P.E.R.C. NO. 83-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Respondent,

-and- Docket No. CO-80-233-101

HARRISON FIREMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Town of Harrison violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1) and (5), when it unilaterally limited the amount of vacation time firefighters could take during July and August. The Commission, relying on the Hearing Examiner's report, dismisses all other allegations of the Complaint, including allegations concerning the elimination of a fire engine company, elimination of non-emergency overtime, and refusal to negotiate concerning workload, compensation, minimum manning and vacation rescheduling.

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In the Matter of

TOWN OF HARRISON,

Respondent,

-and- Docket No. CO-80-233-101

HARRISON FIREMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Murray and Granello, Esqs. (James P. Granello, of Counsel)

For the Charging Party, Schneider, Cohen, Solomon & DiMarzio, Esqs. (David Solomon, of Counsel)

DECISION AND ORDER

On February 6, 1980, the Harrison Firemen's Benevolent Association ("Association") filed an unfair practice charge against the Town of Harrison ("Town") with the Public Employment Relations Commission. The Association alleged that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. (the "Act"), specifically subsections 5.4(a)(1) and (5), [1/] when it allegedly reduced, without negotiation, the amount of overtime which concomitantly reduced the employees' incomes, increased employee workload, and altered vacation schedules.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) [I]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) [R]efusing 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."

These changes resulted from the Town's decision to eliminate an engine company because it would no longer receive a federal revenue sharing grant.[2/]

On April 30, 1980, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On May 8, 1980, the Town filed an Answer denying the allegations that it had impermissibly changed any terms and conditions of employment. It further argued that the charge was untimely filed, it had no obligation to negotiate over the impact of a decision which was a non-negotiable managerial prerogative, and the decision's alleged effect on the employees' terms and conditions of employment was de minimis.

On July 29, 1980, Commission Hearing Examiner Charles A. Tadduni conducted a hearing at which the parties examined witnesses and presented evidence.[3/] The parties submitted post-hearing briefs.

On October 25, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-12, 8 NJPER ___ (¶_____ 1982) (copy attached). He found that the Town did not commit an unfair practice when it limited non-emergency overtime, limited the number of employees allowed to take simultaneous vacations,

2/ The Association does not contest or seek to negotiate the Town's elimination of the engine company.

3/ The exhibits were subsequently lost when the Hearing Examiner's car was stolen. The parties agreed to submit an authenticated copy of each exhibit for each stolen exhibit.

and refused to negotiate during the middle of a contract term over compensation, minimum manning, vacation time, and the number of employees permitted to take simultaneous vacations. The Hearing Examiner did find, however, that the Town violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally changed the amount of vacation time unit employees could take during the months of July and August.

On November 9, 1982, the Town filed Exceptions. It contends that the Hearing Examiner erred in finding the Town violated the Act when it limited the vacation time for the July-August period. It argues that even before the engine company was eliminated, the Fire Chief had the prerogative to refuse vacation "picks", and that its present policy of limiting the amount of days taken for vacation during July and August is merely a continuation of that prerogative. It further argues that no appreciable change has occurred as a result of the new policy.[4/]

The Town has also filed a request to supplement the record with three documents concerning its vacation policy. The first is a 1980 Association proposal that each employee be allowed two consecutive tours of duty off during the period from June 15 through the Wednesday after Labor Day. The second is a June 24, 1981 interest arbitration award noting the parties' agreement to implement a vacation schedule guaranteeing every employee two consecutive tours of duty off each summer. The third is a 1981

4/ The Town also excepts to the Hearing Examiner's conclusion that it had unilaterally changed a past practice of permitting up to five employees from the department to take simultaneous vacations. Because the Hearing Examiner did not find a violation of the Act on this issue, we need not consider it further.

department order implementing this schedule. The Town argues that these documents prove the minimal impact of the Town's vacation policy limiting July-August vacations to two weeks. We deny this request because it is untimely, the Hearing Examiner already having issued his decision.

We have reviewed the record. Substantial evidence supports the Hearing Examiner's comprehensive findings of fact (pp. 4-16). We adopt and incorporate them. We also adopt and incorporate, for the reasons stated in his opinion, all his conclusions of law (pp. 31). We supplement, however, his discussion of the violation he found.

We have consistently held that the granting and scheduling of vacations and other time off are clearly negotiable subjects to the extent that the agreed-upon system does not place substantial limitations upon the employer's ability to deliver governmental services. In re City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER ___ (¶_____ 1982); In re City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), appeal pending, App. Div. Docket No. A-4636-81T3; In re Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 457 (¶12201 1981); In re Hudson County, P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980); In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 42 (¶4188 1978).

In the instant case, the Chief testified that prior to the change in question, employees had picked vacation periods based on their rank and seniority. The Chief, as in the Elizabeth cases, retained the prerogative to deny a vacation request when

too many employees had already selected vacation during one tour period. The Chief's discretion, however, was not unlimited and was instead tied to his assessment of the department's manpower needs.

The Chief did not announce his decision to limit the amount of vacation during July and August because of his concern about manning levels. Instead, he adopted the two week limitation because he believed it was unfair to allow officers with greater rank and seniority to receive large amounts of summer vacation time while employees with lesser rank and seniority might not receive any. Thus, the Chief did not base his decision upon the exercise of an inherent managerial prerogative tied to the determination of governmental policy, but rather allocated vacation time according to his perception of the employees' interests. The parties' past practice did not permit the Chief to make blanket rules governing the allocation of vacation based on his perception of the employees' interests rather than on case-by-case review of summer vacation requests based on manpower needs. Additionally, it is not material that employees had not generally taken longer vacations in July or August prior to the order restricting any such vacations to two weeks. The order deprived the affected employees of their right to request and receive a longer summer vacation in the absence of a manpower shortage. For these reasons, we adopt the Hearing Examiner's recommendation and hold that the Town violated subsections 5.4(a)(1) and (5) of our Act when it unilaterally limited the amount of vacation time an employee could take during the July-August period.

ORDER

IT IS HEREBY ORDERED:

A. That the Respondent, Town of Harrison, shall cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act by unilaterally limiting the amount of vacation time which eligible employees may take during the July-August period.

