P.E.R.C. NO. 91-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-H-89-191

PBA LOCAL NO. 98,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Sayreville violated the New Jersey Employer-Employee Relations Act by establishing a fourth "power" shift in January 1989, and by demoting Ronald J. Batko from temporary sergeant because PBA Local No. 98 filed a grievance contesting transfer procedures. The Commission also that a vacation pay dispute should be resolved through the contractual arbitration clause and that a dispute over compensatory time off arises under the contract and that any violation of that contract or federal law is not an unfair practice.

P.E.R.C. NO. 91-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and- Docket No. CO-H-89-191

PBA LOCAL NO. 98,

Charging Party.

Appearances:

For the Respondent, Casper P. Boehm, Jr., attorney

For the Charging Party, Weinberg & Kaplow, attorneys (Irwin Weinberg, of counsel)

DECISION AND ORDER

On January 17, 1989, PBA Local No. 98 filed an unfair practice charge against the Borough of Sayreville. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) through (7),[1/] when it unilaterally changed vacation pay

---

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or

Footnote Continued on Next Page

calculations; implemented a fourth shift without negotiations; demoted an employee because the PBA insisted on compliance with the contract; and refused to grant employees compensatory time-off.[2/]

On April 17, 1989, a Complaint and Notice of Hearing issued. On June 1, the Borough filed its Answer denying the allegations and incorporating an earlier statement of position.

On November 8 and 9, 1989 and March 28, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 10, 1990, the Hearing Examiner issued his report and recommendations. H.E. No. 91-2, 16 NJPER ___ (¶___ 1990). He found that the Borough violated the Act when its police chief unilaterally created a fourth shift and when it demoted a temporary sergeant back to patrol officer because the PBA had filed a grievance objecting to the procedure used to transfer him. He recommended dismissing the allegations concerning vacation pay and

---

1/ Footnote Continued From Previous Page

complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ The charging party withdrew four other allegations at the hearing (1T7-1T8).

compensatory time-off because they concerned mere breaches of contract.

On August 1, 1990, the PBA filed exceptions. It argues that the vacation pay dispute involves the failure to carry out an arbitration award and a change in a 20 year past practice, not merely a question of contract interpretation. It further argues that the refusal to grant compensatory time-off transcends a matter of contractual interpretation and involves bad faith. It asserts that on Februry 16, 1990, an arbitrator determined that he had no power to enforce the right to compensatory time-off under the Fair Labor Standards Act, 29 U.S.C. §201 et seq.

On August 6, 1990, the Borough filed exceptions to certain findings of fact and conclusions of law. It contends that the Hearing Examiner should have given greater weight to an exhibit (R-1) that the Borough prepared for an arbitration on holiday pay; the PBA's failure to submit evidence of a written proposal concerning the fourth shift shows that the issue was not discussed during negotiations; the fourth shift was not discontinued because of a PBA grievance; the PBA never requested negotiations over the fourth shift; and the chief rescinded the temporary sergeant promotion until the alleged breach of contract could be cured. The Borough supports the Hearing Examiner's conclusions regarding holiday pay and compensatory time-off, but claims it had a managerial prerogative to institute the fourth shift and that the temporary promotion was rescinded for proper reasons.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-18) are accurate. We incorporate them here.[3/]

We begin with the dispute over vacation pay. The parties' contract provides that after fifteen years of service, full-time employees shall receive 28 working days off annually, plus one week's pay. In an arbitration decision concerning holiday pay, the Borough argued that holiday and vacation pay should be treated the same. The arbitrator, in ruling on holiday pay, stated that the same principle applies to vacation pay and that officers should "basically be paid as if these were normal work days or work weeks." Based on its interpretation of the arbitrator's award, the Borough reduced the one week's vacation pay for employees with fifteen years from seven to five days pay. The PBA argues that this change in a past practice violated subsection 5.4(a)(5).

On this record, we are not prepared to find that the Borough's action violated its obligation to negotiate in good faith. In essence, the PBA is claiming that the Borough breached its contractual obligation to pay one week's pay. Although paying five days departs from the long-standing practice of paying seven days, the Borough relied on the arbitrator's language suggesting

---

3/ We disagree with the Borough that R-1 explains why the Borough changed its method of calculating vacation pay. R-1 is labeled "Calculation of Holiday Pay Uniform Employees" and does not refer to vacation pay. We also disagree that the PBA's failure to present their fourth shift proposal in writing proves that it was never presented.

that holiday and vacation pay should be treated the same. Under these circumstances, and particularly because the arbitrator retained jurisdiction should problems arise regarding the implementation of the award, we believe arbitration is the preferred forum to resolve this dispute.

We are not prepared to say that the arbitrator's award permits the Borough's action or even that it squarely addresses this dispute. We are convinced, however, that the dispute turns on an interpretation of the contractual term "one week" and that the Borough's action does not rise to the level of an unfair practice.[4/]

The PBA also argues that the Borough has not complied fully with the arbitrator's award concerning holiday pay. But the PBA can return to the arbitrator, seek to confirm the arbitrator's award pursuant to N.J.S.A. 2A:24-6, or file a new grievance about new violations.

3/ The PBA has also alleged that the Borough's action violated subsections 5.4(a)(1) and (3). The Hearing Examiner found that the Borough's business administrator and treasurer told the PBA President that the change in vacation pay was the Borough's way of getting back at the PBA for winning the arbitration. The Hearing Examiner did not decide whether this amounted to illegal retaliation for protected activity. We have reviewed the entire record, including the fact that the Borough argued before the arbitrator that vacation and holiday pay should be treated the same. We are not convinced that the Borough changed its practice in retaliation for the arbitration rather than in reliance on that arbitration. It consistently took the position that the two benefits should be calculated the same way.

We next consider whether the unilateral creation of a fourth shift violated subsections 5.4(a)(1) and (5). In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987), reaffirmed that police work schedules are mandatorily negotiable unless the facts demonstrate a need to act unilaterally. Thus we must examine the particular facts of this case.

During successor contract negotiations, the PBA proposed a change in work schedules from four days on and two days off to four days on and four days off. As a sweetener, it proposed a fourth "power" shift to put extra officers on the street during the high-need hours of 8 p.m. to 4 a.m. The Borough rejected the four and four schedule and the fourth shift proposal was not pursued independently. Subsequently, the Borough decided to create a fourth shift. In October or November 1988 it posted a notice and sought volunteers. It established the shift in January 1989 with one officer and discontinued it after only three days because of unrelated training needs.[5/] The chief acknowledged that he did not attempt to negotiate the establishment of the shift and that there was no emergency.

Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982), precludes negotiations over a subject if "negotiated agreement would significantly interfere with the determination of governmental

---

5/ The PBA has not proved that the shift was discontinued because it filed a grievance.

policy." There is no per se rule of exclusion for police scheduling cases. Mt. Laurel at 114. Under these facts, we find that the Borough had an obligation to negotiate with the PBA before unilaterally implementing the fourth shift. It was the PBA that first proposed the shift during negotiations, and the Borough has not shown that the PBA would not have agreed to this shift or negotiated some mutually satisfactory compromise. Also, the Borough conceded there was no emergency. In fact, it posted a notice of the shift at least 2 months before implementing it. There was ample time to negotiate and reach an agreement before acting unilaterally. Accordingly, we find that the Borough's action violated subsection 5.4(a)(5) and, derivatively, 5.4(a)(1).[6/]

We next address whether Ronald J. Batko was unlawfully demoted from temporary sergeant because the PBA filed a grievance contesting the Borough's failure to give ten day's notice before transferring him at the time of his promotion to temporary sergeant. The chief stated that he demoted Batko because the PBA objected to Batko's not having received a ten-day notice of promotion. But the PBA made it very clear at the time that it was not objecting to the promotion, but simply to a failure to give ten day's notice before transferring him at the time of the promotion.

