P.E.R.C. NO. 2013-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(JUVENILE JUSTICE COMMISSION),

Respondent,

-and- Docket No. CO-2011-070

NEW JERSEY STATE POLICEMEN'S
BENEVOLENT ASSOCIATION, LOCAL 105,
LAW ENFORCEMENT UNIT,

SYNOPSIS

The Public Employment Relations Commission denies a summary judgment motion filed by the State of New Jersey (Juvenile Justice Commission) in an unfair practice case filed by the New Jersey State Policemen's Benevolent Association, Local 105, Law Enforcement Unit. The charge alleges the JJC refused to negotiate in good faith prior to implementing the a new on-call procedure for parole officers during off-duty hours in violation of the New Jersey Employer-Employee relations Act, N.J.S.A. 34:13A-5.4a(1) and (5). The Commission denies the State's motion finding that material facts are in dispute that must be resolved by the Hearing Examiner.

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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LAW ENFORCEMENT UNIT,

Charging Party.

Appearances:

For the Respondent, Jeffrey S. Chiesa, Attorney General (Julie D. Barnes, Deputy Attorney General, on the brief)

For the Charging Party, Fox & Fox, attorneys (Lynsey A. Stehling, on the brief)

DECISION

This case comes to us by way of a motion for summary judgment filed by the State of New Jersey, Juvenile Justice Commission (JJC). On August 13, 2010, the New Jersey State Policemen's Benevolent Association, Local No. 105 Law Enforcement Unit (PBA) filed an unfair practice charge against the JJC alleging the JJC unilaterally instituted an on call procedure for parole officers during off-duty hours. The PBA alleges the JJC refused to negotiate in good faith prior to implementing the

policy in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 et seq., specifically 5.4a(1) and (5).[1/]

On August 3, 2011, the Deputy Director of Unfair Practices issued a Complaint and Notice of Hearing finding that the allegations contained in the PBA's charge, if true, may constitute unfair practices. Hearing Examiner Perry O. Lehrer was assigned to conduct a hearing. On September 1, 2011, the JJC filed an Answer to the Complaint denying that it committed an unfair practice. On February 10, 2012, the JJC filed a motion for summary judgment and a request to the Commission Chair for a stay of the hearing scheduled for February 14, 2012.[2/] On March 2, 2012, the PBA filed a brief opposing the JJC's motion for summary judgment.

Summary judgment will be granted if there are no material facts 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); Judson v. Peoples Bank &

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. . . . [and] (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/ On February 13, 2012, the Chair denied the JJC's request for a stay and the hearing has commenced before the Hearing Examiner.

Trust Co., 17 N.J. 67, 73-75 (1954). We deny the JJC's motion for summary judgment finding that there are material facts in dispute. What follows are a summary of the facts as submitted by the parties. The JJC submitted a brief, exhibits, and certifications of former Director of Parole for JJC, Thomas Flanagan, and Employee Relations Coordinator for the Governor's Office of Employee Relations, Henry Oh. The PBA submitted a brief, exhibits, and certifications of: counsel, Senior Parole Officer Brian Georgeson, Senior Parole Officer John Budenas, Senior Parole Officer Craig Pfeiffer, and Senior Parole Officer Desiree Strother.

The PBA represents all regularly employed Investigators of the JJC. The PBA and JJC are parties to a collective negotiations agreement with a duration from July 1, 2007 through June 30, 2011. Article XXVIII is entitled Hours of Work. Article XXIX is an Overtime provision.

The Job Specification for Senior Parole Officer Juvenile Justice (SPO) provides that SPOs shall "[have the] ability to respond to emergency situations expediently and remain accessible at all times including days-off and odd-duty hours. According to the certification of Thomas Flanagan, former Director of Parole for JJC, in 2009 and 2010, issues began to arise regarding parole officers response time to emergent matters after normal work hours. At that time, on call was done on a voluntary basis.

When a call came in after normal work hours from local law enforcement who needed a JJC parole officer to respond, district supervisors would call parole officers who lived in the same geographic area as the agency requesting assistance until a parole officer could be reached via telephone to respond. According to Flanagan, this system resulted in lengthy response times and inequitable distribution of overtime.

