

H.E. NO. 2007-3

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

In the Matter of

CITY OF PATERSON,
Respondent,

-and-

Docket No. CO-2005-138

PBA LOCAL 1,
Charging Party,

CITY OF PATERSON,
Respondent,

-and-

Docket No. CO-2005-139

PBA LOCAL 1 SOA,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the City of Paterson violated 5.4a(1) and (5) of the Act when it installed and used approximately 33 overt surveillance/security cameras inside and outside the public safety complex without notice or negotiations with the PBA and SOA. She determined that the City had a managerial prerogative to install the cameras in non-private areas of the workplace to protect the public and public property and to monitor and supervise employee conduct. She also found that the City had a duty to negotiate any impact flowing from the exercise of the managerial decision, but that the PBA and SOA made no demand to negotiate impact.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Dorf & Dorf, attorneys
(Gerald Dorf, of counsel)

For the Charging Party,
Shaw & Perelson, LLP, attorneys
(Mark C. Rushfield, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 23, 2004, Paterson PBA Local 1 (PBA) and Paterson PBA Local 1 Superior Officers Association (SOA) filed unfair practice charges against the City of Paterson. The charges allege that the City violated 5.4a(1) and (5)^{1/} of the

^{1/} These provisions prohibit public employers, their
(continued...)

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it installed surveillance cameras in two work locations within the police department without notice or negotiations, and while the parties were engaged in interest arbitration. During the hearing, Charging Parties amended their charges to allege that approximately thirty additional cameras were installed in various work locations inside and outside the public safety complex without notice or negotiations with the PBA or SOA and that images from those cameras have been used to sustain discipline against officers (2T6).

Based on the record before me, I determined that the City had a managerial prerogative to install overt cameras in non-private areas of the workplace to protect the public and public property, to provide security for its employees and to direct its workforce. As to the use of camera images in disciplinary investigations or in the work place generally, Charging Parties may demand negotiations on any impact flowing from the use of these cameras, including, but not limited to, advance

1/ (...continued)
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."

notification procedures related to future camera installations, as well as information relating to camera placement and scope of the images captured by the cameras; and notice of when the City intends to use camera images to support disciplinary charges and circumstances under which the tapes will be made available to the unions as well as how long to maintain the tape being used for disciplinary purposes. Here, however, no demand to negotiate impact was made and, therefore, no violation was found.

Procedural History

On August 8, 2005, a Complaint and Notice of Hearing issued (C-1).^{2/}

On August 22, 2005, the Respondent filed its Answer (C-2). It admits that it installed two security cameras, one behind the front desk in the lobby of the Police Department and the other in a lobby area adjacent to a rear entrance to the building; that the primary monitors for the cameras are located in the Internal Affairs Office, while a secondary set for back-up are located in a captain's office; that the parties are currently engaged in interest arbitration; and that the PBA and SOA demanded that the City remove the cameras. While Charging Parties describe the cameras as "surveillance" cameras, Respondent refers to the

^{2/} "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Parties' and Respondent's exhibits respectively. Transcript references to hearing dates are "1T", "2T" and "3T" respectively.

cameras as "security" cameras. The findings of fact support that the cameras have a mixed use and that both descriptions are accurate.

Respondent generally denies that it violated the Act and contends that the installation of security cameras in public areas within the Police Department's premises is not mandatorily negotiable. As to the amended charges, Respondent concedes that approximately thirty additional cameras were installed in the public safety complex without negotiations with the PBA or SOA (R-6, R-9; 1T18, 2T6-2T7).

On January 14, 2005, a Commission Designee denied an application for interim relief finding that absent Commission precedent, he could not conclude that Charging Parties had a substantial likelihood of proving that the use of surveillance cameras in the workplace was negotiable. I.R. No. 2005-5, 31 NJPER 2 (¶2 2005).

On January 26, 2006, the Public Employment Relations Commission (Commission) denied the parties' motions for summary judgment, finding that this is a case of first impression and that there are material facts in dispute. City of Paterson, P.E.R.C. No. 2006-50, 32 NJPER 11 (¶5 2006).

A hearing was held on May 4 and 8 and August 3, 2006 at which the parties examined witnesses and presented exhibits. After several mutual requests by the parties for extensions to

submit their briefs, briefs and replies were filed by December 29, 2006. Based on the record, I make the following:

FINDINGS OF FACT

1. The City of Paterson is a public employer, and the PBA and SOA are public employee representatives within the meaning of the Act (1T8-1T9). The most recent collective negotiations agreements expired on July 31, 2003 (1T29). The PBA and SOA negotiated jointly with the City for successor agreements (1T30). I take administrative notice that the PBA and SOA filed petitions for interest arbitration (IA-2004-110 and IA-2004-111) on May 25, 2004, and that on May 26 2006, a joint award was issued by Arbitrator James Mastriani.

2. There are approximately four hundred thirty (430) police officers employed by the City (1T115). Over one hundred fifty officers spend a majority of their workday in the Frank X. Graves, Jr. Public Safety Complex located at 111 Broadway (R-4; 1T116). The public safety complex slopes from front (111 Broadway) which is the first floor to back which is the ground floor (1T46-1T48).

The police department as well as several non-police City agencies - the Taxi Commission, the Division of Community Improvement and DPW Engineering Department - are housed within the complex. The complex consists of one building on seven

levels - basement, ground floor, first, second, third, and fourth floors and the top floor known as the penthouse (R-9; 2T20).

The Municipal Court is connected to the public safety complex but has its own entrance and separate security system. Court employees, however, have access through internal hallways to the public safety complex (R-4; 2T60, 2T144-2T146, 2T149-2T150).

Outside Entrances to the Public Safety Complex

3. There are several entrances to the public safety complex from 111 Broadway:

The main entrance to the building is on the first floor where the police front desk is located. This entrance is used by the public as well as civilian employees and police personnel (2T57).