2. Refusing to negotiate in good faith with the Association by unilaterally altering terms and conditions of employment of employees represented by the Association by unilaterally imposing a limitation upon the amount of vacation time which eligible employees may take during the July-August period.

B. That the Respondent Town take the following affirmative action:

1. Remove the limitation concerning the amount of vacation time which eligible employees may take during the July-August period unless the parties have subsequently negotiated such a limitation.

2. Post at all places where notice 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 Town's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Town to ensure that such notices

are not altered, defaced or covered by other material.

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

IT IS HEREBY FURTHER ORDERED that those portions of the Complaint which allege violations of the Act based upon Respondent's elimination of an engine company, elimination of non-emergency overtime, and refusal to negotiate concerning workload, compensation, minimum manning and vacation scheduling (other than as already covered by this order) be dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Suskin, Butch, Hartnett and Graves voted for this decision. None opposed.

DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983

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 cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act by unilaterally limiting the amount of vacation time which eligible employees may take during the July-August period.

WE WILL negotiate in good faith with the Association and will not alter terms and conditions of employment of employees represented by the Association by unilaterally imposing a limitation upon the amount of vacation time which eligible employees may take during the July-August period.

WE WILL remove any limitation concerning the amount of vacation time which eligible employees may take during the July-August period which we have unilaterally imposed.

TOWN OF HARRISON

(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.

H. E. No. 83-12

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

In the Matter of

TOWN OF HARRISON,

Respondent,

-and-

Docket No. CO-80-233-101

HARRISON FIREMENS BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Respondent violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally changed the amount of vacation which eligible unit employees could take during the July-August period.

The Hearing Examiner further recommends that the Commission find that the Board did not violate N.J.S.A. 34:13A-5.4(a)(5) when it reorganized the fire department by eliminating an engine company; eliminated non-emergency overtime; limited the number of employees who are allowed to take vacation simultaneously; and refused to negotiate mid-contract proposals made by the Charging Party concerning compensation, minimum manning, vacation time and the number of employees permitted to select vacation simultaneously. The Hearing Examiner concluded that the departmental reorganization, elimination of overtime, limitation of the number of employees permitted to take vacation simultaneously and minimum manning proposals were either non-negotiable managerial prerogatives or permissive subjects for negotiations concerning which the Respondent had no negotiations obligation. With regard to Charging Party's other mid-contract negotiations proposals, the Hearing Examiner concludes that Charging Party has not demonstrated by a preponderance of the evidence that Respondent has engaged in any conduct which gave rise to a mid-contract negotiations obligation concerning those issues. Accordingly, those aspects of the charges are 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.

H. E. No. 83-12

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

In the Matter of

TOWN OF HARRISON,

Respondent,

-and- Docket No. CO-80-233-101

HARRISON FIREMENS BENEVOLENT ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Murray, Granello & Kenney, Esqs.
(James P. Granello, Esq.)

For the Charging Party
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(David Solomon, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on February 6, 1980, by the Harrison Firemen's Benevolent Association (the "Charging Party") alleging that the Respondent, the Town of Harrison, 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. (the "Act"). It is alleged in the charge that the Respondent has unilaterally and without negotiations altered terms and conditions of employment of employees in Charging Party's negotiations unit and further, that Respondent has refused to negotiate in good

faith concerning terms and conditions of employment of said employees despite demands to do so by the Charging Party. The Charging Party contends that by this conduct, Respondent has violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). 1/

It appearing to the Director of Unfair Practices that the allegations of the Charge, if true, would constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued in the above-captioned matter. Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 29, 1980, in Newark, New Jersey, at which time all parties were given the opportunity to examine witnesses, present evidence and argue orally. 2/ Briefs were submitted herein by November 7, 1980.

I. Positions of the Parties

The Charging Party alleges that the Respondent, unilaterally and without negotiations, altered terms and conditions of employment when it eliminated one of the engine companies in the department. The Charging Party contends that the elimination of the engine company -- which action it does not contest or seek to

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."

2/ The instant Unfair Practice Charge had its origins in a scope of negotiations proceeding (Docket No. SN-80-17) previously instituted by the Town of Harrison. The Town filed the petition when the Association sought negotiations concerning salary, manning, vacations and pay for acting in the next highest rank. The scope petition was dismissed by the Commission upon its determination that no actual dispute existed concerning the basic negotiability of the issues raised. This charge was then filed. See discussion infra, p. 7.

negotiate -- has led to changes in certain terms and conditions of employment. Specifically, the Charging Party contends that the Respondent has unilaterally reduced the income of unit employees, increased employee workload and substantially altered the scheduling of employee vacations. The Charging Party alleges that it sought negotiations concerning the effects of the Respondent's decision to eliminate the engine company and that the employer has refused to negotiate concerning same.

The Respondent argues that the Charge is untimely under the Act's six-month limitations period. The Respondent further argues that the decision to reorganize the department so as to eliminate an engine company is a non-negotiable managerial prerogative. The Respondent maintains that the individual impacts on terms and conditions of employment which result from the exercise of such managerial prerogatives are also non-negotiable. Finally, the Respondent contends that the Charging Party has failed to prove by a preponderance of the evidence that (a) there was a significant change in the scheduling of employee vacations; (b) a significant change occurred concerning employee safety; (c) there was a significant change in employee workload; and (d) under the contractual relationship present herein, there were changes made concerning employee income which raised a negotiations obligation on the part of the Town.

II. Major Issues for Consideration

The parties stipulated that the Town's decision to eliminate and the actual elimination of the engine company are managerial

prerogatives and therefore are not subjects for mandatory negotiations; hence, these issues are not being disputed herein. The Charging Party alleges that unilateral changes were made in terms and conditions of employment by the Respondent and that Respondent subsequently refused to negotiate concerning same. The Respondent maintains that, under the circumstances of this case: the topics on which negotiations were sought are not mandatorily negotiable, inasmuch as they directly flowed from Respondent's managerial prerogative decisions; no significant changes in terms and conditions were established in the record herein; and any changes in terms and conditions of employment which may have been made herein were permitted under the contract then in effect between the parties.

Hence, the framework for consideration of this matter shall be as follows: (1) were the subjects on which the Charging Party sought negotiation mandatory subjects for collective negotiations? (2) were such subjects permissively negotiable? (3) what unilateral changes, if any, were made by Respondent in terms and conditions of employment? and (4) if Respondent did make unilateral changes in terms and conditions of employment, were such changes permitted under the terms of the parties' extant agreement?