6/ In its exceptions, the Borough contends that the Hearing Examiner's recommended order is too broad because under different facts which have not yet occurred, such a shift might not need to be negotiated. We agree with that general proposition. That is the essence of our case-by-case determination. Our order is tailored accordingly.

The Borough now contends that after being confronted with the PBA grievance, it simply rescinded the temporary promotion until the alleged breach of the ten-day notice provision could be cured. The record does not support that explanation either. The Borough waited ten days before demoting Batko, purportedly to avoid breaching the disputed contractual notice requirement when it transferred him back to his previous assignment. By that time, ten days had already passed since his original transfer. The first notice period had run and there was nothing left to cure. We thus conclude that the demotion was to retaliate for the first PBA grievance rather than to prevent a second one. It thus violated subsections 5.4(a)(1) and (3). Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); In re Bridgewater Tp., 95 N.J. 235 (1984).7/

Finally, we address whether the Borough violated the Act when it refused to grant employees compensatory time-off. It is undisputed that the entitlement to compensatory time-off arises under the collective negotiations agreement. That agreement

---

7/ In its exceptions, the Borough states that:

> respondent if charged with interest should only pay interest for that period of time that Patrolman Batko was deprived of the money during 1989 in the event that he received pay as a result of a previous arbitration for this period of time.

We do not know what arbitration the Borough is referring to. We will award interest less any payments already received.

provides that "[s]uch time may be taken only when scheduled by the Chief or his designee so as not to interfere with departmental operations...."[8/] The PBA has alleged that the Borough has violated the contract and federal law by denying certain compensatory time requests. Such violations, however, are not unfair practices. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The PBA can pursue its claims through the contractual grievance procedure or through the enforcement procedures of the Fair Labor Standards Act.[9/]

ORDER

The Borough of Sayreville is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by establishing a fourth "power" shift in January 1989 and by demoting Ronald J. Batko from temporary sergeant because the PBA filed a grievance contesting transfer procedures.

8/ The contract provision parallels 29 U.S.C. §207(o)(5) which provides that employees "shall be permitted...to use such time within a reasonable period after making the request if the use...does not unduly disrupt the operations of the public agency."

9/ In its exceptions, the PBA claims that an arbitrator refused to consider its Fair Labor Standards Act claim. An arbitrator's refusal to consider that claim does not confer jurisdiction of such a claim here.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by demoting Ronald J. Batko from temporary sergeant because the PBA filed a grievance contesting transfer procedures.

3. Refusing to negotiate in good faith with representatives of the PBA before establishing a fourth "power" shift.

B. Take this action:

1. Negotiate in good faith with the PBA before re-establishing a "power shift" under similar circumstances.

2. Pay Ronald J. Batko the difference between the rate of pay he received as a patrol officer and the rate of pay he would have received as a sergeant for the period January 1, 1989 through February 28, 1989, plus interest pursuant to R.4:42-11(a)(ii), less any payments already received.

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

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson, Reid, Ruggiero, Smith and Bertolino voted in favor of this decision. Commissioner Reid dissented with respect to the finding on the issue of the power shift.

DATED: September 27, 1990
Trenton, New Jersey
ISSUED: September 28, 1990

NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by establishing a fourth "power" shift in January 1989 and by demoting Ronald J. Batko from temporary sergeant because PBA Local No. 98 filed a grievance contesting transfer procedures.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by demoting Ronald J. Batko from temporary sergeant because the PBA filed a grievance contesting transfer procedures.

WE WILL cease and desist from refusing to negotiate in good faith with representatives of the PBA before establishing a fourth "power" shift.

WE WILL negotiate in good faith with the PBA before re-establishing a "power shift" under similar circumstances.

WE WILL pay Ronald J. Batko the difference between the rate of pay he received as a patrol officer and the rate of pay he would have received as a sergeant for the period January 1, 1989 through February 28, 1989, plus interest pursuant to R.4:42-11(a)(ii), less any payments already received.

Docket No. CO-H-89-191

BOROUGH OF SAYREVILLE

(Public Employer)

Dated: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 91-2

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and- Docket No. CO-H-89-191

PBA, LOCAL NO. 98,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Section 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when its Chief of Police unilaterally created a new shift ("power shift"), which had been the subject of collective negotiations for a successor agreement and rejected by the Respondent, without collective negotiations with the Charging Party. This subject was deemed to be within the scope of collective negotiations under Matter of Tp. of Mt. Laurel, 215 N.J. Super. 108 (App. Div. 1987). Further, the Respondent Borough violated Sections 5.4(a)(1) and (3) of the Act under Bridgewater when its Chief of Police first promoted a Patrolman to Sergeant and then demoted him back to Patrolman because the PBA had filed a grievance on his behalf. However, the Respondent did not violate other provisions of the Act since at best they were governed by Human Services and warranted dismissal as mere breaches of contract.

By way of remedy, the Hearing Examiner ordered that the Respondent Borough make the demoted Patrolman whole for the loss of wages suffered by him after he was illegally demoted from Sergeant to Patrolman.

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. 91-2

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and- Docket No. CO-H-89-191

PBA, LOCAL NO. 98,

Charging Party.

Appearances:

For the Respondent, Casper P. Boehm, Jr. Attorney

For the Charging Party, Weinberg & Kaplow, Attorneys (Irwin Weinberg, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on January 17, 1989, by PBA, Local No. 98 ("Charging Party" or "PBA") alleging that the Borough of Sayreville ("Respondent" or "Borough") has 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. ("Act"),[1/] in that: ¶1 - following the PBA's having

---

1/ The PBA alleged separate violations of the Act by the Borough in eight separately numbered paragraphs (¶'s 1-8) in its Unfair Practice Charge. However, on the first day of hearing the PBA withdrew four paragraphs in the Unfair Practice Charge, namely, ¶'s 3, 6, 7 and 8 (1 Tr 7, 8). Thus, the summary of the allegations in the Unfair Practice Charge hereinafter will include reference only to ¶'s 1, 2, 4 and 5).

prevailed in an arbitration proceeding concerning the proper payment of holiday pay, the Borough refused to abide by its terms and further, it unilaterally changed vacation pay calculations in violation of years of past practice; ¶2 - that the Chief of Police implemented a fourth shift between the hours of 8:00 p.m. and 4:00 a.m. without negotiations with the PBA; ¶4 - that an employee was promoted and then demoted improperly without notification and without negotiations with the PBA, which was allegedly done because the PBA insisted on compliance with the contract and because of the exercise of protected activity by the employee; and ¶5 - upon demand for the utilization of compensatory time the Borough refused, notwithstanding that employees, pursuant to the agreement, may opt for compensatory time up to a CAP of (24) hours in lieu of overtime; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) through (7) of the Act.[2/]

2/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 17, 1989. Pursuant to the Complaint and Notice of Hearing, the then Hearing Examiner Marc F. Stuart initially scheduled a hearing for June 21, 1989, in Newark, New Jersey. This date was adjourned by agreement, pending discovery between the parties. However, before another hearing date was scheduled by Hearing Examiner Stuart, the case was transferred to the undersigned Hearing Examiner in or around September 29, 1989. Thereafter, hearings were scheduled and held on November 8 and November 9, 1989, and were concluded by agreement on March 28, 1990. The parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived (3Tr 123) and the parties filed post-hearing briefs by May 22, 1990.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The Borough of Sayreville is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. PBA, Local No. 98 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The applicable collective negotiations agreements between the parties were effective during the terms January 1, 1985 through December 31, 1987. Exhibit J-1 governed the terms and conditions of employment of a collective unit of 23 Sergeants and Lieutenants and Exhibit J-2 governed the terms and conditions of employment of a collective unit of 60 Patrolmen. [1 Tr 9, 15].

