H.E. NO. 2003-12

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

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Respondent,

-and- Docket No. CO-H-2000-254

NORTH HUDSON FIRE OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Scarinci & Hollenbeck, LLC
(Mark S. Tabenkin, of counsel)

For the Charging Party, Loccke & Correia, P.A.
(Richard D. Loccke, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 28, 2000, the North Hudson Fire Officers Association (Association) filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that the North Hudson Regional Fire and Rescue (Regional or Respondent) violated the New Jersey Employer-Employee Relations Act (Act),

specifically N.J.S.A. 34:13A-5.4a(1), (2), (3), (5) and (7).[1/] The Regional is a recently created public employer whose employee complement is comprised of a combination of employees from five previously independent fire departments including the one from the City of Weehawken (City). The various employees were represented in separate negotiations units with their respective municipalities prior to the merger. The Association alleged that on or about February 9, 2000, Weehawken promoted certain firefighters to the rank of lieutenant and unilaterally set their salary which allegedly was inconsistent with the prior Weehawken contract covering superior officers; and allegedly, that by failing to negotiate the salary with the Association the Respondent violated N.J.S.A. 40:48B-4.2 which was intended to maintain existing terms and conditions of employment during the time the different negotiations units were being merged. The Association also alleged the Regional violated the Act by (1) unilaterally modifying the employees compensation;

1/ 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."

(2) unilaterally interfering with the early formulation and administration of the new bargaining unit resulting in a chilling effect on bargaining rights; and, (3) violated the Act because the wrongful actions alleged occurred during the interest arbitration process.2/ The Association seeks a salary adjustment for the former Weehawken employees who were promoted to lieutenant to the pay rate provided in the last Weehawken agreement for the first line supervisory title which was captain.

A Complaint and Notice of Hearing was issued on March 28, 2001. The Regional filed an answer on April 26, 2001 denying it violated the Act. The Regional raised several affirmative defenses, among them that the Association failed to negotiate with it over certain terms and conditions of employment, and that the Regional is not the proper party to this action.

Case Processing and Procedural History

The Complaint issued in this matter on March 28, 2001 scheduling a hearing for September 13, 2001. On August 15, 2001,

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2/ That final allegation is a reference to N.J.S.A. 34:13A-21 which provides:

> During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

That section of the Act was not listed in the charge, but was specifically noted by the Association in its post-hearing brief.

the City of Weehawken gave notice of its intent to intervene. Pursuant to the Respondent's request of August 24 and the Association's request of September 10, 2001, the hearing scheduled for September 13 was cancelled and converted into a prehearing conference. On September 12, 2001, the prehearing conference scheduled for September 13 was cancelled due to the national tragedy of September 11, 2001.

On October 15, 2001, the City of Weehawken moved to intervene in this proceeding. On December 3, 2001, I rescheduled the hearing for March 14, 2002 and invited the City to appear and present oral argument on its motion. The City on December 12 asked for a formal ruling on its motion. By letter of January 8, 2002, I denied the City's motion to intervene and participate in the hearing, but granted it the right to file a post-hearing brief on the legal issues. The City appealed my decision on January 24, 2002. The Commission upheld my decision on March 1, 2002. North Hudson Regional Fire and Rescue, P.E.R.C. No. 2002-46, 28 NJPER 149 (¶33050 2002).

The hearing was held and completed on March 14, 2002.[3/] All exhibits were received by May 17, 2002, and briefs were scheduled for receipt in July 2002. Primary briefs were received by July 16, 2002, and pursuant to the parties numerous joint requests, reply briefs were not received until September 17, 2002. The City

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

did not file a brief. A related interest arbitration award affecting the parties was issued in October 2002. By letters of October 23 and November 14, 2002, the parties were asked to advise me whether any elements of the award were relevant for my consideration in this proceeding. Both parties responded by December 2, 2002, at which time the record closed.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Regional was created pursuant to the Consolidated Municipal Service Act (CMSA), N.J.S.A. 40:48B-1 et seq., in order to consolidate the delivery of fire and rescue services for five municipalities in Bergen County; Weehawken, Union City, North Bergen, West New York and Guttenberg. In order to achieve that consolidation the employees, equipment and fire stations of the five municipalities had to be merged into one entity. The CMSA specifically provided that while the merger was being implemented, the terms and conditions of employment in existing collective agreements would continue to apply to the members of the affected bargaining units until a new collective agreement covering the merged employees was signed.

