P.E.R.C. NO. 87-127

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PEMBERTON,

Respondent,

-and-

Docket No. CO-86-242-179

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
DISTRICT COUNCIL #71,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the Township of Pemberton violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the work hours of Public Works Department employees, represented by the American Federation of State, County and Municipal Employees, District Council #71, from 7:00 a.m. - 3:30 p.m. to 8:00 a.m. - 4:30 p.m. A Hearing Examiner recommended this conclusion and the Chairman, in the absence of exceptions, adopts it.

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DISTRICT COUNCIL #71,

Charging Party.

Appearances:
For the Respondent, Madden, Ferg, Barron & Gillespie, Esqs. (John C. Gillespie, of counsel)

For the Charging Party, John P. Hemmy, Associate Director, AFSCME, District Council #71

DECISION AND ORDER

On March 7, 1986, the American Federation of State, County and Municipal Employees, District Council #71 ("Council #71") filed an unfair practice charge against the Township of Pemberton ("Township"). The charge alleges the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (3), (5) and (7), when it unilaterally changed the work hours of Public Works Department employees from 7:00 a.m. - 3:30 p.m. to 8:00 a.m. - 4:30 p.m.

On May 6, 1986, a Complaint and Notice of Hearing issued.

On May 30, 1986, the Township filed its Answer. It admits changing the employees' work hours, but denies violating the Act.

It contended that it had the managerial prerogative and contractual right to make the change.

On June 11, 1986, Hearing Examiner Jonathan Roth conducted a hearing. The parties entered into stipulations of fact, examined witnesses and introduced exhibits. The Township also filed a post-hearing brief.

On February 27, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-52, 13 NJPER ___ (¶_____ 1987). He found that the Township violated subsections 5.4(a)(1) and (5) of the Act when it unilaterally changed the work hours. As a remedy, he recommended a return to the status quo and posting notice of the violation.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before March 12, 1987. The Township received one extension of time, but on March 23, 1987 advised that it would not file exceptions.

I have reviewed the record. The Hearing Examiner's findings of fact (3-8) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree with the Hearing Examiner that the Board violated subsections 5.4(a)(1) and (5) when it unilaterally changed the public works employees' work hours. I also adopt his recommended remedy.

ORDER

The Township of Pemberton is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with AFSCME, District Council 71 with respect to changes in the shift hours of public works employees and unilaterally changing the shift hours.

2. Refusing to negotiate in good faith with AFSCME, District Council 71 concerning terms and conditions of employment, including any unilateral change in the shift hours of public works employees.

B. That the Township take the following affirmative action:

1. Within sixty days restore the status quo ante, i.e., 7 a.m. - 3:30 p.m. shifts, of public works employees whose hours were changed and negotiate any proposec changes in working hours of public works employees post-dating November 35, 1985.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 herewith.

4. The allegations that subsections 5.4(a)(3) and (7) were violated are dismissed.

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 3, 1987

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with AFSCME, District Council 71 with respect to changes in the shift hours of public works employees.

WE WILL NOT refuse to negotiate in good faith with AFSCME, District Council 71 concerning terms and conditions of employment, including any unilateral change in the shift hours of public works employees.

WE WILL forthwith, within sixty days, restore the status quo ante, i.e., 7 a.m. - 3:30 p.m. shifts of public employees whose hours were changed and negotiate upon demand any proposed changes in working hours of public works employees post-dating November 25, 1985.

Docket No. CO-86-242-179 TOWNSHIP OF PEMBERTON
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-52

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

In the Matter of

TOWNSHIP OF PEMBERTON,

Respondent,

-and-

DOCKET NO. CO-86-242-179

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
DISTRICT COUNCIL #71,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Township of Pemberton violated subsections (a)(5) and derivatively (a)(1) of the New Jersey Employer-Employee Relations Act when it unilaterally and permanently changed starting and stopping times of a unit of public works employees represented by AFSCME, Council #71 from 7 a.m. - 3:30 p.m. to 8 a.m. - 4:30 p.m. The Hearing Examiner found that the change was negotiable and that a past practice of starting and stopping at the earlier hours created a term and condition of employment. He further recommends that the Commission order the Township negotiate the change for 60 days before returning the hours to status quo ante.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-52

STATE OF NEW JERSEY
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Charging Party.

