P.E.R.C. NO. 87-124

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MARLBORO,

Respondent,

-and- Docket No. CO-85-169-7

MARLBORO P.B.A. LOCAL #196,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Marlboro violated the New Jersey Employer-Employee Relations Act when it unilaterally limited to one the number of employees eligible for time off per shift. The Commission finds that this order was overbroad because it prohibited an employee from taking time off even absent interference with the Township's minimum staffing requirements.

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MARLBORO P.B.A. LOCAL 196,

Charging Party.

Appearances:

For the Respondent, Pachman & Glickman, P.A.
(Steven Glickman, of Counsel)

For the Charging Party, Bosco-McDonnell Associates
(Simon Bosco, Consultant)

DECISION AND ORDER

On January 11, 1985, the Marlboro PBA, Local 196 ("PBA") filed an unfair practice charge against the Township of Marlboro ("Township"). The charge alleged that 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) and (5),[1/] when its

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

police chief unilaterally issued a memorandum limiting to one the number of employees eligible for time off per shift.

On July 9, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 15, 1985, the Township filed an Answer admitting the memorandum was issued, but asserting that it treats each situation case-by-case and denying that it has violated the Act.

On October 10, 1985 and November 14, 1985, Hearing Examiner Marc F. Stuart conducted hearings. Both parties examined witnesses, introduced exhibits and argued orally. At the conclusion of charging party's direct case, the Township moved for dismissal, which the Hearing Examiner denied. Both parties filed post-hearing briefs.

On July 18, 1986, the Hearing Examiner issued his report and recommended decision, H.E. No. 87-6, 12 NJPER 592 (¶17222 1986) (copy attached). He concluded that the Township violated subsections 5.4 (a)(1) and (a)(5) when the police chief issued the memorandum. He recommended an order requiring the Township negotiate with the PBA over the number of employees off per shift.

On August 8, 1986, the Township filed exceptions. It contends the Hearing Examiner erred in: (1) relying on City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Docket No. A 4636-81-T3 and City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982); (2) finding that the memorandum was permanent, overly broad and arbitrary; (3) not

dismissing the Complaint under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 87-148, 10 NJPER 419 (¶15191 1984); and (4) not finding that negotiations would substantially interfere with the Township's prerogative to set minimum staffing levels. On September 10, the PBA filed a response supporting the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-6) are generally accurate, but incomplete. We adopt and incorporate them here with the following modifications.

The Township has 18 patrol officers on the police force. The Township has these minimum staffing requirements: two patrol officers on the midnight to 8:00 a.m. and 8:00 a.m. to 4:00 p.m. shifts and four patrol officers on the 4:00 p.m. to midnight shift.[2/] The Township generally schedules three patrol officers on the midnight to 8:00 a.m. shift; four patrol officers on the 8:00 a.m. to 4:00 p.m. shift and five patrol officers on the 4 p.m. to midnight shift (T23-25).[3/] However, it occasionally schedules six or seven patrol officers on the 4:00 p.m. to midnight shift (T78-80).

The principles that guide us in deciding this case are settled. A public employer violates subsection 5.4(a)(5) when it

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2/ This fact is based on the testimony of the lieutenant commanding the patrol bureau (TA 61-62;TA74).

3/ This fact is based on the testimony of the PBA's delegate.

implements a new rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or a contractual defense. To prove such a violation, the PBA has the burden of showing: (1) a change (2) in a term and condition of employment (3) without negotiations. The Township may defeat such a claim if it has a managerial prerogative or contractual right to make the change. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985)

In this case, the Chief instituted his memorandum unilaterally. The issue is whether the memorandum pertains to a mandatorily negotiable term and condition of employment or a non-negotiable managerial prerogative. The public employer has a prerogative to decide the number of employees to be on duty at any one time. However, time off is mandatorily negotiable to the extent it does not cause staffing levels to fall below an employer's minimum requirements. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303, 305 (¶13134 1982).[4/]

4/ We recognize that in Town of W. Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978), we stated: "The number of men allowed off duty is really the converse of the number of men on duty. The latter is permissively but not mandatorily negotiable We must reach the same result regarding the number of men who are permitted off duty at a given time because to do otherwise would, in effect, mandate negotiations on manning levels." We have since impliedly retreated from this holding, see Elizabeth, and now do so expressly since we no longer believe that statement is accurate. The number of employees permitted to take time off will not necessarily implicate minimum manning levels because an employer may schedule more employees than its staff levels require.