III. Findings of Fact

Based upon the entire record in this proceeding, the Hearing Examiner finds:

1) The Town of Harrison (the "Town"), Respondent herein, is a public employer within the meaning of the Act, is subject to its provisions and is the employer of the employees with which this matter is concerned.

2) The Harrison Firemen's Benevolent Association (the "Association"), Charging Party herein, is an employee organization within the meaning of the Act and is subject to its provisions. The Association is the statutory majority representative of a collective negotiations unit comprised of all uniformed employees in the Fire Department of the Town of Harrison below the rank of Deputy Chief.

3) During the period at issue herein, a collective negotiations agreement was in effect between the parties covering the period from January 1, 1978 through December 31, 1979. 3/

4) During calendar 1979, the Town became aware that a federal revenue sharing grant which it had received in prior years would not be received in 1979. The Respondent Town then decided that a reduction in expenses was necessary. Accordingly, the Town resolved to reorganize its fire department and thereby effectuate certain savings. On July 3, 1979, the Town Council adopted a resolution directing the reorganization of the fire department; more specifically, the resolution required the department to eliminate one of its engine companies. Subsequently, on July 6, 1979, the fire chief issued orders implementing the foregoing resolution. 4/

In implementing its decision to reorganize the department so as to eliminate an engine company, the Town did not lay off any firefighters; further, the record does not indicate that any changes were made in the work (shift) schedules of any firefighters. The

3/ Exhibits J-1 and J-2.

4/ Tr. pp. 16-20.

firefighters and captains from the eliminated company were redistributed over the remaining companies with their original tours remaining intact. Concurrent with the decision to reorganize and eliminate one of its engine companies, the Respondent decided to cut its overtime costs by eliminating non-emergency overtime. The Respondent further concluded that certain adjustments in vacation scheduling would be necessary in order to carry out the foregoing changes.

In reacting to the changes concerning the company elimination, overtime and vacation scheduling, Charging Party maintained that these decisions by the Respondent had changed certain terms and conditions of employment. The Charging Party thereupon requested negotiations concerning the various terms and conditions of employment affected by the Respondent's sundry decisions: increased workload, loss of income and altered vacation scheduling. Accordingly, on August 13, 1979, the Association submitted several written negotiations proposals to the Town; the proposals were as follows:

1. A salary increase amounting to 10%.

2. A provision in the collective bargaining contract which would require firefighters acting in the next highest rank to be paid at the rate of that rank.

3. Five additional vacation days.

4. A provision in the collective bargaining contract which would mandate that apparatus shall not respond with less than 3 men. (This last proposal is necessary to protect the safety of the firefighters.) (Exhibit J-4).

The Town responded by filing a scope of negotiations petition with the Commission on September 12, 1979. On December 5, 1979, the Commission dismissed the scope petition, finding that no actual dispute existed as to the negotiability of the matters in contention between the parties. The Commission stated:

> While the parties' interpretations of the contract may differ, a scope of negotiations proceeding will not resolve those differences, especially where there does not appear to be any controversy concerning the basic issue of negotiability. We have previously said we will not rule upon a given subject absent an indication that an actual dispute exists as to its negotiability. See e.g. In re Nutley Bd/Ed, P.E.R.C. No. 80-41, 5 NJPER 417, 418 (¶10218 1979). If an actual dispute exists concerning the parties' obligations (if any) to negotiate mid-term or concerning the reorganization, appropriate forums exist to resolve these matters. In re Town of Harrison, P.E.R.C. No. 80-76, 5 NJPER 554 (¶10288 1979), p. 555.

Subsequent to the issuance of the above-referred scope decision, the instant unfair practice charge was filed with the Commission.

Prior to the elimination of the engine company, the department was comprised of three engine companies and one truck company, each operating over a four-tour schedule. Each truck company tour was comprised of a total of three firefighters -- one captain and two firefighters. Each engine company tour was comprised of three total firefighters -- one captain and two firefighters. 5/

5. Overtime -- The Town's decision to eliminate non-emergency overtime, taken in conjunction with the elimination of the engine company, was part of the Town's effort to cut costs;

5/ Prior to the reorganization, there were three engine companies with four tours per company. Nine of these 12 tours were comprised of three total firefighters, two were comprised of four total firefighrers and one was comprised of two total firefighters. See Exhibit R-1.

these economizing moves were precipitated by the federal funds cuts mentioned earlier. The elimination of non-emergency overtime was achieved primarily by the department's not replacing firefighters who were on leave (vacation, personal leave, sick leave, etc.) on a man for man basis. During calendar 1978 and during the first half of 1979 (previous to the disputed changes made by the Town), whenever a firefighter who was scheduled to be on a tour took leave time, as a general practice, that employee was replaced on a one to one basis. This system apparently resulted in some large overtime bills for the Town. Accordingly, the Town decided to utilize firefighters on overtime only in emergency circumstances or when, in the chief's discretion, a situation arose warranting additional manpower.

The parties' last executed contract contains a provision concerning overtime which states:

> A. The present practice with respect to overtime compensation shall be maintained for the duration of this Agreement, except that the overtime rate shall be computed on the basis of 2080 hours per annum.
>
> B. Overtime shall be computed at the rate of time and one-half (1-1/2). Overtime shall be computed after the employee has completed thirty (30) minutes or more beyond his normal tour of duty. In such event, the employee shall be credited with one (1) full hour overtime. No overtime shall be paid for zero (0) to twenty-nine (29) minutes. 6/

There is no provision in the '76-77 contract or in the '78-79 interest arbitration award which guarantees a minimum amount of overtime to firefighters.

6/ See Exhibit J-1, p. 7.

Paragraph B of the overtime article, which deals with the compensation of overtime, was amended by the '78-79 interest arbitration award; however, that amendment is not material to this discussion.

