

H.E. NO. 2015-10

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

In the Matter of

STATE OF NEW JERSEY  
(JUVENILE JUSTICE COMMISSION),  
Respondent,

-and-

Docket No. CO-2011-070

POLICEMEN'S BENEVOLENT ASSOCIATION  
LOCAL 105,  
Charging Party.

**SYNOPSIS**

A Hearing Examiner recommends that the State of New Jersey, Juvenile Justice Commission (JJC) violated 5.4a(1) and (5) of the Act by unilaterally instituting a mandatory on-call scheduling policy for JJC parole officers without negotiating with the officers' majority representative, the Policemen's Benevolent Association, Local 105 (PBA). The PBA filed an unfair practice charge alleging the JJC violated the Act by refusing to negotiate over compensation for being on-call under the on-call policy, as well as over the scheduling and allocation of on-call duties among parole officers. The Hearing Examiner found that while the JJC had a managerial prerogative to assign on-call duty, it was required to negotiate with the PBA over compensation for being on-call, as well as other impact-related issues arising out of the policy. The Hearing Examiner found that the JJC failed to negotiate in fact over these impact related issues and recommended ordering the JJC immediately negotiate over these issues. While recognizing that the Commission ordinarily will restore the status quo when an employer unilaterally changes terms and conditions of employment, the Hearing Examiner declined to do so here, as there was ample, credible testimony to support the position that restoration of the old, voluntary on-call procedures created public safety concerns regarding response times to juvenile escapes and that the public interest would not be served by restoration of the status quo under these circumstances.

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.

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Appearances:

For the Respondent,  
John Jay Hoffman, Acting Attorney General  
(George Cohen, Deputy Attorney General)

For the Charging Party,  
Loccke, Correia, Limsky and Bukosky, attorneys  
(Marcia J. Tapia-Mitolo, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On August 13, 2010, the New Jersey State Policemen's Benevolent Association, Local No. 105 ("PBA") filed an unfair practice charge against the State of New Jersey, Juvenile Justice Commission ("JJC"). The charge alleges the JJC violated section 5.4a(1) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations

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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; and (5) Refusing to negotiate in good faith with a majority representative of  
(continued...)

Act; N.J.S.A. 34:13A-5.1 et seq. ("Act"), by unilaterally instituting on-call procedures for JJC parole officers without negotiating over the impact of those procedures on officers' terms and conditions of employment. The charge also alleges the JJC refused to negotiate upon demand over the on-call procedures.

On August 3, 2011, the Deputy Director of Unfair Practices issued a Complaint and Notice of Hearing on the allegations of PBA's charge. The JJC filed an Answer to the Complaint on September 1, 2011, denying any violation of the Act. On February 10, 2012, the JJC filed a motion for summary judgment and a request with the Commission Chair to stay a hearing scheduled for February 14, 2012. The Chair denied JJC's request for a stay. On November 19, 2012, the Commission denied the JJC's motion for summary judgment. The Commission found there were material factual issues over whether or not the JJC negotiated with the PBA over compensation and over the scheduling and allocation of on-call duties among qualified officers. State of New Jersey (Juvenile Justice Comm'n), P.E.R.C. No. 2013-34, 39 NJPER 215 (¶71 2012).

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1/ (...continued)  
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."

Hearing Examiner Perry O. Lehrer conducted a hearing on February 14, 2012, at which the parties examined witnesses and presented exhibits. After Mr. Lehrer's appointment by the Commission to the position of Deputy Director of Conciliation and Arbitration, the case was reassigned to me for hearing on February 21, 2013. I conducted a second day of hearing on May 6, 2014, at which the parties examined witnesses and presented exhibits. The parties filed post-hearing briefs on July 15 and 16, 2014.

Upon the record, I make the following:

**FINDINGS OF FACT**

1. PBA Local 105 is the majority representative of permanent and provisional parole officers and corrections officers employed in the Department of Corrections, the JJC, and the State Parole Board ("Board") (2T119-120; J-1)<sup>2/</sup>. PBA Local 326 operates under the auspices of Local 105 and represents parole officers in the JJC and Board (2T120). PBA and JJC are parties to a collective negotiations agreement with a term from July 1, 2007 through June 30, 2011 ("CNA") (J-1). The PBA and JJC negotiated a successor CNA covering the period from July 1, 2011 through June 30, 2015 (2T114-115; J-11).

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<sup>2/</sup> "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s); "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits; and "J" represents joint exhibits.

2. Brian Georgeson is a PBA Local 105 unit member and labor representative. He has worked as a parole officer for the JJC since 2004 and currently works for the JJC as a senior parole officer (1T26-27). As a PBA representative, Georgeson handles labor relations matters on behalf of PBA unit employees, including grievance and disciplinary hearings. He has served as a PBA labor representative since 2009 (1T28-29).

3. Craig Pfeifer is a senior parole officer for the Board and has worked for the Board since 1997 (1T121-122). He also served as PBA Local 326 President from June 2009 through September 2010 (1T122-123). As PBA President, Pfeifer represented both Board and JJC parole officers in disciplinary matters and collective negotiations with the State (1T123).

4. Thomas Flanagan served as the Director of Parole for the JJC from 2009 through February 2011 (2T15-16). As Director, Flanagan's responsibilities included enforcing a variety of restrictions on parolees who served juvenile sentences and managing JJC parole officers and staff who are responsible for enforcing those restrictions (2T16-17). As a condition of their parole, parolees may be required to attend school, drug or alcohol counseling and may be restricted in where they can go, such as being restricted in travel outside their home (2T17). JJC parole officers enforce these and other restrictions on juvenile parolees (2T17).

