

P.E.R.C. NO. 94-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO TOWNSHIP,

Respondent,

-and-

Docket No. CO-H-93-146

FRATERNAL ORDER OF POLICE,
WILLINGBORO LODGE NO. 38,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority granted to him by the full Commission in the absence of exceptions, dismisses a Complaint against Willingboro Township. The Complaint was based on an unfair practice charge filed by Fraternal Order of Police, Willingboro Lodge No. 38 alleging that the Township violated the New Jersey Employer-Employee Relations Act by transferring FOP unit work to non-unit special law enforcement officers. The Chairman finds that the Township did not violate any negotiations obligation when it assigned first shift radar work to special law enforcement officers.

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Charging Party.

Appearances:

For the Respondent, Kearns, Vassallo & Kearns, attorneys
(William John Kearns, Jr., of counsel)

For the Charging Party, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION AND ORDER

On October 27, 1993, the Fraternal Order of Police, Willingboro Lodge No. 38 ("FOP") filed an unfair practice charge against Willingboro Township. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} by transferring FOP unit work to non-unit special law enforcement officers.

^{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. (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...."

On March 9, 1993, a Complaint and Notice of Hearing issued. On April 19, the Township filed an Answer asserting that the parties' contract did not limit the disputed radar enforcement work to the FOP and that using special police for that work was not a transfer of exclusive FOP work.

On May 28, 1993, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On September 30, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 94-5, 19 NJPER ____ (¶____ 1993). He found that the employer did not breach any negotiations obligations because the first shift radar work was new work, not covered by the parties' contract or prior practice.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due October 14, 1993. Neither party filed exceptions or requested an extension of time.

Acting pursuant to authority granted to me by the full Commission in the absence of exceptions, I have reviewed the record. I incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 2-11). I also conclude that under the facts of this case, the Township did not violate any negotiations obligation when it assigned first shift radar work to special law enforcement officers. Accordingly, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: October 29, 1993
Trenton, New Jersey

H.E. NO. 94-5

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

In the Matter of

WILLINGBORO TOWNSHIP,

Respondent,

-and-

Docket No. CO-H-93-146

WILLINGBORO FOP LODGE NO. 38,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds, and recommends to the Commission, that the Township of Willingboro did not violate the New Jersey Employer-Employee Relations Act by assigning special police officers to a portion of the first shift radar work. The FOP had alleged that the disputed work was its unit work, but the Hearing Examiner concluded that the work was new work, not covered by prior practice or a collective agreement.

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. 94-5

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

In the Matter of

WILLINGBORO TOWNSHIP,

Respondent,

-and-

Docket No. CO-H-93-146

WILLINGBORO FOP LODGE NO. 38,

Charging Party.

Appearances:

For the Respondent,
Kearns, Vassallo & Kearns, attorneys
(William John Kearns, Jr., of counsel)

For the Charging Party,
Markowitz & Richman
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION

An unfair practice charge was filed with the Public Employment Relations Commission on October 27, 1992 by Willingboro Lodge No. 38, FOP, alleging that Willingboro Township violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The FOP alleged that

^{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. (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."

since September 14, 1992 the Township unilaterally transferred FOP unit work, radar traffic enforcement, to special officers who were not included in the FOP's negotiations unit.

A Complaint and Notice of Hearing was issued on March 9, 1993. The Township filed an Answer by April 19, 1993 denying that it violated the Act. The Township argued that the FOP's collective agreement did not limit radar traffic enforcement to the FOP, and using special law enforcement officers for traffic enforcement did not constitute a transfer of exclusive FOP work.

A hearing was conducted on May 28, 1993.^{2/} The parties filed post hearing briefs by August 9, 1993.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Township employs approximately 65 police officers including one Chief, one captain, 5 lieutenants, 9 sergeants, 9 detectives, and approximately 40 patrol officers. (T11). The Township also employs over twenty special law enforcement officers pursuant to N.J.S.A. 40A:14-146.9 et seq. As of May 28, 1993 the Township employed 6 class two special officers who are authorized to carry firearms, and 14 or more class one special officers who cannot carry firearms (T13). N.J.S.A. 40A:14-146.11.

The FOP's negotiations unit includes all full time police officers employed by the Township, but excludes all superior

^{2/} The transcript will be referred to as "T".

officers, special officers, school traffic guards, and other employees. The FOP's current collective agreement (J-1) which is effective from January 1, 1991 - December 31, 1993, does not contain a past-practice clause, a unit-work or work preservation clause, nor any provision indicating that radar enforcement or traffic detail is exclusive FOP work (T30).

