P.E.R.C. NO. 93-120

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-91-148

MIDDLESEX COUNTY CORRECTIONS
OFFICERS PBA LOCAL 152,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Middlesex County Corrections Oficers PBA Local 152 against the County of Middlesex. The charge alleged that the County violated the New Jersey Employer-Employee Relations Act by eliminating a weekend work schedule, allegedly in violation of a contractual past practices clause and in retaliation for the PBA's refusal to withdraw a grievance. The Commission finds that anti-union animus was not a substantial and motivating factor in the warden's decision to recommend ending the weekend shift. And under all the circumstances, the Commission concludes that the parties' practices, contract negotiations, and interactions had created a reasonable expectation that the County could make this change unilaterally.

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MIDDLESEX COUNTY CORRECTIONS
OFFICERS PBA LOCAL 152,

Charging Party.

Appearances:

For the Respondent, John J. Hoagland, County Counsel
(Robert C. Rafano, Assistant County Counsel, of counsel)

For the Charging Party, Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On December 12, 1990, Middlesex County Corrections Officers PBA Local 152 filed an unfair practice charge against the County of Middlesex. The charge alleges that the County 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/] by eliminating a

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

Footnote Continued on Next Page

weekend work schedule, allegedly in violation of a contractual past practices clause and in retaliation for the PBA's refusal to withdraw a grievance.[2/]

The PBA requested interim relief. On January 9, 1991, a Commission designee denied that request. I.R. No. 91-11, 18 NJPER 142 (¶23067 1991).

On March 11, a Complaint and Notice of Hearing issued. On June 4, Hearing Examiner Elizabeth J. McGoldrick conducted a

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1/ Footnote Continued From Previous Page

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."

2/ The unfair practice charge did not comply with the requirement that it specify the portions of the Act allegedly violated. Similarly, the County's Answer did not meet the requirement of specific admissions, denials and explanations and specific detailed statements of any affirmative defenses. During the course of this litigation, the PBA also argued that the County had eliminated the weekend work schedule without negotiations. The parties fairly and fully litigated that allegation so we will consider it. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982). However, we caution litigants and our Hearing Examiners that, as a rule, parties should be confined to litigating the issues in the pleadings as filed and amended.

hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.[3/]

On March 10, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-21, 18 NJPER 145 (¶23069 1992). She found that the weekend work schedule was eliminated for economic reasons, not in retaliation for the filing of grievances; the PBA had waived its right to negotiate over the elimination of the weekend schedule; and the decision to eliminate or reduce weekend overtime was a managerial prerogative.

On March 27, 1992, after an extension of time, the PBA filed exceptions. It contends that the Hearing Examiner erred in: (1) failing to consider whether the warden's decision to recommend eliminating the weekend shift was legitimate; (2) failing to find that the PBA's refusal to cooperate in policing an absenteeism problem on the weekend shift motivated the warden to recommend the elimination of the weekend shift; (3) finding that elimination of the weekend shift was inevitable due to budget constraints; (4) finding a consistent increase in overtime costs between 1984 and 1990 rather than that the County failed to show the savings associated with eliminating the weekend shift; (5) discrediting uncontroverted testimony that the PBA requested to negotiate over

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3/ On December 1, 1992, the Appellate Division affirmed our determination in a related scope-of-negotiations case that a PBA negotiations proposal to continue the "current work schedule" was mandatorily negotiable. App. Div. Dkt. No. A-470-91T2 (12/1/92), aff'g P.E.R.C No. 92-22, 17 NJPER 420 (¶22202 1991).

the elimination of the weekend shift; (6) finding that the PBA waived its right to negotiate over work schedules; (7) finding that an interest arbitrator's failure to award the PBA its proposal to continue the existing work schedule indicates that the PBA waived its right to contest a change in the work schedule; and (8) finding that the County had a managerial right to eliminate or reduce weekend overtime. The PBA also relies on its post-hearing brief. The County did not reply to the exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-16) are accurate. We incorporate them with this addition. We add to finding no. 3 that the late 1990 change in starting and stopping times of the second shift involved moving them ahead 15 minutes.

Between 1985 and 1990, the warden made several unilateral changes in shifts or work schedules. He changed the work times of the visitors shift, the starting and stopping times of the second shift, and the work days of the property officer. The PBA neither objected to any of these changes nor sought negotiations.

The weekend shift was established in 1985 to address problems of morale, absenteeism and overtime costs. By having a steady group of employees work two 16 hour shifts on Saturday and Sunday and get paid for 40 hours, the warden hoped that the problems associated with trying to get regular employees to work weekends could be alleviated. The warden sought to reduce absenteeism and the resulting overtime costs of replacing absent employees. The shift was established unilaterally without objection from the PBA.

After the weekend shift was established, seven or eight employees were removed from the shift each year because of excessive absenteeism. The PBA cooperated with the warden in combatting this problem.

