

H.E. NO. 2003-8

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

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-2001-236

PBA LOCAL #77
(SOMERS POINT SOA),

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the City of Somers Point violated the New Jersey Employer-Employee Relations Act by unilaterally eliminating an established practice providing for compensatory time for superior officers. The Hearing Examiner recommends that the compensatory time be reinstated and employees be given the benefit retroactive to January 2001.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Roger C. Steedle, attorney
(James F. Ferguson, of counsel)

For the Charging Party, Schaffer, Plotkin & Waldman
(Myron Plotkin, consultant)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On March 2, 2001, PBA Local #77 (Somers Point SOA or PBA) filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission, alleging that the City of Somers Point (City) violated certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge specifically alleged that the City violated 5.4a(1), (2), (3), (5)

^{1/} "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the hearing is referred to as "T".

and (7) of the Act^{2/} when, in January 2001, it unilaterally discontinued the practice of providing superior officers with twelve compensatory days per year as compensation for extra work hours.

On June 5, 2001, the SOA withdrew the a(2), (3) and (7) allegations (C-2). On July 13, 2001, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the remaining a(1) and (5) allegations (C-1).

On July 25, 2001, the City filed an Answer (C-3) denying it violated the Act. The City specifically denied the existence of any appropriately authorized practice of overtime compensation for superior officers. The City further asserts the following defenses: 1) to the extent superior officers were afforded days off under the "paid eight" system such actions were undertaken solely by the chief of police without the knowledge, consent, or authorization of the City's administrator or its governing body. 2) The Chief's use of the "paid eights" system was ultra vires and not binding on

^{2/} These provisions 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

the City and; 3) superior officers were appropriately compensated for any extra work hours by receiving a larger percentage pay differential than that received by lower ranking officers, under the parties' current collective negotiations agreement.

A hearing was held on February 7, 2002. The parties filed post-hearing briefs by June 6, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Lieutenant Phillip J. Gaffney has been a member of the Somers Point Police Department for 25 years and is a member of the SOA (T17). The other two SOA members are Captain Salvatore Armenia and Captain Gray (T38, T67). Orville Mathis is the Chief of the City's police department and has served in that capacity for the past 16 years (T106).

The police chief is an agent of the City (T100). He is in charge of the day-to-day operations of the police department (T119-T120).

2. At the time Mathis became Chief (approximately 1986), patrol officers and sergeants received eight hours compensatory time or a "paid eight" day each month. They received the "paid eight" days because they worked rotating shifts which resulted in them working approximately 42 hours per week or eight hours extra per month. Since the "paid eight" system did not then apply to superior officers, Mathis simply gave those officers back any extra time they

worked beyond their regular work day/week. That system resulted in cumbersome record-keeping. Thus, Chief Mathis began giving superior officers "paid eight" days; specifically, one leave day each month to reimburse or compensate them for any on-call or overtime they worked in order to alleviate his record keeping (T107-T108).

The "paid eight" days were given by the Chief as a substituted benefit in lieu of overtime pay (T17-T18, T29, T37; T102). Chief Mathis did not first seek City Council's approval before instituting the "paid eight" practice (T109).

According to Chief Mathis, his practice of awarding "paid eight" days to superior officers was neither authorized nor unauthorized. He never discussed it with anybody. The Chief testified he knew it was not within his purview to institute the "paid eight" system of compensation and that he so advised the superior officers (T119), but he also testified "I basically took it upon myself and instituted the practice myself" (T109). I credit the latter testimony, not the former. Mathis applied the "paid eight" practice to superior officers to make the operation of the police department more efficient, i.e., eliminate the overtime record keeping for superior officers. The practice was in place during his entire 16 year term as Police Chief and the method was well known by superior officers (T18, T38, T50-T51, T118-T119). His testimony that it was not "within his purview" of authority lacks credence. I find he knew he could approve overtime and, therefore, he believed he could just substitute the "paid eights" for hour for

hour overtime for superior officers. I believe he thought he was acting within his authority.

