

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF BLOOMFIELD,
Respondent,

-and-

Docket No. CO-80

BLOOMFIELD PATROLMEN'S BENEVOLENT
ASSOCIATION, LOCAL NUMBER 32,
Charging Party.

SYNOPSIS

In agreement with the Hearing Examiner, the Commission dismisses the complaint in an unfair practice proceeding. The Commission finds that the exceptions filed by the charging party lack merit. The first exception relates to the Hearing Examiner's purported failure to take into account certain testimony. The Commission finds that the Hearing Examiner did not ignore the testimony, but rather took cognizance of the testimony and accorded it proper weight in the context of the entire record viewed as a whole. The second exception relates to the Hearing Examiner's refusal to consider an additional allegation on the grounds that it was neither contained in the charge nor adjudicated at the hearing. The Commission affirms, disagreeing with the charging party's contention that the additional allegation was encompassed by the language of the charge. The Commission denies the charging party's post-hearing motion to amend the charge and for a supplementary hearing concerning the additional allegation referred to above, stating that the allegation would be barred by the 6 months limitation provision of the Act. Finally, the charging party's proffer of new and independent evidence is disallowed at this late date, particularly as the 6 months period has not yet expired concerning the new evidence, which may thus be the subject of a separate charge.

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Charging Party.

Appearances:

For the Respondent, Gerald L. Dorf, P.A. (Mr. Thomas
J. Savage, of Counsel)

For the Charging Party, Zazzali & Zazzali, P.A. (Mr.
Lawrence A. Whipple, Jr., of Counsel)

DECISION AND ORDER

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on April 14, 1975 by Bloomfield Patrolmen's Benevolent Association, Local Number 32 (the "PBA") against the Town of Bloomfield (the "Town") alleging unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the Charge alleges unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5)^{1/} by virtue of the January 27, 1975 unilateral promulgation

1/ These subsections prohibit 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.../or/ (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."

and implementation by the Town's Police Chief of "Bloomfield Police Department Memo #48"^{2/} pursuant to which various personnel assignments were effectuated in derogation of a pre-existing policy of departmental seniority.

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Executive Director that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 25, 1975 pursuant to N.J.A.C. 19:14-2.1. On July 31, 1975 the Town filed its answer to the Complaint, essentially denying the existence of seniority rights to shift assignments within the Town's Police Department.

A plenary hearing was held before Hearing Examiner Stephen B. Hunter on September 5, 1975, October 15, 1975 and October 29, 1975 at which both parties were represented and were afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Thereafter both parties filed post-hearing briefs. Pursuant to N.J.A.C. 19:14-7.1, on March 29, 1976 the Hearing Examiner filed with the Commission and served on the parties his Recommended Report and Decision (H.E. No. 76-5, published at 2 NJPER 79), a copy of which is attached hereto and made a part hereof. The PBA

^{2/} The Charge inadvertently referred to Memo #45, and was corrected to refer to #48 by letter amendment dated June 11, 1975.

filed with the Commission exceptions to the Hearing Examiner's Report pursuant to N.J.A.C. 19:14-7.3(a), together with motions to amend the Charge and for a supplementary hearing with respect to the proffered amendment. The Town filed papers in opposition to the PBA's exceptions and motions. Finally, the PBA filed a supplemental brief in support of its motions.

Based upon the entire record herein as specified in N.J.A.C. 19:14-7.2, the Commission has decided to affirm the rulings, findings, and conclusions of the Hearing Examiner and to adopt his recommended Order.

The PBA takes exception to two aspects of the Hearing Examiner's Report. First, the PBA argues that the Hearing Examiner committed "plain error" in finding that the shift assignments of Captain Mathieson and Deputy Chief Dougherty were effectuated in conformity with pre-existing departmental policies and thus did not constitute alterations in terms and conditions of employment. In reaching this conclusion, the Hearing Examiner relied in part upon a 1973 departmental memorandum (Exhibit CH-14) issued by the then Chief of Police. The PBA specifically excepts to this reliance, pointing to testimony of current Chief of Police Castagno that the provisions of Exhibit CH-14 calling for considerations other than seniority applied only to patrolmen and not Superior Officers, that prior to a departmental reorganization in January 1975 no Superior Officers had ever been denied a legitimate request on a shift,

and that determination of a Superior Officer's shift request was based solely on seniority.

We conclude that this first exception lacks merit. The Hearing Examiner did not ignore Chief Castagno's testimony. Rather, he clearly took this testimony into account and concluded, upon the basis of a thorough review of many factors including but not limited to Exhibit CH-14, that the assignments in question were consistent with existing policies. At page 10 of his Report, the Hearing Examiner cites the testimony of Chief Castagno and others, relied upon by the PBA in its first exception, but then continues:

The aforementioned witnesses, however, also testified that there were exceptions to the practice of relying primarily upon seniority considerations in the effectuation of shift assignments and recognized that other factors, in the past, had played a role in personnel assignments.* * *

We conclude that the Hearing Examiner took proper cognizance of the testimony of Chief Castagno, and that the weight accorded this testimony in the context of the entire record viewed as a whole, was appropriate and will not be disturbed by us.