In October 1990, County representatives instructed department heads to keep their overtime budgets at 1989 levels and informed them that no new positions would be added to the 1991 budget. The warden was informed that he had to reduce his staff by 29 people to save approximately $1,074,000 from his operating budget. He met with PBA representatives and told them that he would be willing to support the weekend schedule if the PBA continued to help police the absenteeism problem. He had identified eight employees who had used up to 30 days of sick time and he wanted to remove them from the weekend shift. Rather than agree to their removal, the PBA filed a grievance claiming that the employees were entitled to take their sick time. The warden asked PBA representatives how they expected him to support the weekend shift when they were not going to help him police it and they were filing grievances. The PBA asked the warden to continue processing the grievances and he did so. The warden recommended eliminating the weekend shift. The freeholders accepted that recommendation and the PBA filed this charge.

The first question is whether the warden's recommendation that the weekend shift be terminated interfered with the exercise of protected rights or discriminated to discourage employees from exercising those rights. We answer that question in the negative.

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason

for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

On this record, we are not convinced that the filing of grievances was a substantial or motivating factor in the warden's decision to recommend ending the weekend shift. The shift was started, in part, to reduce overtime costs arising because of excessive absenteeism on weekends.[4/] Some five years later, the warden was faced with a directive that he save one million dollars by reducing overtime and the size of his workforce. This record does not demonstrate that the warden would have recommended saving the weekend shift absent the grievance or that the warden recommended eliminating the shift because the PBA filed the grievance. The warden had to recommend ways to comply with the budgetary directive. He eliminated 12 vacant positions, laid off five employees, and eliminated the weekend shift. Those actions met the freeholders' order.

Although the warden told PBA representatives that he would work harder to save the weekend shift if they cooperated in policing that shift, he was not hostile to their right to file a grievance. He simply stated that he could not urge the freeholders to maintain a work schedule that was not cost-effective, particularly if the

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4/ The statistical evidence does not show that costs increased as a result of having the weekend shift or decreased as a result of ending the weekend shift. The immediate savings associated with eliminating the shift do not factor in the overtime costs of absenteeism associated with a regular schedule.

union did not help make it cost-effective. We distinguish a situation where a public employer, in retaliation for the exercise of protected rights, takes an adverse action it would not have otherwise taken.

We next consider the allegation in the PBA's charge that the County violated a past practice clause of the contract when it eliminated that shift. The PBA has not pursued this claim before us. In any event, the charge asserts a mere breach of contract and there is no support for finding that the County repudiated any contractual commitment. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). To the contrary, the contract does not expressly restrict the County's power to change shifts and the County has done so unilaterally on several occasions without objection from the PBA.

We next consider whether the County had a non-negotiable prerogative to eliminate the weekend shift. We hold that it did not. Work schedules for police officers intimately and directly affect their work and welfare and are therefore mandatorily negotiable so long as a negotiated agreement would not significantly interfere with the determination of governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J.Super. 108 (App. Div. 1987). We must examine and balance the parties' interests based on the particular facts of each case.

This work schedule change meant that employees who did not work weekends now had to, and those who worked only weekends had to

work weekdays as well. The sole motivation in eliminating the shift was to reduce labor costs. Simply because an existing working condition has certain labor costs associated with it does not establish that an agreement on that working condition significantly interferes with the determination of governmental policy. Balancing the parties' interests in this case, we hold that the County did not have a non-negotiable prerogative to eliminate the weekend work schedule to reduce labor costs.

We next consider whether the County had a duty to negotiate before eliminating the weekend shift. We hold that it did not. We base that conclusion not upon any one factor, but upon the totality of circumstances leading up to the County's decision.

As we have recounted, the warden made several unilateral work schedule changes between 1985 and 1990. The PBA did not seek to negotiate over any of these changes or object to the warden's unilateral actions. One of these unilateral changes was the creation of the weekend work schedule, a work schedule that was implemented with the aim of reducing excessive absenteeism. That schedule was introduced as a temporary measure, subject to management review to ensure that sick time and overtime costs were decreased. From 1985 through 1990, the PBA cooperated in policing absenteeism by agreeing that the warden could remove employees with high absenteeism rates from that shift.

The weekend work shift was not incorporated into any collective negotiations agreement. During negotiations for the

1987-1988 collective negotiations agreement, the PBA proposed a clause requiring the County to continue the current scheduling system. The PBA sought this provision to insure that the warden did not change the schedule without first negotiating it with the PBA. The County responded that it had a prerogative to change schedules and that it needed the flexibility to change them when necessary, especially since the control of a jail population was at stake. The interest arbitrator accepted the County's arguments and rejected the PBA's proposal. He noted that the PBA could protest arbitrary and unreasonable changes through "existing remedies" and that if the County seriously abused its prerogative, the PBA would have more compelling arguments for securing contractual protection in the next round of negotiations.

During the next round of negotiations, the PBA did not secure any contractual protection. Thus, the 1989-1990 contract -- the contract in effect at the time the weekend shift was eliminated -- does not expressly limit the County's power to change work schedules or otherwise change what had been the parties' expectations under the previous contract and practice.