Appearances:

For the Respondent
Madden, Ferg, Barron & Gillespie, Esqs.
(John C. Gillespie, of counsel)

For the Charging Party
John P. Hemmy, Associate Director

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 7, 1986, the American Federation of State, County and Municipal Employees, District Council No. 71 ("AFSCME" or "Council 71") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Township of Pemberton ("Township" or "Employer") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). AFSCME alleged that on or about November 25, 1985, the Township changed the hours of work of employees in the Public Works department from 7 a.m. -

3:30 p.m. to 8 a.m. to 4:30 p.m., in violation of subsections 5.4(a)(1), (3), (5) and (7) of the Act.[1/]

On May 6, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On May 30, 1986, the Township filed an Answer pursuant to N.J.A.C. 19:14-3.1, admitting that on or about November 13, 1985, (not November 25) it changed the hours of work for employees in the Public Works department from 7 a.m. - 3:30 p.m. to 8 a.m. to 4:30 p.m. The Township also asserted that the collective negotiations agreement executed by AFSCME and the Township does not delineate hours of work as a term and condition of employment subject to mandatory negotiations and therefore, the change in working hours was a managerial prerogative. The Answer also stated that under the circumstances of this case, public policy in favor of eliminating public corruption outweighs any possible inconvenience caused to municipal employees as a result of the change in working hours.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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 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."

On June 11, 1986, I conducted a hearing in this matter at which time the parties were given an opportunity to introduce evidence, examine and cross-examine witnesses, and argue orally. Post-hearing briefs were submitted by August 15, 1986.

Based upon the entire record I make the following:

FINDINGS OF FACT

The parties stipulated:

1. The Township of Pemberton is a public employer within the meaning of the Act.

2. The Pemberton Township Employees Union, affiliated with District Council No. 71 of AFSCME is a public employee representative within the meaning of the Act.

3. Employees in the Department of Public Works are public employees within the meaning of the Act.

4. The applicable collective negotiations agreement executed by the parties extends from January 1, 1984 to December 31, 1986 (J-1). The agreement contains the following provisions:

i) Article II, Paragraph A(1);

> A. The Township hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the Laws and Constitution of the State of New Jersey and of the United States, including, but without limiting the generality of the foregoing, the following rights:

1. To the executives management and administrative control of the Township Government and its properties and facilities and the activities of its employees;

ii) Article II, Paragraph B;

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities of the Township, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of New Jersey and of the United States.

iii) Article V, Paragraphs A and E;

A. The normal working week shall consist of the present total of an average forty (40) hours per week.

E. Meals during Emergency Overtime.

The Township shall provde each employee, who is required to work for any reason of emergency other than manpower shortage due to employee vacations or other authorized leave, with a meal of not less than $3.00 cost or more than $5.00 cost. An employee shall be entitled to one (1) meal at the end of four (4) hours continuance work if such work assignment shall

be for a duration of five (5) or more hours. This provision shall be applicable for each five (5) hour period of continuous work thereafter.

iv) Article XV, section 3, step 1

Section 3 - When the Union wishes to present a grievance for itself or for an employee or groups of employees for settlement or when an aggrieved employee wishes to present a grievance, such grievance shall be presented as follows:

Step 1 -- Within five (5) working days of the event giving rise to the grievance, the aggrieved employees, the President of the Union, or his duly authorized representative shall present the grievance in writing to the Department Head or his duly designated representative. The Department Head shall answer the grievance within five (5) working days.

5. On November 13, 1985, the Township issued a memorandum concerning a change in work schedules (J-3).

6. On November 25, 1985, the Township implemented that change in work schedules of unit employees in the Public Works Department. The titles effected by the change were laborer, water meter reader, truck driver, park maintenance worker, painter/park maintenance worker, water repairer, senior sign designer, processor and letterer/senior traffic maintenance worker, mechanic, heavy

Williams testified that in or around October 1984, the Township had hired a storekeeper whose job function was to pass out supplies to the Public Works employees and to pump gasoline into Public Works vehicles (T 16). If an employee needed any material he or she would have to request it from the storekeeper. Sometime in October 1985, employees in the Public Works Department met with the Township Administrator. The employees complained that when the storekeeper was pumping gasoline he was unable to walk back to the maintenance garage to supply parts and tools for other Department of Public Works employees. Williams asserted that the meeting resulted in the Township changing the work hours of the Public Works employees from 7 a.m. - 3:30 p.m. to 8 a.m. - 4:30 p.m. Williams was not requested to negotiate the change in hours prior to the issuance of the November 13 memorandum and prior to its implementation on November 25 (T 17). Williams essentially agreed that the November 13 memorandum was posted at the workplace (T 29).

