

P.E.R.C. NO. 2014-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Respondent,

-and-

Docket No. CO-2009-276

FOP LODGE 34,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms the Hearing Examiner's recommended dismissal of a complaint issued in an unfair practice case filed by FOP Lodge 34 against the County of Atlantic. The FOP alleged that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally implementing a policy restricting the number of employees who may be off duty or on leave on any one shift. The Hearing Examiner found that the FOP did not establish a past practice by the County concerning the grant of leave without regard to categories of leave; that the parties had already negotiated terms pertaining to leave categories in their most recent agreement; and that the dispute concerns the interpretation of contractual provisions and should be addressed through the parties' negotiated grievance procedure. The Commission rejects the FOP's exceptions, holding that even accepting the issue as framed by the FOP, the record does not support finding a unilateral change in work conditions.

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, Eric M. Bernstein & Associates, LLC
(Eric M. Bernstein, of counsel)

For the Charging Party, Plotkin Associates, LLC (Myron
Plotkin, Consultant)

DECISION

On February 9, 2009, an unfair practice charge was filed by the FOP Lodge 34. The charge alleges that the County unilaterally implemented a policy restricting the number of employees who may be on leave pursuant to the type of leave requested, violating subsections 5.4a(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. We adopt the Hearing Examiner's report and recommended decision.

A Complaint and Notice of Hearing was issued on August 3, 2009 on the 5.4a(1) and (5) allegations only. The County filed an answer on March 11, 2009. Hearing Examiner Patricia Taylor Todd conducted a hearing on December 16, 2009.

On July 30, 2013, the Hearing Examiner issued her report and recommended decision. H.E. No. 2014-2, 40 NJPER 127 (¶49 2013). She found that the County did not violate the Act and that the FOP had not established a past practice by the County concerning the grant of leave without regard to categories of leave. She further found that the parties have already negotiated terms relating to leave categories in their most recent agreement, and that to the extent the FOP challenges the County's interpretation of the contract by the December 2008 memo, the dispute concerns the interpretation of those contractual provisions and should be addressed through the parties negotiated grievance procedure.

On August 19, 2013, the FOP filed exceptions to the Hearing Examiner's Report, and on September 5, the County filed a reply. The FOP asserts various exceptions to the Hearing Examiner's Report and Recommended Decision, all primarily asserting that the Hearing Examiner incorrectly framed the issue before her and that the December 2008 memo resulted in restrictions on the number of officers off per shift pursuant to the type of leave requested which was a unilateral change in working conditions, and the 2008 memo did not codify the 2002 post orders. The County disputes the FOP's assertions and asserts that the Hearing Examiner's findings of fact and conclusions of law are correct.

We adopt and incorporate the Hearing Examiner's findings of fact.^{1/} H.E. at 2 - 13. We summarize the pertinent facts relevant to this appeal as follows. FOP Lodge #34 is the majority representative of a bargaining unit consisting of all full-time correction officers employed at the Atlantic County Department of Public Safety Division of Adult Detention. The County and FOP have been parties to a series of negotiated agreements, the most recent with effective dates from January 1, 2003 through December 31, 2006.^{2/} The parties' grievance procedure ends in binding arbitration.

Under the parties' Agreement, leave benefits for correction officers include vacation, emergency vacation, compensatory time, emergency compensatory time, administrative leave, emergency administrative leave, and bereavement. Specifically, the Agreement provides, in pertinent part:

Article VIII, Holidays

E. All Officers covered by this Agreement shall be entitled to 3 administrative days off annually.

1/ We note the FOP's exceptions to certain findings of fact by the Hearing Examiner, many of which assert that the Hearing Examiner did not cite contract provisions in their entirety in the decision. We have reviewed and considered the Agreement in its entirety.

2/ On or about August 3, 2006, the FOP and County commenced negotiations for a successor agreement. The parties completed interest arbitration hearings on a successor agreement in early 2009.

F. . . . An Officer cannot call in for the use of administrative time at the beginning of their shift...An Officer may take 1 administrative day per year with as little as 12 hours notice to the management. Officers cannot be refused administrative time unless there is already 1 Officer from that shift utilizing administrative time.

Article IX, Vacation

E. Vacation Requests

3. At least 48 hours notice shall be provided for requests for each single day of vacation and seniority shall resolve all conflicts. (Management shall post the minimum number of Officers needed for each shift. The Operations Unit will provide a list of how many Officers can be off for a shift.) . . . Vacation leave for requested single vacation days as provided herein, will be granted if said use of vacation leave does not violate the posted minimum number of Officers as described above. Each officer shall, however, be granted 1 vacation day annually without regard to minimum staffing. The preceding shall also be limited to 1 Officer per shift.