We have reviewed the record in light of these principles and find that the unilateral promulgation of the policy violated subsection 5.4(a)(1) and (5) of our Act. We do so principally because the policy was overbroad; it would prohibit an employee from taking time off even absent interference with the Township's minimum staffing requirements.[5/]

The Township established these requirements:

Midnight to 8:00 a.m. -- two patrol officers
8:00 a.m. to 4:00 p.m. -- two patrol officers
4:00 p.m. to Midnight -- four patrol officers

The Township schedules three patrol officers on the midnight to 8:00 a.m. shift; four patrol officers on the 8:00 a.m. to 4:00 p.m. shift and between five and seven officers on the 4:00 p.m. to midnight shift. Therefore, while the "only one officer off at a time" policy is consistent with its minimum manning requirements on the midnight to 8:00 a.m. shift, it is overbroad with respect to the other two shifts.[6/] Therefore, with respect to those affected shifts, the Township was required to negotiate with the PBA before implementing

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5/ Before the memorandum issued, the Township's minimum staffing requirements were the only restriction on the number of employees permitted off per shift.

6/ Further, the lieutenant testified that patrol officers have been denied time off even where the minimum staffing levels have not been reached (T78-80).

the change because it pertained to the mandatorily negotiable issue of granting and scheduling time off.[7/]

Finally, this Complaint is not subject to dismissal under Human Services because the dispute does not involve a mere breach of contract, but instead involves a failure to negotiate at all. Human Services.

Accordingly, we hold that the Township violated subsections 5.4(a)(5) and, derivatively, (a)(1) when it unilaterally adopted the October 2, 1984 memorandum.

ORDER

The Township of Marlboro 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 by unilaterally issuing a memorandum restricting the right of employees to take time off.

2. Refusing to negotiate in good faith with Marlboro PBA Local 196 concerning terms and conditions of employment of employees in that unit, particularly by unilaterally restricting the number of employees per shift eligible to take time off.

7/ The Township remains free to deny time off to employees needed to staff the shift as well as to increase its staffing requirements. Its memorandum was overbroad only because it would prevent an employee from taking time off even when the staffing requirements were not compromised.

B. Take the following affirmative action:

1. Rescind the October 2, 1984 memorandum limiting the number of employees eligible to take contractual time off.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987

H.E. NO. 87-6

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

In the Matter of

TOWNSHIP OF MARLBORO,

Respondent,

-and-

Docket No. CO-85-169-7

MARLBORO P.B.A. LOCAL #196,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it instituted a system whereby no more than one man per shift could be permitted contractual time off. The Township's directive imposed an impermissible limitation on the PBA's right to negotiate procedures concerning the scheduling and taking of contractual time off.

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. 87-6

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

In the Matter of

TOWNSHIP OF MARLBORO,

Respondent,

-and-

Docket No. CO-85-169-7

MARLBORO P.B.A. LOCAL #196,

Charging Party.

Appearances:

For the Respondent
Pachman & Glickman, P.A.
(Steven Glickman, of counsel)

For the Charging Party
Bosco-McDonnell Associates
(Simon Bosco, Consultant)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

Marlboro PBA, Local 196, filed an unfair practice charge with the Public Employment Relations Commission on January 11, 1985, alleging that on or about October 2, 1984, the Police Department of the Township of Marlboro, acting through its Chief, unilaterally established a limitation as to the number of employees eligible for time off per shift. The PBA asserted that this interfered with its right to negotiate time off for purposes of vacation, holidays, personal leave and compensatory leave. PBA Local 196 asserts that

this conduct violated N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the unfair practice charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 9, 1985. On July 15, 1985, the Township filed an answer to PBA Local 196's charge, admitting that the Chief of Police did in fact promulgate a memorandum regarding the number of employees eligible for time off per shift, denying that the memorandum is "universal in nature" and asserting instead that it treats each situation on a case by case basis. The Township further denied that its action constitutes a violation of the Act.