Special officers employed by the Township are represented by the Willingboro Special Law Enforcement Officers' Association. That Unit includes all part-time special officers, but excludes all school traffic guards as well as all other Township employees. The Association's current collective agreement (J-2) which is effective from July 1, 1992-June 30, 1995, contains no provision regarding unit work or radar enforcement.

2. The special law enforcement officers title was created and defined by statute, N.J.S.A. 40A:14-146.9(h), generally indicating that specials may be given the authority to perform duties similar to police duties, and provide assistance to police officers.^{3/}

^{3/} N.J.S.A. 40A:14-146.9(h) provides:

"Special law enforcement officer" means any person appointed pursuant to this act to temporarily or intermittently perform duties similar to those performed regularly by members of a police force of a local unit, or to provide assistance to a police force during unusual or emergency circumstances, or at individual times or during regular seasonal periods in resort municipalities.

The statutes specifically provide that special law enforcement officers can exercise the same powers and authority as a permanent police officer, N.J.S.A. 40A:14-146.15,^{4/} but also provide that specials cannot be employed to replace or substitute for full-time police officers or in any way diminish the number of full-time officers employed by the local employer, N.J.S.A. 40A:14-146-16(b).^{5/}

The special law enforcement officer position is only a part-time position, specials generally may not be employed for more

^{4/} N.J.S.A. 40A:14-146.15 provides:

The chief of police, or, in the absence of the chief, other chief law enforcement officer of the local unit wherein the officer is appointed, may authorize special law enforcement officers when on duty to exercise the same powers and authority as permanent regularly appointed police officers of the local unit, including, but not limited to, the carrying of firearms and the power of arrest, subject to rules and regulations, not inconsistent with the certification requirements of this act, as may be established by local ordinance adopted by the appropriate authority of the local unit in which they are employed.

^{5/} N.J.S.A. 40A:14-146:16(b) provides:

Notwithstanding any provision of this act to the contrary, special law enforcement officers may be employed only to assist the local law enforcement unit but may not be employed to replace or substitute for full-time, regular police officers or in any way diminish the number of full-time officers employed by the local unit.

than 20 hours a week except for seasonal periods in resort municipalities (T26, T48). N.J.S.A. 40A:14-146.16. Specials cannot be employed for more than one year (R-1), and they are generally not entitled to overtime compensation (T48).

Pursuant to Township Ordinance No. 86-9 adopted on December 2, 1986 (R-1), class one specials are authorized to perform routine traffic detail, spectator control and similar duties, and issue summonses for disorderly persons and for violations of municipal ordinances.^{6/}

^{6/} Class one duties for specials are set forth in Ordinance No. 86-9, Section 2(a) (R-1) as follows:

Officers of this class are authorized to perform routine traffic detail, spectator control and similar duties as may be assigned by the Chief of Police or, in the absence of the Chief, another law enforcement officer in a supervisory capacity designated by the Chief to act in his stead. The Class One Officers are also authorized to issue Summonses for disorderly persons and petty disorderly persons offenses, violations of municipal ordinances and violations of Title 39 of the Revised Statutes. The use of firearms by said Class One Officers is strictly prohibited and no Class One Officer shall be assigned any duties which may require the carrying or use of a firearm.

The Ordinance authorizes class two specials to exercise the full powers and duties of a full-time police officer.^{7/}

Special officers have been used for crossing and traffic detail at local religious, sporting and school activities, and have done traffic detail at parades and other special events (T12). Class two specials have served arrest warrants, and arrested individuals for a variety of complaints, crimes, and contempt of court (T43-T44).

Despite the performance of these various police duties by specials, their employment has not diminished the number of regular full-time police officers employed by the Township nor caused any regular officer to have his/her regular work shift reduced (T31, T45-T46). In fact, the Township has increased its number of full-time officers (T32).

^{7/} Class two duties are set forth in the Ordinance at Section 2(b) as follows:

Officers of this class are herewith authorized to exercise full powers and duties similar to those of a permanent, regularly appointed full-time police officer. They shall be assigned such powers and duties by the Chief of Police or, in the absence of the Chief, another law enforcement officer in a supervisory capacity designated by the Chief to act in his stead. The use of a firearm by an officer of this class may be authorized only after the officer has been fully certified as successfully completing training as prescribed by the Police Training Commission established within the Department of Law and Public Safety of the State of New Jersey.