Holiday/Vacation Pay Issue (¶1)

4. Article X, Holidays, in J-1 and J-2 provides in identical terms, inter alia, Section A that "All employees...shall not receive any deductions from their pay for not working holidays as hereinafter set forth: [there follows 13 enumerated holidays for 1985, 1986 & 1987]"; Section B that "All employees...shall receive holiday pay no later than December 8th of each year for the holidays hereinabove referred to"; and Section C that "...every employee, whether he works the holiday or not, shall receive straight time pay for thirteen (13) holidays, as provided for herein by no later than December 8th" * * * * [Sections D, E are omitted as not relevant][J-1 & J-2, pp. 21, 23]..

5. Article IX, Vacations, in J-1 and J-2 provides in identical terms, inter alia, Section A that "Full time employees shall receive vacation with pay in each calendar year according to the following schedule: [there follows the vacation entitlement

from one day per month for the first year of employment through 28 working days annually after the 15th year plus one (1) week's pay to be paid on December 8th]; and Section B that "...4. All vacations shall be granted at established base pay rates which shall include longevity... 5. A cash allowance computed according to base pay rates which include longevity in lieu of earned vacations shall be paid as follows: (a) To the employee, where an employee retires or resigns after giving the Borough at least two (2) weeks' notice..." [Section B ¶'s 1-3, 5(b) & 6 are omitted as not relevant][J-1 & J-2, pp. 19, 21].3/

6. The language of Article VIII, Hours of Work and Compensation, in J-1 and J-2 has also remained unchanged since January 1, 1973, except that J-1 and J-2 now provide specifically for a work schedule of four (4) days on and two (2) days off (J-1 & J-2, p. 15). In prior agreements there had been no reference to a specific shift schedule (1 Tr 51). Also, in the agreements prior to J-1 and J-2, the workday was eight hours, including a one-hour lunch period whereas in J-1 and J-2 the workday is defined as eight hours inclusive of a one-half hour lunch period so that the work year is 243 days (1 Tr 95, 96).

3/ It was stipulated that the language in the various Articles on "Vacations" has remained unchanged since January 1, 1973 (1 Tr 50, 51). Although like consistency in the language of the Article on "Holidays" was not stipulated, the PBA's evidence established that the only change in the language since January 1, 1973 was the addition of the requirement that holiday pay be paid by December 8th as provided in Article X, Section A of J-1 and J-2, supra (1 Tr 47, 48).

7. An Arbitration Award was rendered on July 1, 1988 by Robert L. Mitrani on five issues, one of which pertained to "Holiday Pay" (CP-1, pp. 9-11). The dispute over "holiday pay" arose when the Borough made payment of holiday pay by using the same formula that it used in calculating overtime pay, i.e., based upon a 35-hour a week as found in a prior agreement. According to the PBA, the Borough ignored the fact that the workday in J-1 and J-2 had been changed to eight hours. The Arbitrator sustained the position of the PBA, adding that "The same principle applies to vacation pay. The parties know what an officer earns in a normal workday of a normal work week. This must be the standard in calculating vacation pay for a day or a week. The principle is that officers should basically be paid as if these were normal workdays or workweeks..." (CP-1, p. 11). The Arbitrator also retained jurisdiction regarding implementation of his Award.

8. A dispute over the interpretation of the Arbitrator's Award arose within several months and on September 23, 1988, and again on September 29, 1988, counsel for the PBA addressed the Arbitrator on the matter of interpretation, providing a hypothetical example, to which the Arbitrator responded on October 13, 1988 (CP-2). The Arbitrator's clarification resolved nothing since counsel for the PBA again wrote to him on October 25, 1988 and counsel for the Borough responded on November 11, 1988 (R-2 & R-3). This post-Award correspondence, directed to the Arbitrator, raised an additional issue, that of the Borough's calculation of vacation

pay (as well as holiday pay). There having been no resolution of the holiday pay and vacation pay issues subsequent to the November 11, 1988, letter of counsel for the Borough to the Arbitrator, the instant Unfair Practice Charge was docketed on January 17, 1989.

9. The testimony of the three Charging Party witnesses and the single Respondent witness[4/] dealt primarily with the disputed facts and figures as to the correct method of calculation of holiday pay and vacation pay following the Arbitrator's Award, supra.[5/]

10. Kronowski is the Borough's Business Administrator and Treasurer and Patrolman Kelly has been the PBA President for the past three years (1 Tr 34, 61). Sometime between December 8 and December 31, 1988, Kelly approached Kronowski regarding the calculation of vacation pay for the year 1987 pursuant to the Arbitration Award (1 Tr 63, 64, 66, 102; 2 Tr 32).[6/] Based upon Kelly's candor and demeanor, the Hearing Examiner credits his

---

4/ The PBA's witnesses on the holiday/vacation pay issue were William J. Gawron, Charles F. Kelly and Dennis Sheridan (1 Tr 23-32, 58; 34-46, 55, 56; and 47-54). The Borough's witness was Wayne A. Kronowski (1 Tr 62-105).

5/ The PBA's proofs were adduced in support of its claim for a monetary remedy as to holiday pay and vacation pay in the instant proceeding (1 Tr 82, 83). The PBA had initially stated that no monetary remedy was sought in this proceeding (1 Tr 73, 74; 76-81).

6/ Although Kronowski stated that the year of this encounter was 1987, it is clear that it took place after and not before the July 1st Arbitration Award (1 Tr 60, 63, 66, 101, 102; 2 Tr 32, 35, 36).

testimony that he said to Kronowski that since "...the arbitration had already been heard and we felt it was in our favor..." why had the PBA not been paid "...the proper amount of money..." (2 Tr 32). The Hearing Examiner further credits Kelly's testimony that Kronowski stated to him that "...it was their way of getting back at you for winning the arbitration..." (2 Tr 32). (Emphasis supplied). The Hearing Examiner agrees with Kelly that the reference to "their" and to "you" referred, respectively, to the Borough and to the PBA (2 Tr 33). When Kronowski was asked on cross-examination if he had been "directed" (by the Mayor and Council) to make a "...change in vacation pay..." he stated that he did not remember being so directed but he "...could have..." (1 Tr 102). Although Kronowski subsequently denied stating to Kelly that a change in the calculation of vacation pay was "...in retribution for the Arbitration Award..." (1 Tr 103), the Hearing Examiner declines to credit Kronowski's denial for the reason that his testimony, in context, was equivocal and was insufficient to rebut the previously credited testimony of Kelly.