An Evidentiary Hearing, at which the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally, was conducted on October 10 and November 14, 1985. At the conclusion of the charging party's direct case, the Township moved for dismissal (TB 43).[2/] The Township's

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. "

2/ "TA" refers to the transcript dated October 10, 1985; "TB" refers to the transcript dated November 14, 1985.

argument in favor of dismissal was that the number of men off per shift is a permissive subject of negotiations; that neither party had chosen to negotiate that subject; and, thus, the number of men off per shift remains management's prerogative (TB 44). The charging party's response included the argument that other theories documented in caselaw could support the charge in the context of this case; and, that the issue for determination really involved the employee's mandatorily negotiable right to schedule contractual time off. After reviewing the evidence presented by the charging party in its direct case drawing all inferences of doubt against the movant and in favor of the opponent of the motion, Hudson v. People Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), I determined that the charging party had presented evidence which, under certain circumstances and legal theories (See ex. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303, (¶13134 1982), aff'd App. Div. Docket No. A4636-81 T3; City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982), could sustain the burden of a prima facie showing of a violation under the Act. Accordingly, I denied the Township's motion for dismissal.

The Township filed a post-hearing brief on January 3, 1986. PBA Local 196 filed a post-hearing brief on January 24, 1986.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Marlboro is a public employer within the meaning of the Act (TA 7).

2. PBA Local 196 is a public employee representative within the meaning of the Act (TA 7).

3. PBA Local 196 represents a bargaining unit consisting of all patrolmen of the Police Department of the Township of Marlboro (J 1).[3/] On October 2, 1984, the Township's Chief of Police issued a memorandum to the Department's Lieutenant stating "...effective today, and until further notice, only one (1) man per shift shall be allowed off at any time[4/]....[i]f an extreme emergency arises, you may grant an additional man off." (J 6). The Township maintained that the directive was issued due to an increase in workload and the need to have as many police officers as possible on the street to adequately patrol the Township (TB 64). Pursuant to this memorandum patrolmen requesting time off, where time off on a particular shift has already been granted to another patrolman, were denied the time (J 7; J 8). However, despite the unequivocal language of the October 2, 1984 memo, superiors often choose to interpret the word "emergency" liberally, and frequently permit more than one man off per shift (TG 79).

4. Previously, on August 5, 1981, the Chief had issued a similar memorandum to the Lieutenant limiting to one per squad the

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3/ "CP" refers to Charging Party's exhibits; "R" refers to Respondent's exhibits; "J" refers to Joint exhibits; "C" refers to Commission exhibits.

4/ The memorandum affects all types of contractual leave except sick leave.

number of men permitted to take time off (J 9). The Chief cited budgetary concerns for the 1981 directive (J 9). The 1981 directive was grieved, and ultimately on January 31, 1982, it was rescinded (J 13).

5. The Township's population has increased dramatically over the last fourteen years, as has the number of police officers on the Township's police force (TB 5-TB 9). Currently there are approximately fifty police officers on the Township's force (TB 9). Of the fifty, there are approximately eighteen patrolmen (TB 20). There are three squads (shifts) per day, and six patrolmen on each squad (TB 20). Although the record is not clear, it appears that the Township's minimum manning requirement for the midnight to 8:00 a.m. shift is two (2) or three (3) patrolmen; the minimum requirement for the 8:00 a.m. to 4:00 p.m. shift is two (2) or three (3) patrolmen; and, the requirement for the 4:00 p.m. to 12 midnight shift is at least four (4) patrolmen (TB 21-22).[5/] Despite their stated need to have more patrolmen on duty at any particular time, the Township has made no effort to increase the minimum manning levels (TB 87).