N.J.S.A. 40:48B-4.2 specifically provides:

> Where bargaining units are merged which have contracts negotiated in accordance with the provisions of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C. 34:13A-1 et seq.) in existence, the terms and conditions of the existing contracts shall apply to the rights

> of the members of the respective bargaining units until a new contract is negotiated, reduced to writing and signed by the parties as provided pursuant to law and regulation promulgated thereunder.

The Regional was formed after the five municipalities entered into a number of municipal services agreements pursuant to the CMSA (CP-3, CP-4, CP-5, CP-6, CP-7, CP-8, CP-9). The Regional began functioning as a department and responding to fires as one entity on January 11, 1999 (T27, T77), but its transferred and now consolidated employees continued to be paid by their respective municipal employers until sometime in April 1999, after which they were paid by the Regional (T28). Nevertheless, at least some municipalities continued to be responsible for certain employee benefits even after the Regional's first and transitional budget covering April 1, 1999 through December 31, 1999, was adopted on December 20, 1999 (T13, T55, CP-10). Those benefits included payments for vacation leave, terminal leave, holiday leave, sick leave and health benefits for at least some employees (T52-T55).

Despite the Regional's functioning as a firefighting entity commencing on January 11, 1999, the process leading to the Regional's consolidation as the appointing authority of the employees coming from the five municipalities was not complete by February 1, 2000. By letter of that date, CP-16, the Merit System Board held that the Regional was in a transitional stage and was not a single entity authorized to make appointments (T48). Therefore, it held that the employees coming from the five municipal

departments remained employees of the individual municipalities at that time, and they, not the Regional, had the authority to make appointments until March 3, 2000, after which the Regional would be a single entity authorized to make its own appointments (CP-16, T51).

2. The last multi-year collective agreement covering Weehawken fire superior officers prior to the creation of the Regional was an agreement between the City and the Firemen's Mutual Benevolent Association, Local No. 26 (FMBA) effective from July 1, 1994 through June 30, 1998 (CP-1). That agreement covered both rank and file firefighters and superior officers below deputy chief in one unit. The City and the FMBA reached a one year agreement effective July 1, 1998 through June 30, 1999 (CP-2), which was the final collective agreement between those parties prior to regionalization (T19). The terms of CP-2 carried over from the City to the Regional (T20).

The City did not employ fire lieutenants, its first level supervisory title above firefighter was captain (T21, T23). Promotions from the firefighter title were to the rank of captain (T44). Consequently, neither CP-1 nor CP-2 included or covered lieutenants, and the City and FMBA had never agreed upon or negotiated over a salary for lieutenants (T32).[4/] In both CP-1 and CP-2 the first line supervisory title was captain (T91). The

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4/ Just before CP-2 was signed the City requested the parties negotiate a lieutenant's rate into the agreement. The FMBA rejected that proposal believing that would be prenegotiating for the Regional (T33-T34).

salary negotiated for captains in CP-2 was a single pay rate of $71,402 (T20-T21). The pay rate for City firefighters when they moved to the Regional, and presumably for City employees holding the rank of captain, battalion chief and any other title formerly covered by CP-1 and CP-2, was the pay rate provided by CP-2 (T88).

The other four municipalities whose fire employees were merged into the Regional had a lieutenant title in their respective collective agreements covering fire officers. In those agreements lieutenant was the first level supervisory title (T42-T43, T60). Michael DeOrio, the Regional's co-executive director, and current North Bergen Deputy Director of Public Safety testified that for many years North Bergen did not fill its lieutenant title, instead, the captain title in practice became the first level supervisory title, but the North Bergen collective agreements covering fire officers still included a negotiated salary for lieutenants (T109-T116). I credit that testimony.5/

3. In anticipation of the merger of fire officers from five municipalities the Regional filed a representation petition with the Commission on November 30, 1998, Docket No. RE-99-1, seeking to resolve the representation of the fire officers. That

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5/ Association President Brian McGorty testified that West New York had no existing lieutenants but had a lieutenant's pay rate in its contract at the time of regionalization, and that North Bergen had lieutenants prior to regionalization (T42-T43). I believe McGorty was simply mistaken and had it reversed. North Bergen (not West New York) had not used the lieutenant title prior to regionalization.

petition lead to an election which was counted on March 8, 1999, and the Association was certified by the Commission as majority representative of a unit of fire officers including lieutenants, captains, battalion and deputy chief on March 16, 1999 (CP-11, T24, T77).

