

P.E.R.C. NO. 96-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LOPATCONG,

Respondent,

-and-

Docket No. CO-H-94-79

PBA LOCAL 56 (LOPATCONG UNIT),

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Lopatcong violated the New Jersey Employer-Employee Relations Act by repudiating a contractual pay rate for patrol officers working alone after dark. The Complaint was based on an unfair practice charge filed by PBA Local 56 (Lopatcong Unit). While the Commission agrees that a minimum staffing requirement is not enforceable, the record in this case does not support the assertion that the PBA's claim involves minimum staffing levels or tends to interfere with the Township's prerogative to staff the night shift.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LOPATCONG,

Respondent,

-and-

Docket No. CO-H-94-79

PBA LOCAL 56 (LOPATCONG UNIT),

Charging Party.

Appearances:

For the Respondent, Dorf and Dorf, P.C., attorneys
(Gerald L. Dorf, of counsel; Richard B. Robins, on the
brief)

For the Charging Party, Loccke & Correia, P.A., attorneys
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On September 16, 1993, PBA Local 56 (Lopatcong Unit) filed an unfair practice charge against the Township of Lopatcong. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (5) and (7),^{1/} when,

^{1/} These subsections 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment

beginning in April 1992, it refused to abide by a contractual provision requiring double time pay for patrol officers who work alone after sunset.

On December 3, 1993, a Complaint and Notice of Hearing issued. On January 5, 1994, the Township filed its Answer claiming that the disputed contract provision is an impermissible restriction on the Township's ability to make staffing decisions because its purpose is to force the scheduled use of two officers.

On May 10, 1994, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits.

On November 7, 1994, the Hearing Examiner issued his report and recommendations. H.E. No. 95-13, 21 NJPER 20 (126010 1994). He found that the Township violated subsections 5.4(a)(1) and (5) by repudiating this provision of its collective negotiations agreement with the PBA. He recommended a cease and desist order and backpay. He also recommended that the Township be ordered to post a notice of its violation.

On November 22, 1994, the PBA filed exceptions. It argues that the Township should be assessed reasonable counsel fees and

1/ Footnote Continued From Previous Page

of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

costs because it intentionally violated a prior determination on this issue.

On December 15, 1994, the Township filed exceptions. It asserts that the Hearing Examiner erred in not invalidating the double time provision as an attempt to enforce a minimum staffing requirement.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-5) and summarize the relevant facts.

Beginning with the 1978-79 collective negotiations agreement, the parties agreed that:

Two regular police officers shall be assigned in a patrol car on second and third shifts at all times after sunset. Any assigned man not able to report will be replaced by another.

Beginning with the 1987-89 contract,^{2/} the parties also agreed that:

If the shift is not fitted with two regular police officers after sunset, the officer working alone shall be compensated at double time. This section is effective beginning June 1, 1987.

In November 1989, two officers were on special assignment. A lieutenant covered half their shift alone and the chief covered the other half. Two off-duty officers filed grievances claiming that they should have been called in to work and paid overtime at

^{2/} The chief apparently erred when he testified that the language was added in 1981.

time and one-half. The grievances were denied and the PBA demanded binding arbitration. The Township filed a scope of negotiations petition seeking a restraint of arbitration and a declaration that the above provisions were not mandatorily negotiable. The parties then agreed on the terms of a 1990-92 agreement, but that agreement noted that the disputed provisions would remain in the contract pending resolution of the scope case.

On August 13, 1990, we issued our scope decision. P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990). We held that provisions requiring a minimum number of officers on patrol are not mandatorily negotiable, but that premium pay provisions are severable and mandatorily negotiable. We concluded that the provision was not mandatorily negotiable to the extent it would require the Township to maintain a minimum number of officers on patrol after sunset, and we restrained arbitration to the extent the grievances claimed that the Township was compelled to replace absent police officers to maintain staffing levels.

Rather than proceed to arbitration, the parties agreed to submit their contract dispute to our Litigation Alternative Program ("LAP"). They also agreed that the LAP officer's decision would be binding. During the LAP hearing, Officer Robert Thorp apparently stated that the double time provision was a tool used to make the Township have two officers on a shift. The Township thereafter filed another scope petition (SN-92-23) claiming that payment of double time is an impermissible restriction on staffing decisions.