6. The parties have not negotiated any specific provisions governing allotment, or selection of contractual time off, other

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5/ However, at TB 16-17, the testimony suggests that the minimum manning has always been two (2) men on the midnight to 8:00 a.m. shift, two (2) on the 8:00 a.m. to 4:00 p.m. shift and three (3) on the 4:00 p.m. to midnight shift.

than the number of days accorded to each employee under the contract in each category of time off, all with the proviso that the Township's manning needs are to take precedence (J-1, pages 26-30). However, other than the brief restriction instituted in 1981 (See par. 4, Findings of Fact), there had been no other restriction on the number of men per shift permitted off except that there be adequate manning at all times; and, it had been the practice to handle requests for contractual time off on a case-by-case basis (TB 17-18).

7. During 1984, the Township of Marlboro paid out 56 hours in overtime to cover "shorted shifts" as a result of the allowance of more than one person off per shift for contractual time (TB 35). This overtime expenditure resulted from the Township's need to hire additional staff when, by virtue of the combination of vacation, personal, compensatory, holiday or sick time requests granted, the level of staffing on any one particular shift fell below the stated minimums (TB 39).

LEGAL ANALYSIS

Several cases have dealt with either the employer's or the employee organization's ability to either limit or restrict limitation upon the number of employees permitted to take time off concurrently. The question commonly arises in either a Scope of Negotiations or an Unfair Practice context.

In a Scope context, in City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985), the Commission held that the union's

proposal concerning the minimum number of firefighters permitted to take vacation time simultaneously did not affect the City's managerial right to determine manning levels, due to the large size of the force.

In Township of Edison, P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984), the Commission similarly held that in a large force (150 in number) and in the absence of a specific factual record to the contrary, a clause permitting two employees per shift to be on vacation at the same time, and expressly conditioning it upon manpower and squad strength, did not impose a limitation on the City's management prerogative to set minimum manning, sufficient to displace the general presumption that proposals concerning vacations are mandatorily negotiable.

In Township of Millburn, P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984), the Commission held that the union's proposal that a maximum of two men and one officer be permitted to take vacation at the same time was not mandatorily negotiable because it impermissably infringed upon the employer's prerogative to set minimum manning.

In Township of Maplewood, P.E.R.C. No. 84-114, 10 NJPER 259 (¶15124 1984), the Commission held that the town's change in the vacation scheduling procedure, which governed the number of firefighters allowed to take vacation simultaneously, after the expiration of the contract, was appropriate. The issue of the number permitted vacation simultaneously was permissibly negotiable

and the previous contractual terms could not carry over beyond the term of the previous contract.

In City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982), the Commission held, in a case where the FOP proposed a clause permitting no more than five (5) employees to be on leave of absence at a particular time, that an application of the balancing test from State v. State Supervisory Employees Ass'n., 78 N.J. 54, 67 (1978) required the conclusion that a clause permitting a maximum of five (5) officers in a force of 200 to be on leave at a given time failed to impose a sufficient limitation on the City's manaerial prerogatives to displace the general presumption that proposals pertaining to leaves of absence are mandatorily negotiable.

In Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981), the Commission, in reliance upon Hudson County Board of Chosen Freeholders, P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980) and City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978), held that vacation entitlement, including allotment and selection procedures, within the framework established for staffing requirements, is mandatorily negotiable. Kearny, supra, states the general rule applicable to the set of facts at issue in the instant case, at least in a Scope of Negotiations context. 6/

6/ Although Kearny, supra and Edison, supra deal specifically with vacation time, the caselaw supports the application of the principles established in those cases to cases involving the use of other contractual time as well. See, City of Elizabeth, supra and infra, 8 NJPER 303.

Finally, in Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978), the Commission held that the number of men allowed off duty is really the converse of the number of men on duty at a particular time, and that both are permissibly negotiable.

In an unfair practice context, in City of Elizabeth, supra, 8 NJPER 303, the Commission, again setting forth the general rule, held "...our caselaw is...consistent that the granting and scheduling of time off is a clearly negotiable subject to the extent that the agreed upon system does not cause manpower levels to fall below an employer's manning requirements.