Negotiations for the parties first collective agreement began in July 1999 (T55, T77). On September 27, 1999, the Regional presented its written proposal to the Association for a new collective agreement (CP-12). Article 8 of CP-12 provided for a lieutenants salary ranging from $54,500 to $57,500 effective July 1, 1999 (CP-12, T64, T92, T101). By November 1999, however, the parties had reached impasse and on November 18, 1999, the Association filed a petition to initiate interest arbitration, Docket No. IA-2000-36 (CP-18, p.5). An arbitrator was appointed by the Commission on December 1, 1999 (CP-13).

Pre-interest arbitration sessions were held on February 15, March 13, April 18 and May 4, 2000. Formal interest arbitration sessions were held on September 26; October 16, 17, 30, and 31; December 14, 2000 and January 15 and February 13, 2001 (CP-18, p.6). The arbitrator issued an award on October 2, 2002. That award has been appealed to the Commission.

4. On May 28, 1999, the Regional announced an early retirement incentive program (R-2) to induce retirements amongst the merged employees to enhance the Regional's operating efficiency (T78). Approximately 26 of the 56 employees who took advantage of

the retirement program were officers which unexpectedly created an emergent need to fill some fire officer positions (T79-T80).

By letters of October 18, 1999 (R-3), November 30, 1999 (R-4), and December 15, 1999 (R-5), from the Regional's labor counsel to officials of the New Jersey Department of Personnel (DOP) and/or the Merit System Board (Board), the Regional requested that all current or recently expired superior officer promotional lists from Weehawken and the other relevant municipalities be extended or reactivated to allow the Regional the discretion to make the necessary promotions (T44-T45).

On February 1, 2000, the Board issued its final administrative decision on this matter (CP-16). It determined that the Regional was still in a transitional stage and could not, at that time, be treated as a single entity for the purpose of making appointments (i.e., promotions). It held that until the consolidation was finalized the employees of the various fire departments remained employees of the individual municipalities and that the appointing authority in each municipality was responsible for making the appointments the Regional was seeking.

The Board acknowledged the Regional's predicament and need for promotions but gave the respective municipalities the right to make the promotions ("appointments") off of the following lists.

North Bergen: Battalion Fire Chief 12/31/00
North Bergen: Fire Captain 6/28/99
Union City: Fire Lieutenant 5/4/98
Weehawken: Battalion Fire Chief 12/31/00
Weehawken: Fire Captain 1/10/00
West New York: Fire Lieutenant 7/15/01

The Board concluded that:

> the eligibility lists at issue are extended for the purpose of issuing certifications for use only to the town for which the list was originally promulgated and to backfill vacancies in those respective jurisdictions only. [CP-16, p.5]

and gave those municipalities thirty days to make the needed appointments. The Board held that after March 4, 2000, the Regional could make all appointments as a single entity and the municipal lists would no longer be certified. Finally, the Board directed the DOP Division of Human Resource Management to prepare a Regional classification scheme so that promotional announcements could be issued by March 1, 2000 (CP-16; T50-T51; T69; T80-T81; T86-T87).

5. In accordance with the procedures that led to the Regional's creation, one representative from each municipality is a member of the Regional's management committee (CP-8). Jeffrey Welz, the Regional's co-executive director for administration is or was also Weehawken's director of public safety (T77, T106). Welz was aware of the Regional's need to fill officer positions as a result of the success of the early retirement package, and, thus, had to be aware of the Regional's October 18, November 30 and December 15, 1999 requests to DOP (R-3, R-4 and R-5, respectively) to use lists from the different municipalities, including Weehawken, to make promotions to officer positions (T107).

Weehawken, on December 22, 1999, in apparent anticipation of DOP's decision, introduced two ordinances creating the position of Fire Lieutenant and unilaterally fixing the salary for that

position at $65,000 per year (CP-14, CP-15, T31, T37, T102). Those ordinances were passed and adopted on January 12, 2000 (R-7, R-8). Weehawken did not negotiate over the creation of the fire lieutenant title nor the $65,000 pay rate with the Association, the FMBA or any other labor organization representing Weehawken/Regional or former Weehawken employees (T32, T37, T103-T104). Similarly, neither the FMBA nor the Association sought to negotiate the lieutenant's pay rate with Weehawken or the Regional (T105-T106).