As we have discussed, in 1990 the freeholders ordered the warden to cut one million dollars from his budget. He was initially directed to eliminate 29 positions, but this would have resulted in unacceptable staffing levels at the jail. The warden eliminated 12 vacant correction officer positions and laid off five employees, including a correction officer. Since he was required to save still

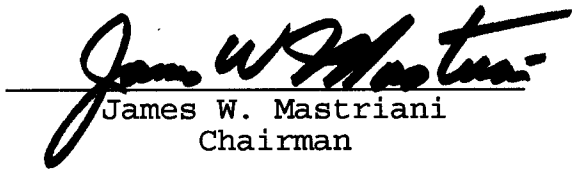
more money, he also considered eliminating the weekend schedule. That schedule had generated high overtime costs, in part because overtime costs were built into the 16 hour shifts but also because of absenteeism problems among employees assigned to that shift. The warden informed the PBA of his budgetary problems and the possibility of eliminating the weekend shift, and he solicited the PBA's suggestions for saving money and its assistance in salvaging the weekend schedule. The PBA, however, did not suggest any viable alternatives for saving money and it discontinued its previous practice of permitting the warden to remove employees with high absenteeism rates from the weekend shift. The PBA did not prove that it demanded to negotiate before the announcement that the weekend shift would be eliminated or before that decision was implemented seven weeks later.

Under all these circumstances, we conclude that the County did not commit an unfair practice when it eliminated the weekend work schedule. The parties' practices, contract negotiations, and interactions had created a reasonable expectation that the County could make this change unilaterally. We accordingly dismiss the Complaint. Monmouth Cty. Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: June 24, 1993
Trenton, New Jersey
ISSUED: June 25, 1993

H.E. NO. 92-21

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

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-91-148

MIDDLESEX COUNTY CORRECTIONS
OFFICERS PBA LOCAL 152,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the County of Middlesex did not violate the New Jersey Employer-Employee Relations Act by abolishing the weekend work schedule. The Hearing Examiner found that the schedule was abolished for economic reasons and not in retaliation for the filing of grievances. The Hearing Examiner also found that the Middlesex County Corrections Officers had neither the contractual nor legal right to negotiate over this particular weekend schedule.

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. 92-21

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

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-91-148

MIDDLESEX COUNTY CORRECTIONS
OFFICERS PBA LOCAL 152,

Charging Party.

Appearances:

For the Respondent, John J. Hoagland, County Counsel
(Robert C. Rafano, Assistant County Counsel, of counsel)

For the Charging Party, Loccke & Correia, Attorneys
(Michael J. Rappa, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 12, 1990 by Middlesex County Corrections Officers PBA Local 152 (PBA) alleging that the County of Middlesex ("County") violated subsections 5.4(a)(1) through (a)(7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/] The PBA alleged that the County violated the Act by

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1/ On the face of the Charge the PBA actually failed to set forth subsections alleged to have been violated. In an interim relief proceeding regarding this matter, however, a Commission

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unilaterally eliminating the weekend work schedule in retaliation for the filing and processing of a grievance.

A Complaint and Notice of Hearing (C-1)[2/] was issued on March 11, 1991. The County filed an Answer (and supporting affidavits)(C-2) on December 31, 1990 denying it violated the Act and asserting both factual and legal defenses.[3/] A hearing was

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1/ Footnote Continued From Previous Page

Designee denied interim relief but found the PBA alleged a violation of subsections 5.4(a)(1) through (a)(7). County of Middlesex, I.R. No. 91-11, __ NJPER ___ (¶_____ 1991). Those 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."

2/ Items identified as "C-" refer to Commission exhibits, those identified as "J-" are joint exhibits, those identified as "CP" refer to the PBA's exhibits and those identified as "R" refer to the County's exhibits.

3/ Although the Complaint did not issue until March 11, 1991, the County filed its Answer and supporting affidavits on December 31, 1990 because it was in response to the PBA's request for interim relief. The County relied on that same submission after the Complaint issued.

held on June 4, 1991 in Trenton, New Jersey.[4/] The parties filed post-hearing briefs by September 11, 1991.[5/]

Based upon the entire record I make the following:

Findings of Fact

1. Prior to August 1985 the County was experiencing a high amount of overtime, low employee morale, and employee resignations. In an effort to correct those problems, but primarily the overtime problem, Warden Rudolph Johnson created a weekend shift at the adult correctional facility (T17, T155, T170). Approximately 60 employees (officers and supervisors) were assigned to that shift

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4/ The transcript will be referred to as "T."

5/ The County attached three correctional facility reports to its post-hearing brief. Those reports were not offered for evidence at hearing, nor was their relevance discussed. They were not admitted into evidence in this proceeding.

By letter of September 20, 1991, the PBA objected to the submission of those documents, but did not copy the County with the letter. Although the County has not had the opportunity to respond to the PBA's objection, I find that those reports are not necessary to properly dispose of this case. The evidence presented on the record is sufficient to make the factual findings and legal conclusions needed to issue a report and recommended decision. Thus, those reports were not considered here.

