

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALBANY POLICE OFFICERS UNION, LOCAL
2841, LAW ENFORCEMENT OFFICERS UNION,
COUNCIL 82, AFSCME, AFL-CIO,

Charging Party,

CASE NO. U-27333

- and -

CITY OF ALBANY,

Respondent.

ENNIO J. CORSI, GENERAL COUNSEL (MATTHEW P. RYAN of counsel), for
Charging Party

JOHN J. REILLY, CORPORATION COUNSEL (TARA BROWER WELLS of
counsel), for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On January 19, 2007, the Albany Police Officers Union, Local 2841, Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO (Council 82) filed an improper practice charge alleging a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the City of Albany (City) instituted a new policy establishing time frames for requesting and responding to requests by patrol officers for compensatory or incidental¹ time off, and conditioning approval of such requests on

¹ Compensatory time is time off earned at a time and ½ rate in lieu of overtime pay, and is an election made by the officer pursuant to Article 11.1 of the collective bargaining agreement between the City and Council 82. The contract is silent on the issue of procedures for the use of compensatory time. Incidental time is vacation leave that is not used in vacation blocks, but at the option of the employee pursuant to Article 13.2.5(a) of the collective bargaining agreement. The contract is silent on the issue of procedures for the use of incidental time.

coverage by other officers working voluntary overtime. The City filed an answer denying any violation of the Act and raising various affirmative defenses, including that the change at issue was not a change in a mandatory subject of negotiation. A hearing was held on September 14, 2007, after which both parties filed briefs.

FACTS

On December 18, 2006, police officer Mark Reith made a written request for a day off on December 28, 2006, to be charged to compensatory time. Some time after December 18, but before December 26, Reith asked the station clerk about the status of his request. He was handed a copy of his request form with a post-it note attached, signed by Commander Colonno, indicating that the station clerk should hold the request until 48 hours prior to the day off requested.²

Reith made a photocopy of the form and attached note and went to see Colonno for an explanation of why his time off request was being held.³ Colonno advised Reith that at a recent staff meeting Police Chief James Tuffey had said that this was how it would be done from now on.⁴ Reith was further advised by Colonno that the reason for the 48 hour hold was that the City was posting the requested time to see if any officers would volunteer to cover it on overtime.⁵ If there were no volunteers, the

² Transcript, pp. 14-15; Charging Party's Exhibit 1.

³ Despite the respondent's objection to Reith's testimony about his conversation with Colonno as hearsay, the respondent neither called Colonno to testify nor did the witness it did call refute Reith's testimony about the conversation.

⁴ Transcript, pp. 15-16.

⁵ Transcript, p. 18.

compensatory time off request would be denied.⁶ Reith was also advised by Colonno that requests could not be acted upon more than 14 days prior to the date requested.⁷ As Assistant Chief Steven Krokoff testified, it was also beginning in December 2006 that compensatory or incidental time off requests could not be made more than 30 days prior to the date requested.⁸

Prior to December 2006, when the police department was reorganized and two stations were eliminated, there was no standard procedure in the patrol division for granting compensatory or incidental time off.⁹ There was no limit on how far in advance of a desired day off a request could be made. There was no set time frame during which an officer would be informed of whether his or her request was granted. If a sergeant receiving a request could determine from departmental computer records that there were enough officers assigned to a given shift to meet the required staffing level, a request would be granted immediately. If a request would bring the staffing below what was necessary, the request would be sent to the station commander for action.¹⁰ Depending on the commander, that request might be granted at any time after it was made.¹¹ The decision to grant or deny leave was within the discretion of the

⁶ *Id.*

⁷ Transcript, p. 17.

⁸ Transcript, pp. 55-56.

⁹ Transcript, pp. 50-51.

¹⁰ Transcript, pp. 18-20.