To the right of the main entrance is a separate entrance leading to the records room where the public gets copies of official documents. This entrance is secured and anyone entering must be buzzed into an area where there is an unlocked second door (3T86-3T87). Through the second door is an open and unsecured staircase which leads to the second floor offices of the Police Director and the Chief of Police. In July 2006, a young child was found wandering the second floor. Cameras caught the image of the girl coming up the stairs from the records area, walking around the second floor hallway and leaning over the open

balcony railing overlooking the front desk area. She was retrieved/rescued by an officer working in the Chief's office (R-11; 2T73, 3T71-3T72).

The Juvenile Division also has a separate entrance from Broadway and is a part of the Public Safety Complex (R-4 at pg. 54; 1T65, 1T73-1T74). The Juvenile Division has either moved or is in the process of moving to the second-floor space formerly occupied by the City's Department of Personnel which recently moved to City Hall (CP-1a, CP-1b; 2T14-2T15). The Division of Community Improvement, currently on the fourth floor, will move into the Juvenile Division's first-floor space with its own street entrance (3T15).

4. There is another entrance to the public safety complex in the rear of the building. This entrance is off of the police parking lot which is used exclusively for police personal cars as well as official marked and unmarked vehicles (CP-1; 1T76, 1T93). The lot itself is fenced and has one entrance with no gate or security clearance, although officers are occasionally assigned to guard the lot's entrance. There is also reserved parking for Municipal Court personnel and Juvenile Division officers in a lot adjacent to the police lot (1T78, 1T94).

Visitors to the public safety complex currently have no parking at the building. There is a new parking garage under construction. Pending construction of the new parking facility,

visitors use parking lots in the surrounding neighborhoods, but they may cut through the police lot to get into the public safety complex (CP-1, image 7; 1T77-1T78, 1T93-1T94, 1T98, 1T103).

5. From the police parking lot which is on ground floor level, there is an entrance to the public safety complex up a flight of stairs to the first-floor "Roll-Call" hallway. This entrance is accessible by magnetic-card swipe for police personnel and maintenance employees only (CP-7; 1T45, 2T25-2T26, 2T69, 2T75-2T75). However, for many years on the Friday after pay day (Thursday), civilian employees, particularly from the Courthouse which connects by an internal hallway to the Roll Call/Police Academy area, prop the door to the parking lot open with a chair in order to access a mobile bank van which is parked in the lot for check cashing. After cashing their checks, the employees return to the building through the propped door. Although propping open the door is a common practice on pay days, it is not an approved use. If employees did not prop the door open, however, they would have to exit the front entrance and take a long walk to the back of the building to access the van (R-7, R-8; 2T118-2T119, 2T137-2T139, 2T142, 2T144, 2T151).

6. Finally, in the rear of the complex, there is also an entrance to the ground floor through the building's sally port. The sally port bay doors are typically left open and, in fact, are inoperable. Maintenance crews use this entrance. It is also

used to bring in prisoners for transport to the cell block on the third floor (1T48, 2T68-2T71). There are seven or eight doors within the sally port which allow access into the complex as well as an elevator. Three or four of these doors are unlocked, although they could be secured (3T21).

The Inside Layout of the Public Safety Complex

7. The floor plans of the Public Safety Complex (R-9) reveal two banks of elevators, one bank each on the east and west sides of the building. There are two side-by-side elevators within each bank. The east side elevators are for the public's use. The west side elevator bank is signed for "authorized police personnel only", because there were problems in the past with unauthorized use. Years before, SOA President Reyes was assigned to put these signs on the west elevator doors (CP-1; R-4; 1T67, 1T107).

Additionally, there are approximately six internal staircases located throughout the public safety complex which run variously from the basement to the penthouse or top floor (R-9). The staircases are accessible to police and civilian employees as well as visitors to the public safety complex, and, therefore, the elevators next to those stairwells are also accessible to employees and visitors even those signed for authorized personnel - e.g. there is no security mechanism preventing unauthorized use of those elevators (1T107, 3T119-3T120).

8. Each floor of the building has a variety of uses and houses different offices or units.

a. The **basement** contains the police firing range as well as a mechanical room, police locker rooms and storage rooms. This area is used by police personnel and civilian maintenance employees (CP-1; R-6, R-9; 1T31).

b. The **ground floor** houses, among other rooms, the property room where evidence is stored, the mail room, printing room and police locker rooms as well as the Taxi Commission office. The latter is a civilian agency under the direction of the Police Director and manned by civilian taxi inspectors. Taxi owners regularly conduct business in this office (R-9; 3T38-3T39). There is an elevator outside the taxi office which is unsecured and travels from the basement to the penthouse (R-9; 2T93). Taking this elevator allows the occupant to by-pass the front desk of the police department (3T41-3T42).

c. The **first floor** houses the main public entrance where the police front desk is located (1T36-1T37, 1T42-1T43). Currently, visitors to the police department sign in at the front desk and are either escorted or directed to destinations within the building including, but not limited to, the Detective Bureau, the Chief's office, the Police Academy and various civilian agencies (1T50-1T51, 1T66, 1T68). In general, however, most visitors are not escorted to their destinations. Once leaving

the front desk, visitors are not monitored. Sometimes unescorted visitors get lost within the building and must be redirected (1T101-1T102).

Behind the front desk through a secured doorway are the patrol offices through which one can access the Police Academy and Roll Call Room (R-9; 1T42). Public safety classes for students at Passaic County College and Fairleigh Dickinson University are taught in the Police Academy. Student visitors to the Academy are escorted to the Academy classrooms and are not allowed to roam throughout the building (1T50-1T51). In the hallway between the Police Academy and the Roll Call Room, there is a staircase and the west side elevators with access to all floors in the complex (R-9).