Fourth (Power) Shift Issue (¶2)

11. Historically, the employees in the Borough's Police Department worked on three shifts with starting times that varied over the years (3 Tr 16, 17). Article VIII, Hours of Work and Compensation, in J-1 and J-2, supra, provides in Section A, inter alia, that the work schedule shall be four days on and two days off

and that the workday shall be eight hours inclusive of a one-half hour lunch period (J-1 & J-2, p. 15). The same Article in Section D provides, in part, that the Borough will give not less than ten calendar days' notice to the PBA "...of any changes in the starting or finishing times of shifts, or addition of new shifts...so that the Association may negotiate the same to and with the Borough. The Borough may not make said changes for the purpose of avoiding the payment of overtime..." (J-2 & J-3, p. 16). (Emphasis supplied).

12. During the negotiations for successor agreements to J-1 and J-2, scheduling and shifts were important issues raised by the PBA, i.e., it sought to change the existing schedule from four days on and two days off to some other combination (2 Tr 36). Among shift change proposals made by the PBA was the "four and four shift," which was strenuously opposed by the Chief of Police, Douglas A. Sprague (2 Tr 66). The PBA also raised the possibility a "power shift," which was discussed as part of its proposal for a "four and four shift" (2 Tr 65, 66). However, when "...the four and four was basically killed at negotiations, so did the power shift, that also died with it..." [Kelly: 2 Tr 66]. The testimony of Kelly that the PBA raised the issue of the "power shift" in the negotiations for the successor agreements to J-1 and J-2 is credited since Chief Sprague testified only that he did not remember that the issue was raised and rejected by the Borough (3 Tr 18, 19), notwithstanding that at one point in his testimony on the subject he stated that when the "four and four" was discussed "...there was

nothing about a power shift..." (3 Tr 19). Kelly's candor and demeanor, supra, continued to impress the Hearing Examiner sufficiently to credit Kelly over Sprague on the issue of whether or not the "power shift" was raised by the PBA in the negotiations.

13. As a result of interest arbitration proceedings initiated by the PBA, a Consent Award was issued by Arbitrator Martin F. Scheinman on September 19, 1988, which provided, in part, (1) that the successor agreements would be effective during the term January 1, 1988 through December 31, 1990, and (2) while the prior work schedule was to remain unchanged (four days on and two days off), the shift selections, beginning January 1, 1989, were to be based on a system of two seniority preferences each year with the Borough being obligated to make every reasonable effort to accord the first choice (CP-14, pp. 7, 8, 13; 2 Tr 37-39). Thus, by this Award the shifts became permanent and were no longer rotated (2 Tr 39-41; 3 Tr 12, 14). In November 1988, the first posting for shift selection by seniority occurred. This change was fully implemented by January 15, 1989. [2 Tr 41-45; 3 Tr 14-16].

14. Chief Sprague testified that in the latter part of 1988, he met with several of his superior officers, including Capt. Leo J. Farley, and a survey was conducted to ascertain the busiest part of the day for police-related services (2 Tr 87, 88). The conclusion reached was that the hours between 8:00 p.m. and 4:00 a.m. were the busiest and that creating a "power shift" during those hours would help eliminate some of the work for the second shift and

the following shift by providing more men on the road (2 Tr 88, 89; 3 Tr 63, 64). Farley was placed in charge of establishing the shift and concluded that six patrolmen would be assigned to the 8:00 p.m. to 4:00 a.m. "power shift" (3 Tr 64, 65). Farley then sent out a notice to all Station Managers and Lieutenants, requesting that anyone interested in working this shift should contact him or Sergeant Sloan (3 Tr 65). This notice was circulated and was possibly posted on the bulletin board for a day or two in October and/or November 1988 (2 Tr 64, 65; 3 Tr 65).

15. By early December 1988, Farley had received the names of six individuals who were "...interested in this shift..." and they were assigned to a proposed schedule for 1989. It was posted on the bulletin board in the "muster room" and at the Station Manager's area during the last week of 1988 or the first week of 1989. [3 Tr 66-68]. Patrolman Barry Marcinczyk testified that on November 30, 1988, he received from Farley a copy of the "power shift" schedule which was to commence the first week of January 1989 (CP-7; 1 Tr 114, 115). Only one of the six patrolmen who volunteered ever worked the "power shift." This occurred on one shift during three days: January 8, 9 and 10, 1989. [1 Tr 123, 124; 2 Tr 42, 93].

16. Sprague testified that the reason for the discontinuance of the "power shift" after only three days in January 1989, was because the Police Department had received a new shipment of weapons and, due to the necessity for training and the resulting

shortage of manpower, the "power shift" was not "implemented" (2 Tr 93; 3 Tr 67).

17. Although the PBA never made any informal or formal complaint to Chief Sprague or Farley, regarding the institution of the "power shift," the PBA at some point filed a grievance and, according to Kelly, as a result of the grievance the "power shift" was discontinued (2 Tr 42, 65, 69, 70).

18. As previously found, Article VIII, Section D of J-1 and J-2 provides, in part, that the Borough will give not less than ten calendar days' notice to the PBA of any "...addition of new shifts..." and further, that the Borough may not make any shift changes "...for the purpose of avoiding the payment of overtime..." (J-1 & J-2, p. 16). The Hearing Examiner credits the denial of Chief Sprague that his having unilaterally created the "power shift" in the latter part of 1988 was not to avoid the payment of overtime but was rather to alleviate some of the workload for the second shift and for the last shift (3 Tr 20, 21).

19. Sprague acknowledged that he did not attempt to negotiate the establishment of the "power shift" with the PBA before posting it (3 Tr 18). Kelly testified that the PBA was never given notice of the commencement of the "power shift" nor, in fact, had the PBA been given notice of an "emergency"[7/] [2 Tr 44, 45].

7/ Article VIII, Section D of J-1 and J-2, supra, provides for a waiver of the notice requirement "...for the period of the emergency..."

Sprague acknowledged that no emergency had been declared at the time of the institution of the "power shift" (3 Tr 59).

Batko Promotion Issue (¶4)

20. Prior to August 30, 1988, Patrolman Ronald J. Batko had taken a Civil Service examination for sergeant and was on a list for appointment (2 Tr 11). Immediately prior to August 30, 1988, Chief Sprague decided to appoint Batko as a temporary sergeant for 90 days with automatic appointment thereafter. This decision was due to Sergeant Bruce Marcinczyk having been off duty due to injury for approximately four months. [2 Tr 14, 98, 99; 3 Tr 26, 27]. Sprague acknowledged that the void created by Marcinczyk's absence had been filled partially by the use of overtime, which had cost more than filling the vacancy. Thus, one of the reasons for the appointment of Batko was to reduce this overtime expenditure [3 Tr 27].

21. Having made the decision to promote Batko on a temporary basis, the Chief then spoke to Batko and told him of his decision. He advised Batko that the promotion would not interfere with his vacation, etc. [2 Tr 16, 99, 100]. The Chief then stated to Batko that he needed an immediate response and could not give him ten day's notice. Batko was also aware of the notice requirement but elected to accept the promotion since he felt he was without any other choice. [2 Tr 16, 17, 100; 3 Tr 29, 31]. Sprague also advised Batko that if he accepted the promotion offer he would serve in an acting capacity for 90 days and thereafter his promotion would

be permanent (2 Tr 20, 98; 3 Tr 57). On August 30, 1988, Sprague sent Batko a memorandum advising him that as of August 31st he was to assume the rank of Acting Sergeant with a temporary assignment, thus thereby replacing Sergeant Marcinczyk (CP-8; 2 Tr 6).