The PBA's second exception, as well as its motions to amend the Charge and for a supplementary hearing, relate to the following issue. As previously indicated, the Charge (and thus the Complaint^{3/}) alleges unilateral implementation of "various" shift assignments, narrowed at the hearing to refer specifically to Captain Mathieson and Deputy Chief Dougherty,

3/ See N.J.A.C. 19:14-2.1(a).

in derogation of a pre-existing seniority policy. During the course of the hearing, the PBA's attorney asked Chief Castagno whether a departmental reorganization in January 1975 (apparently pursuant to which the disputed shift assignments, among other things, resulted) had been the subject of collective negotiations with the PBA. The Town's attorney objected to the question on the ground that only the shift assignments, not the reorganization, were alleged in the Charge and were before the Hearing Examiner. The question was thereupon withdrawn.

In its post-hearing brief, the PBA nevertheless argued that the departmental reorganization itself should have been negotiated prior to its implementation. The PBA alleged an additional unfair practice and sought an order to negotiate. At page 5 of his Report, footnote 4, the Hearing Examiner referred to the PBA's brief and found that the allegation that the departmental reorganization should have been negotiated was neither contained in the Charge nor adjudicated at the hearing, and declined to pass upon the subject further.

The PBA's second exception urges that its allegation concerning the Town's failure to negotiate the reorganization, is "plainly encompassed by the language of the Charge." We disagree. The Hearing Examiner's disposition of the PBA's contention is clearly correct for the reasons stated in his Report and is hereby affirmed.

Apparently in the alternative, the PBA has moved for

leave to amend the Charge (and thus the Complaint^{4/}) to include an allegation that the Town violated the Act "by refusing to negotiate the January 1975 departmental reorganization of the Bloomfield Police Department", and moved for a "supplementary hearing" on this allegation. In a supplemental brief in support of these motions, the PBA makes an additional evidentiary proffer, unrelated to its reorganization argument, attaching a copy of what is purported to be a January 27, 1976 memorandum of the Chief of Police concerning the subject of assignments and re-assignments, superseding all previous memoranda. The PBA argues that the 1976 memorandum eliminates seniority entirely, that it substantiates that which the PBA has been alleging all along, and that it constitutes "proof positive" of the PBA's position. On the basis of the 1976 memorandum, the PBA urges that we reject the Hearing Examiner's Report and either grant its motions for leave to amend the Charge and for a supplementary hearing, or in the alternative find a violation by the Town and issue an appropriate order.

On the basis of our earlier determination affirming the Hearing Examiner's finding that the reorganization allegation was neither contained in the Charge nor adjudicated below, it would be pointless to permit amendment of the Charge and Complaint at this late date. An amendment at this time to include an allegation of January 1975 conduct (the reorganization allegation) would be barred by the 6 months limitation provision

^{4/} See N.J.A.C. 19:14-2.2(a).

of N.J.S.A. 34:13A-5.4(c)^{5/}. To allow an amendment such as the instant one, unrelated to the allegations of the Charge, to relate back to the filing date of the Charge would effectively disregard the 6 months limitation provision. Accordingly, the PBA's motions to amend and for a supplementary hearing concerning the reorganization allegation are hereby denied.

With respect to the PBA's proffer of the purported 1976 memorandum, we find no logical relationship between an alleged January 1976 event and the events with which the instant proceedings have dealt. Whatever effect the 1976 memorandum might have, it certainly has no bearing on the proceedings below and cannot serve as the basis for rejecting the Hearing Examiner's Report or reopening the instant proceeding at this late stage. This is particularly so inasmuch as the PBA has the option of filing a separate charge with respect to the 1976 memorandum, the 6 months period not having yet expired with respect to alleged January 27, 1976 conduct. Accordingly, the PBA's motions concerning the 1976 memorandum are hereby denied.

^{5/} That subsection provides in pertinent part that "no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge...."

ORDER

For the reasons hereinabove set forth, the Commission hereby adopts the Hearing Examiner's recommended Order and the instant Complaint^{6/} is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Charles H. Parcels

Charles H. Parcels
Acting Chairman

DATED: Trenton, New Jersey
May 25, 1976

Issued: May 26, 1976

^{6/} In his recommended Order the Hearing Examiner inadvertently referred to dismissal of the Charge.

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Appearances:

For the Charging Party
Zazzali and Zazzali, Esqs.
(Mr. Lawrence A. Whipple, of Counsel)

For the Respondent
Gerald L. Dorf, P.A.
(Mr. Thomas J. Savage, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission on April 14, 1975 by Bloomfield Patrolmen's Benevolent Association, Local Number 32 (hereinafter the P.B.A.) alleging that the Town of Bloomfield (hereinafter the Town) had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the Act) in that the Town had unilaterally, without prior negotiations with the P.B.A., substantially modified and eliminated existing rules governing working conditions by promulgating "Bloomfield Police Department Memo #48" whereby shift and job assignments were not made in accordance with principles of seniority that had been in effect within the Police Department for many years.^{1/}

^{1/} More specifically, the P.B.A. asserted that the actions of the Town violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

These subsections prohibit 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 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.

With regard to the alleged (a)(5) violation of the Act the P.B.A. referred to the statutory mandate contained within N.J.S.A. 34:13A-5.3 that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 25, 1975.

Pursuant to the Complaint and Notice of Hearing, hearings were held on September 5, 1975, October 15, 1975 and October 29, 1975 in Newark, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs subsequently were submitted by all parties to this instant proceeding. Upon the entire record in this matter, the Hearing Examiner finds:

1. The Town of Bloomfield is a Public Employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Bloomfield Patrolmen's Benevolent Association, Local Number 32 is an employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. An Unfair Practice Charge having been filed with the Commission alleging that the Town of Bloomfield has engaged or is engaging in unfair practices within the meaning of the Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

BACKGROUND

The P.B.A. has been recognized by the Town as the exclusive majority representative for the purpose of collective negotiations for all police officers employed by the Town excluding only the Chief of Police. This negotiating unit is composed of approximately seventy eight (78) Patrolmen, seventeen (17) Sergeants, eleven (11) Detectives, eight (8) Lieutenants, three (3) Captains and one Deputy Chief.