In a separate area on the first floor is the domestic violence witness assistance unit where victims of violent crime and their families are counseled and otherwise assisted. Civilian volunteers work with officers assigned to this unit (1T105, 2T79). It is unclear from the record whether these volunteers are escorted to this office. There is also a gun room on the first floor as well as a Crime Scene Investigations (CSI) Unit (R-9).

d. The **second floor** houses, on one end of the hallway, the Chief's offices. The Internal Affairs unit is located within the Chief's offices. On the opposite end of the second floor hallway

is the Police Director's Office. Between the Chief's and Director's offices are the PBA and SOA offices and offices of the deputy chiefs. Also, the second floor hallway has an open balcony overlooking the first floor front desk (CP-1; R-9; 1T52, 2T80-2T82).

e. The **third floor** houses the Detective Bureau, Narcotics Bureau and Radio/Communications Unit as well as the cell block. Civilian Dispatchers work in the communications room. There is also a lunch room for police and civilian employees with vending machines in the hallway (CP-1; 1T71).

f. The **fourth floor** houses the Warrants Division and Domestic Violence Unit as well as two non-police agencies - the Division of Community Improvements and the DPW Engineering Department - frequented by civilian visitors (CP-1; R-9; 1T73).

g. The **top floor or penthouse** has no police units or civilian agencies but is accessible to maintenance crews (R-9). There are file cabinets stored here including cabinets containing PBA and SOA files (3T77-3T78).

Security Reports and Analyses after "9/11"

Sometime after the events of "9/11", several reports were prepared reviewing the security of the public safety complex.

9. Former Captain Michael Walker (Walker is currently Police Director) prepared a report for then Chief Lawrence

Spagnola (R-1; 2T45). Walker's November 2001 report stated in pertinent part:

At present, due to the number of municipal offices in the building (i.e., the Building Department, Engineering, Personnel, Taxi Inspectors, etc.), there are many civilians entering the building on business not related to the Police Department. After being cleared by the Main Desk personnel, these people are allowed into the elevators unescorted and can go anywhere in the building. It has been the experience of this writer that, after conducting their business with the City Agency, they leave the office and have to find their own way out of the building - this results in civilians taking the wrong elevators and wandering around "secure" portions of the building in an attempt to find their way out. In order to ensure the safety of our building these City Agencies should be relocated to other office space (R-1).

Walker recommended relocating these Agencies to another building or to the east wing of the public safety complex where their staffs and visitors could be contained as well as remodeling the sally port area to provide mechanical overhead garage doors, and fencing the various parking areas and installing a keypad or pass card controlled gate at the lot's entrance (R-1).

10. A Management Review prepared by the State Department of Law and Public Safety was issued in June 2003 (R-2). Specifically, in the section entitled "Security", the review observed that "[b]ecause non-police City offices are located in the building, the general public can apparently roam around at

will in and near police facilities." Among various recommendations, the review suggested that video cameras be installed:

. . . to provide real time surveillance of the area immediately around the exterior of the facility, in vehicle parking and storage areas, inside all entrance ways, and in property and evidence storage areas. Monitors should be installed at the communications center within the view of the supervisor (R-2; 2T50).

11. Subsequently, Captain William Fraher prepared a report entitled "Communication Plan" dated June 23, 2003 (R-3; 2T46). Fraher acknowledged the concerns raised by the Management Review regarding the location of City agencies within the public safety complex which, he also noted, fostered a lack of security. For instance, he observed in his report that "[d]ozens of people each day respond to the agencies to apply for blueprints, diagrams, permits etc. . . . This allows them access to just about any floor or any office in the building. Many times these applicants are found to be lost and wandering on all floors looking for the exits. . . (R-3)." Fraher agreed with the recommendations of the Management Review that ". . . alarms, restricted access doors and cameras would greatly enhance the security of the building (R-3)." He recognized, however, that the main impediment to implementation of the security plans was the availability of funds for purchase and installation of equipment (R-3).

12. Sergeant Patrick Greco has been employed by the City of Paterson for approximately thirteen (13) years and has been a sergeant for the last two years (2T8-2T9). For the past three years, he has been assigned to the Chief's office handling, among other tasks, special projects (2T9). In 2003, Sergeant Greco and then Deputy Chief James Wittig (Wittig is the current Chief) also undertook a security analysis of the Paterson public safety complex at the request of Chief Spagnola. In preparation for their report, they reviewed these previous reports.

On July 11, 2003, Greco and Wittig issued a report detailing security conditions and recommended changes (R-1, R-4; 2T41). In response to requests from the Mayor and Council, Greco issued a follow-up report in September 2003 summarizing his previous recommendations and providing more detailed suggestions on the kind of construction needed as well the types and locations of security cameras (R-5; 2T42-2T43).

Among various changes recommended by the report were installing crash guards outside the building; replacing glass windows and doors; redesigning and reinforcing the front desk area; installing metal detectors; relocating City agencies to another facility; fencing and installing gates to the police parking areas; closing in the sally port area and adding a new security card system and lighting; and installing a video

surveillance camera monitoring system utilizing both internal and external, fixed and pan/tilt/zoom camera types (R-4, R-5).

13. Both Wittig and Greco knew when they prepared the analysis that not all recommendations would or could be implemented because of the availability of funding (3T59). Wittig, in particular, knew the project would have to be phased in (3T67-3T68). He and Greco viewed the security issue as a multifaceted layered system with surveillance cameras being part of the total system (3T60-3T61, 3T67-3T68).

According to Greco, the changes in security suggested by the report (R-4) are now being phased in as monies become available from various grant sources. The changes include, in part, a new front desk area with bullet proof sheeting and X-ray machines (3T9), a new desk in the records area to prevent access to the unsecured staircase leading to the second floor (3T9-3T10), replacing the sally port doors with ones that seal properly (3T20), securing the outer door leading from the police parking lot to the first floor Roll Call Room/Police Academy area (3T28-3T29), and enclosing the second floor balcony area overlooking the front desk (3T33). Greco feels that even if the public safety complex could be completely locked down for security purposes, he would still recommend cameras and a surveillance system (3T60).

