

H.E. No. 2008-8

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

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-2005-230

WEST ORANGE PBA LOCAL No. 25,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Township of West Orange violated 5.4a(1) and (5) of the Act when it unilaterally required its police officers to pump their own gas though mechanics were available to do so. The Hearing Examiner found that mechanics, in the past, had to pump gas for officers if requested by them to do so. The Hearing Examiner also found that the assignment of fueling of police vehicles to officers when mechanics were available was a mandatory subject of negotiations. The Hearing Examiner recommends that the Township be ordered to rescind the requirement that police officers refuel their vehicles when mechanics are on duty.

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 that 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.

H.E. No. 2008-8

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

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-2005-230

WEST ORANGE PBA LOCAL No. 25,

Charging Party.

Appearances:

For the Respondent,
Kenneth W. Kayser, attorney

For the Charging Party,
Klatsky, Sciarrabone & De Fillippo, attorneys
(David J. De Fillippo, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

The West Orange PBA Local No. 25 (PBA) filed an unfair practice charge against the Township of West Orange (Township) on March 7, 2005. The charge alleges that the Township violated section 5.4a(1), (2), (3), (5) and (7)^{1/} of the New Jersey Employer-

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority
(continued...)

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it unilaterally assigned police officers the responsibility of fueling police vehicles. Allegedly, in the past civilian employees of the Township were responsible for the fueling of police cars. On April 18, 2006, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the 5.4a(1) and (5) allegations (C-1).^{2/}

On May 2, 2006, the Township filed an Answer (C-2) denying that it had violated the Act and asserting there has been no change in fueling practices as patrolmen have been fueling police cars for years. The Township maintains that the fueling of patrol cars is incidental to and comprehended by a police officer's job description and that it has the prerogative to assign the duty to police officers.

On June 26, 2006, the Township filed a motion for summary judgement, which was denied by the Public Employment Relations

1/ (...continued)
representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ "C" refers to Commission exhibits, "J" designates exhibits jointly submitted by the parties and "R" refers to Respondent's exhibits, all of which were received into evidence at the hearing. The transcript for the first day of hearing is designated as "1T" and the transcript for the second day of hearing is referred to as "2T". Reference to the transcript page number follows the "T" designation.

Commission (Commission) on September 28, 2006 (C-4). Op. of West Orange, P.E.R.C. No. 2007-21, 32 NJPER 331 (¶138 2006). The Commission ordered the case to proceed to a plenary hearing. On September 11 and December 20, 2007, I conducted a hearing during which the parties presented evidence and legal argument. Post-hearing briefs were submitted on February 28, 2008. Based upon a review of the record, I make the following:

FINDINGS OF FACT

1. PBA is an employee representative within the meaning of the Act (1T9). It represents all police officers below the rank of sergeant employed in the Township's Police Department (1T19; J-1).

2. Township is a public employer within the meaning of the Act (1T9). It is a local Merit System jurisdiction (C-4; J-1).

The New Jersey Department of Personnel (DOP) job description for a police officer provides in pertinent part:

DEFINITION:

During an assigned tour of duty, on foot, or in an automobile, patrols a designated area to provide assistance and protection for persons, to safeguard property, to assure observance of the law, and to apprehend law-breakers; does related work as required. (emphasis provided).

NOTE: The examples of work for this title are for illustrative purposes only. A particular position using this title may not perform all duties listed in this job specification. Conversely, all duties performed on the job may not be listed.

EXAMPLES OF WORK:

Inspects and maintains patrol car by visually checking and/or operating all equipment, by arranging for washing, waxing, and mechanical service, and by taking patrol car to service location in order to insure that vehicle is ready for patrol (J-2).

The New Jersey Department of Personnel (DOP) job description for a school bus driver provides in pertinent part:

DEFINITION:

Under direction, drives a school bus to transport students; does related work as required. (emphasis provided).

NOTE: The examples of work for this title are for illustrative purposes only. A particular position using this title may not perform all duties listed in this job description. Conversely, all duties performed on the job may not be listed.

EXAMPLES OF WORK:

Checks, cleans and performs minor servicing of buses.

Checks gas, battery, oil and water before departure.

Checks vehicles for operating safety.

KNOWLEDGE AND ABILITIES:

Knowledge of care, maintenance, servicing and minor repair of motor vehicles.

Ability to check, clean, service and make minor and emergency repairs to vehicles (J-7).