The "paid eight" method of compensation is specifically contained in the agreement for patrol officers and sergeants. The SOA agreement, however, does not contain or address the "paid eight" practice (T39, T48, T83, T88-T89, T115; J-1). Officers in the detective bureau do not receive "paid eight" days; rather they receive an on-call stipend (T89, T115-T116).

3. When a superior officer wanted to request a "paid eight" day off, he or she would submit an official department "Request for Authorized Leave" form (CP-1 and CP-2) to the Chief with the "paid eight" line marked. Besides "paid eight" leave, the Request for Authorized Leave form lists two other types of authorized leave an officer may request: 1) holiday and 2) vacation (T19-T21, T110-T111; CP-1, CP-2).

The Chief would then review the "paid eight" request and indicate on the form, by his stamp and his signature, whether it was approved or denied (T21-T22, T110; CP-1, CP-2). The Chief was the only official who could approve a "paid eight" request for the rank of lieutenant and above. All paperwork regarding paid eight days came from and through the Chief (T33, T46, T109-111). Any documents regarding "paid eight" days; specifically any payroll, attendance records or leave forms were kept internally within the police department (T92-T93, T109-T111). No paperwork regarding "paid eight" days ever went to the City Administrator's office or any other City office (T109-T111).

4. Throughout 1999 and 2000, all of Lieutenant Gaffney's requests for "paid eight" leave days, 20 days total, were approved by the Chief (T22-T23; CP-1).

5. The City negotiations committee for the parties' current agreement (J-1, effective 1/1/00 - 12/31/03) was led by City Administrator Wes Swain and included former City Council member and Mayor William Rosenberger (T80, T123). Swain has been involved in negotiations for 20 contracts during his employment with the City and was present at all negotiations sessions (T80-T81, T96). Rosenberger has been involved in City affairs for the last 25 years (T123). The Chief was not a member of the negotiations committee and was not present at negotiations (T116, T120).

At the outset of negotiations, the three SOA members represented themselves. The three members stated their proposals to the City's committee at an informal initial session. One SOA proposal sought a 3% stipend. When the parties next met, the City asked the SOA what the 3% stipend was for; the SOA responded it was compensation for overtime and on-call time (T44-T45, T53). The SOA explained that they did not get paid for any time they worked over 40 hours, thus, they wanted the 3% stipend, the same stipend received by officers in the detective bureau (T29, T40, T44-T45, T84, T126).

6. In late spring 2000, after a few negotiations sessions with the three SOA members and while separate negotiations with the patrol officers unit were proceeding, Swain summoned the Chief to a

meeting with the negotiations committee to discuss and clarify various contract issues that had arisen during negotiations. At the meeting, the SOA's request for the additional 3% stipend as compensation for overtime and on-call time was raised. The Chief felt uncomfortable because he knew the City was unaware that the superior officers received "paid eight" days. Mathis then informed the committee that the SOA's claim that they were not compensated for overtime and on-call time was false. He explained the "paid eight" method of compensation and informed the committee that superior officers were given 12 "paid eight" leave days off per year as compensation for extra hours worked (T81-T82, T96-T97, T111-T113). The committee criticized Chief Mathis; they believed he was doing something that was unauthorized or improper in awarding the "paid eight" days. Mathis was unhappy about the criticism (T111-T114).

Prior to this meeting, no City official other than Mathis had ever been informed or was aware of the "paid eight" system of compensation for superior officers. The Chief had never previously discussed it with any other City representative (T82, T108-T109). As City Administrator for seven years, Swain was unaware of the practice. Moreover, Rosenberger, in his 18 years on City Council and his 2 years as Mayor, was unaware of the "paid eight" practice for superior officers and was unaware of any mayor, council member or City administrator ever approving or sanctioning the practice for superior officers. Before this conversation with the Chief, Swain

and Rosenberger believed that superior officers were not being compensated for on-call time or overtime (T82, T85, T123-T125).