Williams admitted that some unit employees had been questioned by local officials concerning the theft of Township property. On cross-examination, Township counsel asked Williams about R-1, a memorandum from Buildings and Grounds employees to the Township Administrator dated October 28, 1980. The employees were requesting a change in hours from 8 a.m. - 4:30 p.m. to 7 a.m. - 3:30 p.m. The memorandum listed eight reasons for the proposed change. The memorandum was found in the Township Administrator's files (T 44, 45). Williams did not know that anyone at Public Works had ever worked from 8 a.m. - 4:30 p.m. (T 41).

14. John Mason has been Township Administrator since October 15, 1985. Mason testified that when he was hired he became familiar with "what looked like widespread corruption in the Public Works Department and perhaps, the Water Department" (T 46). Mason specifically read transcripts concerning the charges brought by local police authorities that certain employees had stolen Township property. Employees had taken gasoline from the pump in the early morning, i.e., 7 - 8 a.m., and there was little supervision at that hour of the day. Those circumstances motivated Mason to make the change in working hours (T 51). On or about the same time Mason was hired, the Superintendent and Assistant Superintendent of the Public Works Department had been suspended, pending further investigation (T 51).

Mason requested two non-unit employees to change their work hours from 8 a.m. - 4:30 p.m. to 7 a.m. - 3:30 p.m. so that they would supervise the gasoline pump and storage room at the Department of Public Works. Both non-unit employees refused the request, citing "personal" reasons (T 54, 55; R-2). Mason asserted that the Township would incur a cost of $20,000 per year to hire someone to take the place of the storekeeper for the hours of 7 a.m. - 3:30 p.m. (T 57).

15. Nothing in the record established that AFSCME filed a contractual grievance concerning the change in work hours.

ANALYSIS

In IFPTE Local 195 v. State, 88 N.J. 393, 403-404 (1982), our Supreme Court summarized the tests for determining when a subject is mandatorily negotiable between public employers and employees:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 403-404]

The Supreme Court had previously recognized in Board of Education of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980) that:

> Logically pursued, these general principles -- managerial prerogatives and terms and conditions of employment -- lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by a public employer involve some managerial function, ending the inquiry at that point would all but eliminate the legislated authority of the union representative to negotiate with respect to "terms and conditions of employment." N.J.S.A. 34:13A-5.3. Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives. [Id. at 589].

Accordingly, the Court cautioned against isolating and focusing solely upon one aspect of the test. Rather, it stressed that "[t]he nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made." [Id. at 591].

Both the Commission and Supreme Court have held that the hours an employee works is a fundamental term and condition of employment. In one of its earliest cases interpreting the Act, Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10 (1973), the Supreme Court held that days and hours of work of faculty members are mandatory subjects of negotiations. A more recent case, Galloway Twp. Board of Education v. Galloway Twp. Education Association, 78 N.J. 1 (1978), is also directly applicable. There, the Court approved the Commission's determination that the unilateral change in starting and stopping times, without a change in the aggregate number of hours worked, violated 5.4(a)(5) of the Act. See also, among other cases, IFPTE Local 195 v. State, 88 N.J. 393 (1982); Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶4053 1983); North Brunswick Twp. Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978); Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977); Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

In State of New Jersey (CWA and Local 195), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985), the Commission applied the Woodstown balancing test in deciding if the State's unilateral change of work hours of certain Department of Transportation employees from 7:30 a.m. - 4 p.m. to 8 a.m. - 4:30 p.m. violated the Act. The State admitted making the change but argued in part that it had the prerogative to determine when an operation is to be performed and the corollary prerogative to require that schedules conform to the hours of operation it sets. In rejecting the State's position the Commission stated:

> While the State has an interest in scheduling work hours, so do the employees. It is for this reason that matters concerning hours and days of work are, in general, mandatory subjects of negotiations....There is nothing in the record that indicates that the State cannot have the work performed during the existing work hours. Thus, we do not believe that to require negotiations would significantly interfere with a determination of governmental policy. [Id. at 724].