3. The Township and PBA are parties to a labor agreement which covered the period of January 1, 2002 through December 31,

2005 (J-1). The agreement does not address whose responsibility it is to fuel police vehicles.

4. At one time, the Department of Public Works (DPW) garage was located at 6 or 8 Lindsley Avenue in West Orange (2T9-2T11). There were approximately seven mechanics working there then (1T142). The mechanics serviced and repaired Township vehicles, fueled police cars and checked the sewage pump stations which were located throughout the town (1T100, 1T107-1T108, 1T114, 1T141-1T142, 2T16-2T17, 2T29-2T30, 2T81).^{3/} Dating back to at least 1980, the mechanics did virtually all of the fueling of police vehicles at the Lindsley Avenue garage (2T102, 2T104-2T105, 2T113, 2T137-2T138).

5. Around March or April of 1983, a new DPW garage opened at 25 Lakeside Avenue, West Orange, which replaced the Lindsley Avenue garage (1T98, 1T141, 2T11, 2T66). Operations at the new garage initially remained the same with the mechanics primarily fueling police vehicles (2T11, 2T139).

Over an unspecified period of time the number of mechanics declined from seven to five (1T129, 1T131-1T132). No particular mechanic had the duty to fuel police vehicles. They all did it

^{3/} Other Township employees drive municipal vehicles. The Township also owns gas powered equipment. The fueling of civilian vehicles and equipment is not in dispute nor the subject of this case.

during their work day, in addition to performing other duties (1T123, 1T129, 1T131-1T132).

There are two sets of fuel pumps at the Lakeside Avenue garage, one set in the front of the building and one set in the rear along the westerly side of the building (R-1(a) and (c); 1T99). Two garage bays where mechanics work on vehicles are situated along the westerly side of the building. Depending on the time of day, the bay doors are open (R-1(b) and (c), 1T113, 2T21-2T22). When the bay doors are open, mechanics inside cannot see whether vehicles are at either set of the pumps (1T122, 2T34, 2T110). They may however, notice whether a vehicle has pulled into the rear area of the premises (2T34).

The front pumps are located about 50-75 yards from the mechanics' work area inside the garage (2T110, 2T113). For a brief and unspecified period, a pneumatic hose placed by the front pumps was connected to a bell which would ring when a vehicle pulled up for fueling (1T153, 1T156-1T157, 2T34-2T35). The rear fuel pumps are a little further away from the bay doors than the front pumps (2T34).

6. The Township has three fueling locations. Though there are three places, the police generally got gas at the Lakeside Avenue garage (1T174-1T175, 2T25-2T26). The other two locations are at Fire Headquarters on Valley Road and Fire Station No. 4 on Pleasant Valley Way (2T8).

Until August/September of 2004, all three fueling locations used a manual system to dispense fuel and keep track of fuel inventory. In 2004, the Township switched to an electronic automated system of dispensing fuel and record keeping at all three locations (1T99-1T100, 2T8-2T12).

7. Under the old or manual system, electric to the fuel pumps had to be turned on in order for them to operate (1T112, 2T13, 2T14). The electrical switch for the Lakeside Avenue pumps was inside the Public Works building (2T14). A mechanic would have to be on site and the building open in order to dispense fuel there (2T15, 2T17-2T18, 2T59-2T60). The electric to the pumps was not kept on when the building was closed because the pumps were accessible to the general public and fuel could otherwise be dispensed without authorization (2T13-2T14).

The fueling of police cars depended upon the presence of mechanics at the Lakeside Avenue garage. On weekdays, the first mechanics to arrive at approximately 6:00 a.m. would telephone the police desk and advise that the fuel pumps were turned on and police cars could arrive for fueling (1T111, 1T179). The day shift worked until about 3:15 p.m. and police cars could be refueled at any time (1T105-1T106, 1T113, 1T143, 2T16). There was also an evening shift that worked until about 11:00 p.m. which through the years was first reduced to 7:00 p.m., then to

5:00 p.m. and eventually eliminated all together (1T143, 2T16). Police cars could be refueled then too.

