-9).

Ordinance No. 2007:49 now provides:

A. The salaries for police officers of the Township of Parsippany-Troy Hills for off-duty services shall be as follows: (1) All off-duty (per-hour rate): (a) regular rate: \$50. (b) premium rate: \$75.

B. All off-duty work will be billed at a minimum duration of four hours up to the fourth hour worked at the regular rate. All work in excess of four hours will be billed at a minimum duration of eight hours up to the eighth hour worked at the regular rate. Any work in excess of eight hours will be billed in two-hour segments at the premium rate. The premium rate shall be billed for any work that is performed on those holidays observed by the Parsippany police department.

C. Any work requiring the use of a marked vehicle will be billed to the employer at the following rate: (1) use of a marked vehicle: (a) up to four-hour shift: \$50. (b) four- to eight-hour shift: \$100.

D. Failure to notify the police department a minimum of two hours prior to a scheduled off-duty job, or if the police officer reports to the scheduled job and the contractor cancels, the contractor will be charged a minimum of four hours at the appropriate rate.

E. There shall be an additional charge of \$5.00 per hour to offset administrative charges.

F. All work will be paid for in advance and deposited in an escrow account to be held with the finance department of the Township of Parsippany-Troy Hills, with the exception of work performed by the Parsippany Board of Education and work related to emergencies.

The Hearing Examiner found that the Township violated its obligation to negotiate before eliminating the "extra benefits." He relied on our decision in Denville Tp., P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981), and concluded that the Township could have adopted an emergency ordinance that conformed to the then-existing terms and conditions of employment that included the "extra benefits." He also found that in the alternative, the Township could have billed vendors in compliance with the existing ordinance and continued to pay officers the "extra benefits" until the Township passed an ordinance conforming to the existing benefits or negotiated a mutually-acceptable alternative.

In its first exception, the Township argues that Denville is factually distinguishable and that Bridgewater Tp., P.E.R.C. No.

2006-62, 32 NJPER 46 (¶24 2006), rev'd 33 NJPER 155 (¶55 App. Div. 2007), commands a different result.

Denville held that while it is true that a municipality acts through ordinances, a municipality is also specifically empowered to enter into binding and enforceable contracts with its employees by virtue of the New Jersey Employer-Employee Relations Act. In Denville, the employer unilaterally altered its ten-year practice of paying police officers their full salaries during leave due to job-related injuries without charge to sick leave. We found that the employer violated its obligation to negotiate in good faith and ordered it to restore the status quo and any sick days lost as a result of the unilateral change in the policy. We noted that our order may have required the adoption of an implementing ordinance, but we left that determination to the employer.

The Township argues that Denville is distinguishable because the administration in that case was aware at all times of the established practice and appeared to have acquiesced to it. In Denville, the Township administrator knew about the unwritten policy, but it was not reduced to writing or incorporated into any ordinance. H.E. No. 81-33, 7 NJPER 190 (¶12084 1981). The Township argues that Denville is also distinguishable because there was no existing ordinance that was inconsistent with the

practice. The Township asserts that Bridgewater is more relevant precedent.

Bridgewater held that a past practice created by the mayor that permitted retiring police officers to use their accumulated sick leave as terminal leave was ultra vires. The Appellate Division distinguished Denville finding that Denville's policy was a matter of public knowledge throughout the municipal offices and Denville's collective negotiations agreement did not cover the topic. The Bridgewater Court found that the mayor's actions entirely disregarded the Township Code and the union contracts and that unilaterally providing terminal leave for retiring officers ran counter to that symmetry.

In denying summary judgment in this case, we found a factual dispute and, citing Bridgewater, stated:

This factual dispute over what the governing body knew or should have known about the Police Department's policies on off-duty employment may be relevant to the ultimate legal question of whether the Township violated its obligation to negotiate in good faith when it unilaterally rescinded the Police Department policies.

[34 NJPER at 253]

We now have the relevant factual findings. No Township administrator was aware of the 1999 police department written policy and neither the mayor nor any Township administrator was aware of the 2007 revised written policy. The parties' contract is silent on the issue of compensation for off-duty work. Thus,

unlike Denville, the practice was not known outside the police department. However, unlike Bridgewater, the police department's written policy did not contravene the parties' negotiated agreement.

