P.E.R.C. NO. 85-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MOONACHIE,

Respondent,

-and- Docket No. CO-84-135-50

MOONACHIE PBA LOCAL 102,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Moonachie PBA Local 102 filed against the Borough of Moonachie. The charge had alleged that the Borough violated the New Jersey Employer-Employee Relations Act when it altered the work schedule of its police hours and thereby increased their work hours. The Commission, although concluding that the charge was mandatorily negotiable since it increased work hours, holds that the Borough had a contractual right to make the change.

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MOONACHIE PBA LOCAL 102,

Charging Party.

Appearances:
For the Respondent, Andora, Palmisano, DeCotiis & Harris, Esqs. (M. Robert De Cotiis, of Counsel)
and
Aron & Salsberg, Esqs. (Richard M. Salsberg and Ellen S. Bass, of Counsel and on the briefs)

For the Charging Party, Loccke & Correia, Esqs. (Manuel A. Correia, of Counsel)

DECISION AND ORDER

On September 8, 1983, the Moonachie PBA Local 102 ("PBA") filed an unfair practice charge against the Borough of Moonachie ("Borough"). The charge alleged that the Borough violated subsections (a)(1),(2),(5), and (7) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") when on August 26, 1983 it unilaterally changed the work schedule, to be effective January 1, 1984, of Borough police officers from a 5 day on - 2 days off, 5 days on - 3 days off schedule to a repeating 5 days on - 2 days off schedule, thereby altering the hours and days of work and days off of all members

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

of the negotiations unit. The charge further alleged that this change was the result of a request by the PBA to commence negotiations for 1984 and was part of an "ongoing pattern of activity by the Borough to harass, intimidate and coerce the members of the bargaining unit." Finally, the charge alleged that the work schedule change violated a preliminary injunction issued by this Commission.

On December 5, 1983, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing. On December 12, 1983, the Borough filed its Answer. The Borough admitted changing the work schedule from the 5-2/5-3 existing work schedule to a 5-2 schedule. It denied the other allegations contained in the Complaint and asserted that it acted pursuant to a non-negotiable managerial prerogative and in conformity with the parties' contract and past practice.2/

On January 26, 1984, Hearing Examiner Zudick conducted a hearing. The parties examined witnesses and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On May 2, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-56, 10 NJPER 295 (¶15145 1984) (copy attached). Relying on Atlantic Highlands v. Atlantic

2/ The PBA filed an Order to Show Cause seeking a preliminary injunction against the proposed implementation of the January 1, 1984 work schedule change. Both parties submitted briefs and supporting documentation and on December 28, 1983 argued orally before Hearing Examiner Arnold H. Zudick. The Hearing Examiner denied the PBA's application for interim relief.

Highlands PBA Local 242, 192 N.J. Super. 71 (1983), certif. den. 96 N.J. 293 (1984) ("Atlantic Highlands"), he found that the Borough had the managerial prerogative to change the work schedule without negotiations. Nevertheless, he found that the Borough violated subsections 5.4(a)(5) and, derivatively, 5.4(a)(1) in refusing to negotiate over compensation for the additional hours the employees were required to work under the new schedule. He recommended dismissal of all other portions of the Complaint.

On May 25, 1984, the Borough filed exceptions to the Hearing Examiner's finding that the Borough committed an unfair practice in failing to negotiate over compensation. It contends that: (1) there was no obligation to negotiate since the change in work schedule was a managerial prerogative; (2) the PBA did not demand negotiations over compensation; and (3) the parties' contract and past practice permitted the change and eliminated any obligation to negotiate over increased compensation.

On May 29, 1984, the PBA filed its exceptions. It contends that the Hearing Examiner erred in finding that the change in work schedule was not negotiable. It argues that the work schedule change here is negotiable because it involves an increase in hours worked. It relies on, among other cases, Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980) ("Woodstown-Pilesgrove") and In re IFPTE Local 195 v. State, 88 N.J. 393 (1982) ("Local 195")

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.