For several years prior to 1973 the P.B.A. and the Town engaged in collective negotiations and informal agreements were reached by the parties. The results of these particular negotiations, however, were never formally reduced to a written collective negotiations agreement.

In or about September of 1973, collective negotiations commenced for the 1974 calendar year. The impasse resolution procedures established by the Public Employment Relations Commission were invoked by the P.B.A. on June 3, 1974 by the filing of a Notice of Impasse [Docket No. I-1632] after the parties had failed to conclude an agreement through direct negotiations. On December 10, 1974, a Report and Recommendation concerning a proposed resolution of the impasse was issued by Stanley L. Aiges, the fact-finder appointed by the Commission

[Docket No. FF-571 - Exhibit CH-27]. On that same date, a Memorandum of Agreement [Exhibit CH-28] was executed by the P.B.A. and the Town that set forth the tentative settlement concluded by the parties' respective negotiating committees^{2/} concerning all the issues negotiated between the parties with regard to terms and conditions of employment. This Memorandum in part provided that "[t]his Agreement and other terms and conditions of employment shall be reduced to writing and shall form a collective bargaining agreement. The Parties hereto agree to expend every reasonable effort to have such agreement consummated by March 1, 1975." This agreement - the first written comprehensive contract between the parties - was to cover the period between April 1, 1974 and December 31, 1975.

Although certain of the agreements set forth within the Memorandum of Understanding have been fully implemented the parties had not formally executed a contract covering the 1974 and 1975 calendar years as of January 6, 1976 when the last briefs were filed in the instant matter. Negotiations are still apparently continuing between the parties with regard to a first written contract.

Prior to June of 1973, the Bloomfield Police Department had been comprised of the Office of the Chief of Police and two divisions. In June of 1973 the Plainclothes Division was commanded by Deputy Chief Anthony Castagno and the Uniformed Division was commanded by Deputy Chief John Dougherty.

In June of 1973, Deputy Chief Castagno became Chief of Police. Castagno, in addition to his Chief's duties, continued his command of the Plainclothes Division since his Deputy Chief's position was not filled by the Town. In the fall of 1973, the Town, at the request of Castagno, retained the International Association of Chiefs of Police (hereinafter the IACP) to conduct an analysis of the organization and operation of the Police Department. In June of 1974, the IACP submitted its recommendations and analysis to the Mayor and Council of the Town as well as to Castagno. The IACP recommended two plans with regard to the basic structure of the Department. The plan selected by Castagno and presented to the Mayor and Council in January of 1975 retained a separate office of the Chief of Police but recommended that the two existing divisions, i.e., the Plainclothes Division and the Uniformed Division be reorganized into three divisions, i.e., a Uniformed Division, Criminal Investigation Division and Services Division. The report recommended that each of the three divisions be commanded by a captain and that each of the three shifts in the Patrol Division [12 midnight to 8:00 A.M. (Shift 1) - 8:00 A.M. to 4:00 P.M. (Shift 2) - 4:00 P.M. to 12 midnight (Shift 3)]

^{2/} The Memorandum stated, in part, that the Agreement was subject to ratification by the membership of the Association and by the Mayor and Town Council.

be commanded by a lieutenant. The report further recommended that the position of Deputy Chief be eliminated after the retirement of the only incumbent, Deputy Chief John Dougherty.

The Mayor and Council in January of 1975 approved of the reorganization of the department as recommended by the IACP and by Castagno who modified the IACP's recommendations in the manner to be referred to hereinafter.

On January 27, 1975 a departmental order (Memo #48) was promulgated by Castagno pursuant to the reorganization of the department. [Exhibit CH-33] This order confirmed, in part, that James Mathieson, a police captain with thirty two years of service within the Bloomfield Police Department, as of February 3, 1975 would be transferred to the night shift (12 midnight - 8:00 A.M.) of the Patrol Division and would assume command of "Shift One." Mathieson would work a "four days on duty - two days off duty" schedule which would necessitate working on an occasional holiday and during certain weekends. For approximately four years prior to February 3, 1975 Mathieson had worked the day shift (Shift 2) and his hours had either been from 6:00 A.M. to 2:00 P.M. or from 7:00 A.M. to 3:00 P.M.^{3/} Mathieson, during this four year period of time, had worked a "five days on - two days off" schedule and had all weekends and holidays off.

As a further result of the issuance of Memo #48 John Dougherty, a Deputy Chief of Police with more than thirty eight years of service with the Bloomfield Police Department, although continuing to command the Uniformed Division, was transferred to a 5:00 P.M. - 1:00 A.M. shift, Monday through Friday, effective February 3, 1975. Dougherty since 1967 had worked a steady day shift from 9:00 A.M. to 5:00 P.M., Monday through Friday.

Prior to the departmental reorganization and before the issuance of Memo #48 Captains Angelo Pezzino and Malcolm Boone had been Shift Commanders within the Uniformed Division. Captain Pezzino, the second most senior captain had commanded the afternoon shift (3:00 P.M. - 11:00 P.M.). Captain Boone, the most junior captain, had commanded the night shift (11:00 P.M. to 7:00 A.M.). The Departmental reorganization resulted in the assignment, effective February 3, 1975, of Captain Pezzino and Captain Boone to command the newly created Criminal Investigation and Services Divisions, respectively. The hours of work of each of these men were to be and are 9:00 A.M. - 5:00 P.M., Monday through Friday.