In its letter the PBA also argued that the County, in Point II of its post-hearing brief, raised the same argument it previously raised in a scope of negotiations proceeding between the parties, SN-91-45, decided by the Commission on August 15, 1991, County of Middlesex, P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991). While I will apply the law as established by the Commission and the courts, the County has the right to frame its own issues in this case and to advance the legal arguments it relies upon. Therefore, I have not ignored Point II of the County's brief.

which were 16-hour shifts on Saturday and Sunday. Pursuant to the contract the employees were paid straight time for the first eight hours of each shift, and time and one-half for the second eight hours of each shift (the overtime rate), resulting in their receipt of 40 hours of pay for 32 hours of work. If an employee reported out sick on a Saturday or Sunday, the employee was docked 2 1-2 sick days to cover the absence (T14).

On August 5 and 6, 1985 Johnson sent memorandums (CP-1, C-2 Exhibit A) to all custody staff notifying them of the new shift and a new work schedule. Although the PBA was the majority representative of the custody staff at that time, Warden Johnson did not send a copy of CP-1 to the PBA, nor negotiate with the PBA over the new shift or schedule, and they were unilaterally implemented by August 12, 1985 (T35, T155, C-2). The PBA voiced no objection and made no demand to negotiate.[6/]

2. Between 1985 and 1990 Warden Johnson, on behalf of the County, made several unilateral shift/schedule changes at the adult facility. In late 1986 or early 1987 Johnson changed the work time

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6/ Johnson testified that the weekend schedule became effective without negotiations with the PBA (T155). Larry Cavanagh, current PBA President, however, testified that the "institution" of the weekend schedule was "a union negotiated item" (T34). I credit Johnson's testimony. In his prehearing certification (C-2), Johnson explained that Cavanagh was not a union officer in August 1985, and that no union member or officer negotiated the weekend schedule. There is no reliable contradictory evidence, thus, I credit Johnson's statement. The PBA apparently submitted a prehearing affidavit in the interim relief proceeding but it was not admitted into evidence in this proceeding, thus it was not considered here.

of the visitors shift (T156). The visitors shift is a whole shift of approximately ten officers which is keyed to the visiting hours at the facility. When the visiting hours were adjusted for Wednesdays and Fridays, the shift hours were also changed. Johnson did not negotiate the change with the PBA (T47-T52, T156-T160).

In late 1990 Johnson changed the starting and stopping time of the second shift. The second shift times were changed to provide better coverage for inmates being returned to the facility from court (T49). Johnson again did not negotiate the change with the PBA (T47-T53, T156-T160).[7/]

Johnson also changed the work days of the "property officer" from Monday--Friday, to Sunday--Thursday. That change was not negotiated with the PBA (T160).

3. Although the weekend shift schedule was implemented in 1985 it was not memorialized in the parties' collective agreement at that time, nor has it been memorialized in subsequent agreements to

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7/ Both Johnson and Cavanagh testified that the visitor shift change and second shift change were not negotiated (T47-T53, T156-T160, T203). But PBA Vice-President, Anthony Pagano, testified that there was no need to negotiate those items because they were discussed with him and he asked the affected employees who had no objection to the changes (T62-T70). Even if those changes were "discussed" with Pagano, he admitted they were not "negotiated," the PBA made no demand to negotiate, and raised no objection (T63, T65). Discussions are not a legal substitute for fulfillment of a negotiations obligation. Therefore, I credit Johnson's and Cavanagh's testimony and Pagano's admission, and find that the County unilaterally changed the work shifts, and the PBA acquiesced to those changes.

date (T156).[8/] In negotiations leading to the parties' 1987-88 collective agreement the PBA apparently sought specific language regarding scheduling. The parties reached impasse on that, and other issues, and proceeded to interest arbitration.

An arbitration hearing was held on July 28, 1987. The PBA made the following language proposal on scheduling: "The current scheduling system shall continue." The arbitrator noted that the PBA was merely seeking that proposal to insure that Johnson did not change the schedule without first negotiating it with the PBA.

The arbitrator issued his decision on November 5, 1987 (CP-6). He denied the PBA's proposal "to contractually provide for the continuation of the existing work schedule..." He held that such a provision could eliminate the Township's flexibility of modifying the shifts, even temporarily.[9/]

4. On December 8, 1989 the parties signed their 1989-90 collective agreement (J-1), the contract in effect when the charge was filed. The weekend work schedule was not included in J-1. The pertinent sections in J-1 include:

§7.02 Preservation of Rights, Duties and Obligations

8/ Although the parties' 1989-90 collective agreement (J-1) notes that shift differentials do not apply to the "week-end" schedule (J-1, §11.12), the weekend schedule itself does not appear in J-1 nor is it defined by J-1. See further discussion infra.

9/ The arbitrator noted that the PBA could avail itself of "existing remedies" if the Township made arbitrary, unreasonable or capricious changes.

Unless a contrary intent is expressed in this Memorandum of Agreement, all existing benefits, rights, duties, obligations, and conditions of employment applicable to any employee pursuant to any rules, regulations, instruction, directive, memorandum, practice, status, or otherwise shall not be limited, restricted, impaired, removed, or abolished.

§11.00 Work Day, Work week, and Overtime

§11.01 The normal work day tour shall be in accordance with the scheduled tours of duty, which shall include thirty (30) minutes of meal time per day, and, in accordance thereto, two (2) rest breaks of fifteen (15) minutes each.