On August 29, 1991, noting our initial scope decision, the LAP officer found that the Township was not obligated to replace both officers who had been reassigned. The Township properly exercised its discretion to staff the shift with only one officer. He found, however, that the Township violated the contract by not following the established procedure for filling the one vacant position and he ordered the Township to pay one officer at double time rates. The Township then withdrew its second scope petition.

After the LAP decision, officers who worked alone continued to be compensated at the double time rate. However, effective May 14, 1992, a Township councilman issued a directive stating that double time would no longer be paid. The PBA filed a grievance protesting the directive. The chief then wrote to the councilman. He explained that the Township had negotiated the double time provision in at least two contracts without objection and that he did not understand why the Township would stop paying double time just eight months before the contract expired. He proposed continuing to pay double time and then negotiating the elimination of the provision from the next contract. The chief's suggestion was rejected.

Even though the Township stopped paying double time to officers working alone, it continued to assign two officers on a regular basis to the night shifts. Officers worked alone after dark only 44 hours in 1992, 46.5 hours in 1993, and 11.5 hours in 1994 through April 27. In addition, the Township did not seek to remove

the disputed provisions from the 1993 contract and they were carried over into that contract unchanged.

On February 5, 1993, the PBA asked us to enforce the LAP decision. On March 23, the Chairman informed the PBA that LAP decisions are not enforceable under N.J.S.A. 34:13A-5.4(f). The PBA then filed this charge.

The Township asserts that the PBA's attempt to enforce the double time provision serves to enforce a minimum staffing requirement. While we agree that a minimum staffing requirement is not enforceable, this record does not support the assertion that the PBA's claim involves minimum staffing levels or tends to interfere with the Township's prerogative to staff the night shift.

While we might be able to construct a scenario where a premium pay provision would significantly interfere with an employer's ability to set staffing levels, this is not such a case. Since May 1992, the Township no longer pays double time to an officer working alone after dark. Yet the Township routinely continues to schedule two officers after dark. Only on rare occasions has the Township been unable to cover a shift with two officers. We fail to see how paying double time to the officer working alone on those rare occasions would significantly interfere with the Township's staffing determinations.

We acknowledge that the PBA may have negotiated for premium pay to induce the Township to schedule two officers. But that intent has had no bearing on the Township's staffing decisions. The

Township routinely scheduled two officers after dark when it paid double time to an officer working alone, it has continued to routinely schedule two officers after it stopped paying double time, and it has never decided to reduce its normal staffing level on this shift to one police officer. The only change has been in the compensation paid to an officer working alone.

Absent any showing of significant interference with the Township's staffing determinations, see Local 195, IFPTE v. State, 88 N.J. 393 (1982), we find that the Township repudiated its contractual obligation to pay double time to a police officer working alone after dark.

We reject the PBA's request for counsel fees and costs. See Commercial Tp. Bd. of Ed. v. Commercial Tp. Supportive Staff Ass'n, 10 NJPER 78 (¶15043 App. Div. 1983).

ORDER

The Township of Lopatcong is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the contractual pay rate for patrol officers working alone after dark.

2. Refusing to negotiate in good faith with PBA Local 56 (Lopatcong Unit) concerning terms and conditions of employment, particularly by repudiating the contractual pay rate for patrol officers working alone after dark.


B. Take this action:

1. Immediately begin paying the contractual rate of compensation to patrol officers who must work alone after dark.

2. Reimburse patrol officers who worked alone after dark since May 1992 by paying them double time, less compensation paid, plus interest at the rates set in R.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: July 28, 1995
Trenton, New Jersey
ISSUED: July 28, 1995

H.E. NO. 95-13

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LOPATCONG,

Respondent,

-and-

Docket No. CO-H-94-79

PBA LOCAL 56 (LOPATCONG UNIT),

Charging Party.

SYNOPSIS

A Hearing Examiner recommends the Commission find the Township of Lopatcong committed an unfair practice when it refused to pay the contractual rate of double time when police officers are scheduled on duty alone after sunset. This matter has been before the Commission several times before. Each time, the Commission has held this provision is negotiable and enforceable.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-13

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LOPATCONG,

Respondent,

-and-

Docket No. CO-H-94-79

PBA LOCAL 56 (LOPATCONG UNIT),

Charging Party.