We first consider whether the Borough had a non-negotiable managerial prerogative to change the work schedule and thereby increase the number of work hours. Whatever may be the general import of Atlantic Highlands, we do not believe that a unilateral mid-contract increase in hours and days worked without at least negotiating compensation constitutes a non-negotiable managerial prerogative.[3/]

The finding that the Borough's change in the work schedule without at least negotiating compensation was a mandatory subject of negotiations does not, however, compel a finding that the change violated our Act. We have repeatedly held that an employer has met its negotiations obligations when it acts pursuant to its collective negotiations agreement. e.g., In re Randolph Twp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); In re Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); In re Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). In this case, although the change in work schedule resulted in increased days and hours

3/ Given the result in this case, we need not decide whether an employer has an absolute managerial prerogative to change a work schedule which results in increased hours and days worked. But see Local 195, 86 N.J. at 412, Woodstown-Pilesgrove, 81 N.J. at 591, Burlington Cty. College Fac. Assoc. v. Bd. of Trustees, 64 N.J. 10, 12 (1973) (Supreme Court's consistent holdings that hours of work are generally mandatory subjects of negotiations). In this regard, Atlantic Highlands did not necessarily hold that every work schedule change was non-negotiable. Indeed, to do so would directly conflict with Local 195. Further, Atlantic Highlands is factually distinguishable since this case involves a unilateral increase in the days and hours worked and the record is barren of any indication that the change was pursuant to a non-negotiable managerial policy decision. Rather, it is apparent that the change was made to increase work hours of the police force. In any event, it suffices in this case to say that a unilateral increase in hours following a work schedule change requires negotiations over at least compensation in the absence of an available contractual defense.

worked, the contract expressly permitted such a change. Article 9.03 provides that "Forty (40) hours per week shall be the normal workweek." Normal is defined as "regular" and "according with, constituting, or not deviating from a norm, rule or principle." Webster's New Collegiate Dictionary (1977). Under the new schedule, 40 hours will be the normal work week. Therefore, we hold that the plain language of Article 9.03 reflects the parties' expressed written intent that the Borough has the right to schedule 40 hours of work per week. Moreover, we are satisfied that the contract further reflects that the Borough has met its negotiations obligation in negotiating compensation. The contract provides for an annual salary. It provides for a 40 hour work week. It provides that overtime shall be paid for work in excess of the basic work day or work week. It further provides that in computing the hourly rate for overtime, the "employee's yearly base salary shall be divided by 2,080 hours" which amounts to an average of 40 hours per week. The prior practice of employees working an average of less than 40 hours per week does not override this clear contractual language. Accordingly, we conclude that the contract authorized the new work schedule and the Board did not violate subsections 5.4(a)(5) or (1).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Wenzler voted in favor of the decision. Commissioner Suskin opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
August 15, 1984
ISSUED: August 16, 1984

H. E. No. 84-56

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

In the Matter of

BOROUGH OF MOONACHIE,

Respondent,

-and-

Docket No. CO-84-135-50

MOONACHIE PBA LOCAL 102,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Borough of Moonachie violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it failed to negotiate over compensation for an increase in work hours/workdays. The Hearing Examiner held that in accordance with the decision in Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J.Super. 71 (App. Div. 1983), the Borough did not violate the Act by unilaterally implementing a new work schedule for police officers, but that it did violate the Act by failing to negotiate over compensation for the increase in work hours resulting from the change. Finally, the Hearing Examiner found that the hours clause in the parties' collective agreement did not act as a waiver of the duty to negotiate over compensation.

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. 84-56

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

In the Matter of

BOROUGH OF MOONACHIE,

Respondent,

-and- Docket No. CO-84-135-50

MOONACHIE PBA LOCAL 102,

Charging Party.

Appearances:

For the Respondent
Andora, Palmisano, DeCotiis & Harris, Esqs.
(M. Robert DeCotiis, Of Counsel)
and
Aron and Salsberg, Esqs.
(Richard M. Salsberg and Ellen S. Bass, of Counsel on the briefs)

For the Charging Party
Loccke & Correia, Esqs.
(Manuel A. Correia, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 15, 1983, by the Moonachie PBA Local 102 ("PBA") alleging that the Borough of Moonachie ("Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The PBA alleged that the Borough unilaterally changed the work schedule of the police employees from a 5-2/5-3 schedule to a straight 5-2 schedule thereby increasing the number of workdays and hours per year, and decreasing the number of days off per year, all of which was alleged to be in violation of

subsections 34:13A-5.4(a)(1), (2), (5) and (7) of the Act. 1/

The PBA further alleged that the Borough changed the work schedule because of its request to commence negotiations for 1984, and as part of a pattern to harass and intimidate unit members. Finally, the PBA alleged that the work schedule change herein was unlawful because it was made in the face of injunctive relief in a previous case.