5. On or about June 7, 2010, Flanagan conducted a meeting with Georgeson and Pfeifer to discuss a change in JJC policy on setting work schedules for JJC officers during "non-traditional" hours (1T30; J-4). "Non-traditional" hours are weekday evenings from 5:00 p.m. to 11:00 p.m. and weekend hours from 8:30 a.m. to 5:00 p.m. (1T58; J-7). The meeting was requested by Flanagan (1T30). Other attendees at the meeting were Steve Adams, then Assistant Director of Parole at the JJC; Felix Mickens, Deputy Director of the JJC; Desiree Strother, a PBA unit member, and several Assistant District Parole Supervisors ("ADPS") (1T30-31, 1T125).

6. Prior to the meeting, JJC officers were required to submit schedules from month to month that contained at least twenty percent (20%) non-traditional hours (1T32). Officers were permitted to make their own schedules from month to month subject to this 20% restriction (1T32). At the June 7 meeting, Flanagan stated that the JJC intended to change that practice by giving management the authority to set work schedules for officers, including non-traditional hours (2T32). The JJC implemented this change in scheduling on June 19, 2010 (J-4; 1T35).

7. After the meeting, Georgeson testified that he, Pfeifer and Flanagan had a "sidebar" discussion in Flanagan's office, during which Flanagan stated that he submitted an on-call scheduling policy to the State Attorney General's office for approval and

that on-call schedules "...will be forthcoming" (1T35-37).

Georgeson also testified that the sidebar discussion lasted a few minutes, during which Flanagan asked for the PBA's position on an on-call policy (1T37). Georgeson responded that he needed to see the proposed policy first before stating the PBA's position (1T37-38). Georgeson was not provided the policy at the meeting (1T37-38).

Pfeifer testified that the June 7 meeting was called to discuss work scheduling changes and PBA's concerns about the impact of those changes on unit employees (1T126). According to Pfeifer, on-call schedules were brought up by Flanagan as an "after-thought" at this meeting (1T126). Pfeifer characterized the brief conversation between himself, Georgeson and Flanagan about an on-call schedule as follows (1T126-127):

**Question:** Okay. And do you remember what was discussed with regard to the on-call schedule [at the June 7 meeting]?

**Answer:** To the best of my knowledge, I think they were discussing the implementation of on-call.

**Question:** Uh huh.

**Answer:** And myself and Brian [Georgeson] had expressed our objection to that.

**Question:** Uh huh.

**Answer:** We felt that needed to be

negotiated because that was a violation of the contract.

**Question:** Okay. Was that a pretty-was the discussion pertaining to the implementation of an on-call policy a fairly short conversation between Management and [the] PBA?

**Answer:** yeah, it really didn't the impression that I got from Mr. Flanagan was that it didn't need to be negotiated, that they were going to go through with this with or without the Union's approval.

Desiree Strother is a senior parole officer for the JJC and has worked for the JJC since 1996 (1T158). She also attended the June 7 meeting as a PBA Local 105 member (1T160). Strother testified that during the June 7 meeting, management discussed with the PBA the scheduling of non-traditional hours for officers and how scheduling of these hours would be determined (1T162-163). Management presented a non-traditional schedule to the PBA and received feedback from the PBA about the proposed schedule. Strother testified that at no point during the meeting was a on-call policy or schedule discussed (1T163). She also testified she did not attend any "side bar" or subsequent meeting with Flanagan or any other management representative to discuss on-call scheduling (1T163-164).

Pfeifer and Strother were sequestered at the hearing and their testimony about the June 7 meeting was unrebutted and



consistent with Georgeson's testimony.<sup>3/</sup> I credit all three witnesses' testimony.

8. On June 22, 2010, Georgeson and Flanagan had a telephone conversation and discussed the forthcoming on-call policy (1T44-45). Between the June 7 meeting and the June 22 telephone conversation, Flanagan and Georgeson had only one "very brief" conversation about the on-call policy (1T45). During their telephone conversation, Georgeson stated that PBA Local 326 was seeking compensation for on-call duties and that it needed to see the on-call policy to begin the process of resolving this issue with the JJC (J-3).

Following the conversation, Georgeson sent an e-mail to Flanagan on June 22 referencing their conversation of the same date (1T45; J-2). Georgeson noted in the June 22 e-mail that while Flanagan had requested the PBA's position on the forthcoming on-call policy, Georgeson could not provide him with the PBA's position until he had an opportunity to review the on-call policy and understand how the policy would impact unit employees (1T46; J-2).

9. In response, Flanagan sent an e-mail to Georgeson on June 23, writing that the on-call policy was a "moot point" until an on-call schedule was devised and provided by the PBA (1T47; J-2).

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<sup>3/</sup> Georgeson was the first witness to testify at the February 14, 2012 hearing and was designated by the PBA as a resource person (1T17-18).

Flanagan also noted in the e-mail that he had asked Georgeson and Pfeifer for some kind of on-call schedule at the June 7 meeting and asked the PBA to advise him in writing of an on-call schedule (1T47; J-2). I infer that by referring to the on-call policy as a "moot point," Flanagan meant that he was not inclined to provide the policy to the PBA unless and until the PBA devised and provided an on-call schedule.