The mechanics rotated working weekends and holidays earning overtime pay (1T35, 1T101-1T102, 1T142, 2T85). On weekends and holidays, a mechanic would arrive at the Lakeside Avenue garage around 6:00 a.m. and phone the police desk to let them know that cars could be refueled. Vehicles could be refueled until about 7:00 a.m. when the mechanic left the garage premises to check the sewage pumping stations throughout the town. When he returned to the garage, he would again call the police desk and apprise the department of the opportunity to refuel vehicles. The weekend/holiday mechanic typically worked until noon and then locked the building when leaving, having switched off the electricity to the fuel pumps (1T106, 1T143, 2T17-2T18). Later that day, a night shift mechanic would arrive at approximately 6:00 p.m. and telephone the police desk to let them know that the pumps were turned back on and available to dispense fuel (1T143). The weekend/holiday mechanics were there to predominately service and repair Township vehicles (1T123, 1T141-1T142, 2T16-2T17, 2T97-2T98).

Under the old system, certain information was required to be manually recorded on forms which were kept by the fuel dispensers (1T45-1T46, 1T52-1T53, 1T102, 1T116, 1T122, 2T11, 2T27-2T28, 2T107-2T108). Pre-printed on the form was the municipal

department, in this case "Police", car number and make of vehicle (R-6; 2T28, 2T36-2T37, 2T107-2T108). Information that needed to be filled in was the license number of the vehicle, odometer reading, amount of gas dispensed and whether oil was put into the vehicle (R-6; 1T102, 2T11, 2T28, 2T36-2T37, 2T107, 2T117-2T118). Not all of the required information was consistently filled out and consequently the record keeping was not always accurate (1T117, 2T82-2T83, 2T119-2T120, 2T179, 2T182-2T183).

8. The Township Police Department has three shifts; midnight, day and afternoon (1T26, 1T85, 2T142). If a police vehicle becomes inoperable for any reason, it is "deadlined" (1T26-1T27, 1T150, 1T168, 2T200). A police car may be deadlined because it is in need of repair or servicing. Under the old fueling system, a police car could also be deadlined if it did not have enough gas to continue to operate and the Lakeside Avenue garage was closed (1T26-1T27, 1T168, 2T115, 2T200). In that event, the police supervisor had the discretion to permit the officer to deadline his vehicle and take another if one was available; direct the officer to refuel at the fire station; or have the officer deadline the vehicle and patrol with another officer in the other officer's car. On occasion, the police supervisor arranged for a mechanic to be recalled and reopen the Lakeside Avenue garage for refueling. The option selected depended upon the circumstances (1T26-1T28, 1T38-1T39, 1T149-

1T151, 1T168-1T177). If a police officer was directed to refuel at the fire station, the officer personally did the refueling (1T28, 1T149, 1T170).

Though there can be legitimate reasons at times for not having patrol cars adequately fueled, deadlining vehicles for this reason became a problem. It led to former Police Chief Edward M. Palardy issuing memorandum P-204 on January 7, 1988 concerning the refueling of police vehicles (J-4; 2T115-2T116, 2T164-2T165). The memo sets forth a schedule of when police cars are required to be brought to the Lakeside Avenue garage for refueling. It also corroborates the weekday and weekend/holiday schedule worked by the mechanics. The memo states in pertinent part, "When he [garage man] returns, he will notify the desk of his availability to continue servicing the police vehicles" (J-4).

Similarly, on August 7, 2001 then-Captain Anthony Giasullo wrote a memorandum to all patrol personnel regarding the refueling of patrol vehicles on the weekend (J-5; 2T166). His memo in pertinent part provides:

Presently, the Department of Public Works provides for the refueling of Township vehicles on the weekend, between the hours of 0700 and 1100 hours. Supervisors assigned to Tour 2 are to ensure that all vehicles available to the Patrol Division during those hours, including vehicles not in use during the tour, are to be refueled regardless of the fuel level. The practice of "topping

off" allows for the vehicle to be used for a twenty four hour period without refueling.

If in the event a vehicle assigned to a patrol function is low on fuel then a spare vehicle shall be assigned.