A case that is closer both factually and legally than either Denville or Bridgewater is Middletown Tp., P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER 228 (¶79 2008). In that case, we found that the Township violated the Act by failing to negotiate with the PBA over the elimination of a reasonable period of shape-up or travel time for patrol officers called in for emergent or immediate overtime. As in this case, the contract was silent on the question and the Township administrator was not aware of the practice. Detectives and traffic officers also received the benefit despite the lack of any authorizing ordinance or contract language. We rejected the Township's argument that the working condition could not be established by a police chief, deputy police chief, or shift commander in charge of a shift of patrol officers. We stated that if the leadership of the Township's police department treated its patrol officers the same way it treated its detectives and traffic officers, the Act requires that the Township negotiate before changing that treatment. We and the Appellate Division specifically rejected the Township's argument that the past practice was invalid because it had never been

negotiated by the administrator and approved by the governing body. 32 NJPER at 326; 34 NJPER at 231.

In its second exception, the Township argues that the police chief did not have the authority to bind the Township to a term of compensation. As we stated above, we and the Appellate Division rejected that argument in Middletown. By failing to enact an ordinance, a municipality cannot evade its responsibility not to unilaterally alter terms and conditions of employment established by a practice of longstanding duration. Denville, 7 NJPER at 360. The solution is to enact the appropriate ordinance, not unilaterally cancel the benefit. Ibid.^{4/}

In its third exception, the Township argues that the Hearing Examiner ignored the fact that the Township conducted negotiations with the unions. The Township asserts that the recommended decision sets a dangerous precedent of requiring unauthorized, internal and other undiscovered practices designed and implemented by the police to take precedence over properly enacted laws. We believe the Township's concern is overblown. The Police Department's written Policy and Procedures were enforced for over 20 years, apparently without objection from any

^{4/} The Township argues for transparency in government. We note that unlike the unwritten practice in Middletown, the procedures were established by written Police Department Policies and Procedures.

third party vendors. The Township has not explained why it could not have adopted an emergency ordinance, as noted by the Hearing Examiner, or continued the long-standing practice pending adoption of the regular ordinance.

Finally, the Township asserts that by requiring that the Police Department comply with a Township ordinance, the Township was acting in the best interest of the public. We do not question the Township's motive in unilaterally changing the longstanding Police Department Policy and Procedure. We are simply reconciling that motive with its statutory obligation to negotiate before changing negotiable terms and conditions of employment.

ORDER

The Township of Parsippany-Troy Hills is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by the Act, specifically by unilaterally changing mandatorily negotiable terms and conditions of employment including the unilateral elimination of the "extra benefits" provided to employees who engaged in off-duty employment during the period of September 24, 2007 and January 2, 2008.

2. Refusing to negotiate in good faith with the charging parties before unilaterally changing a mandatorily negotiable term and condition of employment, specifically, by

eliminating the "extra benefits" enjoyed by unit employees who engaged in off-duty employment during the period of September 24, 2007 and January 2, 2008.

B. That the Township take the following affirmative action:

1. Compensate all affected police officers for any of the "extra benefits" they would have received for having worked an off-duty job during the period September 24, 2007 through January 2, 2008, plus interest on the monetary difference, from the date earned to the date of payment in accordance with R. 4:42-11.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Kregel, Voos and Watkins voted in favor of this decision. None opposed. Commissioners Colligan and Fuller were not present.

ISSUED: May 27, 2010

P.E.R.C. NO. 2010-79

13.

Trenton, New Jersey

NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by the Act, specifically by unilaterally changing mandatorily negotiable terms and conditions of employment including the unilateral elimination of the "extra benefits" provided to employees who engaged in off-duty employment during the period of September 24, 2007 and January 2, 2008.

WE WILL cease and desist from refusing to negotiate in good faith with the charging parties before unilaterally changing a mandatorily negotiable term and condition of employment, specifically, by eliminating the "extra benefits" enjoyed by unit employees who engaged in off-duty employment during the period of September 24, 2007 and January 2, 2008.

WE WILL compensate all affected police officers for any of the "extra benefits" they would have received for having worked an off-duty job during the period September 24, 2007 through January 2, 2008, plus interest on the monetary difference, from the date earned to the date of payment in accordance with R. 4:42-11.

Docket No. CO-2008-096
CO-2008-100

TOWNSHIP OF PARSIPPANY-TROY HILLS
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372