On February 9, 2000, just after the Board issued CP-16, and after the interest arbitration petition had been filed, the municipalities made the following appointments (promotions) to the rank of lieutenant:

North Bergen 3

Union City 7

Weehawken 6

West New York 2

[R-6, p.6, T81]

Both the North Bergen and Weehawken promotions to lieutenant were of employees from a captain's list or higher (T71, T94, T110, R-6, CP-16). All of the employees promoted on February 9 were sworn in by their respective municipalities and then by the Regional (T81). There were no promotions to a captain's position (R-6, p.6).

The six employees promoted to lieutenant from Weehawken on February 9 included employees: Connors, Berone, McDonough, Dembroe, Lorenz and Dave Flood (T39). They were paid the $65,000 per year

rate which was set by the City and then adopted by the Regional without any negotiations with the Association (T37, T89-T90, T103-T104). The North Bergen employees promoted to lieutenant were paid the lieutenant rate in the prior North Bergen collective agreement (T111).

6. On March 29, 2000, the Regional's then labor counsel sent the Association's labor counsel a request to negotiate a pay rate for the Weehawken lieutenant title stating:

> Kindly accept this letter as a request to enter into good faith negotiations to determine the pay rates for the recently created position of Fire Lieutenant in the Township of Weehawken.
>
> This request is submitted without prejudice as to the Regional's position that it was not under a mandatory obligation to negotiate for this particular position since it was created by ordinance through Weehawken. Further, as you know, the Regional is already engaged in negotiations with the North Hudson Fire Officers Association and has submitted a salary proposal in September, 1999 for the position of Lieutenant, as well as other terms and conditions of employment. [R-1] (T96)

That offer to negotiate was not part of or included in the Regional's negotiations proposal for a lieutenant's salary offered in CP-12 in September 1999 (T92), and was offered while the parties were in negotiations but after the commencement of interest arbitration proceedings (T65, T100). The record does not reflect that the Association responded to R-1 (T96).

On August 11, 2000, the DOP issued a directive consolidating the Regional's lieutenant and captain positions into a new classification/title called: Fire Officer I (CP-17, paragraph

1; T57). The interest arbitration decision included a salary award effective from July 1, 1999 through June 30, 2004, which began with the following language:

> Fire Officers shall receive salary increases pursuant to the following salary schedule with increases retroactive to the effective dates reflected on the following salary schedule. The new salary schedule for all of the aforementioned Fire Officers shall be entitled 'all Fire Officers employed by the NHFRD who were previously employed by the municipalities of Union City, Weehawken, West New York, North Bergen and Guttenberg at the time of regionalization.'

The salary schedule referred to in that paragraph included the following schedule for Weehawken lieutenants and captains.[6/]

Old Rank:	Lt.	Capt.
New Rank:	F01	F01
7/1/99	66,324	73,534
1/1/00	67,648	
7/1/00	68,792	75,740
1/1/01	70,296	
7/1/01	71,620	78,013
1/1/02	72,944	
7/1/02	74,268	80,353
1/1/03	75,592	
7/1/03	76,916	82,764
1/1/04	78,237	
4/1/04	81,906	89,906

ANALYSIS

The Charging Party's case rests on its interpretation of N.J.S.A. 40:48B-4.2. It argues that statute required the captain rank remain the first line supervisory rank for Weehawken based

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6/ I took administrative notice of this information from the arbitrator's decision. N.J.A.C. 19:14-6.6.

employees because the terms of CP-2 had to remain in effect until a new agreement was reached with the Regional. While it challenged whether the City had the authority to make promotions, the Association stated in its post-hearing brief:

> Assuming arguendo that . . . Weehawken had the authority to make the said promotions, under the existing contract the next rank to which each of the firefighters could be promoted was the rank of Captain at the annual salary as set forth in the existing contract. p.5.

In fact, in its reply brief, the Association argued that in accordance with 40:48B-4.2, the salary for the captain's rank in CP-2 had to remain the salary for the first line supervisory title out of Weehawken whether the title was captain, lieutenant or fire officer 1.

In addition to arguing that the City's actions changed the terms of CP-2, the Association's position suggests that the City did not have the authority and/or right to create the lieutenant's title, promote the employees and provide for an initial salary. As a remedy, the Association maintains that the six employees promoted by Weehawken should be captains, or fire officer 1, and receive the $71,402 captains salary as provided in CP-2. The Association did not seek a bargaining order as a remedy. It merely seeks implementation of the $71,402 captains salary.