9. Before the new automated fueling system was implemented around August/September of 2004, both DPW mechanics and police officers fueled police vehicles and filled out the associated paperwork at the Lakeside Avenue garage (1T52, 1T103, 1T133-1T136, 1T149, 1T151-1T152, 1T161, 1T181, 2T11-2T12, 2T58, 2T71-2T72, 1T106-1T108). While the mechanics started out principally doing the fueling when operations first moved to Lakeside Avenue, over time some police officers found it easier to pump the gas themselves (2T106-2T108, 2T137-2T139). Since the fuel pumps are located 50-75 yards from the bays where mechanics worked, some officers found it easier to pump the gas than to get a mechanic. Mechanics did not always quickly respond when police vehicles pulled up to either set of pumps as they were busy doing other work and at times were unaware that police vehicles had pulled up to the pumps (1T113, 2T113-2T114). The evidence was unclear as to how many officers regularly pumped their own gas and filled out the paperwork at the Lakeside Avenue garage (1T133-1T136, 1T149, 1T151-1T152, 2T58, 2T71-2T72, 2T113-2T114, 2T179-2T180). What is clear from the record is that some officers fueled their own vehicles (2T58, 2T71-2T72, 2T113-2T114, 2T137-2T139).

10. Prior to the automated fueling system, police officers were not required to pump their own gas. No policies or directives required either the mechanics or police officers to fuel police vehicles (2T17, 2T59, 2T139-2T140, 2T161, 2T163). When mechanics were working at the garage, they were available to pump gas if called upon to do so (2T59). What occurred over time was that some police officers took it upon themselves to do their own fueling (1T161, 2T137-2T139).

Through the consistent testimony of former PBA President Sergeant Robert Verzi, former SOA President Joseph Racaniello, Lieutenant Dominic Bertoldi and Garage Supervisor Robin Young, the PBA presented evidence that the primary responsibility to refuel police vehicles rested with DPW mechanics prior to the implementation of the new automated fueling system (1T26, 1T33, 1T95, 1T100-1T101, 1T104, 1T132, 1T137, 1T142, 1T146, 1T162, 1T167). In support of this testimony, PBA also relies on the January 7, 1988 Chief Palardy memo (J-4), the August 7, 2001 Captain Giasullo memo (J-5) and an email sent by current Police Chief James P. Abbott in which he wrote in pertinent part, "In the past the responsibility of pumping the gas into the vehicles was placed with the Public Works employees although more often than not the police officers dispensed the fuel themselves" (R-2).

Principally by the testimony of the Director of Public Works, Leonard Lepore, the Township introduced evidence that it was not the responsibility of the mechanics to refuel any municipal vehicles, including police, prior to the automated fueling system (2T9-2T10, 2T17, 2T59, 2T72, 2T75, 2T77-2T78, 2T82, 2T91, 2T95, 2T100). It also relies on Chief Abbott's testimony to explain that the Palardy and Giasullo memos were more about avoiding the deadlining of vehicles than who actually was responsible for fueling them (2T164-2T166) as well as attempting to explain what he meant in his own email, R-2 (2T135-2T140).

After reviewing the evidence, I infer and conclude that before the automated system was implemented in 2004, mechanics on duty at the garage were required to pump gas if requested to do so by a police officer. If a police officer didn't want to pump his own gas and a mechanic was on-site, the mechanic had to do the fueling even if it meant dropping whatever else he was doing for the moment.

11. In January, 2001, the Township hired John K. Sayers as its business administrator and police director. Prior to being hired by the Township, Sayers was employed by the Essex County Sheriff's Department (1T21-1T22, 2T176-2T178). There, they used an electronic automated fuel system (2T181-2T182).

When Sayers began working for the Township, he observed the inefficiency of the manual fuel system. Fuel could not be dispensed unless the Lakeside Avenue garage was opened, police vehicles were being deadlined and record keeping was inadequate (2T178-2T179, 2T182-2T183). He also observed that municipal employees, including police, were pumping their own gas (2T179-2T180). Consequently, he decided to implement the same automated system that Essex County used (2T182, 2T184).

Under the new automated system, power to the fuel pumps is always on and fuel can be dispensed anytime of day, each day of the year (2T8, 2T12, 2T116, 2T183, 2T199-2T200). An electronic keypad provides access to the fuel dispenser (R-1(d); 1T77, 1T99, 2T27). The person pumping the gas, typically the driver of the vehicle, is responsible for entering the vehicle identification number, the odometer reading, a personal identification number and the pump number into the keypad in order to gain access to the dispensing system (1T24, 1T44-1T45, 1T77, 1T79, 1T99). Once the information is entered, the fuel pump will operate and dispense gas. With the new system, it is possible for the driver of the vehicle to enter the required information into the keypad to turn the fuel dispenser on and still have someone else, such as a mechanic, physically pump the gas into the car (2T98-2T99, 2T101). All data is stored electronically. Reports regarding fuel inventory and vehicle maintenance can be quickly and easily

produced from the new system (2T12-2T13, 2T49, 2T51). The new system more accurately tracks who is dispensing fuel into which municipal vehicle, the quantity of fuel taken and the frequency in which this is done (2T12-2T13, 2T48-2T49, 2T182-2T184).

