

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MOORESTOWN,

Respondent,

-and-

Docket No. CO-83-225-100

MOORESTOWN POLICE ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delgated to him by the full Commission, adopts the recommended conclusions of a Hearing Examiner that the Township of Moorestown violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the rule governing the assignment of outside employment to unit members, but that all other aspects of the unfair practice charge should be dismissed. The Chairman also agrees with the Hearing Examiner that no monetary award should be made because the Moorestown Police Association did not specifically establish that any employee lost a definite amount of wages due to the change. Neither party filed exceptions.

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MOORESTOWN POLICE ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Bruce L. Harrison, of Counsel)

For the Charging Party, Barbour & Costa, Esqs.
(John T. Barbour, of Counsel)

DECISION AND ORDER

On March 1, 1983, the Moorestown Police Association ("Association") filed an unfair practice charge against the Township of Moorestown ("Township") with the Public Employment Relations Commission. The charge alleged that the Township violated subsections 5.4(a)(1), (2), (3), and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed the rule governing the assignment of outside employment to unit 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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On May 24, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On June 6, 1983, the Township filed an Answer admitting that it had made a unilateral change, but denying any violation of the Act. The Township asserted that the charge was filed beyond the appropriate statute of limitations; the Association was guilty of laches; the subject matter of the change was not a mandatory subject for negotiation; any violation was de minimis; the Association had contractually waived its right to negotiate over the disputed subject; and the Association had failed to exhaust contractual remedies.

On August 25 and 26, 1983, Hearing Examiner Joan Kane Josephson conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally.^{2/} Both parties filed post-hearing briefs.

On February 17, 1984, Hearing Examiner Arnold H. Zudick issued his report and recommended decision. H.E. No. 84-43, 10 NJPER ____ (¶ ____ 1984). He found that the charge had been timely filed and that the Township had violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 5.4(a)(1), by unilaterally changing the assignment procedure for outside work. The Hearing Examiner, however, also found that the Association had failed to establish that any employees had lost a specific amount of work hours at a specific rate of pay and recommended that there be no monetary remedy. He instead recommended an order requiring

^{2/} On approximately October 17, 1983, Hearing Examiner Josephson resigned from the Commission and pursuant to N.J.A.C. 19:14-6.4, Hearing Examiner Arnold H. Zudick was assigned to complete this matter.

the restoration of the previous assignment procedure; negotiation before making any changes in that procedure; and the posting of a notice. He finally recommended dismissal of all other portions of the Complaint.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on or before March 2, 1984. Neither party filed exceptions.^{3/}

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. I adopt and incorporate them here. Based on these findings of fact, and in the absence of exceptions, I agree with the Hearing Examiner not only that the Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by unilaterally changing the assignment procedure for outside work, but also that the Association did not specifically establish that any employee lost a definite amount of wages due to this change. Therefore, only a limited remedy is in order. Finally, I agree that the Association has not proved by a preponderance of the evidence any of the remaining allegations of the Complaint.

ORDER

The Commission ORDERS:

A. That the Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by

^{3/} The Township requested and received an extension of time to March 14, 1984 within which to file exceptions, but nevertheless did not file exceptions.

the Act, and from failing to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly, by failing to negotiate with the Association before changing the procedure for the assignment of outside work.

B. That the Township take the following affirmative action:

1. Immediately cease implementing the current outside work assignment procedure and restore the assignment procedure established in Special Order 79-5 (Exhibit J-5);

2. Engage in good faith negotiations with the Association regarding any future change in the outside work assignment procedure;^{4/}

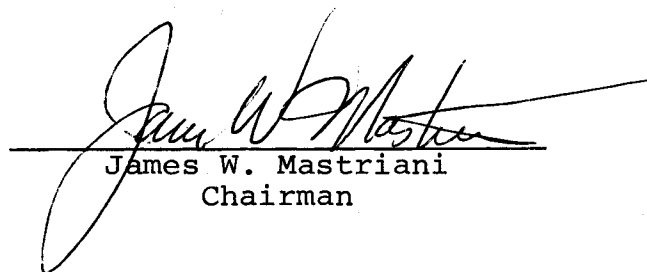
3. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Township's authorized representative shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Township to insure that such notices are not altered, defaced or covered by other materials; and

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

^{4/} This Decision and Order does not apply to any of the lieutenants who may be eligible to perform outside work since the lieutenants are not included in the Association's unit.