The parties' contract also contains the following management rights clause:

> A. The Association recognizes that the Town may not, by agreement, delegate authority and responsibility which by law are imposed upon and lodged with the Town.
>
> B. The Town reserves to itself sole jurisdiction and authority over matters of policy and retains the right, in accordance with the Laws of the State of New Jersey and the rulings of the State Civil Service Commission to do the following: to direct employees of the Town, to hire, assign, promote, transfer and retain employees covered by this Agreement with the Town or to suspend, demote, discharge, or take disciplinary action against employees for just cause, to make work assignments, work and shift schedules including overtime assignments, to maintain the efficiency of the Town operations entrusted to them, and to determine the methods, means and personnel by which such operations are to be conducted. (emphasis added). 7/

6. Workload -- Prior to the reorganization and overtime changes, the normal personnel complement of one engine company tour was three total firefighters: one captain and two rank and file firefighters. When employees who were scheduled to be on duty during one of these tours took leave time (vacation, sick time, injury time, etc.), generally (but not always), they were replaced by having another firefighter come in on an overtime basis. Prior to the reorganization, up to six firefighters -- or 1-1/2 employees per company -- were permitted to select vacation at one time.

Subsequent to the reorganization changes, the normal personnel complement of one engine company tour remains as three total firefighters -- one captain and two firefighters. However, the record indicates that, while the department has the same overall manpower level (no employees were laid off as a result of the reorgan-

7/ Exhibit J-1, p. 6.

ization), there are times when company tours are short-staffed. This has occurred when employees take vacation and/or sick time, etc., and, under the new overtime policy of the Town, are not replaced on a man for man basis. When the reorganization was implemented, vacation schedulings were limited to three firefighters -- or one employee per company -- taking vacation at one time.

The record establishes that the personnel from the eliminated engine company -- three captains and eight firefighters -- were transferred to the two remaining engine companies. An examination of Exhibit R1, the pre-reorganization table of organization, will show that the department would now (post-reorganization) be left with two engine companies and one truck company. Prior to the reorganization, these two engine companies were each divided into four duty tours; six of the eight tours were each comprised of one captain and two firefighters (a full engine company manpower complement); the other two tours were each comprised of one captain and three firefighters.

If one were to evenly distribute the firefighters from the eliminated engine company over the tours of the two remaining engine companies, the following result would obtain: six of the eight tours would be comprised of one captain and three firefighters; the other two tours would be comprised of one captain and four firefighters. Three captains would then be available as "floaters." 8/

Since the reorganization changes, there have been occasions when companies have responded to alarms with two total firefighters

8/ See Tr. pp. 60-62, 66.

instead of the normal three total firefighter complement (during vacation, sick and/or injury leave periods). However, the number of times or general frequency when this has occurred is not established in the record. Further, Chief Rogers testified that a fire company tour responding with two total firefighters is clearly the exception and not the rule; Captain Mounts testified that he has three firefighters under his command; that during normal periods, his company tour responded with one captain and three firefighters and that during vacation periods, his company would respond with one captain and two firefighters. Captain Mounts, who has been with the department for over 14 years, testified that he had never responded to an alarm with a short-staffed company.

On the other hand, the record does not indicate that prior to the reorganization changes fire companies were never short staffed; in fact, if anything, the record would support the opposite conclusion. In answering a question concerning the effects upon a fireighter's workload of responding with a company having less than a full complement of firefighters, Firefighter Bulger responded by giving an example that had occurred "a few years ago" -- clearly placing it in a time frame prior to the reorganization changes. 9/ However, the record again falls short of indicating how often this situation might have occurred in the pre-organization period.

In his testimony, the Chief acknowledged that if manpower is down due to firefighters taking vacation time, sick leave, injury leave, etc., workload of firefighters who respond to an alarm with a short crew may be affected depending on the size of the fire, the type of fire etc. However, the Chief notes that the

9/ See Tr. 57-58.

department is versatile and makes adjustments to a given circumstance. If a company would report to a fire scene short staffed, other companies on the scene might help the short staffed company. 10/ Or, the short-staffed company might abandon their engine and assist another fire company in operating their apparatus. More specifically, in response to a question concerning the difference in the amount of work performed by a firefighter when the firefighter responds with only one other firefighter in the engine company as compared with the situation where the firefighter responds with a full complement of employees in the engine company, Firefighter Bulger gave an actual example of what has happened to him when he responded with a short-staffed crew: he said that the personnel in his engine company abandoned their engine at the fire and consolidated forces with another fire company at the scene. This combined force then operated one piece of apparatus. 11/ The Chief further testified that where circumstances warrant, a recall would be made to bring more firefighters to a scene if it was determined that additional manpower was needed. Finally, the Chief stated that the essential effect of a short-staffed crew responding to an alarm would go more to the quality of the firefighting function than to the workload of the firefighters involved therein. 12/

7. Compensation -- The parties' last executed agreement (Exhibit J-1, covering calendar years 1976-77) contains provisions concerning, inter alia, salaries, overtime, longevity and court time.

10/ See Tr. 39-41.

11/ See Tr. 57-58.

12/ See Tr. 38.

The last arbitration award for the calendar years 1978 and 1979 (Exhibit J-2) states that firefighters' base salaries during 1979 ranged from $11,926.00 to $16,665.00; captains' salaries were designated therein to be $20,750.00 during 1979. 13/

Although their base pay was unaffected, one of the effects on the firefighters of the decision to eliminate non-emergency overtime was a reduction in overall compensation. Several firefighters testified that they had earned approximately $10,000 (each) in overtime payments during calendar 1978; and that during the first half of 1979 (prior to the elimination of one of the department's engine companies and non-emergency overtime), they had earned $5000 (each) in overtime payments. Since the reorganization and overtime changes occurred, these firefighters testified that they have earned either no overtime or minimal amounts ($12.00 during the period from July 1979 through July 1980). 14/

8. Safety -- The Chief testified that since the elimination of the engine company and non-emergency overtime, the safety of the firefighters had not been jeopardized. The Chief noted that while the accepted department practice was to have firefighters enter a burning structure in teams, he noted that both before and after the disputed changes, firefighters have entered burning structures alone as required by the circumstances of a given fire. The Chief stated that injuries have occurred to firefighters at various fire scenes without relation to the number of firefighters at the scene. 15/ The Chief indicated that in responding to a scene with less than a

13/ See Exhibit J-1, p. 7, Tr. p. 48.

14/ See Tr. pp. 46-48, 50-57.