22. PBA President Kelly learned almost immediately of Batko's temporary promotion of August 30, 1988, and on September 1, 1988, Kelly sent a detailed Grievance Letter to the Borough's Police Committee (CP-9; 2 Tr 55). Kelly objected to Chief Sprague's having ignored the ten-day notice requirement in Article VIII, Section D of the agreement by having requested Batko to waive this requirement. Kelly informed the Police Committee that he had on the same date, September 1st, met with the Chief and other superior officers to address the same issue. Further, he stated that Chief Sprague's purpose was to avoid the payment of overtime which, under the circumstances, was barred by Article VIII, Section D, supra. Kelly also advised the Police Committee that his Grievance Letter was to be considered as a "Class Action" since other members of the Department were adversely affected monetarily by this action of Chief Sprague. Finally, Kelly advised the Police Committee that at 3:00 p.m. on that date, September 1st, he had been informed by Batko of a memorandum given to him by Chief Sprague, which stated that as of September 10, 1988, he was being "reverted back" to the rank of patrolman and reassigned to his former position in the Crime Prevention Bureau (see CP-10). Chief Sprague's stated reason for this action was Kelly's objection to Batko's not having initially

received a ten-day notice of promotion. Kelly emphasized in his Grievance Letter that the ten-day notice provision in the agreement did not involve promotions but "only transfer or schedule changes." Thus, while the PBA was seeking to uphold Batko's promotion, the improper transfer was to be voided.

23. Sprague testified that since the PBA wanted him to demote Batko back to patrolman status, preceded by a ten-day notice, he did so by his memorandum to Batko of September 1, 1988 (CP-10, supra; 3 Tr 29, 30). Sprague acknowledged that his motivation in demoting Batko was that a grievance had been filed by the PBA (3 Tr 29).[8/] Batko testified that Sprague had mentioned the "grievance" as his reason for the demotion (2 Tr 15). Kelly also testified that on September 1st, Sprague stated to him that Batko was being demoted because of the PBA having filed a "grievance" (2 Tr 56).

24. As a result of Sprague's demotion decision, Batko served ten days as Acting Sergeant but thereafter he continued to receive the pay of a sergeant until the end of the calendar year 1988 (2 Tr 18, 22). As of January 1, 1989, Batko's rate of pay reverted to that of patrolman and this status continued until February 28, 1989 (2 Tr 22, 23). On February 28th, Batko was again restored to the position of Acting Sergeant and received the rate of pay for sergeant. In either March or April of 1989, Batko became a

---

8/ This "grievance" reference necessarily referred to Kelly's September 1, 1988, letter to the Police Committee (CP-9, supra) and not to a later grievance by Batko on September 21, 1988 (CP-11).

permanent sergeant and his sergeant's rate of pay continued thereafter. [2 Tr 18, 19, 23]. Sprague acknowledged the possibility that overtime pay was avoided by having Batko serve the ten days from his initial appointment on August 31, 1988 (3 Tr 30).

25. PBA President Kelly testified credibly that in his Grievance Letter of September 1st (CP-9) he did not object to Batko's promotion and, also, that the PBA never grieved Batko's promotion (2 Tr 53, 54). What the PBA grieved was Chief Sprague's action of seeking from Batko a waiver of the ten-day notice of "...transfer to another position within the Police Department..." (2 Tr 54). Since neither Sprague nor Batko had the power to waive a provision in the contract, the PBA grieved this action of Chief Sprague (2 Tr 54).

26. Farley had been a member of the PBA's negotiating team in 1977 when Article VIII, Section D was placed in the agreement. Its purpose was to forestall the involuntary transfer of personnel on a short-term basis from one squad to another or from one shift to another without proper notice (3 Tr 70-72). Although Farley could not testify that Section D was intended to cover promotions, he reiterated several times that it was basically directed at "transfers and shifts" (3 Tr 74-77).

Compensatory Time Issue (¶5)

27. Article VIII, Section J of Exhibits J-1 and J-2 provide, in part:

> ...in lieu of cash payment an employee may opt to receive compensatory time off on a time and one-half (1

> 1/2) basis. Such time may be taken only when scheduled by the Chief or his designee so as not to interfere with departmental operations and no employee may opt to receive compensatory time in excess of an annual total of twenty-four (24) hours which is to be calculated at no more than sixteen (16) hours at time and one-half (1 1/2) basis...
>
> [J-1 & J-2, p. 18]

28. Four requests for accumulated compensatory time were received in evidence as Charging Party exhibits as follows:

CP-3: The request of C. Mahle-White, dated October 16, 1988, to receive compensatory time off on October 19, 1988 from 6:00 p.m. to 9:30 p.m. This was rejected by Farley for the reason "not enough manpower."

CP-4: The request of C. Mahle-White, dated December 3, 1988, to receive compensatory time off on December 10, 1988. This was rejected by Lt. R. Green for the reason "lack of manpower."

CP-5: The request of C. Mahle-White, dated December 21, 1988, to receive compensatory time off on December 23, 1988. This was rejected by Lt. R. Green for the reason "lack of manpower."

CP-6: The request of Joseph Wolski, dated July 28, 1989, to receive compensatory time off on August 13, 1989. This was rejected by Farley for the reason "not enough manpower."

[1 Tr 106]

29. For many years the minimum manning in the Borough's Police Department has been five patrolmen and two sergeants in order to cover the sixteen square miles within the Borough (2 Tr 73, 103, 105). Kelly acknowledged that minimum manning involves a safety factor and that manpower shortages have been a concern of the PBA. (2 Tr 73).

30. Departmental compensatory time policy is set by Chief Sprague but is administered by Farley (3 Tr 38, 46, 47).

31. Kelly acknowledged that compensatory time has been denied over a period of five years prior to the incident of October 16, 1988, involving Mahle-White (CP-3; 2 Tr 71, 72). Kelly also acknowledged that if compensatory time resulted in a lack of manpower on a particular shift, this would necessitate overtime in order to maintain the minimum manning requirement (2 Tr 50, 51). When Kelly was asked if he had spoken with anyone about the compensatory time problem, he stated that he had spoken to Farley, with whom he had also raised the provisions of the Fair Labor Standards Act (2 Tr 51, 52). However, on cross-examination Kelly testified that his conversation with Farley on this subject had been about "three years ago" (Tr 75, 76). Chief Sprague testified that he had attended a course on the Fair Labor Standards Act and that he was familiar with the fact that he could not deny compensatory time merely because of the fact that it would involve the payment of overtime (3 Tr 44).

32. Sprague stated that the requests of patrolmen for compensatory time are granted so long as there is the minimum manning of five patrolmen on the road (2 Tr 104, 105). Also, if sickness reduces the scheduled minimum manning, then one patrolman is held over from the prior shift and works a "double shift" (2 Tr 106, 107). Sprague denied that there was any standing practice to refuse a request for compensatory time to those patrolmen working on the midnight shift (3 Tr 43).

ANALYSIS

The Holiday/Vacation Pay Issue Constitutes A Mere Breach Of Contract Claim And Must Be Dismissed Under Human Services.

In 1984, the Commission decided State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). This decision ended the many years of confusion as to when an unfair practice charge presented a true refusal to negotiate in good faith within the meaning of Section 5.4(a)(5) of the Act in contradistinction to those instances where the unfair practice charge presented a mere breach of contract claim. The Commission concluded that the latter cases should be resolved, if possible, under the parties' negotiated grievance procedures. In an attempt to clarify the demarcation between the two situations, the Commission provided several examples of instances in which it would "entertain unfair practice proceedings under Section 5.4(a)(5)."