It is understood that there shall be a minimum of eight (8) hours off duty for each employee prior to the commencement of their next scheduled work shift. Any employee not so provided shall receive one and one-half (1 1/2) times their regular rate of pay for all hours worked on that short shift. This shall not apply to short swings caused by the employee working overtime on their prior shift.

§11.02 The normal work day shall be based upon the utilization of the schedule postings and the assignments therein.

§11.03 Work in excess of the employee's basic work week or normal hour of duty shall be paid at the rate of time and one-half (1 1/2) for those overtime hours worked except for the following:

In a single twenty-four (24) hour period, the first eight (8) hours shall be paid at straight time. The second eight (8) hours shall then be computed at one and one-half (1 1/2) times the regular rate of pay. Finally, the third eight (8) hours worked shall be computed as follows:

The first four (4) hours worked shall be paid at one and one-half (1 1/2) times the regular rate of pay.

The second four (4) hours worked shall then be paid at two (2) times the regular rate of pay.

However, after completion of any twenty-four (24) hour period, all employees will be reverted back to their normal straight time pay rates until such time that the employee's eight (8) hour shift is exceeded. At that time, overtime rates will apply for each hour worked in excess of the employee's normal scheduled shift.

Overtime shall be paid in the first pay period following the earning of the overtime.

§11.12 Shift Differential

J-1 provides for shift differentials in a variety of circumstances. The last sentence of that section provides:

Shift differential shall not apply to the current special week-end schedule.

§18.01 Shift Changes

§18.01 One (1) calendar week notice in writing will be supplied before shift assignments are altered, except in emergency situations.

§39.01 Emanating Policy

It is mutually understood and agreed that all benefits currently enjoyed by employees shall remain in effect and become merged in this Agreement.

§45.01 Yearly Calendar

The work schedule showing rotations and assignments for the following three (3) month period shall be posted at a conspicuous location and available for review by employees no later than one (1) month prior to its effective date.

§47.00 No Waiver

§47.01 Except as otherwise provided in this Agreement, the failure to enforce any provision of this Agreement shall not be deemed a waiver thereof.

§47.02 This Agreement is not intended and shall not be construed as a waiver of any right or benefit to which the parties herein are entitled by law.

§49.00 Changes and Modifications

§49.01 Any changes or modifications in terms and conditions of employment shall be made only after negotiation with the Association.

§49.02 Proposed new rules or modifications of existing rules governing terms and conditions of employment shall be negotiated with the Association before they are established.

In addition to those pertinent sections, J-1 provides for medical, dental, prescription and vision benefits, as well as vacation, sick, bereavement, maternity, military and personnel leave time.

5. The process leading to the formulation of the 1991 budget began in late 1990. On or about October 15, 1990 David Crabiel, Chairman of the County Board of Freeholders, and Albert Kuchinskas, County Comptroller, sent budget instructions to department heads, including Johnson, explaining the budget preparation process.

The department heads were told about the difficult economic times and were instructed to keep their overtime budget at the 1989 level. They were also told no new positions would be added to the budget (T116, T161-T162).

The October 15 letter was sent in part because there was a smaller tax base leading into 1991 which would result in increased taxes if no changes were made (T116-T117). The County was determined not to increase taxes, and intended to introduce a 1991 budget that was $345,000 less than the 1990 budget. Therefore, Kuchinskas reviewed every department's budget and determined the

number of positions or dollars that had to be reduced from each department to meet the County's budget reduction goal. Then the department heads had to formulate a recommendation on how they would achieve that goal. Overtime reductions and employee reductions were the two main options available to department heads (T103-T104, T106, T112, T115-T122, T126, T129).

On or about October 31, 1990 Johnson received notice (R-2) to reduce his staff by 29 people or cut approximately $1,074,000 from his operating budget (T162, T164). R-2 also listed personnel reductions in the other departments. Shortly after R-2 issued, Johnson attended a meeting with County Counsel, Freeholder Warnik, Kuchinskas, County Administrator Paul Abati, Personnel Director Cross, and others. As a result of that, and perhaps other meetings in November 1990, it was determined that Johnson had to reduce his budget and cut positions. The weekend shift was a problem since half of all the time the 50 to 60 employees on that shift worked was overtime (T162-T164).

Johnson was originally directed to cut 29 positions, but due to manpower concerns he could only cut 17 positions. Of those, 12 were vacant correctional officer positions, then he laid off one corrections officer, one maintenance employee and three clerks. In order to try to meet the goals in R-2, he had to eliminate the weekend schedule. By eliminating that schedule and the overtime cost associated with it, he gained enough money to fund the remaining 12 positions he had been directed to cut (the difference

between 29 and 17). That way he was able to provide the same level of coverage and not reduce services (T164-T166, T210).[10/]

By eliminating the 12 vacant positions (and their fringe benefit costs), and the weekend schedule and its overtime cost, Johnson saved nearly $1,000,000. He had tried to find another way to reduce his budget, and asked the PBA for suggestions, but there were no viable alternatives (T167-T168, T217-T218).