Police Director Walker's Implementation of the Security Plans

14. After twenty six years as a Paterson police officer, Michael Walker was appointed Police Director in September 2004 (3T117). Walker reviewed the reports prepared by Greco and Wittig (R-4, R-5; 2T41-2T42), prioritized the recommendations and has been implementing them as funding becomes available (3T124-3T125).

Walker recognizes that it is not feasible to secure every door of every office in the complex, because it would require at least five hundred (500) sets of proximity cards which are very expensive as well as a detector on every access point. Even if such a system was feasible, it would be too difficult to get around the complex (3T121-3T122). Also, until all civilian agencies are moved out of the complex, he does not envision that all visitors will be met and escorted within the complex. Once the agencies are permanently moved, he anticipates that visitors going to the detective division or juvenile division will be met by detectives and escorted (3T134-3T135).

15. Walker's plan is to gradually migrate the civilian agencies out of the public safety complex. The Division of Community Improvements which attracts the greatest number of civilian visitors, such as contractors seeking building permits, is scheduled to be relocated to the first floor space currently occupied by the Juvenile Division once renovations are completed

(3T133-3T134). There will then be a separate street entrance to this agency (3T15). For the foreseeable future, the Taxi Commission and Engineering Department will remain where they are currently located in the complex (3T15-3T16, 3T134).

16. Regardless of the location of the civilian agencies, Walker feels that one way to secure the public safety complex is to have overt surveillance cameras in the public areas of the building (3T120). He visited Passaic County Community College, among other public buildings, and observed cameras in the public areas and parking lots (3T122). Cameras, he asserts, are not primarily utilized to catch employees in wrongdoing, but are part of an overall security system. If, however, an employee does something wrong which is captured by the camera, it will not be ignored (3T123).

For instance, in the past five years there have been incidents of suspected employee misconduct - e.g. thefts. These are some, but not all, incidents of theft recorded in and outside the public safety complex (R-12 through R-16; 3T89):

a. In July 2004, a projector and focus light probe were taken from the Police Academy storage closet (R-12). The items were never recovered, but there was a suspicion that a police officer with a key to the closet was responsible for the theft (3T76, 3T95).

b. In December 2004, rounds of ammunition were discovered stolen from a rescue truck parked in the police parking lot (R-13). An officer discovered the theft when he was moving the truck to the motor pool (3T77). There was a suspicion that the theft was committed by an employee with a key because the truck was locked (3T97).

c. In January 2005, a filing cabinet on the fifth floor (the penthouse) was broken into (R-14). Among the file cabinets stored in this area are the PBA and SOA storage cabinets (3T77-3T78).

d. The Emergency Response Team room in the basement across from the firing range and the female police officer locker room was burglarized. There were pry marks and damage to the door lock (R-15; 3T78). It is unclear from the record when this incident occurred within the last five years.

e. In July 2002, a 2001 Lincoln Navigator was stolen from the police parking lot (R-16). The vehicle had been seized in a narcotics operation and was to be transported to the drug enforcement agency for further investigation. It was never recovered (3T79). As a result of this incident, seized vehicles are now placed in a secured area, not the police parking lot (3T101).

The Camera Installation

17. After the Greco/Wittig security reports were completed, on or about November 2004, the City installed two fixed and overt cameras on the first floor of the public safety complex (1T40). One camera was installed behind and above the front desk showing the back of the desk officer and the main entrance to the public safety complex from Broadway (CP-3).

The second camera was installed on the first floor in the hallway by the Roll Call Room and Police Academy. It depicts the hallway and the rear entrance from the police parking lot. The camera does not show the interior of any room, but it does capture the time clock for police personnel to punch in or out as well as the PBA bulletin board which is next to the clock (CP-4). A shoe shine vendor worked in this hallway until a year ago but no longer works there (1T48-1T49).

18. When these two cameras were installed, the monitors to view the camera images were located in Internal Affairs outside the Chief's second-floor office (CP-1; 1T63, 1T75, 1T84, 1T92, 2T21-2T22). No one was initially assigned to monitor the cameras on a consistent basis. As of August 2, 2006, however, the monitors are in a separate video monitoring room outside the Communications Division (3T53-3T54).

Sworn police personnel, supervised by a sergeant, are assigned 24/7 to monitor the various cameras inside and outside

the public safety complex. The monitors depict images from ten cameras at one time and rotate to cover all of the cameras (3T126). The digital tape from all of the cameras are reviewed on an as needed basis (3T125).

The monitors also record images from cameras placed around the City as part of a pilot project - Project Paterson Shield (1T84, 3T40-3T41, 3T48-3T56, 3T64, 3T127-3T128). The 24/7 video monitoring of the public safety complex was delayed until funding became available from Project Paterson Shield (3T136-3T137). Next to the monitors is a base radio to provide the officers assigned the task of monitoring the camera images immediate contact with police personnel, if necessary (3T56).

19. SOA President Richard Reyes observed the two cameras shortly after their installation (1T29, 1T31-1T32). These cameras, however, were installed without notice to or negotiations with Reyes or PBA President Steven Olimpio (1T31, 1T125). After the instant charges were filed in late November 2004, a sign was posted at the front desk notifying that "Public areas of this building are being monitored by video cameras". (CP-2). A couple of similar signs were also posted in other locations in the building, one specifically in the hallway in front of the PBA office (1T34-1T35). The record is unclear as to where the other sign(s) is located or how many signs were posted.

20. Sometime after the two cameras were installed, approximately thirty additional cameras were added. Neither the PBA nor the SOA were notified about the additional camera installations (1T60, 1T125-1T126).