10. By e-mail dated June 29, 2010, Georgeson responded to Flanagan's June 23 e-mail and expressed the view that he needed specific information about the forthcoming on-call policy in order to take a position on behalf of PBA about the policy (1T50; J-3). Georgeson wanted to review the on-call policy to understand what JJC's expectations were of officers with respect to hours of work while on call, compensation for being on call, and how much time officers would have to respond to on-call situations (1T48-49). Georgeson also asserted that any change in working conditions resulting from the on-call policy should be negotiated (1T50; J-3).

11. In response to Georgeson's June 29 e-mail, Flanagan stated in a June 30 e-mail that Georgeson and Pfeifer had "conflicting positions" about the on-call policy (1T50-51; J-3). Flanagan explained in the e-mail that Pfeifer had asserted that the on-call policy would have a significant impact on JJC officers, while Georgeson wanted to see the policy before passing judgment

on it (1T50-51; J-3). Flanagan did not explain why he could not provide the policy to Georgeson (1T50-51; J-3). Flanagan also acknowledged having a conversation with Pfeifer on June 29, during which Pfeifer requested negotiations over compensation for performing on-call duties (J-3).

Georgeson reiterated his position in response to Flanagan that any change in working conditions resulting from the policy must be negotiated with the PBA (1T50-51; J-3).

12. After the e-mail exchange between Georgeson and Flanagan on June 22, 29, and 30, 2010, no discussions or meetings occurred between the PBA and JJC management officials regarding the forthcoming on-call policy (1T51-52).

13. By letter dated June 30, 2010, Lynsey A. Stehling, counsel to the PBA, notified Henry Oh, then an Office of Employee Relations ("OER") representative, of the PBA's demand to negotiate with the JJC over the forthcoming on-call policy (1T52; J-5). Stehling asserted in the letter that, "...on-call duties are clearly a negotiable term and condition of employment which must be negotiated prior to the implementation of the same" (J-5).

14. By letter dated July 19, 2010, then OER Director David Cohen responded to the PBA's demand to negotiate (1T53; J-6). Cohen wrote in the July 19 letter that the JJC intended to create a rotational on-call system to meet certain operational needs (J-

6). Cohen wrote, in pertinent part:

[T]he Office intends to create a rotational on-call system to address the need for a professional and efficient system which assures the prompt pick up and return to custody of a juvenile offender when circumstances warrant. Officers will be assigned this duty approximately once every four to five weeks. During the on-call duty, officers will be provided with a Commission vehicle to take home in the event that they have to respond to an after hours call. On-call time will not be considered working time and officers will be compensated only when responding to an actual emergency.

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The establishment of this [on call] program is consistent with N.J.A.C. 4A:3-5.7(a) and, therefore, collective negotiations, relating to the establishment of such a program, is not required. Accordingly, please accept this letter as notice that the [JJC] intends to adopt and implement an on-call schedule with adequate notice to your members, as required by the contract between PBA 105 and the State. The [JJC's] labor relations unit will facilitate a meeting with PBA 105 membership where the on-call schedule will be explained.

[J-6]

Cohen did not indicate in the letter that the State was willing to negotiate over compensation for on-call work nor the scheduling and allocation of on-call duties among JJC officers (J-6).

15. On August 25, 2010, Flanagan and Mickens signed and approved

Policy 10JPTS:01.01, entitled "Parole Officer Work Schedule" (hereinafter referred to as "August 2010 Policy" or "Policy")(J-7). The August 2010 Policy went into effect on August 27, 2010 (2T30, 2T60; J-7).

Section II(C) of the Policy provides that parole officers "will be required to work a weekly on-call schedule on a rotating basis" (J-7). Section III(F) states that parole officers "shall be required to be on-call for one week at a time on a rotating basis" (J-7). Under Section III(G), the on-call schedule is set to begin at 5:00 p.m. Friday and end the following Friday at 8:00 a.m. (1T58-60; J-7). Sections III(H) and (N) of the Policy also provides that officers are "required to answer the on-call phone during their scheduled On-Call Week and manage any and all after hour events," while also permitting officers to exchange on-call days with another officer on a "voluntary exchange time agreement" (J-7).

16. Georgeson testified that he did not have any communications with Flanagan regarding the impact of the August 2010 policy on officers' terms and conditions of employment and that compensation and other impact related issues regarding the Policy were never discussed (1T47-48). He further testified that he did not receive a copy of the Policy prior to its adoption by Flanagan on August 25 (1T48). Georgeson received the Policy on August 25, 2010 (1T57).

Pfeifer testified that, after the "sidebar" discussion at the June 7 meeting, he recalled having only one other conversation with Flanagan about the on-call policy prior to its adoption (1T129). He describes that conversation as follows (1T129-130):

**Question:** Okay. And do you remember having any subsequent conversations with Director Flanagan regarding the Union's position regarding on-call?

**Answer:** I believe I had one other conversation with Mr. Flanagan--

**Question:** Okay.

**Answer:** - where I mentioned that the Union, again, was looking for compensation and for changes in the policy because of the negative effects on the officers.

**Question:** Okay. And do you remember what his response was with respect to the Union's position regarding implementation of an on-call policy?

**Answer:** Pretty much that compensation was not even going to be looked at. An again, if this was our final offer they were just going to move forward with what they had.

**Question:** Okay. So did you believe, based on your conversations with Director Flanagan, that the JJC was willing to negotiate with the PBA over issues, and you know, work-related issues pertaining to an on-call

policy?