7. After this meeting with the negotiations committee, Chief Mathis met with his superior officers. He stated his unhappiness over their representation to the City that they had not been compensated for overtime and on-call time when, in fact, they had. Chief Mathis expressed concern to his officers, explaining that the "paid eight" days could now be in jeopardy because the practice had been brought into the open. He also stated that if the superior officers wanted the practice to continue, they should negotiate for it now because negotiations had not been concluded (T114-T115). Mathis was uncertain, however, if he specifically told the superior officers that the "paid eight" days would be taken away from them (T120-T121). The Chief was not on the City's negotiations committee and this conversation between the Chief and the superior officers regarding the "paid eight" days did not occur during negotiations (T97).

8. In August 2000, after failing to reach an agreement with the City on their own, the SOA hired labor consultant Stanley Waldman as their representative. Waldman had represented the SOA in negotiations for several previous agreements (T52-T53, T67-T68, T94). Lieutenant Gaffney, Captain Salvatore Armenia, and Captain Gray continued to be involved in negotiations. Gaffney attended most but not all, of the several negotiations sessions. Armenia attended all sessions (T26-T27, T38, T53, T68, T94).

9. During negotiations, the City never proposed to eliminate or modify the "paid eight" practice for superior officers (T18-T19, T39, T53, T56-T62; CP-3, CP-4, CP-5, CP-6). Similarly, no SOA representative made the practice of "paid eight" days an issue during negotiations (T27, T47, T82, T127-T128).

10. During negotiations in early August 2000, the SOA was still seeking an additional 3% stipend for on-call time and overtime (T69-T72, T93-T94; CP-3). At that point, the SOA's 3% stipend proposal was not related to gradations or differences in rank between officers (T72). However, the SOA dropped the 3% proposal when the City told Waldman that there may be a problem with the "paid eight" days if the SOA persisted with the 3% stipend proposal for on-call time and overtime. The former 3% proposal changed during negotiations into a proposal for a slightly higher percentage increase between the different ranks of officers (T29-T31, T34, T39-T41, T70-T72, T86, T104).

11. Since the parties could not reach an agreement on their own, they engaged in the interest arbitration process. City Administrator Swain met with Waldman and the interest arbitrator for a one day session (T42, T54-T55).

With the aid of, and in the presence of the arbitrator, a memorandum of agreement for a new contract, J-2, was signed by the City and the SOA on December 7, 2000 (T26, T54-T55, T63-T64; J-2). There is no reference in J-2 to the "paid eight" days (T64). J-2 specifically provides "Any proposals made by either party during negotiations not addressed herein are dropped."

After J-2 was reached, Swain and Waldman exchanged documents reflecting the specific contract changes/revisions they had agreed upon. There is no reference to the "paid eight" days in Swain's document containing his version of the agreed upon changes/revisions (T65-T66; CP-7).

12. After J-2 was fully executed, Waldman and Swain had a conversation regarding the "paid eight" days. Swain testified that at the doorway to his office, Waldman stated, "I don't want to hear anything about the Chief taking away these 'paid eight's' from these officers." Swain replied, "There are no 'paid eight's' to take away" (T90). Swain told Waldman there were no "paid eights" because the parties had never negotiated over that issue. Waldman had told Swain that the Chief could not rescind the "paid eight" days because that would be a unilateral move, and if the Chief did that, the SOA was "going to do what we have to do" (T55). I credit both witnesses.

13. Prior to this conversation with Waldman, Swain had had a conversation with the Chief who admitted to him (Swain) that the "paid eight" days he (the Chief) gave to superior officers was not authorized. The Chief solicited Swain's response. Swain informed the Chief that he did not know how he could continue to give the "paid eight" days without City Council authorization. Swain testified that the Chief then said that he had informed the SOA members that if they were interested in maintaining the "paid eight" days, they should negotiate them because he intended to take them away once the agreement was settled (T90-T91). I credit Swain's

testimony. The Chief was uncertain whether he actually told the superior officers he would take the "paid eights" away.

Although Swain considered the 12 "paid eight" days to be a significant benefit for superior officers, the City did not address the withdrawal of the "paid eights" with the PBA during negotiations. The City did not negotiate over the "paid eights" because it believed they would automatically cease since those days, according to the City, were unauthorized. Swain felt that, if the SOA wanted to keep them, they had to specifically raise the issue; since the SOA did not, Swain assumed the days would automatically cease (T91-T92, T97-T98). Swain did not see the need to address the "paid eight" days in J-2, because: 1) the benefit was not authorized; 2) it was not included in the parties' agreement and 3) his understanding was that the benefit was going to stop (T99-T100).