^{3/} Castagno testified that he had changed the hours of "superiors" on "Shift Two" from 6:00 A.M. - 2:00 P.M. to 7:00 A.M. - 3:00 P.M. during the spring of 1974 [Transcript 10-29-75, page 20]

The instant unfair practice charge was filed by the P.B.A. on April 14, 1975. The P.B.A. contended that the reassignments of Captain Mathieson and Deputy Chief Dougherty - in violation of existing seniority rules governing working conditions and in contravention of the mandate of the aforementioned December 10, 1974 Memorandum of Understanding that the status quo be maintained with regard to terms and conditions of employment not specifically modified by said memorandum - violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

MAIN ISSUES

1. Whether the Town in reassigning Captain Mathieson and Deputy Chief Dougherty in effect proposed a new rule or modified an existing rule governing working conditions without negotiating these changes with the P.B.A. before they were established. ^{4/}
2. Whether there was an attendant obligation on the part of the Town to negotiate with the P.B.A. present under the facts of this case?
3. Whether the conduct of the Town in this instant matter was violative of N.J.S.A. 34:13A-5.4(a)(1) and (5)? ^{5/}

^{4/} The P.B.A. in its brief refers to an allegation that was not contained in the original charge - which was never amended - nor adjudicated before the undersigned, i.e. that the departmental reorganization itself was a change in working conditions and should therefore have been negotiated prior to its implementation. The record specifically reflects that the only question asked of a witness concerning whether the departmental reorganization was the subject of negotiations was withdrawn after an objection was raised that this question dealt with matters not alleged in the charge. [Transcript 10-29-75, pages 87-90]

The undersigned finds that this "departmental reorganization" matter is not properly before the Commission. This recommended report and decision will therefore not deal with this particular issue.

^{5/} The P.B.A. in its opening statement at the start of the hearing contended that the Town committed an (a)(1) violation in that the Town unilaterally changed its seniority practices in an attempt to coerce and restrain the employees within the unit from exercising their rights to have a collective bargaining agreement formally executed. [Transcript 9-5-75, pages 12-13]

At a later date the P.B.A. conceded that the above assertion was perhaps not reflective of the motivation behind the Town's actions and never pressed this particular contention. The P.B.A. did contend that an (a)(1) violation had occurred if it was determined that the Town had violated (a)(5) of the Act's unfair practice section. The P.B.A. apparently adopts the policy of the National Labor Relations Board that would mandate a finding that a violation by an employer of any of the six other subdivisions of the Act would also constitute a violation of (a)(1) as a matter of course. [Transcript 10-29-75, page 44]

POSITION OF THE P.B.A.

The P.B.A. maintained that prior to January 27, 1975 the Town had uniformly applied and administered a rule or policy governing the selection of shift and job assignments within the Bloomfield Police Department in accordance with the departmental seniority of the individual police officers. The P.B.A. contended that the promulgation of "Bloomfield Police Department Memo #48" effectively modified or virtually eliminated this rule or policy in that this memo assigned certain police officers to shifts not in accordance with their departmental seniority in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).

The P.B.A. asserted that the Town unilaterally implemented, without prior negotiations with the P.B.A., procedures that substantially modified and eliminated existing rules or policies governing seniority, hours of work and job assignments; subjects which have been administratively and judicially determined to be required, mandatory subjects of collective negotiation.

The P.B.A. proposed that the Commission issue (1) a bargaining order directing the Town to engage in collective negotiations on the matters at issue in this instant matter and (2) mandate that Captain Mathieson and Deputy Chief Dougherty be reassigned to the hours to which they were assigned prior to January 27, 1975 during the pendency of negotiations between the P.B.A. and the Town. The P.B.A. stated that the junior Lieutenant, presently in command of the day shift, should be reassigned to the night shift with Captain Mathieson being reassigned to the day shift in accordance with his seniority.

POSITION OF THE TOWN

The Town maintained that it had not committed unfair practices as defined by N.J.S.A. 34:13A-5.4(a)(1) and (5) in that it had neither proposed a new rule nor had modified an existing rule governing working conditions, specifically with regard to shift and job assignments and hours of work, when it had issued "Bloomfield Police Department Memo #48" on January 27, 1975.

The Town asserted that the record in this instant matter confirmed that departmental seniority had not been the only relevant factor in determining the tour of duty that an individual police officer would be assigned to within the Bloomfield Police Department. The Town contended that a number of other factors including (1) performance, (2) an individual's ability to perform required work, (3) existing shift complement and size, (4) the need for approval from the Chief of Police's office, (5) the desire not to disrupt the efficient operation of the Police Department, and (6) disciplinary considerations had always been carefully

examined in determining job assignments and shift selections for individual police officers within the Department. The Town argued that the assignments of Mathieson and Dougherty admittedly in "violation" of their departmental seniority and personal desires were made after consideration of the aforementioned factors and in the interest of upgrading and improving the efficiency and performance of the Police Department. The Town therefore concluded that there had been no change made concerning the criteria utilized in establishing either shift or job assignments within the Department.

The Town also questioned whether any rule concerning shift or job assignments, whether formal or informal, had ever been applied to superior officers within the Department. The Town noted in this regard that the P.B.A. did not contend that the "seniority rule" with regard to shift or job assignments as it applied to patrolmen had been changed.