The additional cameras are located inside and outside the public safety complex (R-6). The inside cameras are stationary and look like small round balls. The images are digitally recorded and depict only hallways, elevator lobbies and entrances/exits - e.g. no internal spaces such as bathrooms, break rooms or locker rooms are captured. For instance, although cameras show the second floor hallway outside the PBA and SOA officers, the interior of those offices are not shown. The outside cameras are pan-tilt-zoom and are on pre-set tours changing throughout the day, depicting the parking lots and other perimeter views of the public safety complex (R-6; 1T60-1T61, 1T90-1T92, 1T106, 1T114, 2T25, 2T27-2T29, 2T107, 2T114, 3T126, 3T129).

21. Of the total number of cameras inside and outside the complex, three cameras were installed prior to any of the security surveys conducted in 2001 and in use for a period of time before the installation of the cameras at issue in this proceeding (R-6; 2T113-2T114). These three cameras are (1) inside the sally port area with a view of the property room and the cell block garage; (2) outside the third floor

radio/communications room; and (3) outside the third floor east elevators and narcotics office. All three cameras are now integrated into the monitoring system with the approximately thirty new cameras (CP-1; R-6). The only floor with no camera is the top floor or penthouse (2T20).

The Use of Camera Images in Disciplinary Proceedings

Evidence from the cameras - e.g. digital recordings - has been used to sustain disciplinary charges (1T52-1T59). The evidence has also exonerated one officer (1T129, 3T83-3T84).

The following are incidents in which digital recordings from the surveillance cameras were reviewed in disciplinary matters:

22. Sergeant John Phelan who was charged with use of force was given a written reprimand after Internal Affairs reviewed the camera images from a third floor hallway incident and sustained the charge (1T55).

23. Internal Affairs reviewed the digital images of a heated argument between two superior officers - Sgt. Kelly Hemming and Captain Baldino - after a SOA meeting in the Police Academy. The record does not reflect whether the review resulted in discipline.

24. Officer Martinez was assigned to the front desk when she escorted a civilian from the building. The civilian accused her of physically assaulting him. Internal Affairs reviewed the camera images from the incident and was inclined to sustain the

complaint. However, after the PBA reviewed the images with Chief Wittig, they persuaded him that the images were inconclusive and did not support the civilian's claims (1T56-1T57, 1T128-1T131, 3T83-3T84).

25. Several officers were disciplined in an incident involving a flier which was posted in the Roll Call Room, copied and distributed - all without authorization. The flier entitled "Hypocracy [sic] at its Finest" contained an obscene drawing and a narrative pertaining to the police department (R-18). It was retrieved by a patrol commander who brought it to the attention of Chief Wittig (3T81).

When Wittig saw the flier (R-18), he directed an internal affairs investigation into who drew the caricature and who placed it at headquarters (3T81-3T82, 3T107). Wittig had issued an order previously to departmental personnel that no unauthorized fliers or other literature should be placed on department walls and that disciplinary action would be taken against those who disobeyed the order (3T81).

Internal Affairs developed a time line by interviewing commanding officers who had roll calls prior to and after the document was recovered to determine the approximate time when the flier was posted. As a result of the time line, images from the hallway outside the Roll-Call Room were reviewed and enabled Internal Affairs investigators to identify patrolmen, sergeants

and lieutenants in the area when the flier was posted on the PBA bulletin board. The individual responsible for creating the flier was never identified, but approximately ten officers were disciplined, including suspensions, written reprimands and counseling forms for copying the flier and/or knowing of it and not reporting it or stopping its distribution (1T54, 1T126, 3T81-3T83, 3T108-3T114). Lt. Van Kluyve, Lt. Baycora, and Lt. Savastano received counseling forms; Lt. McGuinness, Sgt. Perry, Sgt. Sciala and Sgt J. Esposito received written reprimands; Sgt. Louie Esposito forfeited two days of leave time (1T54).

ANALYSIS

The obligation to negotiate derives from N.J.S.A. 34:13A-5.3 which entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. It further provides that proposed new rules or modifications of existing rules governing working conditions must be negotiated with the majority representative before they are established. In other words, the Act prohibits unilateral employer action either establishing new working conditions or implementing a change in existing terms and conditions of employment without negotiations.

Rules governing working conditions derive from the parties' contract as well as past practice. Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997); Morris Cty. Park Comm'n, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982). As long as the

term and condition of employment is mandatorily negotiable, a negotiations obligation attaches. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [Id. at 92-93; citations omitted]

Here, the item in dispute - the installation and use of overt silent video cameras in the workplace - is not governed by a specific statute or regulation. However, the parties disagree

as to whether the installation of security/surveillance cameras is a negotiable term and condition of employment. This is a case of first impression. Therefore, I have reviewed both private sector^{3/} and public sector precedent in other jurisdictions for guidance.

In a series of private sector cases beginning with Colgate-Palmolive Co., 323 NLRB 515 (1997), the National Labor Relations Board (Board) determined that the installation and use of hidden surveillance cameras in the workplace was a mandatory subject of bargaining. Specifically, in Colgate, the Board considered whether the Employer's installation and use of hidden cameras, most particularly in the restroom and fitness centers, to combat an increase in work place theft and other employee misconduct violated 8(a)(1) and (5) of the National Labor Relations Act. Using standards set by the Supreme Court in Ford Motor Co. v. N.L.R.B., 441 U.S. 488 (1979),^{4/} to determine whether a subject is a term or condition of employment subject to bargaining, the Board concluded that the installation and use of hidden cameras in the work place was plainly germane to the working environment and not among those managerial decisions at

^{3/} Lullo v. International Association of Firefighters, 55 N.J. 409 (1970).

^{4/} In Ford Motor Co., the Supreme Court relied on Justice Stewart's concurring opinion in Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 222-223 (1964).

the core of entrepreneurial enterprise, namely decisions concerning the commitment of investment capital or the basic scope of the enterprise.