In Town of Harrison, P.E.R.C. 83-114, 9 NJPER 160 (¶14075 1983), the Commission held that the Fire Chief did not have the unilateral right to limit or restrict the total amount of time off firefighters were permitted to select during the month of July and August. The Commission based its determination, in large part, on the fact that the Chief did not make this decision because of any concern about manning levels, but instead based upon a concern that it was unfair to allow officers with greater rank and seniority to receive large amounts of summer vacation time while employees with lesser rank and seniority might not receive any. Thus, the Commission determined that the order deprived the affected employees of their right to request and receive a longer summer vacation in the absence of a manpower shortage.

In City of Elizabeth, supra, 8 NJPER 567, the City's Fire Director issued a special notice stating in pertinent part,

> Effective in 1981, and every year thereafter, no more than six (6) men will be allowed on vacation from one (1) tour at any time.

The FMBA charged that this special notice contravened specific provisions in the parties' collective negotiations agreement and established past practice whereby each employee in the department received a minimum summer vacation of eight (8) working days distributed over six (6) summer periods falling between June 15 and September 15; and, eleven employees could use vacation time during any one summer period. The FMBA alleged that the special notice would interfere with this provision and practice because it would prevent thirty employees from taking any summer vacation and would substantially disrupt the ability of other employees to make vacation plans. Thus, the charge alleged a violation of an established practice consistent with the facts herein; but, also a violation of terms and conditions in the parties' existing contract, inconsistent with the terms herein. However, the language of the Commission's decision in Elizabeth is applicable to the instant matter, and the differences in the factual backgrounds of the two cases are less significant in light of the reasoning put forth by the Commission in its decision, and the fact that it did not rely upon either the presence of inconsistent contractual terms and conditions, or past practices. Instead, it analyzed the Special Notice in the context of the generally negotiable right of vacation allotment, entitlement and selection:

> ...[t]he Special Notice was overly broad and should not have been issued without at least a

prior attempt to negotiate with the FMBA. It is not apparent to us, on this record, that every tour would necessarily have been understaffed if more than six men on each tour were able to take vacations at the same time. It may be that on some tours, more than six employees could have taken summer vacations at the same time without going below the necessary manning levels while on the other tours, no more than six employees could have taken simultaneous vacations. The City could have always exercised its reserved right to deny a particular request for a summer vacation if the manpower level on a particular tour could not otherwise be reached. [Citations omitted] A blanket restriction, instead of a more particularized response to an emergency situation, is too severe an intrusion on the right of employees to negotiate vacation time.

Further, the Special Order, effective in 1981 and "every year thereafter," is overly broad in duration. On its face, it continues in force permanently, thus denying some employees summer vacations altogether, regardless of when the emergency which generated it ends.

* * *

In sum, we do not dispute the City's right to set manpower levels and to insure a sufficient number of employees on each tour of duty. Nor do we determine that the City must grant each employee a summer vacation if such grant would impermissably restrict the City's right to set summer staffing levels. Nor do we dispute the City's right to deny or even cancel a vacation request when necessary to meet a staffing emergency on a particular tour of duty. Nevertheless, the City's order in this case sweeps too broadly because it deprives its employees, now and, according to its wording, forever, of the opportunity to have some say on whether they will receive summer vacations, even if the City's right to insure that a sufficient number of employees will be on tour of duty at any one time is not threatened in a particular instance. [Elizabeth, supra at 569; emphasis added]

The Township argues that Elizabeth, is factually inapplicable here because it dealt with a sizeable force and an order which was too restrictive in light of the forces's size. However, by the very language of the decision it is again apparent that this was not the Commission's primary reason for deciding as it did.7/ Instead, the Commission clearly acknowledged the City's right to set minimum manning; however, rejected the directive as being too broad, permanent, and not sufficiently related to manning requirements to be sustained in the absence of negotiations.