14. Under J-2, the SOA received a higher percentage differential than rank and file officers. Gaffney and Capt. Armenia testified that the higher differential was not linked to the issue of overtime or on-call time; rather it was for rank differential (T30-T32, T34-T35, T40 T42). Swain testified superior officers received the increase to "compensate them" because they are on-call and because superior officers have greater responsibilities than patrol officers (T87-T88). Similarly, City representative Rosenberger believed the superior officers received the extra percentage increase as compensation for extra work above their normal work day (T128).

I believe Swain and Rosenberger thought the superiors higher wage increase was to compensate them for extra time worked, but I credit Gaffney and Armenia and find that the salary differential they received was not linked to overtime or on-call time. Based on a lieutenant's pay, the "paid eight" days are worth approximately 12 times \$230, or \$2,760 per year, while the higher differential received by superior officers in comparison is only worth \$320-\$600 per year. The SOA never agreed to relinquish the "paid eight" days, worth thousands of dollars, in return for this slightly higher differential (T34-T36, T40, T42, T55-T56, T104). Consequently, I find the differential was for the superiors greater responsibility and not for on-call or overtime work.

15. On January 10, 2001, after the successor agreement (J-1) was executed, Lieutenant Gaffney submitted a Police Department Request for Authorized Leave form to the Chief, seeking a "paid eight" leave day and a holiday leave day. The Chief approved the holiday leave, but denied the "paid eight", writing "No P8's" on the form (T23-T24, T47; CP-2).

Gaffney and Armenia then asked the Chief about the "paid eight" days. The Chief stated, "You don't earn them (paid eight days), you don't get them". Armenia told the Chief he couldn't do that; the Chief told the superior officers to do what they had to do (T25-T26, T47-T48).

16. Subsequent to January 10, 2001, no superior officer has been granted a "paid eight" leave day or any type of overtime

compensation (T25, T37-T38). Mathis, however, informed the superior officers that he would give them back whatever extra time they worked in straight compensatory time; thus, if they worked 2 extra hours, they would get two compensatory hours. The Chief's offer was apparently rejected (T117).

ANALYSIS

The City violated 5.4a(1) and (5) of the Act when it unilaterally discontinued the past practice of providing superior officers with 12 "paid eight" leave days per year.

The Commission has held that, where a collective agreement is silent or ambiguous on an issue past practice controls. Thus, unless contrary to clear contract language, ". . . a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. . . ." County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); See also City of Atlantic City, P.E.R.C. No. 88-93, 14 NJPER 313 (¶19112 1988); In re Rutgers, the State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

Here, the parties' agreement does not address the issue of "paid eight" leave days. The record, however, shows that the 12 "paid eight" days for superior officers became an established practice, thus a binding term and condition of employment for

superior officers. Those officers have received the 12 "paid eight" days for at least 16 years; they availed themselves of this benefit; and, the official police department Request for Authorized Leave form lists "paid eight" leave as a type of authorized leave a superior officer may request.

Since the "paid eight" days was a binding term and condition of employment, the City was obligated to engage in negotiations with the PBA before attempting to change or eliminate that benefit. As the Commission stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment . . . even though that practice or rule is not specifically set forth in a contract. . . . Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

The City, however, claims that the Chief's past practice of giving the "paid eight" days to superior officers was not authorized or approved by the City's governing body and was, therefore, not binding on the City. The City, therefore, believes it was not obligated to continue the practice, nor to negotiate it away. It believed the practice could lawfully be unilaterally discontinued.

The City also claimed that N.J.S.A. 40A:14-118 vests the City Council with the exclusive authority to pass legislation which establishes the police department and fixes the compensation of its members. N.J.S.A. 40A:14-118 provides as follows:

The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers, and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force. Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:

- a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;
- b. Have, exercise, and discharge the functions, powers and duties of the force;
- c. Prescribe the duties and assignments of all subordinates and other personnel;
- d. Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and
- e. Report at least monthly to the appropriate authority in such form as shall

be prescribed by such authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

As used in this section, "appropriate authority" means the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates.

Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body.

Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law. Nothing herein contained shall prevent the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof. In addition, nothing herein contained shall infringe on or limit the power or duty of the appropriate authority to act to provide for the health, safety or welfare of the municipality in an emergency situation through special emergency directives.

The City argued that the statute proscribes the Chief from having the authority to implement the "paid eight" method of compensation. The City's arguments lack merit.

I find, the Chief is an agent of the City, has the authority to take action to maintain the efficient operation of the police department, and those actions are attributable to the City which is obligated in turn to negotiate over changes in terms and conditions of employment. City of Atlantic City, P.E.R.C., No. 88-93, 14 NJPER 313 (¶19112 1988); adopting H.E. No. 88-46, 14 NJPER 269 (¶19101 1988). The cited statute does not specifically preclude a chief from having the authority to institute a compensatory term and condition of employment. Additionally, there is nothing in the Somers Point City Code, or case law cited by the City in its post hearing brief, which invalidates the Chief's action or prohibits him from instituting a method of compensation in lieu of overtime which he otherwise had the authority to approve.

The record shows the Chief implemented the "paid eight" days merely as the method by which the City would pay superior officers for overtime work. There is no dispute over whether the superior officers were entitled to overtime. Although neither City Administrator Swain nor former Councilman/Mayor Rosenberger thought superior officers were receiving overtime compensation, the record reflects that Mathis gave the superiors back the extra time they worked early in his tenure as Chief. The City did not argue here that superior officers should not be compensated for overtime work.

It argued that the City had never authorized the use of "paid eights" as the method to compensate employees for overtime.

Mathis did not create a new benefit for superior officers nor unilaterally grant them a benefit without some quid pro quo, he merely substituted the "paid eights" for the hour for hour compensatory time the superior officers were otherwise already entitled to receive. He did that for his own convenience.

N.J.S.A. 40:14-118 provides in pertinent part that the chief of police:

. . . shall be the head of the police force and that he shall be directly responsible to the appropriate authority [i.e., the mayor, manager, administrative officer, etc.] for the efficiency and routine day to day operations thereof. . . .

Pursuant to the statute, the Chief had the authority to take reasonable action to enhance the efficiency of his department. He believed that record keeping for compensatory time for superior officers was too cumbersome, thus, he instituted the "paid eight" system as a more efficient manner in which to compensate superiors for overtime work. His action was within his authority and therefore imputable to the City.

The case in Atlantic City is similar to the instant matter. There, the police chief issued a general order establishing a policy providing for maternity/paternity benefits. Those benefits were in place for three and one half years and then unilaterally revoked by a new police chief. The benefit had not been included in the parties collective agreement, nor had city council approved the

general order. The Commission found that the benefit had become a binding past practice and the City violated the Act by its unilateral withdrawal even though the benefit had not been affirmed by city council. The Commission also found that the union (PBA) was entitled to rely upon the apparent authority of the chief of police as an agent of the city to bind it to the maternity/paternity leave benefits. See also E. Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279, 282 (1976), mot. to recon. den., P.E.R.C. No. 77-26, 3 NJPER 16 (1977) which held:

. . . the authority of an agent to do certain acts on behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them if unauthorized. [footnote omitted]

The same result is appropriate here. The City is responsible for the actions of its agent, the Chief, who was acting within the scope of the authority delegated to him by statute and the City, regardless of whether the City leaders knew of or ratified this particular action. See also, Commercial Twp. Bd. Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982). The City's ignorance of, and lack of authorization and ratification for the "paid eight" procedure for superiors neither invalidates the benefit nor makes the practice less binding.

Even if all payroll and other paperwork regarding the "paid eight" practice was kept internally within the police department, the City administrator or other City official could have reviewed it

or spoken to the Chief, since police department operations are within the City's control. N.J.S.A. 40A:11-118. It would be blatantly unfair to the SOA to now find the "paid eight" practice invalid and deny superior officers compensation for overtime work.