First, the Board reasoned that because employees caught in work place misconduct were subject to discipline, the installation and use of cameras had the potential to affect the continued employment of employees whose actions were monitored. The Board compared the use of hidden cameras to other investigatory tools utilized by employers to establish employee misconduct such as physical examinations, drug/alcohol testing and polygraph testing which are mandatory subjects of bargaining. Thus, it concluded, the use of hidden surveillance cameras was unquestionably germane to the working environment. The Board distinguished the employer's use of hidden cameras from its past use of visible cameras, because placement of the hidden cameras, especially in areas such as rest rooms or fitness centers, raised individual privacy concerns and intruded into employees' personal and private lives.

Further, the Board determined that the installation and use of hidden surveillance cameras in the work place was not among the class of managerial decisions at the core of entrepreneurial control because it did not involve a change in the basic direction or scope of the employer's business. The Board determined, therefore, that the union had the statutory right to

collectively bargain over this issue, including "the circumstances under which the cameras will be activated, the general areas in which they may be placed, and how affected employees will be disciplined if improper conduct is observed." Id. at 516.

In National Steel Corp. v. NLRB, 324 F.3d 928 (7th Cir. 2003), enf'g 335 NLRB 747 (2001), the Court affirmed the Board's legal conclusion that the use of hidden surveillance cameras in the work place was a mandatory subject of bargaining. The facts are that for a period of time, National Steel used over one hundred (100) video cameras in plain view to monitor areas of its plant and, for at least fifteen years, used hidden cameras to investigate specific cases of suspected theft, vandalism, or other instances of wrongdoing. In February 1999, National Steel installed a hidden camera in a manager's file cabinet in an attempt to discover who was using the office at night when the manager was not at work. An employee was discharged as a result of this investigation and the union filed a grievance.

During the course of the grievance and after learning of the Colgate decision, the union asked the Employer (orally and in writing) for information regarding hidden surveillance cameras and sought to bargain over any future installation of additional hidden cameras. The Employer refused to provide the information or bargain asserting that disclosure of hidden camera locations

would defeat their use and that it had acted consistent with its longstanding practice of using surveillance whenever it had a reasonable suspicion of wrongdoing and in areas where employees' have no expectation of privacy.

In its appeal of the Board's ruling in favor of the union, National Steel argued that requiring it to bargain over hidden cameras, especially as to location, would compromise secrecy, thus, rendering their use ineffective. The Employer also asserted that the collective bargaining process was so cumbersome that requiring it to bargain would prohibit any meaningful use of the cameras by hindering quick deployment of such cameras if the need arose. Finally, National Steel raised a waiver argument because the union had never demanded bargaining in the past despite its long history of using hidden cameras. The Court rejected these arguments.

As to the need for secrecy, the Court considered the Employer's need for secrecy if hidden cameras are to be effective, but found that the Employer's confidentiality concerns were susceptible to accommodation which could be bargained between the parties. Concerning the Employer's assertion that the bargaining process is cumbersome and citing a similar concern raised in Ford Motor Co., the Court found such concerns exaggerated and, in any event, pointed out that problems created by changing circumstances could be anticipated in the context of

the collective bargaining process. Finally, the court rejected the Employer's waiver argument reasoning that failure to demand bargaining in the past without more does not amount to waiver if there is no additional showing that the union unequivocally intended to give up all future bargaining rights.

The legal conclusions of Colgate-Palmolive and National Steel were revisited and followed by the Court in Brewers and Maltsters Local 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005). In Brewers, the Employer installed two hidden cameras to monitor a rooftop elevator motor room and the rooftop stairs leading to the room in response to a concern of employee misconduct, specifically drug use. Employees occasionally used these areas for work assignments. As a result of video footage captured by these cameras, sixteen employees were disciplined. The union was only notified of the cameras the day after the Employer removed them.

The Court affirmed the Board's ruling that the hidden cameras were a mandatory subject of bargaining and rejected the Employer's assertion that its legitimate security concerns overrode any bargaining obligation because its ruling did not prevent an employer from using hidden surveillance cameras after bargaining over general requirements for the use of hidden cameras.

The Brewers Court distinguished cases cited by the Employer which held that an employer may use overt surveillance of its employees' protected, concerted activities where necessary to further its legitimate security concerns. These cases, it explained, addressed section 8(a)(1) violations prohibiting surveillance which has a tendency to interfere with, restrain, or coerce employees in the exercise of protected activities. The Court reasoned that section 8(a)(1) does not consider whether overt surveillance of protected activities is a mandatory subject of bargaining, a question implicated where the duty to negotiate is at issue.

The facts in Colgate, National Steel and Brewers are distinguishable from this case. First, the cameras at issue in those cases were hidden cameras utilized specifically as investigatory tools to identify suspected employee misconduct. In the matter before me, the cameras are overt and the primary purpose of the camera installation was to secure the public safety complex and only secondarily were the captured images used in disciplinary investigations to identify possible misconduct.

Charging Parties cite The Genlyte Group, 1999 NLRB LEXIS 394 and Nortech Waste and Operating Engineers Local Union No. 3 of the International Union of Operating Engineer, AFL-CIO, 336 NLRB 554 (2001) for the proposition that whether cameras are overt or

covert is not dispositive in determining whether a negotiations obligation attaches. These cases are not persuasive.

In Genlyte, the Employer installed a video surveillance system in its plants because of safety concerns, but it notified the union of its intentions. Although the Administrative Law Judge determined, relying on Colgate, that the camera installation was negotiable, his decision provides no discussion concerning whether there is a distinction between the use of overt versus hidden cameras. I, therefore, cannot tell whether the Judge considered this issue.

In Nortech, surveillance cameras were installed after a contentious union organizing campaign and election purportedly to observe accident and safe work practices. It is unclear from this decision whether the cameras were overt or covert, therefore, the case is not instructive. However, even if the cameras at issue in Nortech were hidden, I find that there is a distinction in hidden versus overt cameras.