Although the "Special Notice" in Elizabeth, supra, was absolute and without exception, and "permanent" on its face; and, the directive in this case contained the "extreme emergency" language and did not state that was in effect permanently, I do not regard these differences as being significant, and I certainly do not agree with the Township that this directive, by its terms, permits "flexibility and a case-by-case review." Instead, I find that the "extreme emergency" language leaves little room for flexibility, and the tenor of the order suggests a policy every bit as permanent as the one in Elizabeth, supra.

7/ Obviously the factual background in Elizabeth was a factor in the Commission's decision; however, it did not expressly rely on force size or specific contratual terms and/or past practices, and in light of the language of the decision, I conclude that those aspects did not represent the primary basis of the Commission's decision.

I recognize the Township's right to set minimum manning requirements. Moreover, I think it is acceptable for the Township to establish minimum working requirements somewhat above a stated absolute minimum to allow for instances of multiple, and perhaps unexpected, requests for time off during any one shift. Therefore, I do not find it unreasonable for the Town to set a minimum requirement of three men per shift, but to require four or five men to be on duty as a buffer against unanticipated depletions of personnel for a variety of valid reasons.

However, I find a directive which states, "effective today, and until further notice, only one (1) man per shift shall be allowed off at any time," to be overly broad and restrictive despite the "extreme emergency" language. I also find it to be permanent to all intents and purposes, absent any termination date, and insufficiently related to the Township's designated minimum manning requirements to justify its promulgation in the absence of negotiations. Granted, the size of the force in this case is much smaller than in Elizabeth, and the likelihood exists that having more than one man off per shift could create a situation which could ultimately result in insufficient manning. However, the creation of an across-the-board restriction eliminates even the employer's ability to make its manning determinations on a case-by-case basis, and still be within the parameters of the October 2, 1984 directive. Furthermore, a closer scrutiny of the numbers and ratios in Elizabeth, supra, and in this case, do not reflect as appreciable a

difference as may appear at first glance. Limiting to six (6), the number of employees permitted off at one time, out of a total manpower of 239 (total compliment of 275), and with a minimum manning requirement of 47, (See, City of Elizabeth, H.E. No. 82-58, 8 NJPER 398, (¶13182 1982), is not so dramatically different from limiting to one (1) at a time, the number of patrolmen permitted time off, out of a total force of 50 police officers (18 patrolmen), and with a minimum manning requirement of two (2), three (3) or four (4) patrolmen per shift.[8/]

In light of the testimony from the Township's witnesses suggesting that the Township chooses to construe the "extreme emergency" language in the order liberally to permit time off wherever possible, it appears that management is being placed in a position whereby it must determine when and how much to violate the directive. Despite the Township's absolute mandate to provide effective law enforcement services, and its reserved right to deny particular requests for time off in the event manpower requirements necessitate such action, I view this mandatory and somewhat arbitrary directive as being comparable to situations where a union seeks to propose that a minimum or maximum number of employees per shift be permitted to take time off. Such has been held to be illegal when it infringes upon an employer's minimum manning

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8/ See also, City of Camden, supra, where the Commission found negotiable a clause providing for a ratio of 5 on leave out of a total force of 200.

responsibilities and is not expressly tied into such requirements. See, Township of Millburn, supra. Here, although possibly quite reasonable under many circumstances (i.e., shifts where the minimum requirement is four (4) men), and even taking into account the relatively small size of the Department, the directive is equally arbitrary, and fails to permit adequate discretion on the part of management. It may be that in many instances not involving "extreme emergencies," and particularly on the midnight to 8:00 a.m. and the 8:00 a.m. to 4:00 p.m. shifts, permitting more than one (1) man off per shift would not interfere with the Township's manning requirements. If, as management argues, and as the testimony appears to confirm, the directive is liberally construed, it would appear that even management realizes that its terms are not reasonable in all circumstances. Moreover, it suggests a tenuous connection between the terms of the directive and the Township's minimum manning requirements. Accordingly, I conclude its imposition is improper, in the absence of negotiation.