¹¹ Transcript, p. 51.

commander and was not subject to any standard criteria.¹²

Also prior to December 2006, compensatory and incidental time off were granted by station commanders without first determining that the required number of officers was available to cover the shift at issue.¹³ In fact, officers were routinely allowed time off, even if that left staffing on a given shift below the department's minimum staffing level.¹⁴ Then, in order to ensure that there was coverage, the department mandated overtime, in inverse order of seniority ("inversing"). It is undisputed that, as a result, the same least senior officers were working mandatory overtime on a regular basis.¹⁵ In addition, officers were often mandated to hold over from their assigned shift to the next shift to cover for officers who were absent on approved compensatory or incidental leave, again based on inverse seniority.¹⁶

The use of inverse seniority for mandatory overtime, because it results in the same group of less senior officers¹⁷ working the involuntary overtime, has a detrimental

¹² *Id.*

¹³ Transcript, pp. 52-53.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* The example given by the department at the hearing was based on an assumed minimum shift staffing level of 20 patrol officers. Since before the December 2006 changes, sergeants and/or commanders were granting time off requests without regard to minimum staffing levels, this example assumed that six officers had requested, and were granted, compensatory or incidental time off, leaving the shift staffed with only 14 officers. This meant that six officers were "inversed" or assigned to work mandatory overtime based on inverse seniority.

¹⁷ Transcript, p. 52. According to Krokoff, inverse seniority does not change until the next class of patrol officers is hired, resulting in the same least senior officers working mandatory overtime. Council 82 presented no evidence disputing Krokoff's testimony on this issue.

impact on those less senior officers as well as on the delivery of services by the department. An officer with little seniority could end up working ten straight 16 hour days, on unfamiliar shifts, in a job in which he or she has relatively little experience, while a senior officer could work only 32 hours during the same period.¹⁸ The result, according to Krokoff's undisputed testimony, is undesirable pressure on patrol officers with the least experience, both on the job and at home.¹⁹

It was also Krokoff's undisputed testimony that the 14 day period during which a compensatory or incidental time off request is considered allows the department to effectively forecast staffing needs, including not just routine staffing, but also pre-planned events.²⁰ Changes do have to be made, however, even within the 14 day period, if an emergency arises, such as a gang-related murder, after the 14 day period starts. When changes need to be made, the City posts the overtime opportunity. The posting "closes" 48 hours prior to the shift posted, meaning that at that point the City knows whether an officer has volunteered to work overtime and can then advise the officer requesting the time whether it has been approved.²¹

DISCUSSION

It is undisputed that in December 2006 the Department stopped mandating that officers work overtime to cover for compensatory or incidental time off. The Department instead made the unilateral choice to simply deny requests that were not

¹⁸ Transcript, pp. 60-62.

¹⁹ Transcript, pp. 53-54, 61-62.

²⁰ Transcript, p. 62.

²¹ Transcript, pp. 64-65.

covered by officers working voluntary overtime, resulting in increases in the number of requests denied. At the same time, the Department also unilaterally instituted new procedures for the use of compensatory and incidental time off, procedures which standardized the time period during which time off requests could be made and the time during which the requesting employee would be notified that the request had been approved, as well as the basis on which the request could be granted. For the reasons which follow, I find that the department permissibly exercised its managerial prerogative to eliminate mandated overtime to cover for compensatory and incidental time off, but violated §209-a.1(d) of the Act when it unilaterally implemented standardized procedures for patrol officers' use of compensatory and incidental time.

A demand that employees be paid for overtime work is a mandatory subject of bargaining.²² The procedure by which overtime is distributed is a mandatory subject of bargaining.²³ The decision whether to allow or require employees to work overtime is nonmandatory because it goes to the means and methods by which the public employer delivers services to the public. The City has clearly stated its belief that the repeated mandating of the same group of less senior officers to work overtime, without limits, negatively impacts the delivery of services to the public because it lessens the effectiveness of the patrol force. The unilateral decision not to require patrol officers to work mandatory overtime to cover for compensatory or incidental time off is not a violation of §209-a.1(d) of the Act, and that portion of the charge that alleges such a

²² *City of White Plains*, 33 PERB ¶14588, *affd*, 33 PERB ¶13051 (2000), *citing Spring Valley PBA v Village of Spring Valley*, 80 AD2d 910, 14 PERB ¶17515 (2d Dept 1981). *See also, City of Yonkers*, 10 PERB ¶13056, at 3099 (1977).

²³ *City of Rochester*, 36 PERB ¶13003 (2003).

violation is hereby dismissed.