C. That those portions of the Complaint alleging that the Township violated subsections 5.4(a)(2) and (3) are dismissed.

D. That the Association's requests for a monetary award and for attorney fees and cost of suit are denied.



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 18, 1984

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.

WE WILL NOT refuse or fail to negotiate in good faith with the Moorestown Police Association concerning terms and conditions of employment of Association unit members, particularly, by failing to negotiate over the change in the outside work assignment procedure.

WE WILL forthwith restore the status quo ante by returning to the assignment procedure for outside work established in Special Order 79-5 dated April 23, 1979, and at the same time we will enter into good faith negotiations with the Association regarding any future change in that assignment procedure.

TOWNSHIP OF MOORESTOWN
(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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Township violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally changed the assignment procedure for outside work. The Hearing Examiner recommended that the Township be ordered to return to the status quo ante and to negotiate in good faith regarding any future change in the assignment procedure. The Hearing Examiner, however, concluded that the Township did not violate subsections 5.4(a)(2) and (3) of the Act and recommended that said portion of the Complaint be dismissed.

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.

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(Bruce L. Harrison, Of Counsel)

For the Charging Party, Barbour & Costa, Esqs.
(John T. Barbour, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 1, 1983, by the Moorestown Police Association ("Association") alleging that the Township of Moorestown ("Township") 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 Association has alleged that the Township unilaterally changed the rule governing the assignment of "outside employment" to unit members, and that by so doing it interfered with the Association by creating competition for "outside work" between unit members, all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5)

of the Act. ^{1/}

More particularly, the Association alleged that the Township unilaterally changed the rule concerning the selection of personnel for assignment to "outside employment" which primarily consisted of working the football games in the Fall, and controlling the traffic light at the shopping mall at Christmas time. The Association alleged that as a result of the change several employees lost the opportunity for outside employment, and as a remedy the Association sought reinstatement of the prior rule, a back pay award plus interest for the affected employees, and attorney's fees. The Township admitted that it made a unilateral change but denied any violation of the Act and asserted a statute of limitations defense, a contractual defense, and a managerial/negotiability defense.

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 May 24, 1983 and assigned to Hearing Examiner Joan Kane Josephson. An Answer denying any violation of the Act was filed on June 6, 1983. Hearings were held in this matter on August 25 and 26, 1983, in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue

^{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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (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."

orally. ^{2/} Both parties filed post-hearing briefs, the last of which was received on December 5, 1983.

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, 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 Township of Moorestown is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the affected employees.

2. The Moorestown Police Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. On April 23, 1979 Township Police Director Loyd Barrentine issued Special Order 79-5 (Exhibit J-5) providing for an assignment procedure for Association unit members who volunteered to perform "outside work." That Order defined outside work as:

Services provided to citizens, groups or businesses, upon their request, that are over and above the services regularly provided by the Police Department. ^{3/}

Such outside work could only be performed on an employee's regular day(s) off.

^{2/} On approximately October 17, 1983 Hearing Examiner Josephson resigned from the Commission and pursuant to N.J.A.C. 19:14-6.4 the undersigned Hearing Examiner was assigned to complete this matter.

^{3/} The concept of outside work began as early as 1968. Part of the language used in the above definition was obtained from Township ordinances in 1968 (Exhibit R-9A) and in 1970 (Exhibit R-9D).

The record shows that the kind of police work included in outside work was performing security and doing traffic control at football games in the Fall, and manually operating one or two street lights at the shopping mall during the Christmas season.

Such outside work was performed strictly on a voluntary basis and was not subject to the overtime pay provision in the parties' collective agreement. ^{4/} Rather, the pay rate for the football and mall outside work was unilaterally set by the Township and paid by the vendor requesting the police officer(s). (Transcript "T" 1 pp. 57, 184). The Township, for example, issued the check for the outside work to the affected employee, but the vendor thereafter reimbursed the Township. The record clearly shows that the Association neither negotiates the football or mall pay rate with the vendor, nor has it ever negotiated the pay rate for outside work, or the assignment procedure or any other aspect of outside work with the Township. (T 1 pp. 52, 58, 86-87, 116). In fact, none of the parties' collective agreements (Exhibits J-1, J-2, J-3, and J-4) contain any clause concerning outside work or the assignment procedure thereto. ^{5/}

^{4/} The parties' most recent collective agreement which is effective January 1983-December 1985 (Exhibit J-4), provides in Article 4 for overtime at a time and one-half rate for all hours worked in excess of an employee's regularly scheduled week.