The JJC implemented a rotational on call policy that took effect in August 2010. A schedule was developed whereby each parole officer was to serve a week of on call duty every seven weeks. The schedule would be posted seven to eight weeks in advance. According to Flanagan, the only restriction placed on patrol officers when they are on call is that they cannot consume alcohol. Flanagan asserts that he made continuous efforts to negotiate the impact of the policy, but would not negotiate compensation for being on call because that is preempted by Civil Service regulation. If an officer receives a call that requires attention while on call, they are paid overtime compensation pursuant to the parties' collective negotiations agreement.

According to Oh, the PBA demanded negotiations over the implementation of the on call policy by letter dated June 30, 2010. OER Director David Cohen responded by letter on July 19, 2010 advising that the issue of monetary compensation for on call duty is specifically addressed by N.J.A.C. 4A:3-5.7(a)(1) and

therefore the JJC is not required to negotiate compensation. Oh certifies that the State has been willing to negotiate the impact of the policy, however the PBA wants monetary compensation for on call duties. Oh provided a letter dated April 26, 2011 with his certification that states the JJC has submitted offers to the PBA to resolve the matter. The PBA, through certification of its counsel, denies receipt of the letter or receiving any proposals to resolve the matter.

The PBA denies that the JJC has been willing to negotiate in good faith. It asserts that in early June 2010, Flanagan approached Georgeson to discuss schedule-related issues. A meeting was then held in early June 2010 between labor and management during which the parties discussed JJC's decision to change the manner in which schedules were prepared. Prior to that point, SPOs were allowed to prepare their own schedules and submit their schedule to their supervisor each month. Management advised at the meeting that it was going to start preparing the schedules and sought the PBA's input with regard to how to prepare the schedule. Georgeson certifies that the PBA proposed a fixed late night for SPOs rather than a rotating late night. After the meeting, Flanagan sent a follow-up e-mail pertaining to the schedule change and did not reference an on call policy.

On June 7, 2010, the PBA asserts that Flanagan contacted SPO Georgeson and former PBA President Craig Pfeiffer to discuss the

implementation of an on call policy in Flanagan's office. Flanagan advised that the policy had been submitted to the Attorney General's office for review and once approved, it would be implemented. According to Georgeson and Pfeiffer, this meeting lasted a few minutes. Georgeson and Pfeiffer advised Flanagan that in order to provide the PBA's position on the policy, they would need to see it.

On June 22, 2010, Georgeson certifies that he had a telephone conversation with Flanagan. During the call, Flanagan advised that the JJC was moving forward with an on call policy and requested the PBA's position on whether it would support the policy. Georgeson again requested to see the policy or be provided with information as to how the policy would work. Georgeson then sent a follow-up e-mail to Flanagan requesting information as to how long on call would last; what extent officers would need to respond to on call situations; and what type of restrictions would be placed on officers who are on call.

On June 23, 2010, Flanagan responded to Georgeson's e-mail advising the parties had been discussing an on call policy for over a year and that an on call schedule was a moot point until the parties could come up with a schedule. Flanagan further advised that he asked Georgeson and Pfeiffer to consider some type of on call schedule at their last meeting. Georgeson disputes in his certification that the parties had been

discussing an on call policy for a year and states that their conversations related to Flanagan periodically advising that an on call policy was forthcoming. Georgeson certifies that the PBA never had substantive conversations with Flanagan regarding the implementation of the on call policy.

On June 29, 2010, Georgeson responded to Flanagan's e-mail advising that the PBA could not make an educated decision about the implementation of an on call policy until the PBA saw the policy or was provided with the specifics of the policy. He requested negotiations regarding any changes that would result because of the implementation of the policy. Flanagan responded on June 30, stating that he was receiving conflicting information from Pfeiffer and Georgeson. Specifically, he advised that President Pfeiffer advised him that on call resulted in major disruption to officers' personal lives and that the matter should be negotiated so that some form of compensation was received. SPO Georgeson was seeking to obtain documentation from Flanagan regarding how the JJC was proposing to implement the policy.

Georgeson responded the same day by e-mail stating that the PBA did not have conflicting positions as it was seeking both compensation and some sort of negotiations with regard to changes in working conditions. The PBA was concerned about impact related issues that had not been negotiated including safety, hours of work and other relevant issues that impact SPOs.