**Answer:** No, not at all.

Flanagan testified he had spoken with Georgeson "on numerous occasions, trying to negotiate how we could formulate [an on-call] program" that would address the need to have officers respond to situations arising during non-traditional hours (2T28). He also wanted Georgeson's feedback and input on how to lessen the impact of a on-call program on PBA members (2T28). On cross-examination, Flanagan did not recall when these meetings with Georgeson occurred (2T47). Flanagan testified he provided the August 2010 Policy to the PBA for review prior to its adoption, but was not "100 percent sure" whether he received comments back from the PBA on the Policy (2T52). He also testified that the Policy was, in part, the by-product of feedback he solicited from individual officers during informal discussions or during staff meetings with officers' supervisors, where he would explain the new on-call procedures (2T49-52). On cross-examination, Flanagan testified about his discussions with the PBA regarding the on-call policy and procedures and characterized those discussions as follows:

**Question:** You indicated that you did meet and have some discussions with the PBA regarding on call?

**Answer:** Right.

**Question:** Was that in response to any kind of demand for negotiations for the on-call

duty or was that more as an informal meeting that you had?

**Answer:** I don't know what the demand for negotiations means, but clearly I was negotiating with him [Georgeson] about parameters of which I was looking for was on-call. Were they informal meetings? I don't know. I don't think you can say it was informal. It was very specific about the issues that we were talking about. Maybe I happened to have been in Atlantic City that day and Brian [Georgeson] was there. And I would say can I talk to you about on-call or I may stop down and see him to talk about it. And we talked on the phone as well. But clearly, I was trying to--yeah, I was trying to negotiate how I could get coverage. And I wanted their input. It affects them. I wanted to know their ideas. As a matter of fact, most of this on-call policy is a result of their input. The switching, the how long they wanted to be on-call. I shouldn't say they wanted to be. Maybe I'm misspeaking there.

But how long. Being on-call once every seven weeks. Some of the people like that because it was once every seven weeks. Some suggested it should be a daily schedule where I'm on-call for Monday, somebody is on-call for Tuesday, different people. Or I'm on-call every Monday for whatever number of weeks. There was a number of different things that they offered up as suggestions, and it seems like we had a lot of different suggestions. And I tried to come up with what I thought was the best.

[2T49-50]

Flanagan did not testify that he had discussions with Georgeson or other PBA representatives concerning compensation for on-call duties (2T50-51). I do not find that Flanagan engaged in negotiations with the PBA over the on-call policy in



response to a demand to negotiate over its impact on parole officers' terms and conditions of employment. Instead, I find that Flanagan's discussions with Georgeson and other officers were informal, sporadic, and not responsive to a negotiations demand over compensation or other impact-related issues.

I credit Pfeifer's and Georgeson's testimony and find that the PBA did not receive a copy of the August 2010 Policy prior to its adoption. Pfeifer's and Georgeson's testimonies are consistent and corroborated by the e-mails exchanged between Georgeson and Flanagan on June 22, 23 and 29, 2010 (J-2, J-3). I also credit Georgeson and Pfeifer's testimonies regarding the lack of negotiations about the August 2010 policy and find that the JJC did not negotiate with the PBA regarding compensation or other impact-related issues arising out of the Policy prior to its adoption on August 25, 2010.

17. On cross examination, Flanagan testified about his position on compensation for unit employees being on-call:

**Question:** Now, prior to putting out the policy for on call, did you provide that policy to the PBA for review?

**Answer:** Yes.

**Question:** Do you recall whether you got any comments back from the PBA as far as things that they believe should be negotiated?

**Answer:** I want to say yes, but I am not 100 percent positive. The

biggest item that they thought should be negotiated to me was the fact that they wanted to be compensated to be on call. Whether they got a call or not, they wanted some type of compensation for that week that they, in fact, were on call.

**Question:** What was your response to that request, to be compensated for being on-call for that week?

**Answer:** My response was that that's in my opinion. I'm not a lawyer. That that was a contractual issue that had to be negotiated by contract, that I had to abide by the contract for any compensation for the officers.

**Question:** So you believe that it was a negotiable item to be compensated for that week of on call?

**Answer:** I believe-I don't know whether it had to be negotiated. There was no provision in the contract for it. They wanted to be paid for being on call. I didn't see it. Nobody in my staff knew about--I mean, in JJC had any recollection. I thought that that was something we'd be negotiating during the contract.

[2T52-53]

I infer from this testimony that Flanagan believed compensation for on-call duties was not covered by the parties' CNA. I also find that this testimony is susceptible to two possible interpretations: (1) Flanagan believed negotiations over compensation did not need to take place at that time because the

CNA was still in effect, or (2) Flanagan believed he did not need to negotiate over compensation for on-call duties.

18. Prior to the August 2010 policy, parole officers were not required to respond to situations involving juvenile delinquents if they occurred outside their regularly scheduled shift (1T55, 2T21-22, 2T61). When a situation involving a juvenile arose during non-traditional hours, an ADPS or an officer in the Parole Response Unit ("PRU") would attempt to contact the officer assigned to the parolee's case and ask that officer to respond to the situation (2T19-21, 2T61). If contacted, the assigned officer could refuse to respond to the situation (2T61). If an assigned officer could not be contacted or was otherwise unavailable, an ADPS or PRU officer would continue to contact parole officers until enough officers volunteered to respond to the situation (1T55, 2T21, 2T61). Situations that required responses from JJC parole officers included juvenile parolees escaping JJC residential programs or facilities, parolees who violated the restrictions on where they can go as monitored by an electronic ankle bracelet, and picking up and transporting parolees who were in the custody of a local police department (1T71, 2T20-21, 2T61).