3. Regular full-time police officers work three overlapping shifts, 7:00 a.m. (0700 hours) to 5:00 p.m. (1700 hours); 2:00 p.m. (1400 hours) to midnight (2400 hours); and 9:00 p.m. (2100 hours) to 7:00 a.m. (0700 hours). They rotate shifts every four weeks (T12).

On direct examination the FOP's President, George Kline, testified that in 1982 and 1983 when there was a radar detail and overtime detail, the Township used three uniformed officers, one assigned to operate the radar, and two in the chase car. While I credit Kline's testimony that in 1982 and 1983 the Township used three regular uniformed officers on radar details, one officer to operate the radar, and two officers to ride in the chase car (T13-T14), I do not credit his testimony to prove that radar details were performed on an overtime basis. Kline used the phrase "overtime detail", but never defined what that meant or when it was used.

After 1983, the Township sometimes used radar during the shift overlaps between 2:00 p.m. (1400) and 5:00 p.m. (1700), and between 9:00 p.m. (2100) and midnight (2400) if sufficient staffing was available, but there was no evidence that radar was performed during the latter half of the 1980's. At least three regular officers were assigned to the occasional radar details performed after 1983, but that work was not performed on overtime (T14). There was no evidence that radar details were ever conducted during the morning shift, and no evidence that any radar details were

operated in the 1990's.^{8/} Specials were not on any radar detail prior to 1992 (T13).

4. On September 2, 1992 Township Police Chief Gary Owens signed an operational directive memorandum (attachment to CP-1) addressed to Captain Anton Poell requiring Poell to establish a traffic enforcement program, otherwise known as radar details. The directive authorized the use of special officers to write citations, and authorized the use of overtime for regular officers. The directive also required details to be conducted using normal shift strength on Thursday's and shift overlap periods.

On September 8, 1992 Captain Poell issued a memorandum (CP-1) to shift supervisors establishing the new radar details effective September 14, 1992. The radar details scheduled to take place during the 2:00 p.m. - midnight, and 9:00 p.m. - 7:00 a.m. shifts were scheduled to use only regular police officers and no specials were used on details during those shifts (T19). The radar detail scheduled for Tuesday and Saturday on the 7:00 a.m. - 5:00 p.m. shift, however, included the use of special officers:

The radar details for the morning shift were scheduled for three hours from 7:00 a.m. to 10:00 a.m. Three regular officers

^{8/} Township Police Chief Gary Owens became Chief in October 1990 (T39). He testified that radar details had not been done for an extended time period (T47). Since he was generally unaware of patrol activities prior to becoming Chief (T47), I cannot be sure whether any radar details were performed in the late 1980's or early 1990, but relying on Owens' testimony I can find that no radar details were performed since Owens became Chief except those directed by CP-1.

were assigned to the Thursday morning detail, but one regular officer and two special officers were assigned to the Tuesday and Saturday morning details.^{9/}

Specials only worked on the Tuesday and Saturday morning radar details (T20). Poell's memorandum also provided that day shift supervisors could call in regular police officers as radar operators on overtime to maintain minimum staffing levels.

9/ The radar details as scheduled in CP-1 are as follows:

DAYS AND HOURS OF OPERATION:

0700 - 1700 SHIFT:

Tuesday 0700 - 1000 hrs. - One (1) Patrol Officer, Two (2) Special Officers.

Thursday 0700 - 1000 hrs. Three (3) Regular Officers

Saturday 0700 - 1000 hrs. One (1) Regular Officer, Two (2) Special Officers

1400 - 2400 SHIFT

Tuesday 1500 - 1700 hrs.

Thursday 1500 - 1800 hrs. Utilizing Shift Regular Officers

Saturday 1500 - 1700 hrs.

2100 - 0700 SHIFT

Tuesday 2130 - 2330 hrs.

Thursday 2200 - 0100 hrs. Utilizing Shift Regular Officers

Saturday 2130 - 2330 hrs.

This language in CP-1 was amended by the Chief's subsequent actions (T17), see discussion herein.