Pfeiffer certifies that he had one other telephone conversation with Flanagan in June 2010 wherein he advised the PBA would be seeking to negotiate issues pertaining to compensation and impact related issues since the PBA's members would be negatively impacted by the implementation of the on call policy. According to Pfeiffer, Flanagan advised that he was unwilling to discuss compensation and the JJC was moving forward with the on call policy without negotiating with the PBA. Pfeiffer certifies that there were no further communications between the JJC and PBA related to policy.

On June 30, 2010, Lynsey Stehling, counsel for the PBA, wrote to Oh demanding negotiations with regard to the implementation of an on call policy. On July 19, OER Director David Cohen responded by letter advising that negotiations were not required as the program was consistent with the Civil Service regulation. Cohen advised that the JJC labor relations unit would facilitate a meeting with the PBA membership to explain the on call schedule. According to Georgeson and Stehling, this meeting never occurred.

On August 13, 2010, the PBA filed the instant unfair practice charge alleging a failure to negotiate the on call policy. On August 27, the PBA received a copy of the policy entitled "Parole Officer Work Schedule." It defines the hours of

work and on call. The hours of work are 8:30-5:00 p.m.[3/], Monday through Friday. Officers also work one defined alternate day a week that includes Saturday or Sunday from 8:30 a.m. to 5:00 p.m. or Monday through Friday from 5:00 p.m. to 11:00 p.m. The alternate work day is defined weeks in advance and the policy provides that the monthly schedule is to be prepared at least three months in advance. SPOs are to work three nights a month and one weekend day a month. The on call aspect of the policy requires all officers to be on call every six to seven weeks due to manpower issues. On call is from Friday at 5:00 p.m. to Friday at 8:00 a.m. During Monday through Friday morning, on call is handled between 5:00 p.m. and 8:30 a.m. the next morning. On weekends, officers must respond from 5:00 p.m. on Saturday through Monday morning at 8:30 a.m when on call.

The policy provides for an on call telephone to be provided to officers. According to Georgeson, there is not a specific telephone provided to officers resulting in officers having to answer their regular work phone creating increased calls related to the officer's normal case load.

The PBA provided certifications related to officer's experiences with the policy since its implementation. The certifications relate that officers have responded to on call

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3/ This excludes the rotating late night that is the subject of a different case currently in grievance arbitration.

situations involving transports, escapes, and electronic monitoring responses. Most on call assignments take approximately five to eight hours to complete. Georgeson certifies that he can not use his own time effectively when on call because he is required to immediately respond to a situation. He is no longer able to coach his son's sports teams and he must take a state vehicle home which has required him to switch his day care provider as he is prohibited from picking up his son in a State vehicle. He certifies that he was unable to meet the pick-up time at the prior day care because his commute was extended because he is required to first go home and switch to his personal vehicle.

Budenas certifies that he has been required to work into the early morning when on call during the week. He is still required to report for his regular work day at 8:30 a.m. resulting in fatigue; he can not make plans outside of his geographic area; he can not maintain secondary employment; he has missed family activities; and is unable to continue taking classes for his Master's Degree because he is required to miss classes while on call. Budenas further certifies that the schedule is interfering with his Military Reserve training because it is difficult to find coverage on the weeks he is scheduled to be on military leave.

Strother certifies that she has been required to work on call assignments until 5:00 a.m. during the week for three consecutive nights and still report to her 8:30 a.m. regular work day. She has a three-year old child who is awoken by the phone calls. Strother's spouse is an internal affairs officer who was also scheduled on call at the same time she was resulting in an incident where both spouses had to respond to calls in the middle of the night requiring an emergent child care situation. Georgeson certifies that the policy creates hardships for single parents, especially those with deceased parents and grandparents, who have difficulty finding emergency child care in the middle of the night. Budenas certifies that one officer who has assisted others by covering their assignments has been denied further coverage as he covers too many on call assignments. According to Georgeson, Flanagan has advised him that officers will be subject to discipline if they do not answer the telephone and respond to an on call situation.

N.J.A.C. 19:14-4.8(d) provides that a motion for summary judgment will be granted:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court enunciated the standard

to determine whether a genuine issue of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. "While 'genuine' issues of material fact preclude the granting of summary judgment, . . . those that are 'of an insubstantial nature' do not." Id. at 540. If the disputed issue of fact can be resolved in only one way, it is not a "genuine issue" of material fact. Id. at 540.