19. The practice of responding to after-hours situations prior to the August 2010 policy was "very sporadic" and "did not work well" (2T23, 2T61).

20. Robert Mercado is a Regional Parole Supervisor ("RPS") with the JJC and has worked for the JJC since 1997 (2T58). Between February 2011 and March 2013, Mercado served as the Acting Director of Parole for the Office of Juvenile Parole and Transition Services (2T67). He is familiar with the practice of responding to after-hours situations prior to August 2010 and actively participated in the formulation and administration of the August 2010 Policy (2T61-62, 2T76-79). Mercado did not meet with the PBA to discuss compensation or other impact-related issues prior to the Policy's implementation (2T87).

21. Mercado testified that parole officer supervisors were unable to contact and deploy officers to respond to emergent matters in a timely fashion under the pre-August 2010 practice (2T61-62). Under this practice, supervisors could not find an adequate number of officers to respond to emergencies such as juveniles escaping from JJC facilities (2T61-62). Mercado also testified that the delays in responding to juvenile escapes created public safety issues and concerns and put the juvenile escapee at risk as well (2T63). Mercado asserted that it was "imperative for us [the JJC] to insure that anyone who leaves the [JJC] facility" was "located, apprehended and returned to custody" (2T63).

Consistent with Mercado's testimony, Flanagan testified that the pre-August 2010 practice of responding to after hours

situations resulted in significant delays in responses by parole officers (2T23). Flanagan testified the situation regarding response times worsened after the JJC decided to "ground" state vehicles and revoke JJC officers' privilege of bringing work vehicles home (2T26).<sup>4/</sup> When that privilege was revoked, officers were required to leave state vehicles at their respective offices and, as a result, officers did not answer many calls after hours (2T26). As explained by Flanagan: "the lack of response [by officers] continued to grow to a point where I had already been told that they are not going to answer the phone because we took their cars away" (2T26-27). This practice and the non-responsiveness of officers prompted Flanagan to work on instituting a procedure that would ensure officers were available at night to respond to juveniles escaping JJC facilities (2T27).

Flanagan's and Mercado's testimony about the public policy concerns regarding the pre-August 2010 practice and the managerial need for a mandatory on-call procedure was unrebutted. I credit their testimony.

22. The administration of the August 2010 Policy led to a formal procedure for responding to after hours situations (2T30). Officers were scheduled to be available on-call for a one week period every six to seven weeks on a rotating basis (1T63, 2T30).

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<sup>4/</sup> According to Flanagan, the work vehicle privilege was revoked because state vehicles had "very high mileage" when officers were allowed to bring vehicles home (2T25-26).

Six officers and one ADPS were assigned to be on-call in a given week (2T64-65). The ADPS would supervise teams of three officers and deploy officers to respond to after hours situations throughout the State (2T64-65). While on-call, all officers were required to answer their work phones and respond to after hours situations as determined by their ADPS (J-7). If an on-call officer failed to answer his or her work phone or respond to an after hours situation, he or she could be disciplined (1T84). This system enabled the JJC to secure and insure an adequate number of officers responded to emergent matters in a timely manner during non-traditional hours (2T65).

23. Under the new on-call system, officers were required to be on-call from 5:00 p.m. to 8:30 a.m. Monday through Saturday and all day Sunday (1T62-63, 1T66-68). Typical on-call assignments included picking up and transporting parolees that have active warrants by local police departments, picking up and transporting parolees escaping JJC residential programs and facilities, and responding to electronic monitoring alerts for parolees violating travel restrictions (1T71). These assignments took officers anywhere from five to eight hours to complete (1T72, 1T142, 1T164).

24. Officers were required to start their regular shift at 8:30 a.m. after completing an on-call assignment, regardless of when the on-call assignment was completed (1T72-73, 1T165). In some

instances, officers were given an on-call assignment where they had to respond to a situation at 10:00 or 11:00 p.m., work on the assignment until 4:00-4:30 a.m., and begin their regular shift that same day at 8:30 a.m. (1T72-73). Strother completed an on-call assignment that lasted until 5:00 or 6:00 a.m. and was expected to work her regular shift that same day (1T165).

Officers on-call have slept in their offices or cars in these instances prior to the start of their regular shift (1T72-73).

25. Between August 27, 2010 and January 21, 2011, on-call officers were compensated at a minimum rate of two hours of overtime pay for physically responding to an on-call situation or responding to phone calls while on-call (1T79-80, 1T146; CP-2). On January 21, 2011, Flanagan e-mailed JJC management officials and wrote that, effective immediately, the two hour minimum overtime payment applied only to officers who physically responded to an on-call situation (1T79-80; CP-2). Effective January 21, officers were required to document minute by minute their telephone calls and provide adequate documentation to management for pre-approval before receiving compensation for telephone calls (1T79-80, 1T146; CP-2).

26. After January 21, an officer on-call who physically responded to a on-call situation received a minimum of two hours overtime compensation for the physical response, even if an assignment took less than two hours to complete (2T40, 2T69). If

assignments requiring physical responses lasted longer than two hours, an officer would be compensated at the contractual overtime rate of pay for the duration of the assignment (2T40). If the end of an on-call assignment coincided with an officer's regularly scheduled shift, he or she would get paid straight time for on-call work performed during his regular shift (2T40-41).