^{5/} In addition to football and mall assignments the record shows that outside work may occasionally include traffic control at wedding receptions and similar events, and traffic control at construction sites. (T 1 pp. 71-77). However, the rate of pay for these jobs has been arrived at between the vendor and the police officer performing the work and not by the Township. (T 1 pp. 74-76). Nevertheless, the police officer involved in such outside work is still required to obtain the Police Director's approval to perform such work if he intends to wear his uniform. (T 1 p. 75).

It is important to note that the football and mall outside work is distinguishable from regular overtime work. Regular overtime work which is paid only by the Township includes the lake patrol and mall stake-out assignments and is compensated in accordance with the parties' overtime clause in their collective agreement. (T 1 pp. 119-121).

4. The assignment procedure established in J-5 requires that outside work be assigned without regard to rank, seniority in the department, or time in grade. Rather, assignment was to be made based upon which employees were eligible on the particular day in question, and of those eligible employees, the employee with the least number of outside work hours for the year would have first priority for the assignment. The effect of this procedure was to equalize the outside work assignments among the interested officers as much as possible.

5. In May 1979 Harry Klatt was promoted to the Police Director's position, but he was unaware of the assignment policy established in J-5 until the Fall of 1982. (T 1 pp. 145, 147, 152). When he first became Director, Klatt appointed Lieutenant Rosenbleeth to allocate the outside work assignments to the eligible police officers, and Rosenbleeth performed that function until August 1980, when then Lieutenant Mann assumed those responsibilities. ^{6/} (T 1 p. 126). Both Rosenbleeth and Mann followed the assignment procedure established in J-5.

In August 1981 Lt. Mann requested a demotion to sergeant, and Lt. Johnson thereafter assumed the responsibility for assigning officers to outside work. Since Johnson, like Klatt, was unaware of J-5 in 1981 (T 1 pp. 129-130, 136-139), he followed the assign-

^{6/} The record shows that on October 10, 1980, Lts. Bell, Mann, and Rosenbleeth sent a memo to Klatt (Exhibit R-1) requesting that lieutenants be allowed to work overtime. Prior to that time lieutenants were not permitted to work overtime or outside work. Thereafter, on November 10, 1980 the Township council passed a resolution (Exhibit R-2) permitting certain lieutenants to work overtime which included outside work. Subsequently, on November 26, 1980 a memorandum was prepared from Klatt to all police officers giving the assignment procedure for outside work (Exhibit R-3). This procedure was virtually the same as J-5, but also included lieutenants. The evidence shows, however, that this memo was never actually distributed to the police officers.

ment procedure used to assign officers to lake patrol and stake-out duty. (T 1 p. 130). That assignment procedure required the assignment to be done per job by seniority, rank, and availability within the schedule (T 1 p. 130). Thus, Johnson, with Klatt's approval, though unknowingly, nevertheless unilaterally changed the assignment procedure for outside work in the Fall of 1981. The effect of that change was to eliminate or seriously reduce the possibility of equalizing outside work among all of the officers and to favor those officers with more seniority or rank.

6. Lt. Johnson and Director Klatt first discovered that they had changed the assignment procedure for outside work in the Fal of 1982 when then Sergeant Mann filed a grievance concerning the change in the procedure. (T 1 p. 145, T 2 p. 28). Prior to that time both Johnson and Klatt thought the procedure was consistent with the past assignment practice. (T 1 pp. 130-131).

On December 15, 1982 Director Klatt denied Mann's grievance at step II. (Exhibit C-2a, exhibit "A"). He found that the grievance was untimely, but admitted that Lt. Johnson "administratively changed the procedure." On January 21, 1983, the Township Manager denied the grievance at step III also because it was untimely but he admitted that:

I do find there was an oversight by the department in the sense that they modified a formal written policy with a verbal policy....This was not a deliberate oversight, but rather stemmed from management changes since the date of Special Order 79-5 was issued. (Exhibit C-2a, exhibit "B").

The Association did not file for arbitration concerning that grievance.

7. Sergeant Mann alleged that he lost 10 to 15 hours of outside work as a result of the change, but he never established the actual pay rate for those hours, and he admitted that he had never worked the football games. (T 1 pp. 17, 40). ^{7/} Lt. Johnson testified, however, that a loss of 15 hours for Mann was unrealistic. (T 2 pp. 30-32).