The Borough denied committing any violation of the Act and argued that it had the managerial right to change and implement the work schedule, and that the PBA's sole remedy was to file a grievance. The Borough further argued that even if the change and increase in hours was negotiable, the change was not unlawful since it was consistent with the hours provisions in the parties' collective agreement.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 5, 1983. The Answer denying any violation was filed on December 12, 1983. A hearing was held in this matter on January 26, 1984 in Newark, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties submitted post hearing briefs and reply briefs, the last of which was received on April 9, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs,

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 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."

the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Borough of Moonachie is a public employer within the meaning of the Act, and is subject to its provisions.

2. Moonachie PBA Local 102 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The parties stipulated that the work schedule in effect from 1981 through December 1983 included a 5-2/5-3 schedule which resulted in employees working an average of 37-1/2 hours per week, 1,946 hours per year, and amounted to 245 workdays per year. (Transcript "T" p. 6, and Exhibit C-4) 2/ The parties further stipulated that the work schedule that took effect January 1, 1984 is a straight 5-2 schedule which has resulted in employees working 40 hours per week every week, 2,080 hours per year, and amounted to 260 workdays per year.

The facts show that on August 14, 1983, Chief Garrand posted the 1984 5-2 schedule (Exhibit CP-1) without conferring with - or negotiating with - the PBA. A day or two later Sergeant Joseph Schisani, the PBA's representative in Moonachie, met with the Chief concerning CP-1, and the Chief agreed to remove the posting at that time, but it was reposted on approximately August 26, 1983. (T pp. 15, 16). Schisani, and police officer Richard Behrens, testified that the Chief said that CP-1 was merely a "bargaining tool" (T pp. 14, 17, 53, 83), but the Chief denied making such a comment. Rather, the

2/ The parties actually stipulated to the information contained in Exhibit C-4, p. 3 concerning the work schedule for 1981-83 and the schedule for 1984. hHowever, C-4 actually listed 1,944 hours per year for 1981-1983, and yet Chief Stephen Garrand testified that there were 1,946 hours per year in those years. (T p. 124). The undersigned is inclined to believe that 1,946 hours per year is correct.

Chief indicated that it was Schisani who asked if CP-1 were a bargaining tool and the Chief responded that it had nothing to do with bargaining. (T p. 134).

4. The parties reached their first collective agreement in 1976, and the evidence shows that the work schedule in effect from 1976 through 1979 was the same as the schedule effective from 1981 through 1983, that is, a 5-2/5-3 37-1/2 hour average per week schedule. For 1980, and the first few months of 1981, the work schedule was changed and was a 4-2/4-2/4-4 schedule with 33-1/2 hours on the average per week, approximately 1,752 hours per year, and 219 workdays per year. In conjunction with the 1980 schedule, however, the employees were required to work 12 extra hours per month on special details for a total of approximately 1896 hours per year. However, in early 1981 the employees were required to work 16 rather than 12 extra hours per month in addition to the 4-2/4-2/4-4 schedule for a projected total of 1,944 hours per year.

5. While it is undisputed that the implementation of the 1984, 5-2 schedule was not specifically negotiated, there is conflicting evidence as to whether the previous schedule changes were negotiated. Chief Garrand, who became Chief in 1981 and was a PBA unit member prior thereto, testified that he had a past practice and contract right to unilaterally change and post the schedule. (T p. 132). Sergeant Schisani testified that he prepared and posted the 1982 and 1983 work schedules, but that they could not be posted without the Chief's approval. (T pp. 17-19, 37-38). Similarly, Charles Brown, a former Borough police officer, testified that he drafted and posted the 1980 schedule which was also approved by the

Chief prior to posting. (T pp. 100, 105). Schisani and Behrens also testified that the change from the 4-2/4-2/4-4 schedule to the 5-2/5-3 schedule in early 1981 was agreed to by both parties (T pp. 26, 56, 85), and Schisani indicated that the schedule changes since 1976 (except for the instant matter) have been agreed upon by both parties. (T p. 49). Brown further testified that the Chief could not unilaterally implement a new schedule. (T pp. 109-110). The evidence shows that when the Chief did apparently unilaterally change the number of extra duty hours from 12 to 16 in the 4-2/4-2/4-4 schedule, a grievance was filed (Exhibit R-1). However, the parties subsequently agreed to implement a 5-2/5-3 schedule in 1981, and there is no evidence that the grievance was pursued and it was apparently dropped.