The Association's argument is unpersuasive. In order to be successful it would mean that the City did not have the right to exercise certain managerial prerogatives. I find that was not the intent of N.J.S.A. 40:48B-4.2.

There is no dispute that public employers in this State have the managerial prerogative to both create new titles, and to promote employees into those titles. Teaneck Bd. Ed. v. Teaneck Teachers Ass'n., 94 N.J. 9, 16 (1983); Wayne Twp. v. AFSCME Council 52, 220 N.J. Super. 340, 343 (App. Div. 1987); Bergen Pines Co. Hospital, P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986); Willingboro Bd. Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); W. Deptford Bd. Ed., P.E.R.C. No. 80-95, 6 NJPER 56 (¶11030 1980). It wasn't so much the City's idea to create the lieutenant's title and promote employees, it was the Regional's idea to fill its need to operate the merged fire department. But the Merit System Board would not let the Regional make the promotions, it ordered the City to make the promotions. The Regional wanted lieutenants, not captains, and the City had to create the lieutenant title in order to make the promotions the Regional needed.

The first issue before me is whether N.J.S.A. 40:48B-4.2 prevented the City from creating the lieutenant's title and promoting employees into that title rather than into the pre-existing captain's title as the Association argued. I agree with the Association that the language in that statute is clear and unambiguous. It says in pertinent part:

> the terms and conditions of the existing contracts shall apply to the rights of the members of the respective bargaining units until a new contract is negotiated.

Terms and conditions of employment are negotiable items that affect the work and welfare of employees. Managerial prerogatives also

affect employees' work and welfare but they are not negotiable. By using the phrase "terms and conditions" in 40:48B-4.2 the Legislature was seeking to protect negotiable items that had been placed in collective agreements. Nothing in that statute suggests that the Legislature intended to prevent public employers from implementing managerial prerogatives.

The Commission has recently spoken regarding the same issue in another case involving the Regional. In North Hudson Regional Fire and Rescue, P.E.R.C. No. 2000-77, 26 NJPER 182 (¶31074 2000), the union representing the firefighters filed a grievance against the Regional alleging the West New York collective agreement was violated when the Regional transferred Union City fire officers into West New York to cover open captain positions rather than promote or appoint West New York firefighters as acting captain. The Regional filed a request for restraint of arbitration with the Commission. The union relied upon N.J.S.A. 40:48B-4.2 to support its claim of arbitrability.

The Commission held that:

> The Regional had a non-negotiable prerogative to respond to its supervisory shortages by a mixture of permanent transfers of fire officers from other towns and temporary assignments of West New York firefighters as acting captains. [26 NJPER at 183.]

Having concluded that the Regional was exercising a managerial prerogative, the Commission addressed the statutory argument:

> While N.J.S.A. 40:48B-4.2 preserves contractual employment conditions until a new agreement is negotiated, we do not believe that statute was

> meant to prohibit the Regional from permanently transferring fire officers to locations within its centralized operations needing supervisory coverage. Id.

The Association contends North Hudson is inapposite to the instant matter because compensation is negotiable and the lieutenant's salary here was unilaterally set. The compensation issue is discussed below, and I find North Hudson directly on point with the issue before me. The Commission held there that 40:48B-4.2 did not bar the Regional from exercising a prerogative even though it impacted employees. The same must apply here. N.J.S.A. 40:48B-4.2 did not bar Weehawken from creating the lieutenant title and promoting the six employees into that title because those were actions within its managerial prerogative. Since the implementation of a managerial prerogative is not a change in terms and conditions of employment, New Jersey Division of State Police, I.R. No. 2001-7, 27 NJPER 155, 156 (¶32053 2001), there was no violation of N.J.S.A. 40:48B-4.2 or our Act because of the implementation of the lieutenant's title and the appointment of six employees thereto.

Having so found, I further find, without first considering the compensation issue, that the Association's claim in this matter cannot survive. The Charging Party initially argued that the Weehawken firefighters had to be appointed to captain and were, therefore, entitled to captain's pay, but subsequently argued that no matter what title those employees held they were still entitled to the captain's pay. The Association cannot have it both ways. CP-2 provided a pay rate for captain, not for lieutenants. Since

the employees were not promoted to captain they were not entitled to the negotiated captain's salary. Thus, the Charging Party's underlying argument is not sustainable.

The second issue before me is whether the Act or N.J.S.A. 40:48B-4.2 were violated by the City's unilateral implementation of the initial lieutenants salary. I find they were not.