Under the new system, police officers are required to refuel their vehicles (1T151, 2T194). Since the implementation of the new system in 2004, there is no longer a problem with deadlining vehicles because of unavailability of fuel (2T116, 2T200).

12. The electronic automated fueling system was implemented in August/September of 2004. Before implementing the automated system, Sayers discussed the idea with the PBA. The PBA indicated that it did not want to be required to do the refueling (1T157-1T159, 2T184, 2T197). It has safety concerns for its members noting that civilians are prohibited by law to pump their own gas at commercial establishments in the State of New Jersey (1T90, 2T131-2T132). Plus, should fuel accidentally spill on an officer while pumping, he would have to remain in the same clothing until the end of his shift (1T54).

The subject of officers doing their own fueling came up again during an interest arbitration proceeding in or around March, 2003. The PBA wasn't interested in discussing it at the time and the memorandum of agreement entered into by the parties to settle their contract does not address the issue (J-3; 1T30-1T33, 2T184-2T185, 2T194-2T195). Though the subject was

discussed on more than one occasion, PBA never agreed to have its members pump their own gas (1T157-1T159, 2T197).

13. After the automated fueling system was implemented, the PBA filed a grievance with Police Chief James Abbott on or about September 9, 2004 (J-6; 1T42, 2T157). The grievance contained several representations such as a civilian employee would be called in off-duty to gas patrol cars, that pumping gas does not fall within the Civil Service job description for police officers and that the Township had transferred work from one union to the PBA without negotiating with either union (J-6). In his written reply to the grievance, Chief Abbott did not challenge the statements contained in the grievance, but rather indicated that he was forwarding the grievance to the mayor and business administrator for their review (J-6; 2T159-2T160). It was not his intention to indicate that he agreed with the contents of the grievance when he did not attempt to refute each sentence of the grievance (2T167, 2T169).

14. There is no significant savings to the Township in overtime pay since the institution of the automated system. Mechanics are still called in to work on weekends and holidays to service and repair vehicles and perform their other duties as they always had in the past (1T102, 2T85-2T86). Also, there has been no reduction in the Township workforce resulting from the automated system (2T60).

ANALYSIS

The PBA argues that the Township violated 5.4a(1) and (5) of the Act when it unilaterally changed the past practice of having civilian garage employees refuel police vehicles to requiring police officers to refuel them. It contends that pumping gas is not incidental to normal police duties and is not comprehended by the job description of police officer. The PBA asserts that the pumping of gas is an extra duty which is a mandatorily negotiable subject of employment.

The Township, on the other hand, disputes that a consistent past practice exists. It maintains that police have pumped their own gas at the Lakeside Avenue garage for years and that the changes generated by the implementation of the automated fueling system are insignificant. The Township contends that the refueling of police vehicles is incidental to and comprehended by the job of a police officer and is therefore not mandatorily negotiable. The Township further asserts that it has a managerial prerogative to change the fueling system for reasons of efficiency, accountability and to promote public safety.

For the reasons that follow, I find that the Township violated the Act by requiring police officers to pump their own gas when mechanics were available.

N.J.S.A. 34:13A-5.3 requires public employers and majority representatives to negotiate over "terms and conditions of

employment." This section also prescribes that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Not all employment conditions require negotiations. In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire employees.^{4/}

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 or 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 policy-making powers, the item must always remain within managerial prerogatives and

^{4/} The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16(e) (4) provides for a permissive as well as a mandatory category of negotiations. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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]

As a general rule, the assignment of duties unrelated to an employee's job classification is mandatorily negotiable. See, e.g., In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Somerset Raritan Valley Sewage Auth., P.E.R.C. No. 97-49, 22 NJPER 403 (¶27220 1996); Long Branch Bd. of Ed., P.E.R.C. No. 93-8, 18 NJPER 403 (¶23182 1992); Borough of Butler, (Butler I) P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987); Kearny Tp., P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Parties negotiate over compensation for a position given the amount, nature and difficulty of the work required. Protection against the imposition of unrelated and out-of-title duties protects the integrity of the equation between the negotiated salaries and the required work. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Maplewood Tp., P.E.R.C. No. 87-80, 23 NJPER 106 (¶28054 1997), Somerset Raritan Valley Sewage Auth. Such protection resembles the regulatory protection granted Civil Service employees against having to perform out-of-title work. N.J.S.A. 11A:3-1; N.J.A.C. 4A:3-3.4; Maplewood Tp.