Finally, the record shows that police officer Behrens also testified that there were no negotiations over the work schedule or workweek during the 1980-81 negotiations. (T p. 78). However, the evidence shows that Behrens was only an alternate to those negotiations, that he sat in on only one session, and that he was unaware of what was negotiated at other sessions. (T p. 85) 3/

6. Chief Garrand indicated that the reason he changed from a 5-2/5-3 schedule to a straight 5-2 schedule for 1984 was to provide

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3/ In response to whether every change was negotiated with the Chief, Behrens testified that it was not negotiated, but was accepted. When aksed what he meant by "accepted," Behrens explained that both parties agreed to the schedule that was going to be posted, and that the PBA and the Chief accepted it. (T pp. 86-87)

The undersigned believes that Behrens misunderstood the meaning of "negotiated," and that his definition of "accepted" really meant "negotiated."

better police coverage, and to provide better supervision and training for police officers. (T pp. 139-140). He indicated that there were twelve officers on the force and that it was better to staff three men on a shift rather than two. He testified that under the 5-2/5-3 schedule he would have a maximum of only eight three-man shifts per week, out of a total 21 shifts per week. Whereas, under a straight 5-2 schedule he would have 18 three-man shifts per week. (T p. 136).

In addition to the manpower reasons, Garrand indicated that he was also implementing a 5-2 schedule to comply with the parties' collective agreement (exhibit D of Exhibit C-4). Article 9 of that agreement provides in pertinent part that:

> 9.01 The normal workday shall be eight (8) hours....
>
> 9.03 Forty (40) hours per week shall be the normal workweek.

Article 10 of the Agreement provides that:

> 10.01 To compute the base hourly rate of an Employee for overtime or other purposes, the Employee's yearly base salary shall be divided by 2,080 hours.

Garrand indicated that Article 9 of the Agreement has been the same since 1976 (T pp. 155, 157-158), and that it was the Borough's intent to implement a 40 hour workweek pursuant thereto. Garrand also testified that under the 5-2/5-3 schedule the officers worked approximately 34, 40-hour weeks. Exhibit R-2 shows that in 1983 Sergeant Sterier, for example, worked 38, 40-hour weeks and 14, 32-hour weeks, and officer Beideman worked 31, 40-hour weeks and 21, 32-hour weeks. The other officers fell in between those figures.

Finally, former Officer Brown testified with regard to Article 10, that the 2,080 hours set forth therein was only the figure used in computing an hourly rate for overtime, court time or similar things. (T p. 108). He indicated that the Mayor knew that they did not work 2,080 hours, but that said figure would be used for the above computation purposes. (T pp. 107-108).

7. In 1982 the parties were involved in an arbitration as a result of a grievance over the Chief's change of the work schedule. The arbitration award, exhibit C of Exhibit C-4 herein, showed that in April 1982 the Chief posted a summer work schedule to be effective on July 1, 1982, which changed the schedule that took effect in January 1982. A hearing was held on June 28, and the award issued on July 12, 1982. The arbitrator sustained the grievance and held that the unilateral change was a departure from the past practice for the setting of schedules. He found that if changes were made in the past it was only after the PBA agreed.

8. In 1983 another dispute arose over a scheduling change and resulted in the filing of an unfair practice charge, Docket No. CO-83-267, on April 6, 1983. An interim relief hearing was conducted thereon on April 15, 1983, and a decision issued on April 19. See In re Borough of Moonachie, I.R. No. 83-16, 9 NJPER 261 (¶14119 1983). The facts of that case showed that the Borough unilaterally altered the work schedule of one police officer in order to replace another officer who was on vacation. The Commission Designee restrained the Borough from changing the police officer's

schedule pending a final decision. 4/

Analysis

There are several factors that need to be considered in determining whether the Borough violated the Act. First, it must be determined whether the Borough had the managerial right to unilaterally change or implement a work schedule. But even if such a right exists, the undersigned must then determine whether a new schedule increased the hours of work, and then whether any such increase fell within the hours of work set forth in the parties' collective agreement.