The Association did not establish that any other employees lost any specific amount of outside work because of the change in the assignment procedure.

8. The record shows that Sergeant Mann, who was not an officer of the Association, first learned of the change in the outside work assignment procedure in the Fall of 1982 (T 1 p. 47). At that time police officer Winkler, who was President of the Association from February through December 1982 (T 1 p. 193), had a conversation with Mann concerning outside work. Mann testified that he told Winkler that the men who didn't work the football games get a chance to catch up (on outside work) with the traffic light, and that Winkler then said:

I know it's supposed to be that way but they didn't do it that way last year. (T 1 pp. 28, 91).

Prior to that remark, Mann believed that J-5 had been complied with in 1981 (T 1 p. 83). ^{8/}

^{7/} Mann did testify that the approximate rate for outside work was \$21.00 per hour, but he never established what rate was actually used for the hours he allegedly lost.

^{8/} The undersigned credits Mann's testimony that he did not know about the change in the assignment procedure until the Fall of 1982. Director Klatt testified that he could not dispute any of Mann's testimony (T 1 p. 150), and that the first time Mann spoke to him concerning the matter was September or October 1982. (T 1 p. 145). In addition, Officer Winkler testified that he did not discuss the situation with Mann until the Fall of 1982 (T 1 p. 198).

Winkler admitted that he knew Lt. Johnson had changed the assignment policy in 1981. He testified that Johnson was making up a separate schedule for football, and one for the mall traffic light. He then told Johnson that Mann had made up a schedule for the whole year, and that Johnson replied:

That's not the way I'm doing it. (T 1 p. 194).

Winkler then clarified his testimony to indicate that when he was talking to Johnson in 1981 he was not aware that a formal outside work assignment policy existed, he only knew Johnson's method was different than the one used by Mann (T 1 pp. 200-201). Moreover, he testified that in 1981 he had no knowledge whether a different assignment system would be used in 1982.

Finally, Winkler testified that since he was not an officer in 1981, nor acting on its behalf, he did not communicate Johnson's statement to the Association President. (T 1 p. 197). He further testified that he did not raise it until the Fall 1982 because that's when the new outside work list was posted (T 1 p. 198).

ANALYSIS

The Timeliness Issue

The Township argued that the instant charge was untimely filed because the Association knew as early as the Fall of 1981 that the Township had changed the outside work assignment procedure, and that therefore the Charge should have been filed in early 1982 at the latest. ^{9/} The undersigned disagrees.

The only thing that occurred in 1981 was that Winkler, who was not a union official at that time, learned that Johnson

9/ The Act at 34:13A-5.4(c) provides for a six months statute of limitations.

was not following the same assignment procedure previously used by Mann. But in 1981, neither Johnson nor Winkler knew that there was an official change in a formal policy, and, in fact, Johnson and Klatt both believed that they were implementing the correct policy. It would be unreasonable to expect the Association to have known about the policy change in 1981 when even management, i.e. Klatt and Johnson, were unaware of any official change until 1982.

Furthermore, when Winkler learned that Johnson was not following the assignment procedure used by Mann, he was not an officer of the Association and had no responsibility to advise the Association or act on its behalf. Once he became President, the relevant period for the assignment of outside work had passed, and it was not until September and October of 1982 that the issue arose again.

The New Jersey Supreme Court in Kaczmarek v. N.J. Turnpike Auth. and N.J. Turnpike Auth. Employees Union Local 194, IFPTE, 77 N.J. 329, 4 NJPER 368 (¶4168 1978), interpreted the statute of limitations provision in the Act and held that:

...it would be derelict for the Court to apply strictly and uncritically a statutory period of limitations without considering conscientiously the circumstances of the individual case....
77 N.J. at p. 338.

and it went on to say that:

...the Legislature, by its very choice of expression, evinced a purpose to permit equitable considerations to be brought to bear. 77 N.J. at p. 339.

The circumstances of this case show that neither of the parties was actually aware of an official change in the outside work assignment procedure in 1981, and that the issue did not

actually arise again until the Fall of 1982. The Association therefore did not have any notice of a change in procedure in 1981, and consequently, could not have been expected to file a charge by early 1982.

The Court in Kaczmarek, supra, also held that, generally, the purpose of a statute of limitations:

...is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend....77 N.J. at p. 337.

In this case the Association clearly filed the Charge within a reasonable time after it learned of an official change in the assignment procedure. Moreover, there was no showing that the Township did not have a fair opportunity to defend against the Charge.