On September 14, 1992 George Kline, local FOP President, sent Chief Owens a memorandum (CP-2), objecting to the use of special officers on the new Tuesday and Saturday morning radar details. He first argued that the use of specials was not consistent with past practice, and was not in compliance with legislation, specifically N.J.S.A. 40A:14-146.8 and 40A:14-146.6(b), covering special officers (T17, T31).^{10/} He further argued in CP-2 that it was unsafe to place specials in vehicle stop situations (T25-T26). Kline concluded CP-2 by requesting a meeting with the Chief to "resolve this matter."^{11/}

The Chief promptly met with Kline pursuant to his request and was receptive to his concerns. In response to Kline's safety concerns the Chief directed Captain Poell to assign a second full-time officer to the Tuesday and Saturday morning radar details (T17). That assignment changed CP-1 to reflect that on the Tuesday and Saturday morning details there would be two regular officers and two specials. One regular officer would operate the radar, and the other regular officer and the specials would chase vehicles, and issue citations (T18).

^{10/} N.J.S.A. 40A:14-146.8 provides: This act shall be known and may be cited as the "Special Law Enforcement Officers' Act."

^{11/} In CP-2 Kline also alluded to conversations he had with an official from the State Attorney General's Office, and with a Commission staff agent. CP-2 was only offered to show Kline's response to CP-1, it was not offered to prove the truth of the conversations to which he referred. I admitted CP-2 on that basis and do not rely on the conversations referred to therein.

The radar details operated pursuant to CP-1 occurred from December 1992 through March 1993. Both regular officers on the Tuesday and Saturday morning details were called in on an overtime basis (T18-T19). But all other regular officers on radar details, including the Thursday morning detail, were on straight time because there was sufficient staffing to staff those details from officers on the regular shifts at that time (T18-T20).

Exhibits CP-3 through CP-6 are the overtime records for the morning radar details for December 1992 through March 1993, respectively. Those exhibits show that two regular officers were called in on overtime to do the Tuesday and Saturday morning radar details (T22-T24).^{12/} All the names on CP-3 through CP-6 are of regular, not special, officers (T29).

5. The Chief used regular officers on overtime to operate the radar details on the Tuesday and Saturday morning shifts because the normal patrol strength on those shifts could not cover the normal patrol duties and the radar details (T50). If the Chief could not have used special officers to assist the two regular officers on the Tuesday and Saturday morning radar details, he would have run those radar details with just the two regular officers (T51). He would not have added another officer to those details, but without the use of special officers, he would not have been able to run those details for as long a period of time (T49).

^{12/} Exhibits CP-4, CP-5 and CP-6 show that the Tuesday and Saturday morning details were either 7:00 a.m. to 10:00 a.m., or 10:30 a.m. to 1:30 p.m., rather than always scheduled for 7:00 a.m. to 10:00 a.m. (T22, T23).

ANALYSIS

The Township did not violate the Act by assigning a portion of the Tuesday and Saturday morning radar detail work to special police officers. After reviewing a number of factors I find that the FOP did not establish that the particular work in question was traditional FOP unit work, nor that the Township violated any statute, ordinance, contract clause, or that any FOP unit member suffered any loss of work due to the assignment of special officers to a portion of the morning radar details.

The FOP's case is premised on the argument that radar detail work is FOP unit work, that the Township "transferred" radar work out of the unit, that it changed its assignment policy, and that specials were substituted for regular officers on the morning details. In its post hearing brief, the FOP argued that the first issue before me is whether the "transfer" of the radar detail work out of the unit constitutes a term or condition of employment for police officers. The FOP concluded that if it was a term or condition then the Township's failure to negotiate over the alleged work transfer violated the Act. But the FOP's premise is flawed.

The issue as framed by the FOP presupposes that it had already proved that radar details is FOP unit work, and that the Township unilaterally transferred that work. But the evidence does not support that presumption. I find that radar details had not been performed for a lengthy hiatus, that morning radar details in particular were not - and never had been - FOP unit work, that

specials have regularly performed other FOP unit work, that specials were not substituted for - nor did they replace - regular officers on the morning radar details, thus no "unit work" was transferred to non-unit employees, and that there was no change in any assignment policy.

The Commission and the courts have generally held that the shifting of work from employees within a particular unit to employees outside the unit is a mandatory subject of negotiations. Middlesex Cty. College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977); Piscataway Twp. Bd. Ed., P.E.R.C. No. 78-81, 4 NJPER 246 (¶4124 1978); Passaic Co. Reg. H.S. Dist., P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981); Monroe Tp. Bd. Ed., P.E.R.C. No. 81-145, 7 NJPER 357 (¶12161 1981); County of Bergen, P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991). Thus, where a labor organization has established that specific work has timely (traditionally) and exclusively been performed by employees in its negotiations unit, a public employer cannot, absent other legal and emergent circumstances, unilaterally assign, shift or transfer the specific work to employees outside the unit.