27. The method of calculating compensation for telephone calls differed from that of compensating officers for physical responses to on-call situations. An on-call officer who received a phone call that lasted longer than 15 minutes was guaranteed a minimum of one hour of overtime pay (2T41, 2T68-69). If a telephone call's duration was less than 15 minutes, he or she would be compensated minute by minute for the actual amount of time the call lasted (2T41, 2T68-69). Each minute of a call lasting less than fifteen (15) minutes needed to be documented and, if approved by JJC management, an officer would receive compensation for each minute of the call at the contractual overtime rate (2T41, 2T68-69).

28. Other than telephone calls supported by adequate documentation or physical responses to on-call situations, on-call officers did not receive compensation for being on-call (2T40). In at least one instance, an on-call officer was denied a request for compensation for reviewing and responding to text messages from his supervisor about an on-call situation (1T143-



145).

29. The CNA does not contain language referencing compensation for being on-call or on-call duties (J-1). Mercado and Flanagan believed the method of compensation adopted by JJC for telephone calls and physical responses to on-call situations was in accordance with the overtime provisions of the parties' CNA (2T39, 2T69). Georgeson interpreted the Agreement differently and filed a grievance challenging the method of compensation for on-call work (1T96-98). A JJC hearing officer denied the grievance on May 14, 2011 (1T96; CP-3).

30. The mandatory on-call procedures under the August 2010 Policy had a significant and disruptive impact on the personal lives of officers and their families (1T82-83, 1T146-147, 1T166-167, 1T175-176; CP-4). Various unit employees testified about the disruption to their personal lives and those of their families following implementation of the August 2010 on-call policy.

For example, Georgeson testified the new on-call policy made it difficult for him to participate in his son's weekend sports activities and otherwise plan events with his family on weekends (1T82-83). Georgeson also testified that officers are not permitted to leave New Jersey while on-call and cannot consume alcohol while on-call (1T83). Bohdan Orichowsky, a JJC parole officer since 1998, testified that the on-call policy restricted

his ability to participate in events and family functions on the weekends (1T146-147). Strother and another parole officer, John Budenas, testified that the on-call policy restricted their ability to plan and participate in family functions on the weekends, as well as complete evening educational programs and secure secondary employment (1T166-167, 1T191).

One JJC officer is a single parent who, when called to physically respond to an after hours situation, does not have a parent or grandparent available to watch her child (1T192). As a result, she has difficulty finding someone to watch her child, especially when receiving an unexpected call at 2:00 a.m. or 3:00 a.m. to respond to an on-call situation (1T192).

This testimony by unit employees concerning the personal impact of the August 2010 Policy was not rebutted. I credit their testimony.

31. Officers were permitted to switch with other officers for on-call coverage, but on occasion had difficulty obtaining coverage or getting supervisors' approval of a switching request (1T81).

32. By letter dated March 16, 2012, Robert Fagella, counsel to the PBA during collective negotiations for the 2011-2015 CNA, advised Jeffrey Corradino, attorney for the State during negotiations, that any future changes to on-call procedures for JJC parole officers should be negotiated first before being

changed (2T109-111; R-8). At a collective negotiations session held on March 20, 2012, the topic of on-call duties was broached and the PBA decided not to pursue the issue (2T112-114; R-9). On cross-examination, Henry Oh, from the Governor's Office of Employee Relations, an attendee at the March 20 session, acknowledged that the session and the PBA's decision to "drop" the issue occurred after the August 2010 Policy went into effect and after the PBA filed the instant charge (2T116).

#### ANALYSIS

The issue in this case is whether or not the JJC negotiated in good faith with the PBA over the impact of the August 2010 Policy before implementing it. The JJC contends and the PBA concedes that the decision to assign on-call duties to parole officers is a managerial prerogative (Rb9; CPb9). In this case, the Commission has determined that compensation for being on-call, along with the scheduling and allocation of on-call duties among qualified officers, are mandatorily negotiable subjects. State of New Jersey (Juvenile Justice Comm'n). Based on the record, the parties' submissions, and applicable law, I conclude that the JJC did not negotiate in good faith over the impact of the August 2010 Policy, and that JJC's refusal to do so violates section 5.4a(5) and, derivatively, (a)(1) of the Act.

Under Section 5.3 of the Act, an employer has a duty to negotiate with a majority representative before changing working

conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

[N.J.S.A. 34:13A-5.3]

Unilateral changes to working conditions "...undermines the employment relationship and violates the terms and goals of the Act." UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330, 332 (¶113 2009).

The employer's duty to negotiate over changes in working conditions encompasses two obligations: (1) the obligation to meet and confer with a majority representative about mandatory subjects of negotiations, and (2) the obligation to negotiate in good faith during those meetings and discussions. NLRB v. Katz, 369 U.S. 736, (1962); Ocean Cty. College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984); Rutherford Bd. of Ed., H.E. No. 88-30, 14 NJPER 73 (¶19027 1987)(final agency decision). In defining the duty to negotiate collectively, the Supreme Court of the United States explained:

[It is] the duty to meet and confer in good faith with respect to wages, hours and other terms and conditions of employment. Clearly, the duty thus defined may be violated without a general failure of subjective good faith: for there is no occasion to consider the issue of good faith if the party has refused even to negotiate in fact-- to meet or confer about any of the mandatory

subjects.  
[Katz, Supra, 369 U.S. at 742]

Similarly, a violation of section 5.4a(5) need not be based on a finding of subjective bad faith. Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶44 2005), recon. den. P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005), aff'd 32 NJPER 417 (¶172 App. Div. 2006). A public employer that unilaterally establishes a mandatorily negotiable term and condition of employment violates the Act regardless of its intent. Id.