Hidden cameras carry an element of surprise and implicate issues of fairness. Employees who are unaware that they are being observed may not comport their conduct to acceptable employer standards, thus triggering possible discipline and affecting their continued employment. For this reason, the other case cited by Charging Parties, SEIU, Local 73 v. Bloom Township High School District 206, 20 PERI 35 (2004), is distinguishable -

it concerned the use of hidden cameras in a maintenance garage. Charging Parties, nevertheless, assert that the cameras may be overt, but they are small and, therefore, not easily detected. SOA President Reyes, however, testified that he noticed the cameras shortly after they were installed. Presumably, if he noticed them, the cameras were also noticed by others. These cameras were not "hidden".

Local 73 also implicated issues of privacy where the camera focused on a changing area and lunchroom. Such privacy concerns, raised also by the Courts in the three NLRB decisions, are not evident in Paterson where cameras were placed in plain view in hallways, at entrances to the public safety complex and outside the complex depicting the parking lots and surrounding areas. These areas were not used exclusively by police employees but were accessible to civilian employees and visitors to the police department and the civilian agencies housed in the complex.

Charging Parties assert, nevertheless, that police officers have an interest in not being continually observed by surveillance cameras in the work place, particularly areas which are police-only areas. This privacy interest is identified as a term and condition of employment requiring negotiation.

In analyzing constitutional claims under the fourth amendment, Federal Courts have recognized that public employees have a reasonable expectation of privacy in the work place which

is determined on a case-by-case basis and judged by a standard of reasonableness under all the circumstances. In O'Connor et al. v. Ortega, 480 U.S. 709 (1987), the Supreme Court determined that under all the circumstances, the Employer hospital violated a doctor's fourth amendment privacy rights in its search of his desk and file cabinets. In Wilcher v. City of Wilmington, 139 F.3d 366, 374-375 (3d Cir. 1998), the Court upheld drug testing procedures for firefighters and recognized that public employees in highly regulated areas such as law enforcement have diminished expectations of privacy because police and firefighters provide the important function of protecting and promoting public safety.

The Federal Courts, however, have recognized that expectations of privacy are generally not implicated where an employer acts overtly in establishing video surveillance. In Hector Vega-Rodriguez, et al., v. Puerto Rico Telephone Company, et al., 110 F.3d 174 (1st Cir. P.R. 1997), the Court reasoned that there is no expectation of privacy in cameras which are displayed openly in undifferentiated work areas and further observed:

. . . And the mere fact that the observation is accomplished by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one. The bottom line is that since [the employer] could assign humans to monitor the work station continuously without constitutional insult, it could choose instead to carry out

that lawful task by means of unconcealed video cameras not equipped with microphones, which record only what the human eye could. Id. at 181.

The Vega Court delineated factors to be considered in determining whether an employee privacy interest is established, including whether a particular office area was given over to the employee's exclusive use, whether, and to what extent, others had access to the work space and whether employees were put on notice that certain areas were subject to employer intrusions. Id. at 179. See also, Acosta v. Scott Labor LLC, 377 F. Supp. 2d 647 (W.D. Ill. 2005).

There are instances, therefore, where police officers may be able to demonstrate a sufficient privacy interest - e.g. surveillance cameras in locker changing rooms or bathrooms - which might trigger a balancing-test analysis under Local 195, IFPTE v. State, 88 N.J. 393 (1982). In such instances, there is a tension between the employee privacy interest and the employer's interest in protecting the public and public property, providing a secure working environment for employees and directing its workforce. A balance must be struck between these competing interests which may require negotiations. Here, however, no employee privacy interests were demonstrated and, therefore, a balancing-test analysis is unwarranted.

Charging Parties assert, however, that the location of the PBA bulletin board and time clock in a hallway captured by a

camera and the second-floor hallway outside the PBA and SOA offices are areas which are "private". I disagree. The bulletin board/time clock areas are used by police officers, visitors to the Police Academy and civilian employees alike. The location of the time clock and bulletin board in the "Roll-Call" hallway, an undifferentiated work area, pre-dates the camera installation. The installation of cameras, in and of itself, did not convert that space from public to private. As to the camera focused on an area outside the PBA and SOA offices, the second floor also houses the Police Director's, Chief's and Deputy Chief's offices. The camera in this area does not depict the interior of any room. This area is also not private. No term or condition of employment is implicated by these facts.

Finally, the NLRB cases are distinguishable from the matter before me because safety concerns associated with law enforcement and the protection of the public and governmental property are distinguishable from the concerns of private enterprise for the economic viability of the business. The use of cameras in the workplace to secure public property and persons require a different analysis. Public sector agencies in other jurisdictions have addressed the issue of cameras in the workplace and provide guidance.

In a final agency decision, East Pennsboro Township, 28 PPER 36 (¶28015 1996), a hearing examiner dismissed an unfair labor

practice charge alleging, among other things, that the Township violated the Pennsylvania Labor Relations Act (PLRA) when, without negotiations, it unilaterally installed closed-circuit overt video cameras in the police department with a monitor in a civilian manager's office. The police department and municipal offices were housed on the second floor of a three story building owned by the Township. The first and third floors were leased space.

At the recommendation of the Township's insurance carrier to realize savings in insurance premiums, the Township installed four closed circuit video cameras (no audio capacity) as follows: (1) on the top floor focused on a hallway leading to restrooms where vandalism had been occurring; (2) in the second floor sanitation and sewer departments focused on a drawer through which monies in excess of three million dollars were annually processed; (3) in the police department patrol room focused on areas where prisoners were restrained, where the PBA held its meetings and where patrol desks were located; and (4) on the bottom floor of the building focused on vending machines where vandalism had been occurring. The camera in the patrol room was placed there, in part, to assist the department in defending against baseless prisoner claims of police brutality. The monitor for all cameras was housed in the office of the Township manager.