The most effective way to define and protect certain work as exclusive unit work is through the parties collective agreement. Clauses that attempt to protect work traditionally performed by unit employees such as in a recognition agreement, a work preservation clause, or a prior practice clause are mandatorily negotiable. City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988); Rutgers,

The State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd. App. Div. Dkt. No. A-468-81T1 (1983); Rutgers, The State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), mot. for recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979). aff'd. App. Div. Dkt. No. A-3651-78 (1980). But where, as here, there is no contractual protection for unit work I must examine the parties prior practice regarding the work in dispute to determine whether the Township had a negotiations obligation before assigning specials to perform a portion of the morning radar details.

PRIOR PRACTICE

Although the FOP established that the Township operated radar details in 1982 and 1983, it failed to establish when (which shifts) or how often those details were performed during that period. The only other evidence the FOP produced regarding radar details was that after 1983 the Township sometimes assigned several regular officers to operate radar details on the second and third shifts. No overtime was given for that work, no radar details were performed on the morning shift, there was no evidence establishing how often radar details were performed after 1983, and no evidence was offered to prove that radar details were ever operated in the second half of the 1980's or in the 1990's prior to Capt. Poell's recent directive.

In its post hearing brief, the FOP stated that:

For the past ten (10) years prior to September, 1992, whenever the Township employed police

officers to traffic enforcement work, it utilized regular police officers exclusively (at 16).

While it might be accurate to say that whenever a radar detail was operated prior to September 1992 only regular officers were used on the detail, it is inappropriate to infer from that statement that radar details have been performed during the last ten years.

In order to demonstrate that a particular unit has a viable claim to specific work as part of an established practice,^{13/} the labor organization minimally must show that the specific work was performed with a certain regularity and continuity and within a reasonable time prior to the advent of a unit work issue. Absent a showing that the specific work has been regularly and timely performed, and absent a work preservation or prior practice clause, the work cannot be relied upon as an established practice or be considered traditional work in the labor relations sense. See New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 89-3, 14 NJPER 502 (¶19211 1988), adopting H.E. No. 87-75, 13 NJPER 593 (¶18223 1987). The burden here was on the FOP to prove that radar details were performed on a consistent basis throughout the years in order to constitute traditional work. But even assuming that some radar details were performed in 1984 and 1985, I find the above evidence

^{13/} "By definition, an established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct." Caldwell-West Caldwell Bd. Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in pt, rev'd in pt., 180 N.J.Super. 440 (App. Div. 1981).

insufficient to establish that radar details were operated after those years. Thus, I infer that as much as a 7 to 8 year hiatus in the operation of radar details existed prior to Poell's directive. Given the length of the hiatus here, the FOP cannot claim that radar details are traditional unit work.

In New Jersey Transit Bus Operations, the Employer had assigned a particular bus route which had not been performed in over 13 years to a garage whose employees were represented by the TWU. The ATU filed a charge alleging the route had previously been its unit work. The Commission held that the 13 year hiatus supported a finding that the ATU had not traditionally performed that work. Since the ATU had no prior practice or contractual right to the specific work, the complaint was dismissed.

The instant case is very similar to N.J. Transit. Here, too, there was no contractual right to the disputed work, and the evidence established that there was a lengthy hiatus between the time the work was last performed and the September 1992 work assignment. While there was a longer hiatus in N.J. Transit, the hiatus here is long enough to support a finding that the FOP has not traditionally performed the disputed work, and this case is distinguishable from cases relied upon by the FOP where there was no lengthy hiatus. See Piscataway Tp. Bd. Ed.; Passaic Co. Reg. H.S. Dist.; Monroe Twp. Bd. Ed.

The FOP also relied upon my decision in Town of Dover, H.E. No. 89-6, 14 NJPER 555 (¶19233 1988), to support its argument. In

Dover, the Town laid off three civilian police dispatchers represented by the Teamsters Union and assigned their work to regular police officers outside the Teamsters unit for purely economic reasons. The dispatchers had been employed for many years to perform dispatching, Monday-Friday on a 24-hour basis. Weekend dispatching was performed by regular police officers who also performed dispatching during the week if a civilian dispatcher was unavailable. I found that the Monday-Friday dispatching work was Teamsters unit work and that the Town violated the Act by unilaterally shifting that work to police officers.