Post orders are guidelines and instructions for the officers' daily routines in the facility; they are drafted by the administration, approved by the department head, director or warden, and implemented by operations staff. The most recent version was issued on July 31, 2002 by then-Warden Gary Merline and has not been revised or updated since. The post orders specify that "current union contracts as well as local, state and federal regulations will take precedence over these orders in the event of a conflict between documents."

Shift one at the jail is 11:30 pm to 7:30 am, shift two is 7:30 am to 3:30 pm, and shift three is 3:30 pm until 11:30 pm.

The post orders provide in pertinent part:

Leave Granting Guidelines for Officer Requests

The following is the maximum number of officers permitted off for vacation, administrative and compensatory time: Shift #1 - 3, Shift #2 - 5, Shift #3 - 4.

* * *

Max. number off can consist of any combination of vacation, administrative, compensatory, emergency vacation, or emergency administrative time as determined by the respective collective bargaining agreement.... After the maximum # is reached, the following are to be approved. If no administrative days are included in the maximum number (emergency or regular) an administrative day must be approved. For approval purposes the administrative and emergency administrative days are the same. The only difference is that once a year an officer may request an administrative day with as little as 12 hour notice. Therefore, if the request is less than 48 hours but more than 12 it is counted as the annual emergency administrative day. However, if someone has requested an emergency administrative day for that day, it would not be approved. (In other words emergency status does not require it to be added.)

Officers get one emergency vacation day per year that can be taken without regards to the established minimum staffing guidelines, but must be before 48 hrs. of the start of his/her shift (muster). Only one officer per shift is permitted to utilize an emergency vacation day.

Compensatory days are treated like vacation days. An officer may use "emergency" days for any reason.

The following are examples of the maximum number of officers who may be approved to be off at any given time. Shift 2 is utilized as an example.

The orders then depict a chart with four columns, each column containing one example of how leave can be allocated per shift. The first column, example 1, shows a total of 8 officers off - five for vacation (V), one for administrative (A), one for emergency vacation (EMV) and one for emergency administrative (EMA), in that order. The second column, example 2, shows a total of six officers off - two for vacation, one for administrative, two for vacation, and one for emergency vacation, in that order. The third column, example 3, shows a total of five officers off - one for vacation, one for compensatory leave - one for administrative, one for vacation, and one for emergency administrative leave, in that order. The fourth column, example 4 shows a total of six officers off - three for vacation, one for compensatory, one for vacation, and one for emergency administrative, in that order. (The emergency administrative leave in this example is asterisked, with the following explanation: "Only the time limit caused this to be an emergency.") The document also provides leave granting guidelines for sergeants, lieutenants, special occasions, and procedural steps for handling leave requests.

George Hebert has been an Atlantic County corrections officer for fifteen years, and the President of FOP Lodge 34 for approximately five years. As President, Hebert participated in

all of the negotiations sessions for the most recent collective negotiations. There were no proposals by the County regarding leaves of absence for officers. According to Hebert, prior to December 2008, in order to request leave time, a corrections officer would fill out a slip with operations at least 48 hours prior to the requested leave, and await word on whether the request was approved or denied. There is no limitation on the form as to how many officers are allowed to take a certain category of leave. Hebert's understanding of the stated number of officers permitted time off on a given shift was that the officers could use "any time (they) want".

Myron Plotkin is the FOP's labor consultant. James Ferguson is County Counsel. On January 22, 2007, in response to the FOP's request for a copy of the County's minimum manning guidelines during the most recent negotiations, Ferguson wrote to Plotkin, as follows:

Below are the minimum staffing guidelines for shifts 1, 2, and 3 as you requested at our last negotiation session on 01/09/07.

Shift 1 29 on duty, Maximum 3 off

Shift 2 55 on duty, Maximum 5 off (includes 2A).

Shift 3 35 on duty Maximum 4 off (C-1).

On December 4, 2008, Captain Bondiskey, Operations Commander, issued an interoffice memorandum to all personnel entitled Leave Granting Guidelines (hereinafter known as the "December 2008 memo"), as follows:

The following is the maximum number of staff allowed off for vacation, administrative, compensatory, emergency vacation (Officers), emergency administrative (Officers, Sergeants & Lieutenants) *See individual collective bargaining agreements, and Operations Post Orders, for specific circumstances with regard to "emergency" time.