15/ See Tr., pp. 38-39, 68.

full manpower complement of firefighters, the essential effect was on the quality and speed of the firefighting job rather than on the firefighters' safety. 16/

9. Acting pay -- Prior to the disputed changes, Captain Mounts had been called in on an overtime basis when another captain was on vacation, out sick, etc. Since the engine company elimination, when a captain has been out sick, on vacation, etc., Captain Mounts has not been called in on an overtime basis, in accordance with the limitations placed on non-emergency overtime. Instead, he testified that one of the firefighters on the same shift as the absent captain is appointed to be the Acting Captain. No additional compensation has been paid to the employees who performed as Acting Captain.

Firefighter Bulger testified that since the elimination of the engine company approximately one year earlier, he had been appointed as Acting Captain on five or six occasions. With regard to the period prior to the charges, Firefighter Bulger's testimony was inconsistent. Initially, when asked by his attorney whether he had ever performed as Acting Captain prior to the changes, Mr. Bulger replied in the negative. Later in his testimony, however, Mr. Bulger stated that "a few years earlier" he had been acting captain. The witness' testimony was given on July 29, 1980; the elimination of the engine company and the vacation and overtime changes had occurred one year earlier in July 1979. Thus, Mr. Bulger was stating that he had been acting captain prior to the disputed changes. The undersigned credits the latter testimony over the

16/ See Tr., p. 38-39.

former. In giving his first answer, Mr. Bulger was in the midst of being questioned on the issue of "acting in the next highest rank"; thus, he was "focused" on the topic -- he was anticipating the question and the response -- he was "out in front" of his attorney, giving the response before the question was out. Somewhat later in the testimony, while being questioned on another important issue in the case -- that of the effects on firefighters of responding to a fire scene with less than a full complement of firefighters on a piece of firefighting equipment -- the witness used an actual example to answer the question. In an almost offhanded manner, the witness said, "a few years ago...I was Acting Captain that night." This answer was spontaneous, matter of fact and quite specific (as it was an actual example). In accordance with the foregoing, the Hearing Examiner credits the latter testimony on this issue. 17/

The Chief testified that subsequent to the changes, firefighters have been appointed to fill in as acting captain. However, subsequent to the elimination of one of the department's engine companies, several captains were freed of the regular duty of commanding a tour. At least one of these captains was made a "floater" whose primary assignment was to backfill for captains on vacation, sick leave, etc. 18/ There was no indication in Firefighter DeSalvo's testimony that he had been appointed as acting captain in the year since the elimination of the engine company.

10. Vacation -- Prior to the elimination of the engine company and the changes instituted in overtime and vacation policies, firefighters were permitted to select vacation by giving six days

17/ See Tr., pp. 54-59.

18/ See Tr., pp. 44, 61.

notice to the department. Vacation was picked by seniority and by rank. Sometimes, a number of employees from one company were permitted to take vacation simultaneously; the general rule in the department was that five employees could take vacation at the same time; sometimes the Chief permitted six employees to take vacation at the same time. The Chief had sometimes turned down vacation requests at certain times because too many employees had selected vacation during one tour period. 19/

After the elimination of the engine company and the vacation and overtime changes, the vacation policy structure changed somewhat. No firefighter lost any vacation time. Employees still selected vacations based on their rank and seniority. However, because the department could no longer replace, on an across-the-board basis, employees on vacation or on sick leave, certain restrictions were imposed on vacation selections. As a general rule, only one firefighter per company (or three in the department) could select vacation at the same time. However, the Chief testified that there are times when he now permits as many as four firefighters from the entire department to be on vacation at one time. Further, employees may pick a maximum of two weeks vacation from the July-August period. The Chief still retains -- and exercises -- his prerogative of refusing certain vacation picks, as he did prior to the changes. Also, the Chief testified that in comparing the vacation selections for 1979 and 1980, he could perceive no significant changes in the distribution of vacation over the entire two-year period. 20/

19/ See Tr., pp. 21-24, 43, 45.

20/ See Tr., pp. 21-22, 43-44, 62-64.

IV. Analysis and Discussion of Law

The Association claims that by its actions, the Town unilaterally altered terms and conditions of employment. The Association further states that it made demands to negotiate with the Town concerning the affected terms and conditions of employment; however, the Town has refused to negotiate, contending on various grounds, that it has no negotiations obligations concerning any of the issues raised by the Association.

Initially, the Town asserts that the charge is untimely under the Act's six-month limitations period. See N.J.S.A. 34:13A-5.4(c). That argument is rejected. The Town decided upon its reorganization on July 3, 1979; it began implementing the reorganization and the other changes on July 6, 1979. The Association made its formal demand to negotiate the affected terms and conditions of employment on August 13, 1979. In its charge, the Association alleges that the Town has refused to negotiate since on or about September 10, 1979. The Charge was filed on February 6, 1980. As filed, the Charge may seek redress for unfair practices which occurred as far back as August 6, 1979. Clearly, the alleged refusal to negotiate occurred within the six-month limitations period. 21/

21/ Whether or not the first actual refusal to negotiate which is alleged by the Charging Party occurred within the six-month limitations period is not crucial in the context of a Charge such as this inasmuch as the violation (refusal to negotiate) is a continuing one. Further, although the reorganization occurred on July 6, 1980, that action is not, in and of itself, being protested by the Association. Rather, it is the associated actions taken by the Town after it reorganized the department which affected terms and conditions of employment -- and the refusal to negotiate concerning same -- which are being protested.

The Town's decision to eliminate an engine company is essentially a decision concerning the department's organizational structure or table of organization. The Commission has determined that reorganizational decisions relating to staffing and manpower considerations are basic managerial prerogatives and are not mandatory subjects for collective negotiations. 22/ That issue is not being contested here. However, the Town argues that any effects flowing from the aforementioned managerial determination are also not negotiable. The undersigned rejects that proposition; rather, a balancing test approach must be taken to determine negotiability.

The approach set forth by the New Jersey Supreme Court for determining whether a matter is within the scope of collective negotiations requires the examination of several factors. First, the matter must concern a term and condition of employment. Second, if the matter is a term and condition of employment, it is mandatorily negotiable unless preempted by a specific statute or regulation which expressly sets that particular term or condition.