The FOP relied on two holdings in my Dover decision to support its claim here. First, that the Town's economic justification for the shifting of work did not excuse its obligation to negotiate with the Teamsters, and second, that the lack of a work preservation clause in the Teamsters contract did not mean the Town could unilaterally shift work. Based upon my second holding in Dover, the FOP argued that the absence of a work preservation clause here did not give the Township the right to assign specials to the radar details.

My decision in Dover, however, cannot be relied upon to support the FOP's argument. The facts are distinguishable. A critical element here is the lengthy hiatus in the performance of radar details. There was no such hiatus in Dover. My finding regarding the work preservation clause in Dover was made because the practice there showed that civilian dispatchers had performed the

disputed work up until the time of their layoff. There was no performance hiatus of the disputed work. Here, the lack of a work preservation clause coupled with a lengthy hiatus in the performance of the disputed work allowed the Township to treat radar details as new work. See New Jersey Transit.

Notwithstanding the lengthy hiatus here, however, the record shows that the Township acted consistent with the pre-1985 practice. The FOP's evidence only conclusively showed that radar details were operated on the second and third shifts. There were no radar details on the first shift. The Township, therefore, consistent with its prior practice, assigned three regular officers to the radar details on the second and third shifts. The radar details on the first shift were new work, and the Township was not obligated to treat that as FOP unit work.

Additionally, any economic justification the Township may have had for using specials for radar work is not a relevant factor in this case. My decision is based upon a finding that the disputed work is new work.

Finally, my decision in Dover was not adopted by the Commission. In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989) the Commission rejected my recommendation and held that the dispatching work was not Teamster "unit work" because police officers also regularly performed dispatching duties and occasionally performed dispatching during the week. Thus the charge there was dismissed.

OTHER FACTORS

Two other factors were considered in reaching a decision in this case. First, in its post hearing brief the FOP argued that the Township "replaced" regular officers with special officers in violation of N.J.S.A. 40A:14-146.16(b). The evidence does not support that argument. In order to establish that a regular officer was replaced on the first shift the FOP had to establish either that the Township was required to have three regular officers on a radar detail, or that it had assigned three regular officers to the Tuesday and Saturday morning radar details. Neither element was established and no officers were, in fact, replaced. Capt. Poell's September 1992 directive (CP-1) assigned only one regular officer to the Tuesday and Saturday morning radar details. After listening to the FOP's concerns, however, Chief Owens assigned a second regular officer to those details before they actually commenced. I credited Chief Owens testimony that only two regular officers were needed to operate a radar detail and that if he could not use specials he would still only assign two regular officers to these two details.

Thus, the Township fully complied with N.J.S.A. 40A:14-146.16(b). Specials were used to assist the two regular officers on the Tuesday and Saturday morning details, they did not substitute for, nor did they replace regular officers on those details, and no regular officers employment was affected by the use of specials on those details.

Second, this case is similar to the result in Monmouth County Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992). There the sheriff had unilaterally assigned PBA unit work to non-unit employees for many years without PBA objection. When a similar assignment was made more recently the PBA filed a charge. The Commission dismissed the charge because the PBA had not opposed-or sought to negotiate over-the earlier transfer of unit work. The result here is the same.

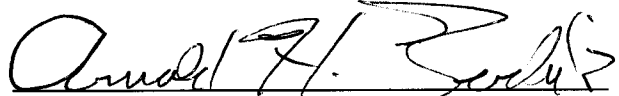
Class two special officers have served arrest warrants and arrested individuals. Other specials have performed traffic duty. Both functions were part of regular police duties performed by unit members. The FOP has not previously objected to the assignment of their duties to special officers. The assignment of specials to a portion of the Tuesday and Saturday morning radar details, therefore, was consistent with the pre-existing practice of assigning specials to work regularly performed by regular officers.^{14/}

Accordingly, based upon the entire record and the above analysis, I make the following:

^{14/} Since the duties of special officers as established by statute include the duties of regular officers, it is logical and inevitable that specials will perform some regular police work. The Township is on notice, however, that it cannot assign specials to police work in violation of N.J.S.A. 40A:14-146.16(b).

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

DATED: September 30, 1993
Trenton, NJ