The Commission concluded that the change in starting and stopping times was a mandatory subject of negotiations.[2/]

2/ That finding did not require the Commission to conclude that the change violated the Act. The Commission proceeded to discuss and apply the principle that no unlawful unilateral change occurs where a collectively negotiated agreement permits such a change. That principle is also the Township's alternate defense in the case, which I address at page 18.

Other aspects of work scheduling are non-negotiable when the employer's interests are paramount.[3/] In Warren County, P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985), the employer changed the shift assignment of a senior institutional attendant at a juvenile detention center from 3 p.m. - 11 p.m. to 7 a.m. - 3 p.m. The Commission found that the grievance challenging the change was not arbitrable. It stated that on balance, the dominant concern was the employer's ability to deploy personnel in order to promote efficiency and increase security at the center. The Commission concluded that the dispute concerned the employer's right to assign employees to particular tasks. In a footnote to that conclusion, the Commission

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3/ Both the Courts and the Commission have recognized that application of Local 195's balancing test may sometimes result in finding that a particular work schedule change is non-negotiable. In Local 195, the Court stated:

> We do not hold that the decision as to which employees are working at a given time would never significantly interfere with the determination of governmental policy. In certain instances, such a decision may impinge on the ability of the governmental entity to determine policy. Cf. Irvington PBA v. Irvington, 170 N.J. Super 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (holding that a municipal decision to initiate a three-shift work schedule that rotates around the clock for police officers is a non-negotiable matter of managerial prerogative). [Id. at 412].

The Appellate Court in Irvington held that individual shift assignments to an established work schedule were non-negotiable where the reason for such assignment was for continuity and consistency of supervision and facilitation of the training process.

stated: "There is no allegation that the hours of work will increase as a result of the assignment or that the employer has unilaterally changed the starting and stopping times of established shifts" (my emphasis). Id. at 100. See also, Tenafly Board of Education, P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983) (shift schedule change of head custodians found non-negotiable where change was direct result of board's managerial decision to reorganize its maintenance department); Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983) (Town has managerial prerogative to make a shift assignment based on qualifications when it seeks a particularly qualified individual to do a particular task); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982) (Town has managerial prerogative to change hours of duty to create and staff Juvenile Bureau and to enable superior officers to train and discipline rank-and-file officers); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) (Town retains right to mandate overtime and assign specific overtime task); City of Northfield, P.E.R.C. No. 82-95, 8 NJPER 277 (¶13123 1982) (new work schedule for firefighters is not arbitrable where the alteration in schedule was direct result of City's managerial decision to reduce number of full-time firemen on duty during night hours); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981) (Borough has managerial right to make emergency assignments regardless of work schedule); Freehold Regional High School Board of Education, P.E.R.C. No. 78-29, 4 NJPER 19 (¶4010 1977) (limited exception to general rule that hours of work is a

mandatory subject of negotiations where change in hours is necessary to effectuate a managerial prerogative); Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985), mot. for recon. den., P.E.R.C. No. 85-112, 11 NJPER 310 (¶16111 1985) (Borough has managerial prerogative to change work schedules of patrol officers to conform to schedule of superior officers when motivated by a need for more direct supervision of patrol officers. Moreover, patrol officers were not required to work more hours, morning or evening shifts or weekend days).

The Township argues that it had and retains the managerial prerogative to alter the work hours of employees in the Department of Public Works because on balance public policy favoring the elimination of corruption and protecting public funds prevails over policy interests for public employees stated in the Act.