OFFICERS

Shift #1

Vacation or Compensatory

Three (3) maximum

Administrative

One (1) maximum

Emergency Administrative

One (1) maximum

Emergency Vacation

One (1) maximum

Shift #2

Vacation or Compensatory

Five (5) maximum

Administrative

One (1) maximum

Emergency Administrative

One (1) maximum

Emergency Vacation

One (1) maximum

Shift #3

Vacation or Compensatory

Four (4) maximum

Administrative

One (1) maximum

Emergency Administrative

One (1) maximum

Emergency Vacation

One (1) maximum

The memorandum concluded:

**Leave Granting Guidelines are currently under review" (J-3).

Thus, according to the memo, 6 officers below the rank of Sergeant total were permitted off on Shift 1, 8 on Shift 2, and 7 on Shift 3. Prior to the December 2008 memo, Hebert had never seen a list where the number of officers allowed off was shown per category of specific leave. Hebert's understanding of the operation of the December 2008 memo is that "if nobody asked for an emergency day, administrative time, and nobody asked for an emergency vacation day and four people asked for an administrative day, only one person would be allowed off for that day. Three people would be denied and they would not fulfill any of the obligations to have eight people off. There would only be one person off."

Seeking to clarify the memorandum, Plotkin wrote to Ferguson on January 12, 2009 requesting minimum staffing information.

Plotkin requested the number of slots/positions per shift available if 100% staffed, and the number of actual employees assigned to each shift. On January 14, 2009, Ferguson responded, providing different minimum staffing information for shifts 1 through 3 than in the January 2007 letter - 38, 58 and 53 officers, respectively. Ferguson also stated that the memorandum was "enacted" in response to Scheinman's arbitration decision. On January 27, in response to Plotkin's January 23 followup correspondence, Ferguson provided further clarification of the minimum manning figures he reported.

Hebert believes that prior to the issuance of the December 2008 memo, the County had a past practice of not categorizing or "pigeonholing" leave time; "you'd just go in and apply for the time off and you got the time off". Hebert feels that the memo potentially limits the total number of officers permitted to take leave. According to Hebert, the County has never followed the contract the way it is expressed in the December 2008 memo; more officers than the stated maximum of three have been permitted to be off, so the County is now enforcing something that was never previously enforced.

The FOP asserts several exceptions to the Hearing Examiner's report and recommended decision. At the core of all of the FOP's exceptions, it primarily asserts that the Hearing Examiner incorrectly framed the issue before her, and that the appropriate issue for her consideration was whether the County changed a work

rule without negotiations when it issued the December 2008 memo which it asserts promulgated new restrictions on the number of officers who would be allowed off on any shift pursuant to the type of leave requested. The FOP also argues that the Hearing Examiner erred in concluding that the December 2008 memo simply codified the 2002 post orders. We reject the FOP's exceptions. Accepting the issue as framed by the FOP, we conclude that there was not a unilateral change in work conditions. The post orders were issued in 2002, several years before the December 2008 memo. The post orders set out the maximum number of officers who could be permitted off for each shift, and allowed for that maximum to be a combination of certain leave types. However, the post orders go on to state limitations on the number of additional officers who could be off pursuant to leave type that once the maximum is reached. In addition, the Agreement sets forth restrictions on the use of administrative leave and emergency vacation leave. Thus, the record supports that the December 2008 memo was a memorialization by the County of the restrictions already set forth in the 2002 post-orders and the parties Agreement. When the 2002 post-orders and the Agreement are compared to the 2008 memo, there no substantive differences in the leave types permitted off for each shift. Hebert's testimony that prior to the issuance of the December 2008 memo the County did not limit the total number of officer permitted to take leave pursuant to leave type is inconsequential - - an employer does

not violate the Act by ending a past practice and granting more generous benefits and by returning to the benefit level set by the contract. Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991). Scheduling of leave or other time off is generally mandatorily negotiable, however, is tempered by the County's managerial right to set minimum manning standards. Galloway Tp., P.E.R.C. No. 2003-65, 29 NJPER 114 (¶35 2003). Thus, to the extent the FOP objects to the current restrictions placed on taking leave pursuant to leave type, it can raise the issue during subsequent negotiations.

ORDER

The Hearing Examiner's Report and Recommended Decision is adopted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Voos and Wall were not present.

ISSUED: December 19, 2013

Trenton, New Jersey