1. Repudiation of an established term and condition of employment: This is most clearly illustrated by an employer's decision to abrogate a contract clause based upon its belief that the clause is outside of the scope of negotiations. An unfair practice proceeding would be entertained to determine whether or not the employer has already repudiated a contract clause based on its belief that the clause is non-negotiable or, alternatively, where the employer has raised a scope of negotiations defense to a contract claim. As a corollary, a claim of repudiation might also be supported by a contract clause "...that is so clear that an inference of bad faith arises from a refusal to honor it or by

factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause..." (10 NJPER at 423). (Emplasis supplied).

2. Specific indicia of bad faith: It is here required that such indicia of bad faith be "...over and above a mere breach of contract..." (10 NJPER at 423).

3. Vindication of the policies of the Act: An unfair practice proceeding will be entertained where the charge indicates that the policies of the Act, rather than a mere breach of contract, "...may be at stake..." (10 NJPER at 423).

Findings of Fact Nos. 4 through 10, supra, on the holiday/vacation pay issue compel the conclusion that the allegations in ¶1 of the Charge raise only a "mere breach of contract claim" under Human Services, supra. The "holiday" issue was litigated as part of the Mitrani arbitration and is dealt with in his Opinion and Award (CP-1, pp. 9-11). The "vacation" issue was not specifically before Mitrani but, nevertheless, he volunteered that the same principle of calculation for holiday pay applied to vacation pay (CP-1, p. 11). Following Mitrani's Arbitration Award on July 1, 1988, both parties became enmeshed in the mechanics of how to apply it to the holiday and vacation pay calculations for 1987 and 1988. There followed the correspondence of counsel for the parties with Mitrani since he had stated in his Award on the "holiday pay" issue that he was "...retaining jurisdiction of this case should problems arise regarding the implementation of this award..." (CP-1, p. 11).

When the correspondence with Mitrani failed to produce a satisfactory result, the PBA filed the instant Unfair Practice Charge several months after the last letter to the Arbitrator. However, the mere fact that the PBA filed a Charge with the Commission does not, in and of itself, convert the dispute into a viable Section 5.4(a)(5) proceeding.

The PBA has failed to convince this Hearing Examiner that the requisites to the finding of a Section 5.4(a)(5) violation by the Borough have been met. None of the illustrations provided above by the Commission in Human Services, supra, appear to have been satisfied by the proofs adduced at the hearing. Plainly, there has been no "repudiation" of an established term and condition of employment as to holiday pay or vacation pay. Further, there has been no repudiation of a contract clause that is "...so clear that an inference of bad faith arises from a refusal to honor it..." Nor does the Hearing Examiner perceive that the Borough has changed the "...parties' past and consistent practice in administering a disputed clause..." As to the latter, it is not without significance that the PBA sought arbitration of the holiday pay issue. This suggests that the instant dispute between the parties is one of contract interpretation rather than the Borough repudiation of a "past and consistent practice." Finally, this case in no way involves evidence that the "policies" of the Act might be at stake.

Because the "holiday pay" and "vacation pay" issues constitute mere breach of contract claims, the Hearing Examiner has no alternative but to recommend dismissal of this aspect of the Complaint under Human Services and subsequent decisions of the Commission: see, for example, Perth Amboy Board of Education, P.E.R.C. No. 87-29, 12 NJPER 759, 760 (¶17287 1986); Borough of Tenafly, P.E.R.C. No. 88-92, 14 NJPER 274 (¶19102 1988); and Garwood Board of Education, D.U.P. No. 88-20, 14 NJPER 445 (¶19182 1988).[9/]

The Borough Violated Sections 5.4(a)(1) And (5) Of The Act When Its Chief Of Police Unilaterally Created A "Power Shift" Where That Issue Was Discussed And Abandoned In The Negotiations For Successor Agreements To J-1 And J-2.

There can be no doubt but that the PBA placed great emphasis in the negotiations for successor agreements to J-1 and J-2 upon scheduling and shifts (see Finding of Fact No. 12, supra). Among the shift change proposals made by the PBA was that for a "four and four shift." However, this was strenuously opposed by Chief Sprague. In the same vein, the PBA also raised the possibility of a "power shift" but, as Kelly testified, the power

---

9/ The Hearing Examiner will not formally recommend deferral of the parties' "holiday pay" and "vacation pay" dispute to arbitration under their negotiated grievance procedure since it is not "...interrelated with a breach of contract...": Tp. of Pennsauken, P.E.R.C. No. 88-53, 14 NJPER 61, 63 (n. 5)[¶19020 1987]. The Commission has stated on more than one occasion that where deferral is appropriate it should occur before hearing: see Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983); Tp. of Pennsauken, supra; and Stafford Tp. Board of Education, P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989).

shift "died" along with the demise of the "four and four shift" in negotiations (Id.).

Notwithstanding the testimony of Chief Sprague that he either did not remember that the "power shift" issue was raised in negotiations or his subsequent uncredited testimony that it was not, the Hearing Examiner has, by crediting Kelly on this issue, found as a fact that the "power shift" was raised by the PBA and was discussed in the negotiations for the successor agreements (Id.).[10/]

The Interest Arbitration Award of September 19, 1988, set forth conclusively the terms and conditions of employment to be incorporated into the successor agreements. Chief Sprague thereafter met with his superior officers and he determined to create a "power shift" during the "busy hours" of 8:00 p.m. to 4:00 a.m. beginning in January 1989 (see Finding of Fact No. 14, supra). Farley sent out a notice to all Station Managers and Lieutenants in October or November 1988, and by early December he had received the names of six individuals who were interested in volunteering for the shift (see Findings of Fact Nos. 14 & 15, supra). A proposed schedule was then posted; for example, Patrolman Marcinczyk received

---

10/ Necessarily, the Consent Award of Interest Arbitrator Scheinman on September 19, 1988, makes no reference to the "power shift" issue since it was abandoned during the negotiations. Arbitrator Scheinman's Award, with respect to shifts, dealt only with their having become permanent and that shift selection was to be made by seniority (see Finding of Fact No. 13, supra).

a copy of his shift schedule from Farley on November 30, 1988 (see Finding of Fact No. 15, supra). The "power shift," which was unilaterally established by Sprague was unilaterally discontinued by him, after only three days, on January 10, 1989, due to the fact that the Police Department had received a new shipment of weapons and he was without the manpower to continue it (see Findings of Fact Nos. 15 & 16, supra).

There can be no doubt whatever but that Sprague never attempted to negotiate the establishment of the "power shift" with the PBA before implementation, notwithstanding that Article VIII, Section D of J-1 and J-2 was in effect at the time. Section D provides, in part, that the PBA is to receive not less than ten calendar days' notice of any "...addition of new shifts..." The only exception to the ten-day notice requirement is the existence of an "emergency." All parties agreed that an emergency did not exist at the time. [See Findings of Fact Nos. 11, 18 & 19, supra].[11/]

The fact that the PBA filed a grievance, objecting to the unilateral creation of the "power shift," is not germane to the resolution of the issue before the Hearing Examiner. Rather it is the legal consequence to the Borough of Chief Sprague's having first

---

11/ It is noted that another provision of Article VIII, Section D of J-1 and J-2 states that the Borough may not make changes in starting or finishing times or add new shifts for the purpose of avoiding the payment of overtime. The Hearing Examiner has found that Chief Sprague's motivation in unilaterally creating the "power shift" was not to avoid the payment of overtime but rather to alleviate some of the workload for the second shift and for the last shift (see Finding of Fact No. 18, supra).

unilaterally established a "power shift" and then unilaterally discontinuing it for the reasons stated above. It appears to the Hearing Examiner that this conduct of the Chief is governed by The Matter of Tp. of Mt. Laurel, 215 N.J. Super. 108 (App. Div. 1987.[12/]

In Mt. Laurel the Commission had found that the following provisions in the existing agreement, and in a subsequent proposal by the union, with respect to hours and shifts, were mandatorily negotiable: (1) the actual number of hours a patrol officer will work during a given work week and work day (8 hour day and 40 hour week proposal), (2) the work schedule or work cycle for patrol officers (5-2, 5-2, 5-2, 5-1), and (3) the maintenance of three eight-hour tours of duty and their starting and ending times.