Accordingly, the undersigned believes that the Charge was timely filed.

The 5.4(a)(2) and (a)(3) Allegations and Count II

There was no showing by the Association that by unilaterally changing the outside work assignment procedure the Township dominated or interfered with the existence or administration of the Association, or that by making the change it intended to - or did in fact - discriminate against any employee because of the exercise of his/her protected activity, or that it attempted to discourage employees in the exercise of their rights under the Act. Consequently, the 5.4(a)(2) and (3) allegations, and Count II of the Charge should be dismissed.

The Unilateral Change

The undersigned finds that by unilaterally changing the

assignment procedure for outside work the Township violated §5.4 (a) (5) of the Act. The Township's assertion that no unilateral change had been made, and its assertions that the assignment procedure does not affect the employees' terms and conditions of employment, or that outside work is a management prerogative, or that the Association waived the right to negotiate work rules, are without merit.

First, the undersigned believes that it is necessary to distinguish between the "outside work" herein, and outside employment in the general sense. The undersigned finds that "outside work" in this case is the same as, or at least similar to overtime in the traditional sense because the Township is involved in the assignment procedure, it negotiates the salary for the employees with the outside vendor, and because the employee is serving in his/her regular capacity as a police officer while performing outside work. Outside employment, however, is a term usually denoting a different job which is entirely unrelated to the employee's police job.

Second, the issue in this case is not whether there is a need to provide outside work (overtime), or how many employees will be permitted to do outside work at any one time. Rather, the issue here is which procedure will be used to determine which employees will be offered the outside work.

The Township's argument that the instant assignment procedure does not affect the employees' terms and conditions of employment is without merit, and its argument that the existence of outside work is a managerial prerogative is distinguishable from

the instant matter. In In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), the Commission held that although the decision concerning the need for overtime and the number of employees who will work overtime is non-negotiable, the determination of which employees will work overtime is negotiable. The Commission stated that:

The determination of who works overtime relates to the hours employees work and the compensation they earn. Thus, an employer must negotiate over such questions, for example, as whether overtime will generally be distributed according to seniority, according to a schedule, or according to who volunteers. 8 NJPER at 450. 10/

City of Long Branch, supra, is directly on point with the instant matter. The issue here does not concern whether to assign outside work, or how many employees may perform outside work at any one time, rather, it is limited to which employees, and through what procedure, employees will be entitled to perform outside work. 11/ Consequently, in application of Long Branch, the determination of who performs outside work is a term and condition of employment because it affects the employees' hours of work, and the Association is, therefore, entitled to negotiate over which procedure to be used to distribute the outside work.

Furthermore, even if the final determination of who should perform outside work were non-negotiable because it significantly interfered with a managerial prerogative, the procedure

10/ See Also In re Hunterdon County, P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982).

11/ Pursuant to City of Long Branch, supra, the Township is probably correct that the decision as to whether to make outside work (in the context of this case) available is non-negotiable. However, that is not the issue herein.

used to determine who would be eligible for such work is negotiable. ^{12/} See Local 195, IFPTE v. State of N.J., 88 N.J. 393, 410 (1982); and State of N.J. v. State Supervisory Employees Assn., 78 N.J. 54, 90-91 (1978). Therefore, at the very least, the Township was required to negotiate over the procedure to be used for the selection of employees for outside work which is really all that the Association sought herein.

Moreover the Township's assertion that no unilateral change has been made herein is simply not supported by the evidence. The facts show that Lts. Rosenbleeth and Mann followed the assignment procedure in J-5, but that Lt. Johnson, with Director Klatt's approval, thereafter applied a different procedure. Although the procedure in J-5 was neither negotiated by the Association, nor appeared in the parties' collective agreements, it was no less a past practice affecting terms and conditions of employment which was unlawfully unilaterally changed by the Township.

The law in this State is well settled. An established practice of a term and condition of employment, whether or not it is specifically included in a collective agreement, is a negotiable item that generally cannot be unilaterally changed by an employer. In In re New Brunswick Bd/Ed, P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), Motion for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073

^{12/} The undersigned recognizes that there may be times when the Township may prevent the assignment of outside work to an otherwise eligible employee. For example, in emergency situations the Township may decide to deploy a police officer otherwise eligible for outside work to a particular detail because of his rank, or his experience or his expertise in a particular area.