The Township alleged that it installed the cameras pursuant to its managerial right to regulate activity on its premises and to supervise its police officers. It was motivated by both economic and safety concerns. The Police Association asserted, in part, that the Township refused to bargain over changes in terms and conditions of employment caused by the installation of the camera and monitor which, it contended subjected officers to supervision by the civilian manager, jeopardized their safety in dealing with confidential informants and restricted their ability to hold Association meetings.

In rejecting the Association's arguments and finding no changes in working conditions, the hearing examiner determined that the Township had a prerogative to determine who supervised its officers, that the Township authorized officers to cover the cameras when confidential informants were present in the patrol room and that the Township's paramount interest in monitoring activity in the patrol room outweighed the Association's interest in holding its meetings there. The Association, he concluded, could use other areas in the police department for its meetings which were not monitored by cameras. Thus, the hearing examiner found no negotiations obligation in the installation of overt video cameras at the workplace.

Finally, the Association alleged that the Township refused to bargain over the impact of the camera installation on employee

working conditions, particularly how the tapes would be used in the disciplinary process and for how long they will be retained. After acknowledging that an employer is required to impact bargain, the hearing examiner explained that the record was silent as to whether or not the employer intended to use the tapes in the disciplinary process and, therefore, he found no violation. Compare, Oil City Area Education Association PSEA/NEA, 34 PPER 92 (¶31 2003) (where school district installed overt video cameras in school in response to complaints of vandalism and theft. The Association requested impact bargaining relative to the use of video surveillance cameras. The hearing examiner found no duty to engage in impact bargaining because the use of cameras did not result in any change in the district's guidelines or procedures for evaluating or disciplining employees.).

In a New York decision adopted as a final agency decision, City of Syracuse, 14 NYPER 4790 (¶4645 1981), a hearing officer considered whether the City had an obligation to negotiate before installing an overt camera surveillance system in its police garage. The City reasoned that because the garage housed a large number of equipment and vehicles and due to its high security nature, the garage needed constant monitoring, best accomplished by the use of cameras. In dismissing the charge, the hearing officer stated:

By virtue of its accountability for public funds, a public employer is obliged to supervise its employees and maintain the security of its property. With respect to the latter responsibility, the Board has held that the security of the employer's premises is "a matter within the realm of management prerogative." As to the employer's right to supervise its employees, a series of cases involving the installation of time clocks and parcel inspections procedures has established that an employer's right to record the activity of its employees becomes negotiable only where the employees are required to participate in the recording process, for it is at that point that they are called upon to assist in the implementation of a managerial decision as a function of their duties." Id. at 4791.

Subsequently, in Roswell Park Cancer Institute, 34 NYPER 4769 (¶4582 2001), aff'd 34 NYPER 3094 (¶3040 2001), an administrative law judge, citing City of Syracuse, and other cases, affirmed that a surveillance policy which provided, in part, for the use of visible mounted surveillance cameras in the workplace was a matter within management's prerogative to secure its property and to record the activity of its employees. She also determined that since the area surveyed by the cameras captured not only public employees, but, also, visitors and patients, the use of cameras, under those circumstances, did not encompass terms and conditions of employment and was not mandatorily negotiable.

In Niagara Frontier Transit Metro System, Inc., 36 NYPER 3108 (¶3036 2003), aff'g 36 NYPER 4639 (¶4538 2003), the Board determined that the Transit Authority violated its bargaining

obligation under the Public Employee's Fair Employment Act when it refused the union's demand to bargain the impact of its decision to use video footage from bus surveillance cameras in disciplinary proceedings. The Board further determined that even if the Employer concluded that there was no impact, it could not summarily refuse the union's demand to bargain and condition bargaining on proof of impact.

The facts in the Pennsylvania and New York cases cited above, holding that the installation and use of overt cameras in the workplace is non-negotiable, closely parallel the matter before me and the legal conclusions are, therefore, instructive. For instance, in both East Pennsboro, and Paterson, the facility housing the police department also housed non-police agencies and, presumably, were accessible to police personnel, civilian employees and visitors. Also, in both cases and in City of Syracuse, the cameras were overt and installed, at least in part, for security purposes. Additionally, like the cameras in Roswell which captured images of public employees, visitors and patients, the cameras in Paterson capture images of police personnel, civilian employees and visitors to the public safety complex.

Finally, like Niagara, the City of Paterson used evidence from video images to discipline its employees (police officers), triggering a negotiations obligation over the impact of its decision to use video footage in its investigations. However, unlike Niagara, Charging Parties here did not demand impact negotiations. Without a demand, no obligation to negotiate

impact is triggered. Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998). In the future, the unions may demand negotiations on any impact flowing from the managerial decision to install and use overt cameras in the public safety complex - e.g. advance notification procedures for future camera installations, including information relating to camera placement and scope of the images captured by the cameras as well as notification of when the City intends to use camera images in disciplinary proceedings and the circumstances under which the tapes will be made available to the unions and maintained by the City, and, finally, a change in location of the PBA bulletin board.

Under the facts before me, the public employer's right to protect the public and public property, particularly in light of the heightened security concerns raised by the events of "9/11", and to monitor or supervise employee conduct outweighs the interest of public employees to be free from continuous overt surveillance in the non-private areas of the workplace. Therefore, I do not find that the installation and use of overt cameras in the Paterson public safety complex without negotiations violated the Act, particularly where the unions made no demand to negotiate impact despite knowing of the camera placements.

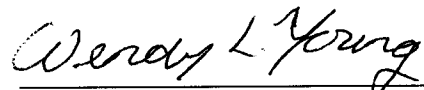
Based on the above, I do not find that the City of Paterson violated 5.4a(1) and (5) of the Act.

CONCLUSIONS OF LAW

The City of Paterson did not violate 5.4a(1) and (5) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.



Wendy L. Young
Hearing Examiner

DATED: January 25, 2007
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 5, 2007.