In November 1990 while County officials were formulating the 1991 budget and meeting with department heads regarding the budget, it was also meeting with the labor organizations representing County employees advising them of budget and job reductions. Cavanagh, by invitation, attended a meeting in late November 1990 with all union presidents and Crabiel, County Freeholder Finance Committee Chairperson; Kuchinskas; Abati; Cross, and others. The union presidents were told there would be job reductions and cost reductions because of the 1991 budget. Cavanagh also attended a public Board of Freeholders meeting at which the 1991 budget and the tax levy reduction was discussed (T41-T44).

Kuchinskas presented the County budget goals to the Freeholders finance committee on December 3, 1990. The initial goal was $345,000 less than the 1990 budget (T117).

10/ Exhibit CP-5 shows the consistent increase in overtime costs between 1984 and 1990. In 1990 the overtime costs resulted in an average salary increase of 36.9% (T197-T201).

6. Several times between 1985 and 1990 there were absenteeism problems on the weekend shift which resulted in the removal of certain employees from that shift. Johnson and the PBA had an understanding until late 1990 that employees on that shift with poor attendance would be removed from the shift (T171, T178).

Based upon the County budget goals expressed in November 1990, Johnson was aware that the weekend shift might be eliminated (T164, T166-T170, T215-T216), but he was prepared to support it if the PBA cooperated in policing that shift to eliminate employees who had a high absentee rate (T172). In late November 1990, Cavanagh discussed the upcoming 1991 budget with Johnson. Johnson told him that if the PBA cooperated in policing the weekend shift he might be able to "salvage the schedule." (T172, T176). Several days later Johnson identified eight people with excessive absenteeism who were going to be removed from the weekend shift. Cavanagh informed him that the PBA would not accept their removal from the shift (T176).

Shortly thereafter, but prior to December 3, 1990, Cavanagh presented Johnson with two grievances. One grievance concerned a health and safety issue, the other concerned abuse of sick leave referring to the weekend shift (T29-T30). Johnson told Cavanagh:

> ...Larry, you know the problems I am having. I am trying to save the schedule for you. I've got to go downtown to the...Freeholders, and I need your help on this. I can't have you fighting me when I am trying to fight for you, and you are filing grievances. That is not going to help the situation. (T177)

Johnson did not ask Cavanagh to withdraw the grievances. Instead, Cavanagh asked Johnson to hold the grievances until he

talked to his people. The following day Cavanagh asked Johnson to process the grievances. Johnson complied with his request (T177).

On December 3, 1990 Johnson met with Cavanagh and Lt. Tolentino, the union representative for the superior officers unit (T30, T71). Cavanagh presented the PBA's position on those grievances. Johnson responded to Cavanagh:

> ...how would you expect me to support something when you are not going to help me police it, and you are filing grievances; how could I possibly support that? (T172).

Cavanagh did not withdraw those grievances (T31).[11/]

11/ Cavanagh testified that Johnson said that if Cavanagh continued to pursue the grievances, he (Johnson) could no longer support the weekend shift (T31). He did not testify that Johnson asked him to withdraw the grievances. Tolentino testified that Johnson asked Cavanagh to withdraw the grievances and then he (Johnson) could defend the shift; that Cavanagh said no, and that Johnson said, "Then I can't support the weekend shift" (T79). But on cross-examination Tolentino corrected his testimony and testified that Johnson said it would be "harder" to support the continuation of the shift or "be difficult for him to defend or support it." (T82)

Johnson denied telling or asking Cavanagh to withdraw the grievances (T177), and then made the statement at T172. I credit Johnson's statement and Tolentino's testimony on cross-examination. I find that Johnson did not ask or tell Cavanagh to withdraw the grievances. Cavanagh did not testify that Johnson said it, and Johnson denied it. Thus, I do not credit Tolentino's testimony that Johnson said it.

I also find that Johnson made the remark at T172 rather than the remark attributed to him by Cavanagh at T31.

Tolentino explained that Johnson said it would be "harder to support" the weekend schedule without Cavanagh's cooperation rather than he "could not defend" it (T82).

Based upon the County's fiscal problems and stated intent to reduce the 1991 budget below the 1990 level, the County decided, by late November or early December 1990 and to some extent unaware of the grievances, to eliminate the weekend shift because of the overtime cost (T103-T110, T116-T122, T132, T150-T151, T215-T218). On December 6, 1990 Johnson held a meeting with Cavanagh, Lt. Tevoli, supervisor of the weekend shift, Sgt. Buchanan, and Deputy Wardens Semple and Marazo. Johnson gave everyone a copy of a memorandum he wrote to all correction officers and superior officers (CP-2 and C-2, Ex. B) informing them that the weekend shift was being eliminated (T27-T29). CP-2 provides:

> It is with regret that I must inform you that the decision has been made to eliminate the Weekend Shift and return to the traditional shift. At this time, we will, however, be able to maintain the Third Shift without alteration.
>
> The necessity for this change is brought about by several factors.
>
> It is no longer economically possible to continue this costly schedule and at the same time maintain the required number of custody staff. 12 Correction Officer vacancies which existed have been removed from our rolls, and the only way to maintain the needed level of staff is to return the work force to the more traditional and cost effective method of scheduling. We think this move will eliminate the need for any further reduction in the Correction Officer ranks.
>
> It is important to note that when we began this schedule, on a trial basis, our stated goal was to reduce absenteeism and thereby reduce the cost of overtime. We have not been able to fully realize those goals and, consequently, cannot afford to continue.
>
> Within the coming week each affected employee will be asked to select a first and second choice of schedule assignment. As usual, performance, seniority and

> record of absenteeism will be considered in making these assignments. Those Officers who do not make a choice will be assigned by the Deputy Warden.
>
> It is my hope that we receive your full cooperation and that this transition will take place as smoothly as possible.
>
> I will remain available to discuss any suggestions you might have which will accomplish what must be accomplished.

After December 6, shift commanders were directed to compile a list of correction officers and their choice of shift. Thereafter, on or about the last week of January 1991, the weekend shift was eliminated (T32). The PBA did not demand negotiations over the elimination of the weekend schedule (T44).[12/]

Also on December 6, 1990 Kuchinskas sent a letter to department heads (C-2, Exh. D), including Johnson, seeking confirmation of information, such as overtime statistics, sent to him during the normal course of business. The information, including overtime information, was reviewed in planning for the 1991 budget (T132-T136).

7. On December 12, 1990 the PBA filed its Charge and request for interim relief. The County's Answer was filed on December 31, 1990, and a show cause hearing was held on January 3, 1991. Interim relief was denied on January 9, 1991.

12/ On direct examination Cavanagh testified that the PBA requested negotiations over the elimination of the weekend work. The County, allegedly refused (T31). But on cross-examination Cavanagh admitted he never gave the County a written request to negotiate over the elimination of the weekend schedule (T44). Since Cavanagh never explained when or to whom he made a verbal request to negotiate, I do not credit his testimony to prove that such a request was made.

On January 11, 1991 the County filed a petition for scope of negotiations determination seeking to determine the negotiability of several clauses proposed for negotiations for the successor to J-1. The parties had entered interest arbitration. Those items pertinent to this proceeding are:

1) The PBA proposed adding the sentence: "The current work schedule shall continue in effect" to the Work Day, Work Week and Overtime clause which is §11.00 et seq. of J-1.

2) The PBA proposed that "shift placement be by a seniority bidding system."

On August 15, 1991 the Commission issued its decision, County of Middlesex, P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991) finding that the work schedule sentence was negotiable, but the shift placement sentence was not.

ANALYSIS

The County did not violate the Act by eliminating the weekend schedule. The County did not eliminate the schedule in retaliation for the filing of grievances; the PBA had waived the right to negotiate over schedule changes; and the decision to eliminate overtime is a managerial prerogative.

Motive

The PBA alleged that Johnson recommended the elimination of the weekend shift because Cavanagh filed grievances. In support of that position it relied primarily upon Cavanagh's testimony of what Johnson said, and Johnson's own testimony. Having reviewed the

testimony, however, I did not credit pertinent parts of Cavanagh's testimony, and the inferences I drew from Johnson's testimony were different from those advanced by the PBA.

The PBA sought to prove its case based upon the test established in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). Under Bridgewater, a charging party must prove that protected conduct was a substantial or motivating factor resulting in the employer's action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

Cavanagh's grievance filing was protected activity. While Johnson was aware of that activity, Kuchinskas was not. But even assuming that the "County" was aware of the activity, the PBA failed to prove the County was hostile to the activity because it did not prove that anti-union animus was a motivating or substantial reason for eliminating the weekend schedule.

The process that led to the elimination of the weekend schedule was the process leading to the formulation of the 1991 budget. That process began in October and continued throughout November 1990. The County had decided to reduce its budget for 1991 and not increase taxes. Thus, it specifically targeted jobs and overtime as areas to cut, prior to Cavanagh filing grievances, in order to comply with its budget goals. Johnson was aware, prior to December 1990, that the weekend schedule was a target for elimination due to its high overtime cost. Cavanagh also knew, in November 1990, that the County would undertake job and other cost reductions to comply with 1991 budget projections.

That was the background to Johnson's conversation with Cavanagh about the grievances. Johnson knew that the weekend schedule was targeted for elimination because of its overtime cost, knew that he might not be able to save it, and knew that he had to make a recommendation on reducing his budget. He expressed interest in saving the schedule but could not support it with excessive absenteeism which only increased the overtime cost.

Johnson's remarks to Cavanagh were not in retaliation for the grievances, were not motivated by anti-union animus, not intended as animus, nor evidence of it. Those remarks were an expression of his frustration in not being able to find a way to support the weekend schedule before the Freeholders. Johnson did not ask or threaten Cavanagh to withdraw the grievances. He sought the PBA's assistance in finding ways other than eliminating the

weekend schedule to reduce his budget, but no viable alternatives were offered, nor could he find any. Thus, I find that the PBA did not satisfy the third element of the Bridgewater test and the burden did not shift to the County to defend its action.