The undersigned dismissed the 5.4(a)(2) and (7) allegations at the hearing because the Charging Party failed to prove that the Borough dominated or interfered with the existence or administration of the PBA, and because the Charging Party failed to establish that the Borough violated any rule established by the Commission. 5/ However, having considered all of the evidence and legal arguments, the undersigned finds that the Borough violated 5.4(a)(5) and derivatively (a)(1) of the Act, not because it unilaterally implemented a new work schedule, but because it failed to negotiate over compensation for the additional hours of

4/ After the Interim Relief Decision issued in CO-83-267, that case was assigned to the undersigned Hearing Examiner for a hearing on the whole matter. A Complaint and Notice of Hearing issued on August 16, 1983 (CO-83-267-29), and a prehearing conference was held on October 4, 1983. At the prehearing conference the parties agreed to stipulate the facts, waive a hearing, and submit the matter directly to the Commission. The undersigned sent proposed stipulations to the parties on October 17, 1983, and the parties have yet to finalize the stipulations.

5/ The 5.4(a)(2) alleged violation of the Act was dismissed because the Charging Party failed to prove by a preponderance of the evidence that the Borough took any action to dominate or interfere with the PBA.

work resulting from the implementation of the new schedule. 6/ The parties' collective agreement did not support such an increase in hours without the opportunity to negotiate over additional compensation.

The Parties' Positions

In addition to arguing that the implementation of police work schedules was negotiable, the PBA argued that the Borough was estopped from raising the alleged non-negotiability of work schedules as a defense, and argued that the Borough could only raise the negotiability issue in a scope of negotiations proceeding. Moreover, the PBA argued that the parties' collective agreement did not permit an increase in hours, and that said increase differed from the parties' past practice. Finally, the PBA argued that it was harassed and intimidated by the Borough.

The Borough argued that it had the right to post and unilaterally establish a new work schedule, that the contract provided for a 40-hour workweek, and that the PBA's sole remedy concerning the contract interpretation issue was the grievance procedure of the collective agreement.

Regarding the parties' procedural and apparent jurisdictional arguments, the undersigned finds that both the negotiability issue and the contract interpretation issue may appropriately be raised in an unfair practice proceeding. Although it is preferred that, where possible, a question concerning the negotiability of a given item be first raised through a scope proceeding in order to

6/ The Borough did not commit an independent violation of 5.4(a)(1) of the Act. As discussed infra, there was insufficient evidence that the Borough harassed, intimidated, or coerced the PBA or its officials.

avoid committing a violation of the Act, it is certainly appropriate to raise negotiability as a defense in an unfair practice proceeding. If the issue is first raised in an unfair practice proceeding, however, the respondent acts at its peril because if the issue is found to be negotiable and the respondent did not negotiate, the respondent will have violated the Act.

With respect to the instant contract interpretation issue, the Borough's assertion that said matter could only be resolved through the parties' grievance procedure is misplaced. The contract issue herein was actually raised by the Borough, not the PBA, as a defense in this matter. The Commission in that context has frequently interpreted collective agreements to determine whether they operate as a waiver of negotiability rights. 7/

With regard to the 5.4(a)(1) intimidation charge, the evidence does not support a violation of the Act. First, the PBA did not establish that the work schedule was changed because it sought to commence negotiations. The only evidence in that regard is the allegation that Chief Garrand said that the new schedule was only a "bargaining tool." The undersigned, however, credits Garrand's testimony that it was Schisani who asked if the new schedule was a bargaining tool, and Garrand responded that it was not. Garrand testified extensively about the managerial need for a 5-2 schedule, and it makes little sense that he would state that the new schedule was merely a bargaining tool in light of the asserted managerial need for a 5-2 schedule. Second, there is insufficient

7/ See In re Old Bridge M.U.A., P.E.R.C. No. 84-116, 10 NJPER (¶ 4/13/84); In re Randolph Twp. Bd/Ed, P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); In re Wharton Bd/Ed, P.E.R.C. No. 83-35, 8 NJPER 570 (¶13263 1982); In re Jamesburg Bd/Ed, P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979); In re Pascack Valley Bd/Ed, P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

evidence to show that the instant work schedule change was made in retaliation for the arbitration award in 1982 or the injunctive relief in 1983, or that a pattern of harassment and intimidation existed. Although the arbitration matter involved the work schedule, it was limited to a summer schedule change, and it occurred more than a year before the events leading up to the instant charge. In addition, the injunctive relief matter was limited to the scheduling of one employee and is not particularly related to a work schedule change for the entire unit. Although it occurred shortly before the instant change, it is not enough to demonstrate a pattern of harassment.