Both parties in Mt. Laurel agreed that the contested provisions satisfied the first two criteria of Local 195 v. State, 88 N.J. 393 (1982), namely, that the subject matter intimately and directly affected the work and welfare of the employees involved and that the subject matter had not been preempted by statute or regulation. The disagreement turned on the third criterion in Local 195: whether "...a negotiated agreement would...significantly interfere with the determination of governmental policy..."

12/ In that case the Court affirmed the Commission's decision: P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985).

After distinguishing Atlantic Highlands[13/] the Court stated that it saw nothing in its prior decisions, which had established a per se rule excluding police scheduling issues from the area of mandatory negotiability (215 N.J. Super. at 114). The Court added that to so conclude would fly directly in the face of Local 195, supra.

Applying the Local 195 "balancing test," the Court stressed that the Mt. Laurel police work schedule had been arrived at through negotiations in 1981 and that the union's proposed schedule merely memorialized the schedule in the old contract. [215 N.J. Super. at 115]. The Township, therefore, had the burden of advancing reasons in support of its need to resist inclusion of the union's proposal in a successor agreement. This burden "...was simply not met..." Thus, the Court affirmed the Commission's conclusion that "...no matter of significant managerial prerogatives has been placed on the scale to counterbalance the direct and intimate effect work schedules have on employees..." [215 N.J. Super. at 115, 116].

In the instant case, this Hearing Examiner has previously found that: (1) the PBA sought the inclusion of a "power shift" in the negotiations for successor agreements to J-1 and J-2; (2) this proposal was abandoned by the PBA because of the strenuous opposition of Chief Sprague; (3) the parties entered into a Consent

---

13/ Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den., 96 N.J. 293 (1984).

Award in interest arbitration proceedings, which did not deal with the issue of the "power shift"; (4) the existing Article VIII, Section D provided explicitly for at least ten calendar days' notice of any "...addition of new shifts...,"[14/] excepting only the case of an "emergency" [which is not involved herein]; (5) Chief Sprague unilaterally and without notice to or negotiations with the PBA estblished a "power shift," which was implemented during the first week of January 1989; and (6) Chief Sprague almost immediately and unilaterally discontinued the "power shift" for the stated reason of lack of manpower when a new shipment of weapons was received in the Police Department.[15/]

A fair reading of Mt. Laurel leaves no doubt but that the PBA had the right to negotiate the "power shift" issue with the Borough upon demand since it was a mandatory subject of negotiations under the rationale of the Commission and the Court in that case. In other words, negotiations would not have significantly interfered with Borough policy.

How could Chief Sprague, who so strenuously resisted the "power shift" proposal in negotiations, subsequently object to negotiating the establishment of this very "power shift" with the PBA, following his decision that the "busy hours" between 8:00 p.m.

14/ This clause and the prior negotiations history created an obligation to negotiate the "power shift": Mt. Laurel, supra.

15/ The PBA expressed no interest in negotiating the discontinuance of the "power shift."

and 4:00 a.m. required such a shift? Obviously, the Chief had no good and sufficient reason. Therefore, the Borough violated the Act as a result of the Chief's conduct in undertaking unilaterally to establish the "power shift" in the latter part of 1988.

Accordingly, the Hearing Examiner will recommend an appropriate remedy hereinafter.

The Borough Violated Section 5.4(a)(1) And (3) Of The Act When Its Chief Of Police Demoted Ronald J. Batko On September 1, 1988, From Acting Sergeant To Patrolman Because The PBA Filed A Grievance Objecting To The Procedure Used By The Chief In Making The Initial Promotion On August 31, 1988.

The salient facts are that Chief Sprague, immediately prior to August 30, 1988, decided to appoint Batko as a temporary Sergeant for 90 days with automatic appointment thereafter. This decision was due to Sergeant Marcinczyk's having been off duty due to injury for approximately four months. The Chief's decision was also due, in part, to reduce overtime expenditures. Batko was eligible for this appointment, having then been on the Civil Service list for sergeant. The Chief stated to Batko that he could not give him the "ten days' notice. Batko's promotion became effective August 31, 1988. When Kelly learned of it he sent a detailed Grievance Letter to the Borough's Police Committee on September 1st, objecting to Sprague's having ignored the ten-day notice requirement and, also, his having requested Batko to waive it.[16/] On the same date,

---

16/ Kelly was of the opinion that since the ten-day notice requirement had been ignored by the Chief when he promoted Batko, overtime was due to certain other of the Department.

September 1st, Kelly learned from Batko that the Chief had demoted him back to Patrolman as of September 10, 1988.[17/] Kelly had emphasized in his Grievance Letter and in his testimony that the PBA did not object to Batko's promotion since the ten-day notice did not involve promotions but "only transfers or schedule changes." What Kelly did object to was the Chief's having sought from Batko a waiver of the ten-day notice "...of transfer to another position within the Police Department..." (2 Tr 54). Farley also testified that Article VIII, Section D was placed in the agreement in 1977 to forestall the involuntary transfer of personnel on a short-term basis from squad to squad or from shift to shift without proper notice. [See Findings of Fact Nos. 22-23, 25 & 26, supra].

NOTE: The Hearing Examiner is at a loss to understand the contention of the PBA that the ten-day notice requirement of Article VIII, Section D, supra, was involved in the Chief's decision to appoint Batko to the temporary position of Acting Sergeant for 90 days. As the Hearing Examiner reads Article VIII, Section D, it appears to mandate a ten-day notice for any changes in the starting or finishing times of shifts or the addition of new shifts, the latter having been relevant to the Chief's unilateral establishment of the "power shift," supra. The Batko

---

17/ The ten-day extension was, according to the Chief, provided to Batko so that the Chief might retroactively comply with the ten-day notice requirement.

promotion was not an involuntary short-term transfer from a squad or a shift of the type which resulted in Section D having been placed in the agreement in 1977 as Farley so testified. On the other hand, the Hearing Examiner concurs with the PBA's position that it did not object to Batko's "promotion" since this is consistent with Article XVII, Temporary Assignments, in J-1 and J-2 at p. 35, which the Commission has considered previously: Borough of Sayreville, P.E.R.C. No. 87-2, 12 NJPER 597-599 (¶17223 1986), mot. reconsider. den. P.E.R.C. No. 87-58, 12 NJPER 856 (¶17331 1986).

The Hearing Examiner now finds and concludes that the Borough violated Sections 5.4(a)(1) and (3) of the Act when Chief Sprague based his decision of September 1, 1988, to demote Batko from Acting Sergeant to Patrolman upon Kelly's Grievance Letter to the Borough's Police Committee on the same date, September 1st. Not only did the Chief acknowledge that it was this grievance, which triggered his decision to demote Batko, but he also so stated to Batko and to Kelly.