In Bd/Ed Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed/Assn, 81 N.J. 582 (1980), the court described the balancing test to be utilized in making such scope determinations as are presented herein:

> The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to bind-

22/ In re City of Northfield, D.U.P. No. 80-11, 5 NJPER 532 (¶10272 1979); In re City of Jersey City, P.E.R.C. No. 77-53, 3 NJPER 66 (1977).

> ing arbitration. Thus these matters may not be included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment.
>
> On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is preeminent, then bargaining is appropriate. 23/

(A) Overtime -- In several prior decisions, the Commission has determined that issues relating to the rate of compensation for overtime worked, the distribution or allocation of overtime among employees and the procedures for selecting employees to work overtime are all mandatory subjects for collective negotiations. In re City of Elizabeth, P.E.R.C. No. 80-80, 6 NJPER 14 (¶11008 1979); In re Twp. of Maplewood, P.E.R.C. No. 78-89, 4 NJPER 258 (¶4132 1978); see also, In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980). However, a determination concerning whether or not to schedule overtime is a manpower/minimum manning issue. In the instant matter, when to utilize firefighters on an overtime basis involves the determination of manpower levels at a given point in time. As such, it is a managerial prerogative and is not a mandatory subject for collective negotiations. In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER (¶ 1982); see also In re City of Yonkers, 10 PERB 3097 (¶3056 1977). The undersigned would further note that the Town has specifically reserved to itself through the contractual management rights clause

23/ Woodstown-Pilesgrove, supra at 591. See also, State v. State Supervisory Employees Assn, 78 N.J. 54, 67 (1978) and In re IFPTE Local 195 v. State, 88 N.J. 393, 404 (1982).

the sole authority to determine overtime needs. 24/ Having determined that the Town's decision to eliminate and the elimination of non-emergency overtime is a non-negotiable managerial prerogative, the Town is not obligated to negotiate concerning same. Accordingly, the Town's failure to negotiate over the elimination of non-emergency overtime was not violative of the Act.

(B) Workload -- The Association has alleged that the Town changed several extant terms and conditions of employment (one of which was firefighters' workload) in the middle of an existing contract.

As a general proposition, workload is a term and condition of employment which is a mandatory subject for collective negotiations. In re Dover Bd/Ed, P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), affm'd App. Div. Doc. No. A-3380-80T2 (3/16/82); In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66 (1977). Firefighters' workload would appear to be negotiable, inasmuch as workload will "intimately and directly affect" employees and negotiations thereon "would not significantly interfere with the exercise of inherent managerial prerogatives" in the determination of governmental policy. 25/

However, the Association's demand to negotiate comes in the middle of the term of an existing written agreement between the Association and the Town. Given the proposition that workload is a mandatorily negotiable subject, the inquiry concerning the workload issue herein must focus upon whether the Association's

24/ See Exhibit J-1, p. 6, text set forth at p. 9 herein.

25/ State v. State Supervisory Employees Assn, 78 N.J. 54, 67 (1978).

mid-contract negotiations demand has a justifiable basis in fact: did the Town effectuate unilateral changes in firefighters' work-load? if yes, what were those changes? and finally, were such changes permitted under the terms of the parties' extant agreement? or, was there an obligation to negotiate concerning the changes?

It is established in the record that subsequent to the reorganization, the normal personnel complement on an engine company tour has not been decreased -- if anything, the record would indicate that the normal personnel complement on an engine company tour may have increased due to the redistribution of personnel from the eliminated engine company into the remaining engine companies (see discussion infra at p. 10). The record also establishes that vacation selections are now being limited to one employee per company selecting vacation at one time. When taken together, these facts would indicate that during a normal vacation period, the manpower complement of an engine company tour should be at least three total firefighters. However, if there are sick leaves (or other non-discretionary leaves) taken during a normal vacation period, that may decrease tour strength to below the three total firefighter level. The record indicates that, since the reorganization, there have been instances where engine company tours were short-staffed -- i.e., had fewer than three total firefighters. However, there is no indication in the record as to how often this has occurred. Further, the record indicates that this circumstance is infrequent -- the Chief testified that the occurrence of a short-staffed company is an exceptional situation

and Captain Mounts testified that he had never responded to a call with less than two firefighters in his engine company.

Prior to the reorganization and the overtime and vacation changes, six firefighters -- or an average of 1-1/2 employees per company -- were permitted to select vacation at one time. In order to maintain tour personnel strength at a level of one Captain and two firefighters per tour, firefighters who were absent from their tour were generally replaced on a man for man basis by having other firefighters work overtime. However, the record indicates that in the pre-reorganization period, tour personnel strength was not uniformly kept at three firefighters. Firefighter Bulgar's testimony indicated a pre-reorganization instance of a short tour. However, again the frequency of such occurrences was not established.[26/]

To establish that a unilateral change in firefighters' workload was made herein, part of the factual predicate necessary to establish such a change is a showing of what the workload was prior to the reorganization and what it became after the reorganization. The premise advanced herein by the Charging Party is that because the employer has not replaced absent firefighters on a man for man basis, the personnel strength of engine company tours has fallen and workload, accordingly, has been increased. However, the frequency of the occurrence of short-staffed crews was not established in the record. Thus, standing alone, the fact that there are now occasions when short-staffed crews man engine companies does not help to establish a material change.

26/ There is no direct indication in the record that engine company tours were consistently maintained at full personnel strength prior to the reorganization, and, as observed above, there is some support to the contrary.

In addition, the undersigned notes that the mere occurrence of a short-staffed crew on a particular engine company tour is not, standing alone, indicative of any workload change inasmuch as on some tours, no fire calls are logged. 27/ Further, the record does not establish that workload is necessarily increased by responding to a fire call with a short-staffed crew. The workload effects in such instances were said to be dependent upon the particular circumstances of the fire -- size, type, etc. For example, the record indicates that a short-staffed crew will sometimes abandon their fire apparatus and combine with another crew at the fire scene. It was stated by the Chief that the essential effect of having a short-staffed crew at a fire scene was more a quality factor in the firefighting function than a factor in firefighters' workload.