The Work Schedule Change

Although the facts show that the Chief had the right to physically post a work schedule, or to delegate that function, the evidence also shows that previous changes in the work schedule have been agreed upon or negotiated by the parties, not unilaterally established by the Borough. The undersigned credits Schisani's and Brown's testimony that all previous schedules (but for the arbitration, injunctive relief and instant matters) were agreed upon prior to posting, and that other schedule changes were agreed upon by both parties. The past practice thus supports the PBA's contention.

Until recently, the law in this State provided that, in general, police work schedules were negotiable. See Borough of Roselle and Roselle Borough PBA, Local No. 99, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd App. Div. Doket No. A-3329-79 (5/7/81); In re Twp. of Franklin, P.E.R.C. No. 83-38, 8 NJPER 576 (¶13266 1982); and In re Borough of Atlantic Highlands, P.E.R.C.

No. 83-75, 9 NJPER 46 (¶14021 1982). Although there were certain recognized exceptions to that general rule, [8/] the Court in Borough of Roselle, supra, held that the change from a 4-2 to a 5-2 schedule was negotiable. Thus, noting the parties' past practice that work schedule changes were negotiated, the Borough herein under the prior law would have violated the Act herein and been required to negotiate over the instant work schedule change.

However, the Commission's decision in Borough of Atlantic Highlands, supra, was recently overturned by the Appellate Division in Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J.Super. 71 (App. Div. 1983), certif. denied ___ N.J. ___ (3/2/84), and the Court found that police work schedules were non-negotiable. The Court held:

> We are of the opinion that the fixing of the overall work schedule for the police force of the Borough is a managerial prerogative and a policy not subject to mandatory negotiations. slip. op. at 8.

In that case the PBA sought to change the work schedule from a 5-2, to a 5-2/5-2/5-3 schedule. That matter was presented to the Commission and the Court through a scope of negotiations petition, and since the Court found the issue non-negotiable resulting in no change to the previous schedule, no issue existed regarding additional compensation because there was no change in the hours or days of work.

Without specifically referring to Borough of Roselle, the Court in Borough of Atlantic Highlands, supra, apparently overturned

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8/ See Town of Irvington v. Irvington PBA Local 29, 170 N.J.Super. 539 (App. Div. 1979); certif. den. 82 N.J. 296 (1980); In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); In re Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982); and In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

the Roselle decision. The PBA herein, however, argued that the Court's decision in Atlantic Highlands should not apply herein because application of that decision in this case would result in a change and increase in work hours, whereas in Atlantic Highlands, no change or increase in hours occurred. The PBA is apparently arguing that Atlantic Highlands may only apply where it will not result in a change in hours or days of work.

In addition, the PBA argued that the Court's decision in Atlantic Highlands does not apply herein because the Appellate Division's decisions in Borough of Maywood v. Maywood PBA Local No. 102, App. Div. Docket No. A-3071-82T2 (December 15, 1983) affirming P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983); and in Township of Middletown v. Middletown Township PBA Local 124, App. Div. Docket No. A-3664-81-T3 (April 28, 1983) affirming P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), are more applicable.

In Borough of Maywood, supra, the Employer filed a scope petition with the Commission seeking a restraint of arbitration. The issue involved the determination of which officers would temporarily fill in on other shifts. The PBA filed a grievance alleging violations of the overtime and seniority provisions of the parties' collective agreement. The Commission and the Court refused to restrain arbitration and held that although the Employer could determine the number of officers on a shift, it could not, absent emergencies, unilaterally determine which officers would fill in for other officers who were temporarily absent.

The facts in Township of Middletown, supra, were similar to those in Maywood. In Middletown, the Township filed a scope

petition seeking restraint of an arbitration. The Township was using a rotation system to determine which officers would be temporarily transferred to fill in for absent officers. The PBA filed a grievance and argued that the Township violated the parties' contract by using a rotation rather than a seniority system. The Commission and the Court found that the type of system used to determine temporary assignments therein was negotiable.