Nevertheless, if the Commission finds that Johnson's remarks constituted evidence of hostility, I find that the elimination of the weekend shift was inevitable due to budget constraints. Johnson could find no other way to approach his budget goals and still maintain sufficient manpower at the correctional facility other than eliminating the weekend schedule and its high overtime cost. Even if Johnson supported the schedule, I find the schedule would have been eliminated whether or not the grievances had been filed or absenteeism problems existed, because it was the only way for the County to move toward its budget reduction goal.

Waiver

An examination of J-1, and the parties' prior practice, as supported by case law, shows that the PBA waived the right to negotiate over the weekend shift, and weekend shift schedule changes. Work schedules and/or work shifts are negotiable for police employees as long as negotiations would not significantly interfere with the determination of governmental policy. In re IFPTE Local 195 v. State, 88 N.J. 393 (1982); Mt. Laurel Tp. v. Mt. Laurel Tp. Police Officers Assoc., 215 N.J. Super. 108 (App. Div. 1987). A majority representative may waive its right to negotiate

over work schedules based upon clear and unequivocal language in its collective agreement. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82). Where a contract clause is clear on its face, neither a contrary past practice nor parol evidence may be used to change the meaning of the collective agreement. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); N.J. Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); Boro of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981); Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (¶2014 1980). But where the collective agreement is either ambiguous or silent on the matter parol evidence may be used as an aid in the interpretation of an agreement, and past practice that defines the parties' conduct becomes an established term and condition of employment. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981); Sussex County, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982).

Here, both J-1 and the prior practice support the County's right to eliminate the weekend schedule. First, J-1 does not contain the weekend work schedule, nor any specific work schedule. While §11.12 made a passing reference to the weekend schedule, it

did not memorialize the schedule, it was only intended to prevent the payment of shift differentials to employees working that schedule.

Second, the protections appearing in §47.02 that J-1 shall not be construed as a waiver of any right, and in §49.01 that changes of terms and conditions can only be made after negotiations, cannot be read in a vacuum. They must be balanced and considered in pari materia with other sections of the agreement. Since §7.02 provides that conditions of employment shall not be changed or abolished "unless a contrary intent is expressed in this...Agreement," an exception exists to §§47.02 and 49.01.

Third, a review of §11.00, the workday work week and overtime section, and §18.01, the shift change section, give the County the right to set the work schedules and shifts. Section 11.01 provides "the normal work day tour shall be in accordance with the scheduled tours of duty," and §11.02 provides "the normal work day shall be based upon the utilization of the schedule postings and the assignments therein." The agreement does not otherwise specify the work schedules, nor does it contain any work schedules. It is the County -- through Johnson -- that sets and posts the schedule; thus, I find that §§11.01 and 11.02 mean that it is the County that determines the work week and work day and makes assignments by posting the schedule.

Section 18.01 is the only section dealing with shift changes and it only requires that one week's written notice be

provided before shift assignments are altered. That is an exception to §§47.02 and 49.01.[13/] The County more than complied with 18.01 by notifying the PBA of the change in December 1990 but not implementing it until late January 1991.

The prior practice, and the arbitrator's decision in CP-6 support that analysis. The original implementation of the weekend schedule and all the changes made on that schedule were unilaterally implemented by the County. The PBA acquiesced to the conduct. Thus, the County has the right to unilaterally change the work week schedule -- including the elimination of the former weekend schedule -- subject to the 18.01 notice provision.

The PBA knew in 1987 that Johnson could unilaterally change the work schedule. It sought to restrict that practice by convincing the arbitrator to include contract language protecting the then current scheduling system. By rejecting that language the arbitrator left intact Johnson's right to unilaterally change the schedules and shifts.

Since the County complied with contractual intent and prior practice it did not violate the Act by eliminating the weekend schedule. See Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57,

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13/ Section 18.01 and §§47.02 and 49.01 are incompatible but for the language in §7.02 that provides for an expressed contrary intent. Since every section of the Agreement must have meaning, I find that 18.01 must mean that shift assignments (work schedules) can be altered upon proper notice, but that 47.02 and 49.01 protects against changes in other terms and conditions of employment.

11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack Valey Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980).

Overtime

Even assuming that it could prove some violation of the Act, to the extent the PBA seeks a remedy reimplementing the weekend schedule, that remedy is unenforceable. There is no dispute that the weekend schedule includes 16 hours of overtime. Section 11.00 of J-1 is intended to cover overtime, and §11.03 labels the hours worked after the first eight hours worked on any given day as overtime.

While a labor organization has the right to negotiate over a pay rate for overtime, and over allocation of overtime to qualified employees, N. J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88), it does not have the right to negotiate over whether the employer shall offer overtime work. Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14074 1983); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The County made a managerial determination to eliminate regular weekend overtime to meet its budget goals. Any attempt by the PBA to negotiate a schedule requiring overtime would interfere with the County's governmental policy determinations. Thus, the County's decision to eliminate or reduce weekend overtime is not negotiable.

Accordingly, based upon the above facts and analysis, I make the following:

RECOMMENDATION

I recommend the Complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: March 10, 1992
Trenton, New Jersey