1978), aff'd App. Div. No. A-2450-77 (April 2, 1979), the Commission held that:

Where, during the terms of an agreement a public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement...the employer must first negotiate such proposed change with the employees' representative prior to its implementation. 4 NJPER at 85.

The Commission has followed that same rule of law more recently in In re Sayreville Bd/Ed, P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983), where it held that:

...[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment, such as...the amount of an employees salary, even though that practice or rule is not specifically set forth in a contract. 9 NJPER at p. 140.

Consequently, the Township's failure to negotiate a change in the outside work assignment procedure was a violation of the Act.

Finally, the Township's argument that the Association waived the right to negotiate over the work rules governing the assignment of outside work is not supported by the law. In In re Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982); and In re Township of Ocean, P.E.R.C. No. 81-133, 7 NJPER 333 (¶12149 1981), the Commission held that new rules, or the modification of existing rules governing working conditions, are negotiable, and cannot be waived by a collective agreement since that negotiable right is specifically provided for by statute. See N.J.S.A. 34:13A-5.3. 13/

13 The Township's arguments that the Charge should be dismissed because the Association failed to exhaust its contract remedies by filing for arbitration, and that the Charge was de minimis, are also without merit. This case did not involve a contract interpretation but rather a failure to negotiate over a term and condition of employment. In addition, the type of procedure used to determine the selection for outside work could have a significant impact on the number of outside work hours offered to any given employee.

The Remedy

The only appropriate remedy herein is to order the Township to reinstate and follow the procedure established in J-5 for the assignment of outside work, and to order it to negotiate over any future changes in that procedure. Despite the fact that Mann estimated that he lost 10 to 15 hours of outside work, the undersigned is not satisfied that the Association proved such a loss. No documents were presented to show which days, or which assignments, or specifically how many hours Mann would have worked if the procedure in J-5 had been followed, and no evidence was provided to show how many outside work hours Mann had worked in the past. In addition, Mann could only indicate an approximate rate for the outside work and did not establish the actual rate he may have received. Consequently, the determination of how many hours he may have lost and what pay rate he may have received is too speculative to affix an award.

Finally, the Association did not demonstrate that any other particular employees lost a specific amount of hours at a specific rate of pay. Thus no monetary remedy is appropriate herein.

Accordingly, based upon the above analysis the undersigned finds that the Township failed to negotiate with the Association regarding the change in the outside work assignment procedure.

Based upon the entire record the Hearing Examiner makes the following:

Conclusions of Law

1. The Township violated N.J.S.A. 34:13A-5.4(a)(5) and

derivatively 5.4(a)(1), by unilaterally changing the assignment procedure for outside work.

2. The Township did not violate N.J.S.A. 34:13A-5.4 (a)(2) and (3) by changing the assignment procedure because it did not interfere with the administration of the Association nor did it discriminate against any employee because of their exercise of protected activities. That portion of the Complaint should be dismissed in its entirety.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Township 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 to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly, by failing to negotiate with the Association about changing the procedure for the assignment of outside work.

B. That the Township take the following affirmative action.

1. Immediately cease implementing the current outside work assignment procedure and restore the status quo ante by returning to the assignment procedure established in Special Order 79-5 (Exhibit J-5).

2. Forthwith engage in good faith negotiations with the Association regarding any future change in the outside work

assignment procedure. ^{14/}

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 on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Township's authorized representative shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Township to insure 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 Township has taken to comply herewith.

C. That the Complaint be dismissed regarding the allegation that the Township violated ¶5.4(a)(2) and (3) of the Act.

D. That the Association's request for a monetary award and for attorney fees and cost of suit be denied.


Arnold H. Zudick
Hearing Examiner

Dated: February 17, 1984
Trenton, New Jersey

14/ Neither the findings nor the recommendations set forth in this matter are meant to apply to any of the lieutenants who may be eligible to perform outside work. The lieutenants are not included in the Association's unit, or any negotiations unit, therefore, there is no obligation for the Township to negotiate the assignment procedure for lieutenants, and the Township may unilaterally decide what, if any, outside work assignment procedure will apply to employees holding that rank.

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 Moorestown Police Association concerning terms and conditions of employment of Association unit members, particularly, by failing to negotiate over the change in the outside work assignment procedure.

WE WILL forthwith restore the status quo ante by returning to the assignment procedure for outside work established in Special Order 79-5 dated April 23, 1979, and at the same time we will enter into good faith negotiations with the Association regarding any future change in that assignment procedure.

TOWNSHIP OF MOORESTOWN

(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, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.