The undersigned has considered the PBA's arguments herein, but concludes that the Borough did not violate the Act by failing to negotiate over the implementation of a new work schedule. The decisions in Maywood and Middletown are distinguishable from Atlantic Highlands and from the instant facts. Moreover, there is nothing in the Court's decision in Atlantic Highlands to suggest that it was limited to situations where no change or increase in work hours or workdays occurred. Therefore, the decision to change the work schedule herein was not negotiable.

However, the above finding does not mean that the Borough did not violate the Act. There is a difference between negotiating over the decision to change the work schedule and the content of the work schedule, and negotiating over compensation to cover additional work hours or workdays imposed by the work schedule change. Failure to negotiate over compensation in such circumstances is a violation of the Act. The courts and the Commission have held on more than one occasion that, generally, the exercise of a managerial right is severable from the obligation to negotiate over compensation for assigned work. In Woodstown-Pilesgrove Bd/Ed v. Woodstown-Pilesgrove Ed. Assoc., 81 N.J. 582, 594 (1980), teachers were re-

quired to teach two additional hours the day before Thanksgiving. The New Jersey Supreme Court held that negotiations (arbitration) over payment for the extra work hours would not significantly or substantially interfere with the Board's exercise of its managerial prerogative of assigning the work.

Later that same year the Appellate Division in Ramapo-Indian Hills Ed. Assoc. v. Ramapo-Indian Hills H.S. Dist. Bd.Ed., 176 N.J.Super. 35 (App. Div. 1980), also upheld the right to negotiate (arbitrate) for compensation as a result of a managerial change. In that case the Board merged two positions into one and set the salary. The Court, in affirming the Commission, held that since the hours and workload of the new position were part of the managerial decision they were not negotiable, but that the issue of compensation was negotiable (arbitrable).

More recently in Morris County and Morris County Park Commission v. Morris Council No. 6, N.J.C.S.A., App. Div. Docket No. A-795-82T2, January 12, 1984 (Notice of Appeal denied 4/10/84; petition for certif. pending Supreme Court Docket No. 22,347), the Appellate Division again held that negotiations over compensation are appropriate where they do not prevent the exercise of managerial rights. In that case employees had been permitted to use County vehicles to commute back and forth to work. When the County unilaterally discontinued that policy the Council sought to negotiate over compensation but the County refused. The Court required negotiations and said:

> Clearly, questions of compensation intimately and directly affect the welfare of public employees. No state statute or regulation is here involved.

> Nor will the ordered negotiation over compensation for the lost economic benefit significantly affect the County's exercise of its management prerogative to dispose of its vehicle fleet as it deems appropriate. The PERC order for negotiation therefore constitued an appropriate exercise of its remedial discretion. slip. op. at 5.

In addition to the above cases, the Commission in a recent police case In re City of Paterson, P.E.R.C. No. 84-113, 10 NJPER ___ (¶_____ 4/13/84), has distinguished between the exercise of a managerial prerogative and the obligation to negotiate over compensation. The City had temporarily assigned certain captain duties to a lieutenant and the Commission held:

> The City's right to make assignments and reductions in force is severable from, and not adversely affected by, its obligation to negotiate over compensation for assigned duties. P.E.R.C. No. 84-113, slip. op. at 6.

The undersigned believes that the instant matter is in the same category as the above-cited cases. The Borough, pursuant to Atlantic Highlands, had the right to implement a new and different schedule even though it resulted in an increase in overall work hours. But absent a contractual waiver, the Borough was required to negotiate with the PBA over compensation for the increase in hours. Such negotiations will not prevent the Borough from implementing a new schedule. 9/

9/ The decision in In re Maywood Bd/Ed, 168 N.J.Super. 45 (App. Div. 1979), where the Appellate Division held the impact of a managerial decision to reduce the work force was non-negotiable, is not applicable herein to support a claim that compensation is non-negotiable. Maywood, supra, was issued prior to Woodstown-Pilesgrove, supra; Ramapo-Indian Hills, supra; and, Morris County, supra, and those cases clearly hold that compensation is negotiable as a result of changes occasioned by managerial decisions where such negotiations will not interfere with such decisions. In the instant case the negotiations over compensation will neither prevent nor adversely affect the implementation of the new work schedule.

The Collective Agreement

The Borough argued that since Article 9.03 of the parties' agreement provides for a 40-hour workweek, that it is under no obligation to negotiate over compensation. The PBA, however, argued that neither Article 9.03 nor the parties' past practice required a 40-hour week. The PBA maintained that Article 9.03 was not clear on its face and did not operate as a waiver.