I disagree and determine that the schedule change in this case was mandatorily negotiable. I first take note that this case does not concern a reorganization of a department; nor does it concern an "emergency";[4/] nor does it involve a change in hours of

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4/ In Township of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), appeal pending App. Div. Dkt. No. A-4801-85T7, the Commission acknowledged the dictionary definition of emergency; "(1) an unforseen combination of circumstances or the resulting state that calls for immediate action; (2) a pressing need." Webster's New Collegiate Dictionary, 1981. A clause in the parties' collective negotiations agreement permitted shift changes when an "emergency" existed. The Commission concluded that the employer had a contractual right to make the shift changes until the emergency ceased. In Pitman, the Commission denied the arbitrability of a grievance

Footnote Continued on Next Page

a qualified individual to perform a specialized task; nor does it concern the workings of a police department where work schedules subject to mandatory negotiations might be "an intrusion on the exercise of the express and inherent police power functions of the municipality and would significantly interfere with the exercise of inherent managerial prerogatives necessary to the proper operation of a police force." Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984). In Irvington, the Appellate Division distinguished the New Jersey Supreme Court holding in Galloway;

> We cannot agree with PERC, as argued before us, that Galloway is a controlling case. In this obscure area of what constitutes a managerial prerogative, the importance of managing a police department cannot be equated with the need of a board of education to unilaterally fix the working hours of its secretaries. Id. at 546.5/

4/ Footnote Continued From Previous Page

protesting the shift change of a patrol officer because the Borough needed to "temporarily assign personnel to meets its emergent manpower requirements." Id. at 679.

The Township has not argued that it was faced with an "emergency." Even if the circumstances permitted one to conclude that it was faced with an "emergency," it (like the employer in Hamilton) would be required to return to the status quo when the emergency ceased. The Township's change in hours was permanent. Finally, the only provision of the contract which references "emergency" is irrelevant to the disposition of issues in this case (Article V, paragraph E - "Meals During Emergency Overtime").

5/ In Township of Mt. Laurel, App. Div. Dkt. No. A-2408-85T6, (Feb. 11, 1987), the Appellate Division recognized the "broad" and "imprecise" language of Atlantic Highlands in eschewing a per se rule of non-negotiability of police scheduling issues. The court determined that under Atlantic Highlands and

Footnote Continued on Next Page

Applying the Local 195 balancing test, I find that the change in starting and stopping times intimately and directly affected the work and welfare of the unit employees, that the matter was in no way preempted by statute or regulations and that the interests of these public employees prevail over the interests of the public employer.

The Township maintains that its interest is the "elimination of corruption." At best, the Township has overstated its managerial interest -- the facts of this case simply do not support the conclusion that absent a unilateral permanent change in hours, the corruption could not have been eliminated. This case does not even concern the managerial need for supervision (an argument not specifically raised by the Township nor disputed by the Association). It does concern the method by which the Township achieved its non-negotiable managerial prerogative. The Township

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5/ Footnote Continued From Previous Page

Irvington, "the differing facts of each case should determine whether a disputed subject if mandatorily negotiable and that such a decision needs to be made on a case-by-case basis." Slip. op. at 8. The court emphasized that the employer had failed to "advance reasons in support of its need from a policy making point of view, to unilaterally control police work hours" and in agreement with the Commission, concluded that actual number of hours a patrol officer works, work schedules and maintenance of established hours were negotiable subjects.

asked two non-unit (supervisory or non-supervisory) employees to change their schedules to conform with the 7 a.m. - 3:30 p.m. shifts of unit employees. When they refused, citing "personal" reasons, the Township changed the unit employees starting and stopping times.

This permanent unilateral change goes beyond the legitimate exercise of managerial prerogatives because it deprives employees of the opportunity to have some say on what shall be their working hours, "one of the items most evidently in the legislature's mind when it extended the New Jersey Employer-Employee Relations Act to public employees." See, State of New Jersey (C.W.A. and Local 195) citing Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶14053 1983) and City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982). In Elizabeth, the Commission determined that the City violated subsections (a)(5) and derivatively (a)(1) of the Act when it unilaterally and indefinitely limited the number of employees who could take summer vacations. The Commission stated that the City's change "sweeps too broadly" in response to its managerial concern.