Employers do, however, have a non-negotiable right to assign new duties if they are incidental to or comprehended within an

employee's job description and normal duties. See, e.g., Maplewood Tp.; City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982); Mercer Cty. Park Comm'n, P.E.R.C. 81-93, 6 NJPER 491 (¶11250 1980).

Neither party has submitted the results of a DOP classification appeal or desk audit. The results would have been helpful in determining whether the refueling of vehicles is contemplated within the DOP job description of police officer. In the absence of such guidance, a brief review of related Commission case law is instructive.

In Mercer Cty. Park Comm'n, the Commission found that a police chief had a prerogative to require police officers to check the oil in their vehicles before going on patrol and change flat tires when maintenance employees were not available. In reaching that conclusion, the Commission balanced the relatively minor work load implications of checking the oil and changing a flat tire against the objective of avoiding costly maintenance and keeping cars available for duty.

In Borough of Butler (Butler I), the Commission held that the maintenance of police vehicles beyond simply checking fluid levels and tire pressure is non-police work and mandatorily negotiable. It also stated that a provision requiring police to

check oil, tires and vehicle lights during holidays, weekends and in the absence of a mechanic is not mandatorily negotiable. In Borough of Butler (Butler II), I.R. No. 90-4, 15 NJPER 472 (¶20192 1989), a Commission Designee found that filling a patrol car with gasoline is non-police work which does not place limitations on the governmental mission of providing police services. He did not rule whether the assignment of refueling to a police officer was a mandatory or permissive subject of negotiations.

In determining the circumstances in which a public employer would have a prerogative to require police officers to maintain patrol vehicles, the Commission has considered the availability of mechanics to do the work a material factor. Assessing Commission precedent regarding police work and vehicle maintenance, I infer that anything more than simply checking fluids and tire pressure when mechanics are available is "extra non-police duties" and mandatorily negotiable. Borough of Butler (Butler I). In this case, officers can be required to monitor the level of fuel in their patrol cars, but it would be an extra non-police assignment to require them to actually do the fueling when mechanics are available.

The Township argues it has a prerogative to assign police officers the duty of pumping their own gas. It maintains that the change to an automated system was based on valid management

concerns such as having police cars available for patrol, fuel inventory control and accountability of its employees. It relies on Commission case Monroe Tp. Bd of Ed., P.E.R.C No. 85-6, 10 NJPER 494 (¶15224 1984).

In Monroe Tp. Bd. of Ed., the Board of Education sought to restrain the arbitration of a grievance filed by the Education Association on behalf of school bus drivers. The grievance alleged that the Board changed a longstanding past practice when it required the bus drivers, rather than mechanic's helpers, to fill up their buses with gas. The grievance cited health and safety concerns. The transportation maintenance services had moved to a new garage and the Board instituted a mechanical security system for the dispensing and recording of gasoline. The Board asserted a non-negotiable prerogative to make this policy change. The Commission agreed with the Board ruling that the Board had a non-negotiable managerial prerogative to assign bus drivers the duty of pumping gas into their buses. The Commission also held, however, that severable issues related to employee health and safety are mandatorily negotiable and arbitrable.

Here, unlike Monroe Tp. Bd. of Ed., we are dealing with police officers, not school bus drivers. I will not venture to guess all of the duties incidental to and comprehended by the job of school bus drivers. Also, the Commission issued the two

Borough of Butler decisions after it had issued its decision in Monroe Tp. Bd. of Ed. The Commission had the benefit of Monroe Tp. Bd. of Ed. but nevertheless made the distinctions drawn in the Borough of Butler decisions concerning police duties and vehicle maintenance. Simply stated, I find the Borough of Butler decisions more on point and controlling.

Under the facts of this case, I fail to see why the assigning of the fueling of vehicles to police officers when mechanics are available is a non-negotiable subject. No preemption arguments have been presented. The pumping of gas intimately and directly affects the work and welfare of police officers raising health and safety concerns. Negotiations on this subject would not significantly interfere with the exercise of inherent management prerogatives or place substantial limitations on government's policy making powers.