The Act requires negotiations, not agreement, on mandatorily negotiable subjects. Piscataway Tp. Negotiations "require dialogue between two parties with an intent to achieve common agreement rather than an employee organization presenting its view and the employer considering it and later announcing its decision." Piscataway Tp., Supra, 31 NJPER at 103. Meetings, discussions or information sessions where an employer explains a proposed change in working conditions without soliciting a majority representative's consent to the change do not satisfy the negotiations obligation under the Act. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987) (Commission finds township did not meet its negotiations obligation by conducting information sessions about a forthcoming change in health insurance plans where employer did not solicit consent to change from union); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12

NJPER 737 (¶17276 1986), aff'd NJPER Supp.2d 185 (¶163 App. Div. 1987), certif. denied 111 N.J. 600 (1988) (Discussion between employer and teachers' union about compensation for an additional teaching assignment did not qualify as "negotiations" where the employer did not make counter-proposals on the subject and where discussions were limited to outlining why the employer believed the union's compensation demands were inappropriate), Pennsauken Tp., H.E. No. 93-9, 19 NJPER 24 (¶24011 1992), adopted, P.E.R.C. No. 93-62, 19 NJPER 114 (¶24054 1993) (Employer's invitation to union to provide input about a unilateral change in lunch procedures for unit employees did not satisfy employer's negotiations obligation). In addition, direct dealing with unit employees about proposed changes in working conditions is prohibited by the Act. Matawan-Aberdeen Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989)

Here, the JJC refused to meet and confer with the PBA over compensation and the scheduling and allocation of on-call duties among parole officers prior to adopting the August 2010 Policy. On June 7, 2010, more than two months prior to adopting the Policy, Flanagan announced to Georgeson and Pfeifer that an on-call scheduling policy was prepared and submitted to the State Attorney General's office for approval. During a brief discussion on June 7 and a brief telephone conversation on June 22, Georgeson repeatedly requested Flanagan provide a copy of the

forthcoming on-call policy in order to understand its impact on PBA unit employees and commence negotiations over impact-related issues. Flanagan thwarted PBA's attempt to assess and negotiate the impact of the Policy by denying Georgeson's requests to review the policy. These actions, along with the OER's express refusal on July 17 to meet and negotiate with the PBA over compensation for being on-call and other aspects of the Policy, constitute a refusal to negotiate in fact. The refusal to meet and confer with the PBA about the impact of the August 2010 Policy prior to its adoption is a violation of the Act, irrespective of whether the JJC acted in bad faith.

The JJC also implemented the August 2010 Policy without negotiating with the PBA over compensation for being on-call. Pfeifer credibly testified that, during his conversations with Flanagan on June 7 and June 29, Flanagan discussed the implementation of an on-call policy as something that could be done without the PBA's consent or approval and was not open to discussing additional compensation for on-call duties. Flanagan asserted in his testimony that compensation for being on-call was not covered by the CNA and that he did not need to negotiate with the PBA over compensation for on-call duties. Flanagan did not respond to Pfeifer's and Georgeson's requests to negotiate compensation in a manner conducive to dialogue or negotiations about the issue. In lieu of negotiating compensation for on-call

duty, Flanagan and Mercado unilaterally applied the CNA's overtime provisions in compensating on-call duty despite the absence of language in the CNA addressing this subject.

In its brief, the JJC contends that the implementation of its on-call policy was not mandatorily negotiable and relies on Hunterdon County, H.E. No. 85-12, 10 NJPER 539 (¶15250 1984), adopted at P.E.R.C. No. 85-63, 11 NJPER 29 (¶16014 1984) in support of this position. JJC's reliance on Hunterdon County is misplaced. That case is distinguishable from the present matter.

In Hunterdon County, a union representing sheriff's officers filed an unfair practice charge challenging the decision of the County Sheriff to institute a mandatory on-call schedule in place of a past practice where officers volunteered to respond to on-call situations as they arose. 11 NJPER at 29. The Commission held, under the circumstances of that case<sup>5/</sup>, that the "need to implement the on-call system in order to improve department efficiency outweighed the employees' interests in the old system's retention." Idid. The Commission also noted that the employer was willing to negotiate compensation and other aspects of the new on-call policy impacting officers. Idid. Moreover, the Hearing Examiner found that the union "was not precluded from

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<sup>5/</sup> In a footnote to its decision, the Commission expressed "no opinion on whether, under different circumstances, an on-call system might be mandatorily negotiable." 11 NJPER at



making a demand for additional compensation over and above that which already exists" and that "any refusal of the County to negotiate on an additional demand of the Association for compensation would be violative of Subsection (a) (5) of the Act." 10 NJPER at 540. Since the union did not demand negotiations over compensation and other impact-related issues, the Commission adopted the Hearing Examiner's recommendation to dismiss the union's complaint. 11 NJPER at 29.