In In re Freehold Borough Bd/Ed, P.E.R.C. No. 82-38, 7 NJPER 604 (¶12269 1981), the Commission addressed the issue of an alleged unilateral change in workload. The Commission determined that while workload was a term and condition of employment and the employer's actions did affect employee workload, there was no negotiable increase in workload shown in the record. The Commission stated:

> Based upon the limited factual record in this case, we are unable to conclude that a mandatorily negotiable increase in workload actually occurred in this case. The facts indicate that there was no increase in pupil contact time, nor was there a lengthening of the teachers' work day. The only increased workload alleged is based upon the teachers' responsibility to complete IIPs for each of their students. However, the stipulated record

27/ Tr. p. 57.

> herein does not establish what the extent, if any, of such an increase was. Moreover, assuming some measure of increased workload did occur in this matter, there is no indication in the record that any workload increase could not be accommodated within the strictures of the preparation time and compensation provisions already provided in the parties' current contract. Thus, we must conclude that the Association has not met its burden of proving the allegations of the Complaint by a preponderance of the evidence. See N.J.A.C. 19:14-6.8. (emphasis added) 28/

Based upon the foregoing, the undersigned concludes that there was no mandatorily negotiable workload increase demonstrated in the record herein.

(C) Compensation -- Compensation has been determined to be a mandatorily negotiable term and condition of employment. Galloway Twp. Bd/Ed v. Galloway Twp. Ed/Assn, 78 N.J. 25 (1978); Manchester Ed/Assn v. Manchester Reg. H.S. Dist Bd/Ed, P.E.R.C. No. 80-136, 6 NJPER 245 (¶11119 1980), affm'd and modified App. Div. Doc. No. A-3808-79 (1981). In the instant matter, while firefighters' total compensation was decreased, their contractual salary amount remained unchanged. The decreased compensation resulted from the elimination of non-emergency overtime. The overtime elimination is a non-negotiable subject.

The Association's demand to negotiate increased compensation came during the term of an existing agreement between the parties. Inasmuch as the Town has not violated any compensation or overtime provisions of the parties' agreement and given the finding that no negotiable increase in workload was proven herein, the Association's mid-contract demand to negotiate increased compensation would appear to be without foundation. Accordingly,

28/ In re Freehold Borough Bd/Ed, P.E.R.C. No. 82-38, 7 NJPER 604 (¶12269 1981).

there was no obligation on the Town to negotiate additional compensation at the point in time when the demand was made by Charging Party. 29/

(D) Safety -- Though couched in terms of firefighters' safety, the Association's proposal concerning the number of men who respond with each piece of apparatus is essentially a minimum manning provision. The Commission has determined that minimum manning is a managerial prerogative and is not a mandatory subject for negotiations. In re City of Cape May, P.E.R.C. No. 80-35, 5 NJPER 403 (¶10210 1979), In re City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), affm'd App. Div. Doc. No. A-4851-79 (1981), pet. for certif. den. 88 N.J. 476 (1981). Hence, the Town's refusal to negotiate concerning this proposal is not violative of the Act.

(E) Acting pay -- Premium pay for temporary work assignments to a higher employment category is a mandatory subject for collective negotiations. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981).

There is no provision in the parties' agreement which governs this term and condition of employment. The record indicates that firefighters had performed acting captain assignments prior to the reorganization and overtime changes. No frequency of such performance was established. After the reorganization, the record shows that firefighters continued to perform acting captain

29/ This finding would have no applicability to a demand by the Charging Party to negotiate increased compensation for firefighters after the expiration of the instant contract. Such a proposal would not be viewed as a mid-contract negotiations demand and accordingly would be mandatorily negotiable.

assignments. Again, no frequency of performance of such assignments was established. The record indicates that firefighters who have been designated from time to time to be acting captain have not received premium pay for performing such duties.

Subsequent to the reorganization, three captains were freed of their prior duties of commanding an engine company tour; one of these captains was permanently made a "floater" whose assignment was to backfill for absent captains (the assignment of the other two captains is not clearly delineated in the record).

Based upon the foregoing, the undersigned is unable to conclude that a significant change occurred in the practice of assigning firefighters to the position of acting captain and in the practice of not paying them a premium therefor. Thus, while the issue is a mandatorily negotiable subject, in the circumstances of this case, the Association has failed to justify its mid-contract negotiations demand. The record does not indicate that the Town's actions changed a contractual term or a prior practice of the parties. If the Town did not alter a contractual provision or prior practice -- and, if it merely continued the prior practice of assigning firefighters to perform acting captain's duties and not paying them therefor -- it would seem that it also did not incur a mid-contract negotiations obligation concerning this topic. 30/ Accordingly, the Town's refusal to negotiate concerning same was not violative of the Act.

30/ Again, this finding in no way influences the status of a proposal which is made by the Association subsequent to the expiration of the parties' then-extant contract concerning premium pay for the performance of acting captain's duties. Such a proposal would not be viewed as a mid-contract negotiations demand and therefore would be mandatorily negotiable.

(F) Vacation -- The Association's allegations concerning vacations raise three issues: two issues relate to scheduling vacations and one issue relates to the amount of vacation. Initially, the Association claims that the Town's actions unilaterally altered the scheduling of unit members' vacations. More specifically, the record indicates that the Town's reorganization of the department and the overtime and vacation policy changes made by the Town resulted in a reduction of the number of firefighters permitted to select vacation simultaneously. In addition, the Town restricted the total amount of time off which firefighters were permitted to select during the prime summer vacation months of July and August. Finally, in the Association's request for negotiations to the Town (Exhibit J-4; see p. 6 supra), five additional vacation days were demanded; the Association contends that the Town's refusal to negotiate concerning same is violative of subsection 5.4(a)(5) of the Act.