The Town emphasized that in any event the question of seniority shift selection by senior Superior Officers such as Mathieson and Dougherty was not a mandatory subject for collective negotiations, as defined by specific judicial decisions, inasmuch as the ability of a Chief of Police to assign the duties and shifts of superior officers was "essential to the ability to manage and direct the enterprise." The Town therefore maintained that if the Commission determined that the Town had effectuated changes in existing seniority policies when it issued Memo #48 then it was not under any duty to negotiate these changes, concerning non-mandatory subjects for negotiations, with the P.B.A.

DISCUSSION AND ANALYSIS

After careful consideration of the foregoing and the record as a whole, the undersigned does not find that the Town's conduct in promulgating "Bloomfield Police Department Memo #48" violated N.J.S.A. 34:13A-5.4(a), subsections (1) and (5).

The critical question before the undersigned, as stated in the P.B.A.'s brief, is whether the Town's actions in issuing "Bloomfield Police Department Memo #48" pursuant to the departmental reorganization and reassigning Mathieson and Dougherty to shifts not in accordance with their departmental seniority altered existing rules or policies concerning the weight given to seniority in determining shift and job assignments.

The P.B.A. introduced exhibits, consisting of certain internal Police Department memoranda, that were purported to be the only written records of the rules and policies that delineated the factors to be considered in determining an individual police officer's tour of duty. As stated earlier no comprehensive

collective negotiations agreement has ever been executed by the P.B.A. and the Town and therefore no contractual provisions exist concerning such subjects as seniority, assignments and hours of work.

Exhibit CH-14 was described throughout the Hearing as the most comprehensive document available that set forth the procedures that were followed in making shift and job assignments within the Department. This memorandum from the then Chief of Police, Mitchell Dario, to Deputy Chiefs Castagno and Dougherty is dated January 12, 1973, is entitled "SOP [Standard Operating Procedure] - Tours of Duty" and reads as follows:

Seniority and performance have been factors in determining the tour of duty that the individual Police Officer will be assigned to within the Police Department. When a vacancy occurs within a "shift", personnel have been given an opportunity, based on seniority and performance, to decide whether or not they desire to fill the vacancy.

To avoid confusion, interruption of operations, and to provide for efficient and planned assignment of personnel, I have designed a procedure to be followed for personnel requesting a change in tour of duty hours based on seniority and performance.

Effective immediately, requests for reassignment of tour of duty hours and duties must comply with the following regulations: -

1. Seniority and performance will be the basis upon which tour of duty assignments will be made.
2. Request for change in hours of assignment will be received on an annual basis only. (This does not preclude that a reassignment will not be made if a vacancy occurs during the course of the current year, or for disciplinary purposes).
3. Request for reassignment must be submitted not later than December 31st of the current year.
4. Request for reassignment of tour of duty hours will be honored whenever possible and only to the extent that it does not disrupt the efficient operation of the Police Department.
5. Reassignment, if request is approved, will take effect by January 15th of the new year.

It should be noted that this procedure will include the assignment of tour of duty hours for the individual Police Officer and determine the assignment of duties.

An examination of this document reveals that seniority was simply one of the listed factors to be considered in planning the assignments of police personnel. The performance factor was specifically enunciated whenever any

reference was made to the concept of seniority in this memorandum. Dario's memo also referred to several exceptions to the general "seniority and performance" rule. In this regard reference was made to (1) reassignments being made for disciplinary purposes and (2) requests for reassignments being honored whenever possible only to the extent that [said reassignment] did not disrupt the efficient operation of the Police Department. In addition the entire tenor of the Dario memo itself substantiates the contention of the Town that the approval of the Chief of Police - approval that could not be considered merely pro forma in nature - was a prerequisite before shift and duty assignments were approved.

Two other P.B.A. exhibits designated as CH-10 and CH-12 consisted of memos from Dougherty and Mathieson respectively, the two police officers whose reassignments precipitated the filing of this instant unfair practice charge. Dougherty's memo to all Shift Commanders, dated November 13, 1972, in part stated that, "[a] new year is fast approaching. This means reselection of assignments based upon performance and seniority." (emphasis mine) Mathieson's memo to Dario, dated November 27, 1972, stated in part, that "[i]n accordance with department S.O.P. the uniform division will be offered the chance to change their shift or post according to seniority and performance, effective January 15, 1973."^{6/} (emphasis mine) It would therefore appear that both Mathieson and Dougherty, in their written communications at least, recognized that departmental seniority was not the only basis for shift assignments of police personnel.^{7/}

The oral testimony of the witnesses called by both the P.B.A. and the Town also established that departmental seniority was not the sole criterion to be examined before shift and job assignments were made. It was evident from

^{6/} The Dougherty and Mathieson memos were drafted between seven and nine weeks before the comprehensive Dario memorandum (CH-14) was written.

^{7/} The P.B.A. did introduce into evidence certain exhibits [CH-11, CH-13, CH-16, CH-19, CH-21, CH-23, and CH-24] that consisted of internal police memos from Captains Pezzino, Boone and Mathieson and, in one instance, Chief Castagno to Deputy Chief Dougherty. These documents, in part, referred to either individual requests to be reassigned to particular shifts according to seniority or actually confirmed that shift assignments had already been made in accordance with seniority.