Here, unlike the union in Hunterdon County, the PBA demanded negotiations over compensation for being on call on multiple occasions and clearly communicated the need to negotiate any changes in working conditions resulting from the on-call policy. The JJC refused to engage in negotiations over compensation and other impact-related issues pertaining to the on-call policy. That refusal, as asserted in Hunterdon County, violates section 5.4a(5) of our Act.

The JJC also contends that the PBA waived its right to negotiate over compensation for being on-call by deciding not to pursue the issue at a collective negotiations session on March 20, 2012. According to the JJC, the PBA implicitly accepted the method of compensation implemented by the JJC since August 2010 by entering into a 2011-2015 CNA with the JJC that contains identical overtime provisions to the 2007-2011 CNA. By agreeing to the 2011-2015 CNA and dropping the issue of compensation for

on-call duty during negotiations, the JJC contends the PBA's charge should be dismissed. This argument lacks merit.

A majority representative may waive the right to negotiate over a mandatorily negotiable subject. UMDNJ, Supra, 35 NJPER at 332. However, a waiver of the statutory right to negotiate must be "clear and unmistakable." Red Bank Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978). Waiver may be found where a mandatory subject of negotiations has been fully discussed and explored in negotiations, and where the union has consciously yielded its position. Cf. Bridgeton Bd. of Ed., P.E.R.C. No. 2011-64, 37 NJPER 72 (¶27 2011) (majority representative waived the right to negotiate over concurrent use of sick leave with FMLA leave when the public employer proposed to negotiate over the issue at four separate negotiations sessions and the majority representative expressly refused to negotiate the subject). A waiver may also be found where an employer acted consistent with a past practice the union did not object to or request negotiations over. UMDNJ ibid. However, a waiver ends when the union's acquiescence ends, i.e., when the union demands negotiations over the employer's practice. UMDNJ Ibid. Moreover, a union's decision to sign a CNA that does not address the subject matter of a pending unfair practice charge does not operate as a waiver of the right to pursue the charge. Pennsauken Tp., Supra, 19 NJPER at 27 (Union did not waive right

to negotiate over changes in lunch procedure by entering into CNA during pendency of charge since the CNA did not contain clear language addressing lunch procedures).

In this case, the PBA's decisions not to pursue the issue of compensation for on-call duty at a collective negotiations session and to enter into the 2011-2015 CNA do not operate as a waiver of its right to negotiate compensation for on-call duty. The 2011-2015 CNA does not set forth language addressing compensation for being on-call. There is no evidence to indicate that the PBA consciously yielded to the JJC's position regarding compensation for on-call duty and accepted the JJC's method of compensation. The PBA may have decided not to pursue the issue so as not to prejudice its position in its pending unfair practice charge and grievance. The JJC cites no legal precedent and the undersigned is unaware of any precedent where a waiver has been found under these circumstances. Accordingly, I find that the JJC violated sections 5.4a(5) and, derivatively, (a)(1) of the Act by refusing to negotiate over the impact of the August 2010 Policy.

#### REMEDY

Ordinarily, when an employer unilaterally changes terms and conditions of employment and refuses to negotiate with a majority representative, we will restore the status quo pending negotiations. UMDNJ Supra, 35 NJPER at 334. However, the

authority to restore the status quo must be exercised with due regard for the employer's status as a governmental entity serving the public. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Sec., 78 N.J. 1, 16 (1978); UMDNJ With this consideration, we have declined to restore the status quo. UMDNJ Ibid.

Restoration of the voluntary on-call procedure would not serve the public's interest. The JJC has presented ample, credible testimony indicating that the old, voluntary system of responding to juvenile escapes and other on-call situations was ineffective and put the public and the escapee in harm's way, while the mandatory on-call procedure was more effective at addressing these concerns. I, therefore, decline to restore the pre-August 2010 practice of responding to on-call situations pending negotiations over the impact of the proposed August 2010 Policy. However, I am recommending the parties immediately commence negotiations in good faith over compensation for being on-call, including retroactive compensation since August 27, 2010 (The date the Policy became effective), as well as the scheduling and allocation of on-call duties among qualified PBA unit employees.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the State of New Jersey, Juvenile Justice Commission, cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith over compensation for being on-call, as well as the scheduling and allocation of on-call duties among qualified unit employees.

2. 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, particularly by refusing to negotiate in good faith over compensation for being on-call, as well as the scheduling and allocation of on-call duties among qualified unit employees.

B. That the State of New Jersey, Juvenile Justice Commission take the following affirmative action:

1. Immediately commence good faith negotiations with the PBA over compensation for being on-call, including retroactive compensation since August 27, 2010, as well as negotiations over the scheduling and allocation of on-call duties among qualified PBA unit employees.

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. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

/s/ Daisy B. Barreto

Daisy B. Barreto  
Hearing Examiner

DATED: April 29, 2015

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 May 11, 2015.



# 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 with Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith over compensation for being on-call, as well as the scheduling and allocation of on-call duties among qualified unit employees.

**WE WILL** cease and desist from 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, particularly by refusing to negotiate in good faith over compensation for being on-call, as well as the scheduling and allocation of on-call duties among qualified unit employees.

**WE WILL** immediately commence good faith negotiations with the PBA over compensation for being on-call, including retroactive compensation since August 27, 2010, as well as negotiations over the scheduling and allocation of on-call duties among qualified PBA unit employees.

**WE WILL** 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.

**WE WILL** within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

Docket No. CO-2011-070

State of NJ Juvenile Justice Commission  
(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