The new procedures for requesting compensatory or incidental time and the new response times, however, are mandatorily negotiable. The Board has held that notice to employees and their bargaining agents of actions taken or decisions made by an employer, including the approval or denial of compensatory time off requests, is a mandatory subject of negotiations, except in emergency situations.²⁴ The Board likened a demand for reasonable advance response to an employee's leave request to a proper demand for fair treatment, which is a mandatory subject.²⁵

The Board has also held that a public employer has the "...management right to change unilaterally...staffing levels to coincide with its belief regarding the number of personnel needed or wanted for the delivery of a service of a desired type or level..." and that any restriction on this right is a nonmandatory subject of negotiation.²⁶

There is no dispute in this case that, both before and after December 2006, compensatory or incidental time off requests could be granted by a sergeant if doing so would not reduce the staffing level below the minimum set by the City for that particular day. The difference is that prior to December 2006 a sergeant could grant that request immediately as long as doing so would not put staffing levels below the established minimum, while after December 2006 the request, again if it would not bring staffing levels below the minimum, could not be granted until 14 days before the time

²⁴ *Town of Carmel*, 29 PERB ¶¶3053, at 3121 (1996).

²⁵ *Id.*

²⁶ *Town of Carmel*, 31 PERB ¶¶3006, at 3009 (1998), *confirmed sub nom. Town of Carmel PBA, Inc v Pub Emp Rel Bd*, 267 AD2d 858, 32 PERB ¶¶7028 (3d Dept 1999). See also, *City of Rochester, supra*.

requested.

There is also no dispute that, prior to December 2006, a request for compensatory or incidental time off that would, if granted, reduce staffing levels below the minimum, was referred to the station commander for action. There were no departmental criteria used by station commanders to determine whether to grant or deny such requests; it was a discretionary determination. After December 2006, the standardized 30 day, 14 day and 48 hour time frames were implemented, limiting the discretion of the station commanders to act on time off requests.

While the City has the right to decide not to mandate overtime, it does not have the right to unilaterally establish department-wide procedures for requesting and responding to requests for compensatory time off which limit the discretion previously vested in the station commanders. While the change in the use of mandated overtime to cover for compensatory or incidental time off does implicate the City's right to determine staffing levels, the unilateral change in the request and response times does not. Unlike the early vacation pick system found nonmandatory by the Board in *Town of Carmel*,²⁷ nothing about the exercise of discretion in accepting and responding to time off requests in any way limits the City's ability to adjust staffing levels as it deems necessary or prevents the City from scheduling the number of employees it wants for duty at a given time.

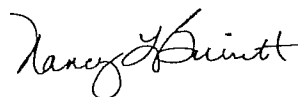
I find that it was, therefore, a violation of §209-a.1(d) of the Act for the City to unilaterally implement department-wide, non-discretionary time limits for requesting time and for responding to those requests.

²⁷ *Town of Carmel*, *supra* note 26, at 3009-3010.

IT IS THEREFORE ORDERED that the City rescind its policy and practice of not allowing compensatory and incidental time off requests to be made more than 30 days prior to the date requested; that the City rescind its policy and practice of holding such requests until at least 14 days prior to the date requested; and that the City rescind its policy and practice of not responding to a request until 48 hours prior to the date requested if the request would result in staffing levels falling below the minimum set by the City; that the City return to the practice in place prior to December 2006; and that the City make any Council 82 bargaining unit member whole for wages and benefits lost, if any, by virtue of the City's unilateral implementation of department-wide, non-discretionary time limits for requesting time off and for responding to such requests.

IT IS FURTHER ORDERED that the City sign and post notice in the form attached at all locations ordinarily used to post notices of information to unit employees.

Dated at Albany, New York
This 14th day of February, 2008



Nancy L. Burritt
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Albany, in the unit represented by the Albany Police Officers Union, Local 2841, Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, that the City:

1. Will rescind its policy and practice of not allowing compensatory and incidental time off requests to be made more than 30 days prior to the date requested;
2. Will rescind its policy and practice of holding such requests until at least 14 days prior to the date requested;
3. Will rescind its policy and practice of not responding to such requests until 48 hours prior to the date requested if a request would result in staffing levels falling below the minimum set by the City;
4. Will return to the practice in place prior to December 2006; and
5. Will make any Council 82 bargaining unit member whole for wages and benefits lost, if any, by virtue of the City's unilateral implementation of department-wide, non-discretionary time limits for requesting time off and for responding to such requests.

Dated

By
on behalf of the City of Albany

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This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.