The Township argues that the issue of the number of men off per shift has been held to be permissibly negotiable, and in the absence of any negotiated provision, it becomes management's prerogative. In support of this argument, the Township relies on cases arising in a Scope of Negotiations context. I think a distinction must be made here. In a Scope of Negotiations context,

the Commission has held this subject to be generally permissive;[9/] thus, giving the employer the ability to decline to negotiate and exercise its prerogative.[10/] However, in an unfair practice context, the issue becomes instead whether there is interference with a protected right or activity of an employee or employees under the Act. Here, the allegation is that the Township has interfered with the Local's right to negotiate terms and conditions of employment on behalf of its members, and by so doing, derivatively has interfered with rights guaranteed to employees under the Act. The Association is asserting that the Township's directive impermissably interferes with its right to negotiate over procedures concerning the scheduling and taking of contractual time off. Thus, the Association is focusing on a right which has been held to be mandatorily negotiable.[11/] Therefore, the analysis must necessarily be approached from a different perspective. It is possible to find an unfair practice violation where under other procedural circumstances and on a different record, the basis of the unfair practice could be deemed non-negotiable, and I believe on this record such is the case.

9/ See ex., Township of Maplewood, supra, footnote 7., indicating circumstances under which this subject can be mandatorily negotiable.

10/ See ex., Township of Maplewood, supra, 10 NJPER 269, and Township of West Orange, supra, 4 NJPER 266.

11/ See generally, City of Elizabeth, supra, 8 NJPER 303, and Town of Kearny, supra.

The Township also argues that under its decision in State of New Jersey, Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission should not exercise its jurisdiction in this matter. However, in the absence of any negotiated contractual provision, and in view of the fact that this is the second instance of such a directive on the part of the Township, which I believe to be directly related to the Association's corresponding (a)(1) allegation, I find Human Services, supra, to be inapplicable.

We are ultimately faced with a balancing requirement as enunciated by the Supreme Court in Bd/Ed Woodstown-Pilesgrove v Woodstown-Pilesgrove Ed/Assn, 81 N.J. 582, 591 (1980).

> The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made.

On balance, given the Township's right to set minimum manning and review time off requests on a case-by-case basis, I conclude that the requirement to negotiate such a provision does not substantially interfere with management's prerogative to set minimum manning.[12/]

12/ In reaching this determination, I credit testimony suggesting that one of the Township's motives in issuing this directive was to reduce the amount of overtime expended in instances of sudden simultaneous requests for time off without an adequate buffer of manpower, creating a situation where the Township is forced to either hire additional manpower or pay overtime (see Findings of Fact, para. 6, supra). I analogize this to a long line of cases arising in an educational context in which the Commission has repeatedly held that when the dominant issue is

Footnote Continued on Next Page

CONCLUSIONS OF LAW

I conclude that the Township violated N.J.S.A. 34:13A-5.4(5) and, derivatively (1), by refusing to negotiate prior to the issuance of the Police Chief's October 2, 1984, memorandum to the Police Lieutenant, limiting the number of men off per shift to one at any time.

RECOMMENDED ORDER

The Township of Marlboro 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.

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 by unilaterally restricting the number of employees per shift to take contractual time off.

B. Take the following affirmative action:

12/ Footnote Continued From Previous Page

budgetary rather than an educational objective or goal, management cannot exercise unfettered prerogative, but must, instead, negotiate such decisions. See, In re Piscataway Township Board of Education, P.E.R.C. No. 82-91, 8 NJPER 231 ¶13096 1982). Although I do not question the Township's right to create a buffer, I believe its creation must be more closely tied to actual manning requirements and be less arbitrary and rigid.

1. Immediately engage in good faith negotiations with PBA Local 196 over the Township's proposal to restrict the number of men off per shift to one man.

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

Marc Stuart
Hearing Examiner

DATED: July 18, 1986
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concering terms and conditions of employment of employees in that unit by unilaterally restricting the number of employees per shift to take contractual time off.

WE WILL immediately engage in good faith negotiations with PBA Local 196 over the Township's proposal to restrict the number of men off per shift to one man.

TOWNSHIP OF MARLBORO
(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.