None of these exhibits however referred specifically to "S.O.P." within the department with regard to personnel assignments unlike exhibits CH-12 and CH-14 referred to earlier. In addition these exhibits referred to how certain individual requests were processed or how certain individual assignments were made. These exhibits made no attempt, unlike CH-14, to define departmental policy with regard to personnel assignments generally.

the record that departmental seniority and/or seniority within rank [in the case of superior officers] was usually the most important factor in the determination of personnel assignments. For example, Chief Castagno testified that to his knowledge the requests of sergeants and lieutenants assigned to the Patrol Division for particular shifts, in accordance with their seniority, had never been denied. Castagno also testified that prior to the departmental reorganization in January of 1975, when all three captains were in charge of shifts, all requests for shift assignments from captains in accordance with their seniority were likewise honored.^{8/} Mathieson, Dougherty, and Patrolman Michael Rabasco, President of the P.B.A., testified that to their knowledge an individual's seniority was virtually dispositive with regard to the question of shift assignments within the Police Department regardless of rank.^{9/}

The aforementioned witnesses, however, also testified that there were exceptions to the practice of relying primarily upon seniority considerations in the effectuation of shift assignments and recognized that other factors, in the past, had played a role in personnel assignments. These factors included (1) the need for the approval of the Chief of Police (2) the desire not to disrupt the efficient operation of the Police Department (3) disciplinary considerations (4) performance [i.e. an individual's ability to perform required duties].

An examination of the testimony concerning both the weight given in the past to the above specified factors in the selection of shift and job assignments and the role these considerations played in the reassignments of Mathieson and Dougherty is in order and will be discussed seriatim.

1. THE NEED FOR THE APPROVAL OF THE CHIEF OF POLICE

It is virtually axiomatic given the paramilitary organization of police departments throughout the state that the need for the approval of the Chief of Police before effectuating shift and/or job assignments is a constant. The record in this instant matter reflects that although Chief Castagno's authority to approve certain personnel assignments may be delegated to Commanders of the Department's several divisions or even to Shift Commanders Castagno possesses the ultimate authority on a day to day basis to establish a basic Table of Organization for the Department, work schedules, and shift complements and assignments.^{10/}

^{8/} Transcript 10-29-75, pages 45-46.

^{9/} Transcript 9-5-75, pages 28-29, Transcript 10-15-75, pages 23-24, 57.

^{10/} Specific policy decisions of the Chief are subject to the review of the Mayor and Council.

For example, it is uncontroverted that Chief Castagno requested and subsequently obtained an analysis of the Police Department by the IACP. His recommendation concerning which of the two organization plans proposed by the IACP should be adopted was accepted by the Mayor and Council along with the modifications that he suggested. Castagno issued several memoranda and orders pursuant to the departmental reorganization [Exhibits CH-32, CH-33, CH-34 and CH-36] that resulted, in part, in the partial reduction of the number of policemen assigned to specific shifts within the Uniform Division and numerous reassignments of individuals to the newly organized Criminal Investigation and Services Divisions.^{11/} Witnesses Mathieson and Rabasco testified that the Chief of Police was integrally involved in the shift selection process, especially when circumstances had arisen where strict seniority considerations would arguably hamper the efficient operation of the Department.^{12/}

As referred to hereinbefore, the record established that it was Castagno's predecessor as Chief of Police who formalized the "S.O.P" with regard to personnel assignments and who designed the procedure to be followed by police officers in requesting a change in their tour of duty. This procedure clearly implied that there would be an administrative review made by the Chief of Police or his designee of all requests for reassignment.

The undersigned therefore concludes that the role played in the past by Bloomfield's Chief of Police concerning assignments and transfers has not been pro forma in nature. The Chief of Police has been able to consider additional factors as part of the shift assignment process and has not been restricted to an examination of a police officer's departmental seniority only. The record substantiates the Town's contention that the exercise of the Chief's independent judgment as to the needs of the Town and the Department has been recognized as being an important part of any existing rules or policies concerning job and shift assignments.

2. THE DESIRE NOT TO DISRUPT THE EFFICIENT OPERATION OF THE POLICE DEPARTMENT

As set forth earlier the Dario memorandum of January 12, 1973 (Exhibit CH-14) in part stated that "[r]equests for reassignment of tour of duty hours will be honored whenever possible and only to the extent that it does not disrupt the efficient operation of the Police Department." (Emphasis mine) The

^{11/} Transcript 10-29-75, pages 5-7, 25, 64.

^{12/} Transcript 9-5-75, pages 56 and 77, Transcript 10-15-75, pages 45-46.

record reveals that the Chief of Police is primarily responsible, on a day to day basis, for determining what shift and job assignments should be made to maximize the efficiency of the Police Department.^{13/} No concrete evidence was proffered by the P.B.A. that disputed that the issue concerning the efficient operation of the Police Department was traditionally a factor in determining tours of duty. In this regard the P.B.A. chose instead to question whether the motivation behind the decision to reassign Dougherty specifically was actually predicated on efficiency considerations inasmuch as Castagno had not designated Dougherty to act as the Acting Chief of Police when Castagno was scheduled to be away from the Department for a period of time.^{14/}

Castagno testified throughout the proceeding that this "efficiency factor" was paramount in his mind when he decided to reassign Mathieson and Dougherty despite their seniority ranking. Castagno maintained that in making these appointments he had hoped to upgrade the operations of the Department by placing the next two highest ranking senior officers in direct charge of the Police Department for the sixteen hours or so when Castagno was not present in his office. Mathieson and Dougherty would be permitted to render command decisions during Shifts One and Three that normally would have to be issued in person by the Chief of Police.^{15/}

Prior to the January, 1975 reorganization Castagno, Dougherty and Mathieson - the Chief of Police, the only Deputy Chief, and the Senior Captain respectively - were all working together between the hours of 9:00 A.M. - 3:00 P.M., Monday through Friday. Castagno at that time was normally the only individual contacted if serious problems developed on Shifts One and Three.^{16/}

^{13/} At one point in the record Castagno testified that specific requests for re-assignment would be considered by both him and the Division Commander at a meeting at which time the "efficiency factor" would be discussed. [Transcript 10-29-75, page 34]

^{14/} See footnote 5 and Transcript 10-29-75, pages 66-75.