Within the framework of an employer's minimum manning determinations, the scheduling of vacations -- when employees may select vacation, the method by which employees may select vacation, the total amount of vacation, the amount of consecutive vacation time, etc. -- is generally a mandatory subject for negotiations. 31/ However, the issue of how many employees may take vacation simultaneously is a permissive subject for negotiations. The Commission

31/ In re Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978) and In re Twp. of Springfield, P.E.R.C. No. 80-86, 6 NJPER 35 (¶11018 1980).

considered the topic of vacations and time off in In re Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978); it stated:

> The number of men allowed off duty is really the converse of the number of men on duty. The latter is permissively but not mandatorily negotiable. We must reach the same result regarding the number of men who are permitted off duty at a given time because to do otherwise would in effect, mandate negotiations on manning levels. However, within the framework of the number of employees that the employer has determined are necessary at a given time, the employer must negotiate as to which employees may be off duty, the method of selecting employees to be off duty, the amount of time that an employee can take consecutively, etc....What must be negotiated is the method of determining which employees can be off duty and at what times but these negotiations must recognize the fundamental right of the employer to determine how many men are on duty (and, as a necessary consequence, off-duty) at any given time.
>
> We note that the employer does not have unfettered discretion in determining how many employees can be off duty at any time. As stated, the number of paid days off that an employee may receive in a year is mandatorily negotiable. The employer is obligated to provide employees with an opportunity to take these days in accordance with the negotiated agreement. 32/

In the instant matter, the parties appeared to have an established practice whereby up to five employees from the entire department were permitted to take vacation simultaneously. That practice was unilaterally changed, mid-contract, by the Town's actions so that now only three employees from the entire department are permitted to take vacation simultaneously. Thus, the Town's action constituted a unilateral change of a permissive subject of

32/ In re Town of West Orange, supra, at pp. 3-4. See also, In re Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978); In re Twp. of Springfield, P.E.R.C. No. 80-96, 6 NJPER 35 (¶11018 1980); and Paterson Police PBA, Local 1 v. City of Paterson, 87 N.J. 78 (1980).

negotiations concerning which the parties arguably had an agreement based upon past practice. Thus, the issue for consideration herein is whether the employer's unilateral change of a permissive subject for negotiations is violative of the Act, where there is no negotiated written agreement concerning the permissive subject but rather where the Charging Party indicates that an agreement exists on the permissive subject via an established practice.

For purposes of this decision, assuming without deciding that an agreement is determined to exist upon the issue of how many employees may take vacation simultaneously, no unfair practice action would lie herein. In In re Twp. of Jackson, P.E.R.C. No. 82-79, NJPER (¶ 1982), the Commission stated:

> Regardless of whether the contract has been violated by the apparent deviation from past practice, there has not been a unilateral alteration in the terms and conditions of employment. In In re Paterson Police PBA Local No. 1, 87 N.J. 78, 93 (1981), our Supreme Court recognized that certain items which are normally non-negotiable because they fall outside the terms and conditions of employment may be permissively negotiated by employers and representatives of police officers and firefighters. As Kearny holds and the PBA concedes, the subject of criteria for temporary assignments falls outside the terms and conditions of employment, even though it is permissively negotiable. Even if we assume arguendo that the Township violated the contract, it did not change a term and condition of employment and thus did not violate subsection (a)(5). 33/

33/ In re Twp. of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129, at (¶13057 1982); see also In re City of Camden, P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982), see Hearing Examiner's report at 8 NJPER 182-3.

Accordingly, even assuming arguendo that the Town has violated an agreed upon permissive subject for negotiations, it did not unilaterally change a term and condition of employment and therefore did not violate subsection 5.4(a)(5) of the Act.

However, the Town's action in limiting the amount of an employee's total vacation time which may be taken during the July-August period is a unilateral change in a mandatorily negotiable term and condition of employment; accordingly, that action was violative of subsection 5.4(a)(5).

Finally, with regard to the Town's refusal to negotiate concerning the Association's demand for a greater amount of vacation time, the undersigned determines that the Town's refusal to negotiate concerning this, under the circumstances of this matter, was not violative of subsection 5.4(a)(5). The treatment of this issue follows closely that given the Association's demand to negotiate increased compensation (supra p. 24). The Association's demand to negotiate increased vacation time -- although a mandatory subject for negotiations -- came during the term of an existing agreement between the parties. Inasmuch as the Town has not violated any contractual provision regarding the amount of vacation time to be provided to firefighters and given the finding that no negotiable increase in workload was proven herein, the Association's mid-contract demand to negotiate increased vacation time would appear to be without foundation. Accordingly, there was no obligation on the Town to negotiate additional vacation time at the time when the demand was made. 34/

34/ This finding would have no applicability to a demand by the Association to negotiate increased vacation time for firefighters after the expiration of the instant contract. See fn 28, supra.

V. Conclusions of Law

Based upon the entire record in this matter, the Hearing Examiner concludes that the Association has failed to prove by a preponderance of the evidence that the Town has violated subsection 5.4(a)(5) of the Act when it (1) reorganized the fire department by eliminating an engine company; (2) eliminated non-emergency overtime; (3) limited the number of employees who are permitted to take vacation simultaneously; (4) refused to negotiate mid-contract proposals made by the Association concerning workload, compensation, minimum manning, vacation time and the number of employees permitted to take vacation simultaneously. However, the undersigned concludes that the Town did violate the Act when it unilaterally limited the amount of vacation time an employee could take during the July-August period.

Recommended Order

Accordingly, for the reasons set forth above, it is hereby ORDERED:

(A) that the Respondent, Town of Harrison, shall cease and desist from:

(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act by unilaterally limiting the amount of vacation time which eligible employees may take during the July-August period.

(2) Refusing to negotiate in good faith with the Association by unilaterally altering terms and conditions of employment of employees represented by the Association by unilaterally

imposing a limitation upon the amount of vacation time which eligible employees may take during the July-August period.

(b) That the Respondent Town take the following affirmative action:

(1) Remove the limitation concerning the amount of vacation time which eligible employees may take during the July-August period.

(2) Negotiate with the Association upon demand concerning any proposed limitations regarding amounts of vacation which may be taken during the July-August period.

(3) Post at 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 Town's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Town to ensure that such notices are not altered, defaced or covered by other material.

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

It is hereby further Ordered that those portions of the Complaint which allege violations of the Act based upon Respondent's elimination of an engine company, elimination of non-emergency

overtime, and refusal to negotiate concerning workload, compensation, minimum manning and vacation scheduling be dismissed.

Charles A. Tadduni

Charles A. Tadduni
Hearing Examiner

Dated: October 25, 1982
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 cease and desist from interfering with, restraining or coercing our employees in the exercise of rights guaranteed to them by the Act by unilaterally limiting the amount of vacation time which eligible employees may take during the July-August period.

WE WILL remove the limitation concerning the amount of vacation time which eligible employees may take during the July-August period.

WE WILL negotiate with the Association, upon demand, any proposed changes regarding the amount of vacation time which eligible employees may take during the July-August period.

TOWN OF HARRISON
(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.