Further, the status of the "paid eight" past practice never changed as a result of negotiations. The City and the SOA never negotiated nor reached any agreement to change or eliminate that practice. The City's belief that the "paid eight" days would simply cease because they were unauthorized and because the SOA never raised the issue during negotiations is erroneous. Rather, the onus was on the City to raise the issue during negotiations and secure a definite agreement with the SOA to eliminate the "paid eight" practice if they so desired. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The City had the opportunity to accomplish this but failed to do so. While the SOA received a higher percentage differential as a result of negotiations, there is no convincing evidence that the SOA received that differential in exchange for relinquishing the "paid eight" days (See Finding No. 14.) Thus, without a clear meeting of the minds to eliminate the practice, the past practice of the "paid eight" leave days continues as a binding term and condition of employment. See Passaic Valley Water Commission, P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984).

The City cited several cases in its post-hearing brief in support of its contention that it was not obligated by the Chief's actions. Falcone v. DeForia, 103 N.J. 219 (1986); Loigman v. The Township Committee of Middletown, 297 N.J. Super. 287 (App. Div. 1997); Grimes v. City of East Orange, 288 N.J. Super. 275 (App. Div. 1996); Delarmi v. Borough of Ft. Lee, 132 N.J. Super. 501 (App. Div. 1975); M&O Disposal Company v. Middletown Township, 100 N.J. Super. 558 (App. Div. 1967); Bianchi v. City of Newark, 53 N.J. Super. 66 (App. Div. 1958). Those cases were not sufficiently on point or persuasive. At least three cases concerned the appointment or hiring of certain employees, and one concerned the ability of employees to recover salary after an illegal dismissal, circumstances that were not close enough to the instant case.

Accordingly, based on the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. The City violated 5.4a(1) and (5) of the Act when it unilaterally discontinued the practice of providing superior officers 12 "paid eight" leave days per year.

RECOMMENDED ORDER

I recommend the Commission ORDER the City:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly, by unilaterally eliminating 12 "paid eight" leave days for PBA Local #77, (SOA) unit members.

2. Refusing to negotiate in good faith with PBA Local #77 (SOA) over the elimination of the "paid eight" leave benefit.

B. Take the following affirmative actions:

1. Reinstate the 12 "paid eight" leave days for superior officers retroactive to and including January 10, 2001.

2. Make whole any employees adversely affected by the discontinuance of the "paid eight" leave days practice from January 10, 2001 to present.^{3/}

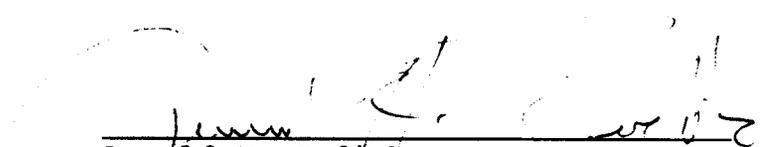
3. Negotiate in good faith with PBA Local #77 (SOA) over any proposed modification or proposed elimination of the 12 "paid eight" leave days practice.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

^{3/} If superior officers received some hour for hour compensation for overtime work between January 10, 2001 and the present, those hours should be deducted from their 12 "paid eight" days per year so they receive no more than 12 days for overtime and on call work per year.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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



Arnold H. Zudick
Hearing Examiner

DATED: October 31, 2002
Trenton, New Jersey



RECOMMENDED



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 New Jersey Employer-Employee Relations Act, particularly by unilaterally eliminating 12 "paid eight" leave days for PBA Local #77 (SOA) unit members.

WE WILL cease and desist from refusing to negotiate in good faith with PBA Local #77 (SOA) over the elimination of the "paid eight" leave days benefit.

WE WILL reinstate the 12 "paid eight" leave days for superior officers retroactive to and including January 10, 2001.

WE WILL make whole any employees adversely affected by the discontinuance of the "paid eight" leave days practice from January 10, 2001 to present.

WE WILL negotiate in good faith with PBA Local #77 (SOA) over any proposed modification or proposed elimination of the 12 "paid eight" leave days practice.

Docket No. CO-H-2001-236

City of Somers Point
(Public Employer)

Date: _____

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372