Similarly, the Township's permanent change in hours sweeps too broadly, given the adequate managerial prerogative of temporarily shifting starting and stopping times while negotiating a permanent change. Moreover, the Township's respect for the private preferences of two non-unit employees not to oversee the existing shift does not countervail the interests of the employees who have invoked their collective negotiations rights under the Act. The

Township would have sacrificed little by requiring one non-unit employee to oversee the existing shift while it negotiated with Association to impasse the proposed change. (I distinguish Closter because the Township has not specifically alleged a need for supervision; Irvington is distinguishable because this matter does not involve public concern for safety inherent in the operation of a police department). Accordingly, I find that the change in starting and stopping times was a mandatory subject of negotiations.

II

Finding that the Township's change in the starting and stopping times was a mandatory subject of negotiations does not, however, compel a finding that the change violated the Act. While the Act does not permit unilateral alterations in terms and conditions of employment without prior negotiations, there can be no unlawful unilateral change where a collectively negotiated agreement permits such a change. However, to establish waiver, the contract must clearly and unequivocally authorize the change. State of New Jersey (C.W.A. and Local 195), Elmwood Park Board of Education, and Sayreville Board of Education, P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The Township argues that Article 11, paragraph A(1) and Paragraph B (broad management rights clauses) and Article V, paragraph A (providing that the work week shall be an average of 40 hours) reserve to it the right to change the starting and stopping times of the Public Works employees.

J-1 does not, on its face, clearly and unequivocally authorize the Township to change the starting and stopping times of the employees' work day. There are, however, broad management rights clauses. Further,

> there is a settled labor contract principle that, except where specifically restricted by contract, management generally has been held to have the right to change the work week and work shifts. As stated in Elkouri and Elkouri, How Arbitration Works: 'where the contract contain[s] no express restriction on the employer's right to determine the starting and stopping time for work shifts the employer has been permitted unilaterally to change the starting and stopping time.' [Id. at 483]. State of New Jersey (C.W.A. and Local 195) at 726.

The issue is whether the contract's silence concerning the starting and stopping times establishes that AFSCME and the Township recognized this principle.[6/] In determining this issue one must resort to negotiations history and past practice. State of New Jersey (C.W.A. and Local 195). The record contains no substantive testimony concerning the negotiations history of the parties. With respect to past practices, Williams established that in his nine years with the Township, employees in the Public Works Department worked from 7 a.m. - 3:30 p.m. R-1 does not sufficiently rebut his testimony. Even assuming that employees worked from 8 a.m. - 4:30 p.m. before October 1980, I find that a past practice of employees

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6/ The Township's reliance on Article V, Paragraph A is misplaced because the clause does not speak to the days or hours of work. See Elmwood Park at 139.

starting at 7 a.m. and stopping at 3:30 p.m. existed from 1980 until November 13, 1985. Having determined that the change in hours is a mandatory subject of negotiations and a past practice of employees working from 7 a.m. - 3:30 p.m. established a term and condition of employment, I conclude that the Township violated subsections (a)(1) and (5) when it unilaterally changed the public works employees' work hours to 8 a.m. - 4:30 p.m. on November 25, 1985.7/

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Township cease from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the union with respect to changes in the shift hours of public works employees.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment, including unilateral implementation of change in the shift hours of public works employees in the negotiations unit represented by AFSCME, District Council 71.

7/ Charging Party presented no evidence supporting its allegations that the Township violated subsections (a)(3) and (7) of the Act. Accordingly, I recommend that this portion of the complaint be dismissed.

B. That the Township take the following affirmative action:

1. Forthwith negotiate upon demand any proposed changes in working hours of effected public works employees post-dating November 25, 1985. Within sixty days restore the status quo ante, i.e., 7 a.m. - 3:30 p.m. shifts, of public works employees whose hours were changed.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 herewith.

Jonathan Roth, Hearing Examiner

DATED: February 27, 1987
Trenton, New Jersey

APPENDIX "A"
RECOMMENDED

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the union with respect to changes in the shift hours of public works employees.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment, including unilateral implementation of change in the shift hours of public works employees in the negotiations unit represented by AFSCME, District Council 71.

WE WILL forthwith negotiate upon demand any proposed changes in working hours of effected public works employees post-dating November 25, 1985. Within sixty days restore the status quo ante, i.e., 7 a.m. - 3:30 p.m. shifts, of public employees whose hours were changed.

TOWNSHIP OF PEMBERTON
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James W. Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08625 (609) 292-9830.