The Commission on several occasions has considered whether contractual clauses operate as a waiver (see note 7 infra), and has also considered the application of the parol evidence rule. 10/ The parol evidence rule provides that outside evidence such as oral statements and past practice cannot be used to otherwise change the clear meaning of a contractual clause, but may only be used as an aid in interpreting the language. See Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953), and Casriel v. King, 2 N.J. 45 (1949). However, where the clause is unclear on its face, both oral statements and past practice are appropriate to determine the meaning of the clause. Moreover, unless a contract clause clearly and unequivocably authorizes an employer to make particular increases in the hours of work, a waiver of negotiations at least with respect to compensation would not exist. See In re Deptford Bd.Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1981), aff'd App. Div. Docket No. A-1818-80T8 (5/24/82).

The undersigned has considered the parties' positions and finds that whether the parol evidence rule applies here or not,

10/ See In re Old Bridge M.U.A., supra; In re Raritan Twp. M.U.A., P.E.R.C. No. 84-94, 10 NJPER 147 (¶15072 1984); In re Twp. of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983); and, In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981).

Article 9.03 did not operate as a waiver of negotiability rights and did not authorize the fixing of a 40-hour work week on a full-time basis. Very simply, Article 9.03 only provides that 40 hours per week shall be the "normal" work week. The word "normal" in that context means that 40-hour weeks shall be the standard, and shall be representative of most of the work weeks. But it certainly does not mean that 40-hour work weeks shall always apply. The word "normal" herein acts as a qualifier, and if the parties had agreed to a 40-hour work week, every week, there would have been no need to utilize the word "normal."

Nevertheless, the instant facts and the past practice clearly demonstrate the intent of the parties. The facts show that in 1981, 1982 and 1983 the employees worked more 40-hour work weeks than anything else. 11/ That certainly falls within the intent of Article 9.03 in that the normal work week was 40 hours per week. Additionally, the facts and the past practice show that the parties' collective agreements have, since 1976, had the same work week language as contained in Article 9.03 herein, and yet during all those years the employees have never worked more than 37-1/2 hours per week on the average. It is inconceivable to the undersigned that a public employer which believed it had the right under the contract to implement a 40-hour work week, every week, without additional cost to the public would wait eight years to do so. Rather, the undersigned believes, as evidenced by the past practice, that Article 9.03 was never meant to require 40 hours a week every week. It was only meant to be the norm. Consequently,

11/ In 1983 for example, the employees averaged 34, 40-hour weeks and 18, 32-hour weeks. (Exhibit R-2).

the PBA never agreed to a 40-hour work week, every week, and therefore, it did not waive the right to negotiate over compensation for the additional work hours imposed by the Borough in implementing the new work schedule. 12/ Therefore, the Borough violated the Act by not negotiating over such compensation.

Accordingly, based upon the entire record and the above analysis, the undersigned makes the following:

Conclusions of Law

The Borough of Moonachie violated N.J.S.A. 34:13A-5.4 (a)(5) and derivatively 5.4(a)(1), by failing to negotiate over compensation for the increase in work hours/workdays resulting from the implementation of a new work schedule.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Borough cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from failing and refusing to negotiate in good faith with the PBA concerning terms and conditions of employment of PBA unit members, particularly by failing to negotiate with the PBA over compensation for the increase in work hours per week.

B. That the Borough take the following affirmative action.

12/ The yearly work hours were increased by approximately 134 hours pear year.

1. Immediately engage in good faith negotiations with the PBA concerning both retroactive and prospective compensation for the increase in work hours/workdays resulting from the implementation of the 5-2 schedule.

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, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Borough to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Borough has taken to comply herewith.

C. That the Complaint be dismissed regarding all other aspects of the Charge, and that the request for attorney's fees and costs be denied.

Arnold H. Zudick
Hearing Examiner

Dated: May 2, 1984
Trenton, New Jersey

Appendix "A"

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, and

WE WILL NOT refuse or fail to negotiate in good faith with the PBA concerning terms and conditions of employment of PBA unit members, particularly, by failing to negotiate over compensation for the increase in work hours/workdays.

WE WILL forthwith engage in good faith negotiations with the PBA regarding retroactive and prospective compensation for the increase in work hours/workdays.

BOROUGH OF MOONACHIE
(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 James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780