The P.B.A. apparently attempted to establish that if Castagno did not deem Dougherty capable of commanding the Department in his absence then it would appear unlikely that Castagno was testifying truthfully when he stated that he reassigned Dougherty to the 5:00 P.M. to 1:00 A.M. shift - when he would be in charge of the entire Department - because of Dougherty's superior performance and experience.

Castagno, however, testified that on two occasions, while he was away from the department, he had been unable to leave Dougherty in charge of the department since Dougherty had either been ill or on vacation. Castagno also asserted that Dougherty, in years past, had expressed a reluctance to serve as commander of the Department in the Chief's absence and Castagno concluded that he should appoint a Captain to take temporary charge of the Department in future instances.

^{15/} Transcript 10-29-75, pages 19-20, 23-31, 62-64, 67, 84 and 86-87.

^{16/} Transcript 10-29-75, page 20.

During the course of his testimony Castagno referred to recent incidents that took place after the reassignments were made that he believed substantiated his contentions that the Department would now be more efficiently run as a direct result of the new assignments. Castagno stated that on one particular occasion, involving a potential riot situation in nearby Nutley, Deputy Chief Dougherty had taken complete control over a situation that would have required the direct involvement of Chief Castagno prior to the departmental reorganization.^{17/}

Castagno also contended that another reason why Dougherty was assigned to a 5:00 P.M. - 1:00 A.M. shift concerned the fact that as commander of the Department's Uniformed Division Dougherty would then be on active duty at a time when the largest number of men were assigned to the Patrol Division that was under his jurisdiction and when the greatest number of incidents were reported. Castagno believed that it would be more efficient to have Dougherty on active duty during this "peak period" within his division.^{18/}

In summary, the undersigned concludes that this aforementioned "efficiency factor" has been recognized as one of the matters to be considered in making personnel assignments. The undersigned also finds that the fact that this issue played an apparently dispositive role in the reassignments of Mathieson and Dougherty does not mean that their seniority was totally ignored in making the new assignments nor does it constitute a modification or elimination of existing rules or practices governing shift selection. In this instant matter other factors as analyzed hereinbefore and to be referred to hereinafter outweighed considerations of departmental seniority.

3. DISCIPLINARY CONSIDERATIONS

The aforementioned Dario memorandum (CH-14) in enunciating the factors weighed in determining the tour of duty to which an individual Police Officer would be assigned stated, in part, that reassignments could be made on an other than annual basis "if a vacancy occurred during the course of the current year, or for disciplinary purposes." (Emphasis mine)

^{17/} Transcript 10-29-75, pages 26-29 and Exhibit R-1.

^{18/} Transcript 10-29-75, pages 103-104.

Castagno also testified that Captains Pezzino and Boone had been assigned to command the Criminal Investigation and Services Divisions respectively while being on active duty from 9:00 A.M. - 5:00 P.M. because these hours subsumed the most active periods of these two divisions.

All of the witnesses who testified in this matter; specifically, Mathieson, Rabasco, Dougherty and Castagno, recognized that individuals could be reassigned to a different shift, for disciplinary reasons, not in accordance with their departmental seniority.^{19/} Mathieson affirmed that, in his career, he personally had switched two or three men from his shift to a less desirable shift after presenting the relevant facts to the Chief of Police. Dougherty declared that throughout the years he had possessed the authority to change a man's shift although he had never found it quite necessary to change an officer's hours of work for disciplinary reasons.^{20/}

The record does reflect that assignments, not in accordance with strict seniority, were infrequently made for disciplinary reasons inasmuch as these particular actions were undertaken only when all other alternative forms of discipline had failed to resolve a particular problem. In addition the record also clearly establishes that the reassignments of Mathieson and Dougherty were not made for disciplinary reasons at all.

It is however evident to the undersigned that this "disciplinary factor" has always been recognized as an exception to the general principle that shift assignments are made in accordance with seniority wherever possible. The existence of this "disciplinary factor" also evidences again the role played by the Chief of Police and other high ranking officers in the shift selection process. There has always been recognition of the need upon occasion to subordinate the desires of an individual officer concerning shift selection [based on seniority considerations] to the collective needs of the Police Department as pronounced by the Chief of Police and approved by the Mayor and Council.

4. PERFORMANCE - AN INDIVIDUAL'S ABILITY TO PERFORM REQUIRED DUTIES

As discussed earlier the only exhibits introduced by the P.B.A. that referred specifically to the concept of "S.O.P." with regard to shift assignment [Exhibits CH-12 and CH-14] listed "seniority and performance" as factors considered in determining the tour of duty to which an individual Police Officer would be assigned.

Performance was defined generally as encompassing a policeman's ability to perform required duties in a satisfactory, acceptable manner. The record reflects that both inferior and superior performance was considered in making personnel assignments.

^{19/} Transcript 9-5-75, pages 55, 63, 70-72, Transcript 10-15-75, pages 27-29, 57-59, Transcript 10-29-75, page 17.

^{20/} Transcript 9-5-75, page 71, Transcript 10-15-75, pages 58-59.