It is undisputed that compensation is negotiable, Englewood Bd. Ed. v. Englewood Teachers Assn. 64 N.J. 1 (1973), and should be undisputed that the salary for the lieutenants in this case was negotiable. The question here is whether the City and/or the Regional had a duty to negotiate the lieutenants salary before it was implemented. A public employer has the obligation to offer to negotiate prior to implementing a change in an existing term and condition of employment. Hudson County, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp.2d 62 (¶44 App. Div. 1979); New Brunswick Bd. Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978). But a majority representative has the burden to demand negotiations over severable negotiable aspects after the implementation of a managerial prerogative particularly where no pre-existing term and condition of employment has been changed. Trenton Bd. Ed., P.E.R.C. No. 88-16, 13 NJPER 714, 715 (¶18266 1987); Monroe Tp. Bd. Ed., P.E.R.C. No. 85-35, 10 NJPER 569, 570 (¶15265 1984).

Trenton is similar to the instant matter. There the employer abolished a title held by an employee, placed the employee

into a new title it had created and paid the employee the same rate he had received before. The union filed a charge alleging the employer refused to negotiate over additional compensation. The Commission held that the union had the burden to initiate negotiations on the severable question of compensation, 13 NJPER at 715, and dismissed the case. Trenton can be contrasted with Bergen Pines Cty. Hospital where the employer created a new title and the union requested negotiations. The employer refused to negotiate, instead relying on its own interpretation of the parties contract. The Commission found a violation holding that contract was not a defense.

The holdings in Trenton and Monroe are applicable here. Weehawken had the prerogative to create the lieutenant title and promote the employees. It also had the right to provide an initial salary for the new title in order to immediately employ the employees in that title, and by doing so it did not change any existing terms in CP-2, but that does not mean that salary was not negotiable. It was, but neither the City nor the Regional were obligated to offer to negotiate that salary prior to implementation because the creation of the title was a prerogative and because Weehawken's actions did not change the terms and conditions of CP-2. Anyone promoted to captain would still receive $71,402. The burden was on the Association to request negotiations any time after it became aware of the unilaterally established $65,000 salary for lieutenants, but there is no evidence it made such a request.

Instead, the Association filed this charge on February 28, 2000, but the charge did not constitute a request to negotiate. Trenton Bd. Ed., 13 NJPER at 715. The Regional offered to negotiate over compensation for the Weehawken lieutenant title on March 29, 2000, but there was no response. Based upon the above, I must conclude that neither the City nor the Regional ever failed or refused to negotiate over the salary for Weehawken lieutenants. Having found that the actions by the City and Regional were not unlawful, there is no basis for finding a violation of N.J.S.A. 34:13A-21.

The above analysis, however, does not end the discussion regarding compensation. In its post-hearing brief the Regional argues that if any "employer" had a duty to negotiate it was Weehawken because it established the $65,000 lieutenant salary. The Regional made a similar reference in its March 29, 2000 offer to negotiate. The problem with that position is that it suggests that the Regional could not have been obligated to negotiate as a result of Weehawken's acts. That is the wrong message. After all, it was the Regional who needed to have promotions and asked DOP for the opportunity to promote. Weehawken and the other municipalities were only involved in the process because the Merit System Board insisted. I believe the Regional was responsible for the City's actions here and would have been obligated to negotiate upon any Association demand at least by February 9, 2000 the day of the promotions.

But in accordance with the above analysis, the six employees promoted herein were not entitled to receive $71,402 by operation of CP-2. To the extent there was any separate negotiations obligation I agree with the Regional's assertion in their post hearing brief that the interest arbitration award has resolved all outstanding compensation issues.

The parties negotiated over compensation for lieutenants, and the arbitration award provided a salary schedule encompassing Weehawken's lieutenants for the operative time period. The promotion to Weehawken lieutenant was effective February 9, 2000. The award provides that Weehawken's lieutenants (and now fire officer 1) be paid $67,648 effective January 1, 2000, with increases every six months thereafter until April 1, 2004. Consequently, the salary for the six employees at issue here must be adjusted retroactively to comply with the interest arbitration award subject to any changes made by the Commission on appeal.

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

CONCLUSIONS OF LAW

Neither the Regional nor the City violated the Act or the CMSA by the actions they took in promoting and paying six employees as lieutenants.

RECOMMENDATION

I Recommend the complaint be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: January 14, 2003
Trenton, New Jersey