The Township's concerns about accountability, inventory control, vehicle maintenance, good record keeping and avoiding the deadlining of vehicles can all be preserved and protected under the new system. As long as the driver of the vehicle, in this case a police officer, is responsible for punching into the system the required information, the Township's management interests will not be compromised by a mechanic physically putting in and removing the gas dispenser nozzle. The police officer entering his personal identification number into the

system can still be held responsible for the amount of fuel dispensed and the frequency of fill ups. With the vehicle number and odometer reading entered, the Township is insured that the fuel is going into an authorized vehicle, presumably for municipal purposes, and can generate vehicle maintenance reports. When mechanics are not at the Lakeside Avenue garage, as in the past, police officers could be required to do the fueling themselves. It has always been within the discretion of the police supervisor to require officers to refuel rather than deadline a vehicle. Under the new system, officers have the ability to gas up at the Lakeside Avenue garage instead of exclusively refueling at the fire stations when mechanics are unavailable. Accordingly, I find that requiring police officers to pump their own gas when mechanics are available to do so is a mandatory subject of negotiations.

The PBA contends that the Township violated the Act by unilaterally changing the parties' past practice of having civilian garage employees refuel police vehicles and transferring the responsibility to police officers. The Township argues that there was no uniform, consistent past practice of civilian garage employees pumping the gas for police officers prior to the institution of the automated fueling system. It maintains that both mechanics and police officers did the refueling at the Lakeside Avenue garage and police officers did the refueling at

fire stations when the mechanics were unavailable at the discretion and direction of police superiors.

In Middletown Tp. P.E.R.C. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000), the Commission discussed three types of cases it has generally seen involving allegations that an employment condition has been changed. The instant case fits into the second category described in Middletown Tp.:

. . . (2) cases where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change;

. . . Such a change triggers the duty to negotiate under section 5.3. As stated in Sayersville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment . . . even though that practice or rule is not specifically set forth in a contract. . . . Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

Thus, unlike in the first type of case, the representative need not show an actual contractual entitlement or a binding past practice. Indeed if an entitlement or binding past practice could be shown, what would be left to negotiate? To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment

condition without first negotiating. [Id. at 29-30]

The mechanics at the Lakeside Avenue garage initially pumped gas for police officers. Over time, some police officers voluntarily fueled their vehicles, the extent of which is unclear. Before the automated system was implemented, officers were not required to pump gas when mechanics were on-duty at the garage. The only time police officers were directed to do the fueling themselves was when the mechanics were unavailable and at the discretion of police supervisors.

The implementation of the automated system changed all that. Police officers are now required to do the fueling themselves at all times. This represents a change in an existing working condition, which requires negotiations. While the parties discussed the change on numerous occasions, they did not negotiate over it or negotiate the subject to impasse. The Township unilaterally implemented the new system believing it had the prerogative to do so. I disagree.

The Township is not bound to maintain the practice. It is simply required to negotiate before changing it. See, Middletown Tp.

Based on the above, I find that the Township violated subsection 5.4a (5) and derivatively (1), when it unilaterally assigned police officers the duty of pumping their own gas at times in which civilian garage employees were available to do so.

RECOMMENDATION

I recommend that the Township restore the status quo ante by rescinding the requirement that police officers refuel their own vehicles when mechanics are on duty at the Lakeside Avenue garage. The officer shall remain responsible for entering the required information into the fueling system in order to turn on the fuel dispensers.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. The Township of West Orange cease and desist from:

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

2. Refusing to negotiate in good faith with the PBA concerning terms and conditions of employment of its members, specifically by requiring police officers to pump their own gas without negotiations.

B. That the Township take the following affirmative action:

1. Rescind the requirement that police officers refuel their own vehicles when mechanics are on duty at the Lakeside Avenue garage.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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



Perry O. Lehrer
Hearing Examiner

DATED: April 10, 2008
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 April 21, 2008.



NOTICE TO 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 police officers in the exercise of the rights guaranteed to them by the Act.

WE WILL cease and desist from refusing to negotiate in good faith with the PBA concerning terms and conditions of employment of its members, specifically by requiring police officers to pump their own gas without negotiations.

WE WILL rescind the requirement that police officers refuel their own vehicles when mechanics are on duty at the Lakeside Avenue garage.

Docket No. CO-2005-230

Township of West Orange
(Public Employer)

Date: _____

By: _____

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, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372