Appearances:

For the Respondent,
Dorf and Dorf, attorneys
(Gerald L. Dorf, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Manuel A. Correia, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 16, 1993, the Lopatcong Policeman's Benevolent Association, Local No. 56 filed an unfair practice charge against the Township of Lopatcong. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, (a) (1), (2), (5) and (7),^{1/} when

^{1/} These subsections 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. (2) Dominating or interfering with the formation, existence or administration of

in April 1992, the Township refused to pay double time pay to officers who were on duty alone after sunset as required by the collective negotiations agreement.^{2/}

A Complaint and Notice of Hearing was issued on December 3, 1993.

On January 5, 1994, the Township filed an Answer. It does not dispute the factual allegations of the charge. Rather, the Township alleges that the pertinent contract provision concerns a non-negotiable managerial prerogative and therefore it had no duty to comply with the provision.

A hearing was held on May 10, 1994 and briefs were submitted on July 11, 1994.

1/ Footnote Continued From Previous Page

any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

2/ On August 29, 1991, a binding decision was issued, pursuant to a Litigation Alternative Program (LAP) proceeding. The LAP Umpire found that the Township violated the collective negotiations agreement when it failed to pay the contractual double time rate when an officer was on third shift duty alone. The Umpire ordered the Township to compensate officers at the double time rate when they work the third shift alone. Initially, the Charging Party filed a motion requiring that P.E.R.C. order compliance with the LAP decision. In March 1993, the Commission determined that there are no enforcement procedures available in a LAP proceeding. Accordingly, the PBA filed this charge.

The facts in this matter are not disputed. This controversy first came before the Commission on April 11, 1990 when the Township filed a scope of negotiations petition (Docket No. SN-90-66) seeking both a declaration that a contract provision on minimum staffing is not mandatorily negotiable and a restraint of arbitration of two grievances arising under that provision.

The contract between PBA Local 54 and the Township was effective from January 1, 1987 to December 31, 1989.

Article 23, Section B provided:

B. Two regular police officers shall be assigned in a patrol car on second and third shifts at all times after sunset. Any assigned officer not able to report for duty will be replaced by another.

* * *

If the shift is not fitted with 2 regular police officers after sunset, the officer working alone shall be compensated at double time. This section is effective beginning June 1, 1987.

In Township of Lopatcong, P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990), the Commission restrained, in part, the arbitration concerning Article 23. It held that to the extent the provision unconditionally calls for a minimum number of officers on patrol, it is not mandatorily negotiable. However, the Article's premium pay provisions were found to be severable and mandatorily negotiable. The provision does not unconditionally require a minimum number of officers to be on duty; rather, it is a premium pay provision which is mandatorily negotiable. Accordingly, the Commission could not consider the wisdom or cost of the premium pay proposal. Those

issues had to be addressed through the negotiations process.

Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

I make the following findings of fact.

1. On June 18, 1991, the Township and the PBA agreed to submit the pending arbitration to the Commission's LAP program. They further agreed that the decision would be binding. The LAP Umpire found that an officer working alone at night is contractually entitled to double time pay. During the hearing, Officer Robert Thorp acknowledged that the double time provision in the contract was a tool used to make the Township assign two officers on a shift.

2. The Township initially complied with the decision of the LAP Umpire (T12) and the language in the 1987 contract was incorporated unchanged into the January 1, 1990 - December 31, 1992 contract.

3. Subsequent to the LAP proceeding, patrol officers who worked alone during the specified hours were compensated at the double time rate (T14). However, effective May 14, 1992, Township Councilman Ron Gutek issued a directive stating that double time would no longer be paid (T14). (C-1B in evidence)

4. The PBA filed a grievance protesting the directive.

The Chief of Police wrote to Councilman Gutek. He explained the history of the contract provision and urged the Township to continue paying double time and wait for future

negotiations to alter this provision. (C1-C in evidence; T15). Nevertheless, the Township Council denied the grievance.

5. After May 14, 1992, two patrol officers continued to be assigned on a regular basis to the night time shift. Very occasionally, one of the employees regularly assigned to the next shift might be sick or on vacation and the other officer on duty would have to work the shift alone. Patrol officers worked alone a total of 44 hours during the hours of darkness during 1992, 46.5 hours (for approximately 6 shifts) in 1993 and about 11.5 hours in 1994 through the date of the hearing (CP-3 in evidence). The Township paid straight time for these hours.

6. Chief Nick Corley testified that when he was a patrol officer, he first negotiated the double time language in 1980 on the PBA's behalf. He acknowledged that the extra compensation was a lever to impel the Township to retain two officers on a shift (T42).