The Commission has since 1984 applied the New Jersey Supreme Court's analysis in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) in cases where the Charging Party has adduced proofs sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision, in this case, to demote Batko. Once this

burden has been met, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242). In meeting its burden, the Charging Party must establish (1) that protected activity was involved in the alleged discriminatory action of the employer, (2) that the employer knew of this activity and, finally, (3) that the employer was hostile toward the exercise of this protected activity (see 95 N.J. at 246).

The Commission has held on many occasions that the filing of grievances is a protected activity. For example, see Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); and Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988), adopting H.E. No. 88-52, 14 NJPER 319, 322 (¶19117 1988).

When Kelly filed his Grievance Letter with the Borough's Police Committee on September 1st, he was engaging in protected activity under the Act on behalf of Batko. It cannot be gainsaid but that the Borough had knowledge of Kelly's having filed his Grievance Letter of September 1st since it was given to members of the Borough's Police Committee.

There remains the question of whether hostility or animus was manifested by the Borough in response to Kelly's Grievance

Letter. Here the factor of "timing" is relevant.[18/] The action of Chief Sprague was precipitous upon his learning of the Kelly Grievance Letter, namely, on the same date, September 1, 1988, Sprague delivered to Batko his memorandum demoting Batko from Acting Sergeant back to Patrolman as of September 10th (CP-10). Given the fact that Chief Sprague acted within hours of the Grievance Letter of September 1st, there can be no doubt whatever that the Chief's "timing" affords this Hearing Examiner the basis for inferring that Chief Sprague acted with hostility or anti-union animus when he acted so quickly to demote Batko:

Turning now to whether or not the Borough has met its burden under Bridgewater, namely, that Batko would have been demoted even in the absence of protected activity on his behalf by the PBA, the Hearing Examiner is convinced that this burden has not been met. It is crystal clear that Batko would have continued as Acting Sergeant for a period of 90 days and, as promised, that he would have become a permanent sergeant thereafter but for Kelly's grievance of September 1st. The Chief indicated as much by testifying that he felt compelled to demote Batko in response to the grievance and the necessity, however erroneously placed, that he must comply with the ten-day notice requirement of Article VIII, Section D.

18/ See University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 8 (¶17002 1985); and Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988).

Thus, based on the facts and discussion above, the Respondent Borough violated Sections 5.4(a)(1) and (3) of the Act by Chief Sprague's having demoted Ronald J. Batko on September 1, 1988, as a result of the PBA's having filed a grievance on his behalf. By way of remedy, the Hearing Examiner will recommend that Ronald J. Batko be made whole for the loss of earnings that he suffered by having his pay reduced from that of Sergeant to that of Patrolman between the dates of January 1, 1989 and February 28, 1989 (see Finding of Fact No. 24, supra).

Just As With The Holiday/Vacation Pay Issue, The Issue Of Compensatory Time Involves A Mere Breach Of Contract Claim And Must Be Dismissed Under Human Services.

Findings of Fact Nos. 27-32, supra, clearly suggest that the Compensatory Time issue is one involving a breach of contract by the Borough, the only remedy for which is resort to the parties' negotiated grievance procedure. The criteria for discerning whether or not an issue such as Compensatory Time is one for a Commission proceeding under Section 5.4(a)(5) or whether the determination belongs elsewhere, has been considered previously in the Human Services discussion of the holiday/vacation pay issue, supra. This discussion need not be repeated except to emphasize that the Hearing Examiner is persuaded that none of the Human Services exceptions are applicable to the Compensatory Time issue contained in Paragraphs 5 of the Unfair Practice Charge.

The Borough has certainly not repudiated the contract clause pertaining to Compensatory Time (Article VIII, Section J of

J-1 and J-2). The instant dispute pertains to an interpretation of how and under what circumstances Section J is to be implemented. The four requests for accumulated compensatory time (CP-3 through CP-6) would appear to have formed the basis for the filing of a grievance by the PBA based upon an alleged violation of Article VIII, Section J. This was not done and, instead, the PBA has elected to include the denials of these four requests for the use of compensatory time within the instant Unfair Practice Charge.

This does not, however, alter the legal posture of the issue before the Hearing Examiner. Accordingly, the Hearing Examiner must recommend dismissal of the Compensatory Time allegation in the PBA's Unfair Practice Charge.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when its Chief of Police unilaterally established a "power shift" where that issue was discussed and abandoned in negotiations for successor agreements to J-1 and J-2 due to the strenuous objection of the Chief of Police, the subject matter of the "power shifts" being within the scope of collective negotiations.

2. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when its Chief of Police demoted Patrolman

Ronald J. Batko on September 1, 1988, from the position of Acting Sergeant to Patrolman because the Charging Party had filed a grievance objecting to the procedure used by the Chief of Police in making the initial promotion of Batko on August 31, 1988.

3. The Respondent Borough did not violate any other provision of N.J.S.A. 34:13A-1 et seq. either by its conduct with respect to a dispute over the calculation of holiday pay and vacation pay or as to its policy of granting or denying the use of compensatory time, both subject matters being dismissable under Human Services as mere breach of contract matters.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with representatives of the PBA prior to establishing and implementing a "power shift" and by demoting such employees as Ronald J. Batko from the position of Acting Sergeant because of the PBA having filed a grievance on his behalf.

2. Refusing to negotiate in good faith with representatives of the PBA prior to establishing and implementing a "power shift."

B. That the Respondent Borough take the following affirmative action:

1. Upon demand, negotiate in good faith with representatives of the PBA prior to establishment and implementation of additional shifts such as the "power shift," which was established and implemented unilaterally during the first week of January 1989.

2. Make Ronald J. Batko whole for loss of wages suffered by him as a result of the discriminatory action of Chief of Police Douglas A. Sprague on September 1, 1988, namely, make payment to Batko of the difference between the rate of pay for a Sergeant and the rate of pay for a Patrolman during the period January 1, 1989, through February 28, 1989, with interest at the rate of 7.0% per annum for the year 1989 in accordance with R.4:42-11(a)(ii).

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

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

C. That the allegations that the Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(2), (4), (6) and (7) be dismissed in their entirety for lack of proof.

Alan R. Howe
Hearing Examiner

Dated: July 20, 1990
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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with representatives of the PBA prior to establishing and implementing a "power shift" and by demoting such employees as Ronald J. Batko from the position of Acting Sergeant because of the PBA having filed a grievance on his behalf.

WE WILL NOT refuse to negotiate in good faith with representatives of the PBA prior to establishing and implementing a "power shift."

WE WILL, upon demand, negotiate in good faith with representatives of the PBA prior to the establishment and implementation of additional shifts such as the "power shift," which was established unilaterally and implemented during the first week of January 1989.

WE WILL make Ronald J. Batko whole for loss of wages suffered by him as a result of the discriminatory action of Chief of Police Douglas A. Sprague on September 1, 1988, namely, make payment to Batko of the difference between the rate of pay for a Sergeant and the rate of pay for a Patrolman during the period January 1, 1989, through February 28, 1989, with interest at the rate of 7.0% per annum for the year 1989 in accordance with R.4:42-11(a)(ii).

Docket No. CO-H-89-191 BOROUGH OF SAYREVILLE
(Public Employer)

Dated _____ By _____
(Title)

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

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