The testimony of the witnesses in this proceeding established that this performance factor was recognized as being an important consideration in making individual job assignments within a particular shift [e.g. whether an individual would be on Motorcycle Patrol within the Uniformed Division or assigned to the Youth Section of the Criminal Investigation Division while on Shift 2] ^{21/}

The record also established that although individual performance has not often been a "determining factor" in assigning policemen, especially superior officers, to the shift itself, despite the existence of memoranda to the contrary [Exhibits CH-10, CH-12 and CH-14] ^{22/} performance has been considered on an ad hoc basis. ^{23/} In this regard, Castagno emphasized that the assignments of Mathieson and Dougherty were not made to punish these individuals or because of their inability to perform tasks previously assigned to them. He maintained that on the contrary he had made these appointments because of their expertise and superior performance. ^{24/} Mathieson affirmed that he possessed special qualifications for the assignment that he presently performed within the department i.e., he had taken the examination for Chief of Police and passed; he had commanded the Night Squad for a number of years; and he had held the rank of Captain for fifteen years. ^{25/} Dougherty confirmed that although all three Captains were well qualified only Mathieson had passed the competitive exam to become Chief of Police. ^{26/}

Under the circumstances in the instant matter it is apparent that the reassignments of Mathieson and Dougherty involved changes in job assignments as well as shift assignments inasmuch as Mathieson's and Dougherty's responsibilities were undoubtedly affected by the decision to place them in direct charge of the operation of the Police Department for the sixteen or so hours when Castagno was not physically present in his office. It is the undersigned's finding that in this hybrid "change in shift - change in responsibilities" situation performance has always been recognized as being an important consideration in the making of personnel assignments within the Department.

^{21/} Transcript 10-15-75, page 5, Transcript 10-29-75, pages 14 and 15.

^{22/} Transcript 10-15-75, pages 96-97, Transcript 10-29-75, pages 5 and 29.

^{23/} Transcript 9-5-75, pages 55-56, 70-71, Transcript 10-15-75, page 26, Transcript 10-29-75, pages 11-17.

^{24/} Transcript 10-29-75, page 30.

^{25/} Transcript 10-15-75, page 13.

^{26/} Transcript 10-15-75, page 69.

In conclusion the undersigned does not find that the Town in promulgating "Bloomfield Police Department Memo #48" and reassigning Captain Mathieson and Deputy Chief Dougherty proposed a new rule or modified any existing rule governing seniority practices relating to personnel assignments within the Police Department.^{27/} Therefore, there was no attendant obligation on the part of the Town to negotiate with the P.B.A. present under the facts of this case.

As discussed before it is evident that departmental seniority and/or seniority within rank [in the case of superior officers] was, in the normal course of events, the single most important factor in the determination of personnel assignments including the selection of shifts. However the record before the undersigned clearly established that (1) there are exceptions to the practice of relying primarily upon seniority considerations in the effectuation of shift assignments and (2) there are other factors, referred to hereinbefore, considered in the finalizing of personnel assignments that on occasion have outweighed considerations of seniority in making assignments within the department.^{28/} The undersigned does not find that the P.B.A. met its burden in proving the allegations of its charge by the preponderance of the evidence.^{29/}

The undersigned's determination that no change was effected in existing departmental rules governing working conditions as a result of the issuance of "Memo #48" makes unnecessary any detailed consideration of the issue as to whether such matters as "shift and job assignments being made in accordance with strict departmental seniority" are required subjects for collective negotiations.^{30/} The parties had briefed these and other "scope of negotiations" issues in the event that it was determined by the undersigned that there had been changes made

^{27/} The undersigned does find that the existing rules or policies within the Department relating to shift assignments have been applied to superior officers as well as to patrolmen despite the Town's arguments to the contrary.

^{28/} It is interesting to note that the P.B.A. has not argued that seniority considerations are now being outweighed by other factors with regard to the shift assignments of any patrolman, sergeant or lieutenant within the unit.

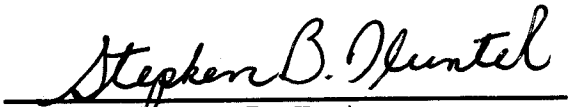
^{29/} N.J.A.C. 19:14A-3.3

^{30/} A Petition for Scope of Negotiations Determination may be filed by the parties, pursuant to N.J.A.C. 19:13-11 et seq., seeking a determination as to whether these disputed matters are required, permissive or illegal subjects for collective negotiations if resolution of these "scope" issues is necessary during the course of negotiations between the P.B.A. and the Town.

in existing policies governing shift selection.^{31/} Suffice it to say, assuming arguendo the undersigned had determined that existing rules governing shift selection had been modified or eliminated, Commission precedent would leave little doubt that the impact of a decision to reassign unit members to shifts not in accordance with existing procedures as it affects terms and conditions of employment - if not the decision itself - was a required subject for negotiations.^{32/}

ORDER

Accordingly, for the reasons set forth above, IT IS ~~HEREBY ORDERED~~ that the charge in this matter be dismissed in its entirety.



Stephen B. Hunter
Hearing Examiner

Dated: Trenton, New Jersey
March 29, 1976

^{31/} The Town had argued that if the undersigned determined that changes had been made unilaterally affecting the "status quo" relating to shift selection, these changes could still be unilaterally implemented since the subject matter of this "change" dealt with a non-mandatory subject of negotiations.

^{32/} See Rutgers, The State University, 2 NJPER 13 (1976) and other Commission "Scope of Negotiations" decisions cited therein.