Nevertheless, a motion for summary judgment should be granted cautiously. The procedure should not be used as a substitute for plenary trial. Baer v. Sorello, 177 N.J. Super. 182 (App. Div. 1981) and N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

N.J.S.A. 34:13A-5.3 prohibits a public employer from unilaterally establishing or changing terms and conditions of employment. Whether an employer has an obligation to negotiate turns on whether the term and condition of employment is mandatorily negotiable. N.J.S.A. 34:13A-5.3; Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). Mandatory negotiability is determined by balancing the impact on employees' work and welfare against any interference with the determination

of governmental policy. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). If the interference is significant, the subject is not mandatorily negotiable.

The JJC argues that it has a managerial prerogative to implement an on call policy to improve and meet operational effectiveness that outweighs the PBA's interests in retaining an old system. Hunterdon Cty., P.E.R.C. No. 85-63, 11 NJPER 29 (¶16014 1984) (Finding a managerial need to put qualified employees on call and dismissing the unfair practice charge, but not determining whether the dispute was permissively negotiable). As to the impact of its alleged assertion of this prerogative, the JJC asserts it is preempted by N.J.A.C. 4A:3-5.7(a)(1). This regulation provides:

> Eligibility for overtime compensation for on call employees shall be as follows: Employees in covered positions (35, 40, NE) who are required to remain on call and cannot use their own time effectively shall be considered to be working and shall have such on call time included in the total hours worked. In those situations where employees are merely required to remain at home or leave word with appropriate officials where they may be reached, they are not considered to be working while on call unless their freedom to engage in personal activities during that period are severely restricted.

In support of its preemption argument, the JJC has provided a July 1, 2006 letter from the New Jersey Department of

Personnel[4/] Office of Compensation Management (DOP) advising the JJC that Nursing Supervisors were not entitled to on call compensation under Civil Service regulations because they only had to be available by cell phone to answer questions and therefore could use their time for their own purpose. In addition, the letter advises that the nurses are in a 4E workweek that is exempt from on call compensation per the regulation.

The PBA responds that it is not suggesting that the JJC cannot implement an on call policy, but that it must negotiate the impact of the policy in good faith. It asserts that the SPO's job specification states that officers work a 40-hour workweek and that the workweek is designated as a non-exempt 40-hour week. It asserts that the letter provided by the DOP to JJC relates to Supervisors of Nursing Services who are in a 4E workweek that is exempt and that parole officers are not exempt. Thus, the regulation only applies if the officers are permitted to use their time effectively while on call. The PBA argues that the certifications it provided establish that the officers are restricted in the use of their time while on all. The PBA further disputes that the JJC has ever engaged in negotiations regarding the implementation of the on call procedure.

Compensation for being on call is mandatorily negotiable. Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208 (1979);

4/ Now the Civil Service Commission.

Stafford Tp., P.E.R.C. No. 2005-51, 31 NJPER 84 (¶40 2005). The scheduling and allocation of on call duty among qualified employees is also mandatorily negotiable, provided the employer can mandate an assignment if the negotiated system does not produce enough qualified volunteers. Belleville Tp., P.E.R.C. No. 94-111, 20 NJPER 241 (¶25119 1994); City of Long Branch, P.E.R.C. No. 83-15 8 NJPER 227 (¶13095 1982) aff'd NJPER Supp. 2d 130 (¶111 App. Div. 1983). However, "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n., 78 N.J. 54, 80-82 (1978). To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem, 91 N.J. at 44. State Supervisory explained that statutes that set minimum and maximum benefits can preempt negotiations below or above those limits:

> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are

> mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum.

At this juncture, the facts in the record do not definitively answer whether the JJC has or has not committed the unfair practices alleged. The Civil Service regulation relied on by the JJC does not specifically exempt parole officers from receiving compensation for on call time. Rather, it requires a test be performed as to whether parole officers may use their time effectively. The JJC asserts they can and the PBA asserts they can not. Neither party has provided us with a legal or factual basis to apply its interpretation. Likewise, both parties' supporting certifications paint very different pictures as to whether there were negotiations regarding the impact of the policy. Final resolution of this dispute requires a thorough consideration of competing evidence, a task we cannot accomplish in summary judgment.

ORDER

The State of New Jersey Juvenile Justice Commission's motion for summary judgment is denied. The case is returned to the Hearing Examiner for further proceedings.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself.

ISSUED: November 19, 2012

Trenton, New Jersey