The Township acknowledges that to the extent the disputed provision is a premium pay provision, it is mandatorily negotiable. However, the Township argues that since the PBA views this language as a device to ensure that two officers will always be on duty "after dark", the provision is improperly serving to enforce the illegal minimum staffing provision. "The parties did not seek to negotiate extra compensation for officers who work alone at night, to the contrary, the Association admittedly first desired to obtain -- and now seeks mandatory negotiation regarding -- a provision which serves purely as a minimum manning requirement." Post-hearing

brief pg. 9. It argues that the "true issue is whether the Association may admittedly seek to achieve through indirect means what it may not achieve directly, the mandatory negotiation of a minimum manning requirement, albeit one enforced in the guise of a double time payment mechanism." Post-hearing brief pg. 13.

The Association asserts that the issues of minimum staffing and related compensation have been fully adjudicated in the LAP proceeding.^{3/} It urges that the same issues may not be relitigated under the doctrine of res judicata.

The facts before me do not support the Township's overall argument. Even after announcing that it would no longer pay double time when a patrol officer is on solitary night-time duty, the Township continued to schedule two police officers on the night-time shift. The Township did not institute a new schedule incorporating solitary nighttime patrols. Thus, in all of 1993, officers worked alone at night only 46 hours or approximately six shifts. Officers apparently worked the solitary night shifts only when fellow officers were not available. It is only the double time compensation incurring at those unscheduled times which the Township refuses to pay. That compensation decision is severable from the Township's managerial prerogative to establish a new schedule with reduced staffing levels for nighttime shifts, a prerogative the Township has not asserted.

^{3/} Where the parties agreed to be bound by the Umpire's decision.

The Township unpersuasively argues that the contract provision is a de facto bar to the exercise of its managerial discretion.^{4/} The Township never exercised its managerial discretion; it merely repudiated the contract language. Had it exercised its discretion to create a new schedule, it is doubtful that the union's claim could survive. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). The facts reveal no substantial limitation on the Township's policymaking power.

Accordingly, I recommend the Commission find that when the Township refused to pay the negotiated level of compensation, it repudiated the contract language without exercising a managerial prerogative. It committed an unfair practice by violating subsection 5.4(a)(5) and derivatively (a)(1) of the Act.

Conclusions of Law

The Township violated subsections 5.4(a)(5) and derivatively (a)(1) of the Act by repudiating its collective negotiations agreement with PBA Local 56 (Lopatcong unit) by refusing to pay double time to patrol officers who must work alone on after-dark duty.

Recommended Order

I recommend that the Commission ORDER:

A: That the Township cease and desist from:

^{4/} The PBA negotiator's subjective state of mind of the is simply irrelevant to this determination.

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to pay the contractual rate compensation to patrol officers working alone on after-dark duty.

2. Refusing to negotiate in good faith with PBA Local 56 (Lopatcong unit) concerning terms and conditions of employment of employees by unilaterally refusing to pay the contractual rate of compensation to patrol officers working alone on after-dark duty.

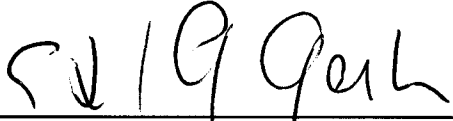
B. That the Township take the following action:

1. Immediately pay the contractual rate of compensation to patrol officers who must work alone on after-dark duty.

2. Reimburse patrol officers who commencing in April 1992 worked alone on after-dark duty the proper contractual rate of compensation, double-time, plus interest, less compensation paid.

3. 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Edmund G. Gerber
Hearing Examiner

Dated: November 7, 1994
Trenton, New Jersey

NOTICE TO ALL 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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to pay the contractual rate of compensation to patrol officers who work alone on after-dark duty.

WE WILL NOT refuse to negotiate in good faith with PBA Local 56 (Lopatcong unit) concerning terms and conditions of employment of employees by unilaterally refusing to pay the contractual rate of compensation to patrol officers working alone on after-dark duty.

WE WILL immediately pay the contractual rate of compensation to patrol officers who must work alone on after-dark duty.

WE WILL reimburse patrol officers who commencing in April 1992 worked alone on after-dark duty the proper contractual rate of compensation, double-time, plus interest, less compensation paid.

Docket No. CO-H-94-79

Township of Lopatcong

(Public Employer)

Dated _____

By _____

(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.