

H.E. NO. 2006-1

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

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and-

Docket No. CO-H-2003-237

WEST NEW YORK POLICE  
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the public employer violated 5.4a(5) and derivatively a(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The hearing examiner found that the employer refused to negotiate compensation with the majority representative regarding the assignment of duties performed by the Coordinator for the Office of Emergency Management (a position which had been performed by a civilian) to a police captain. The hearing examiner found that the employer's unilateral decision to pay the police captain overtime compensation for the partial performance of OEM duties violated the Act, as did its failure to negotiate compensation regarding the assignment of those duties to other unit employees in the captain's absence.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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, The Murray Law Firm, LLC  
(Mary E. Hennessy-Shotter, Esq.)

For the Charging Party, Mets, Schiro & Kleinle, LLP  
(Leonard C. Schiro, Esq.)

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

On March 8, 2003, West New York Police Supervisors Association ("Association") filed an unfair practice charge against the Town of West New York ("Town"). The charge alleges that on or about October 15, 2002, the Town Police Director issued a memorandum advising that Captain Michael Caliguiro, an Association unit employee, was to assume the responsibilities of Coordinator for the Office of Emergency Management ("OEM"). The charge alleges that Coordinator for OEM position was previously held by non-police personnel and compensated an annual salary of \$15,000. The charge alleges that on December 5, 2002, the Police

Director issued a memorandum to all police personnel advising that the Town had adopted a resolution confirming the assignment of Captain Caliguero to the position of Coordinator for OEM. The Association alleges that the assignment is tantamount to an increase in workload, and therefore, subject to negotiations. The Town's actions allegedly violate sections 5.4(a)(1), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 24, 2003, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On July 2, 2003, the Town filed an Answer, denying that it engaged in any unfair practice and asserting that it had a managerial prerogative to assign the position of Coordinator for OEM. The Town asserts that the assignment of Captain Caliguero to the position was for reasons of efficiency and economy, and therefore, it was not required to collectively negotiate with the Association.

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<sup>1/</sup> 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; (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."

On March 23, 2004, I conducted a Hearing at which the parties examined witnesses and presented exhibits. Post hearing briefs were filed by July 2, 2004. Reply briefs were filed by July 16, 2004.

Based upon the record, I make the following:

**FINDINGS OF FACT**

1. The Town of West New York is a public employer within the meaning of the Act. The Association is a public employee representative within the meaning of the Act and represents all Town police personnel with "the permanent New Jersey Department of Personnel classification of Sergeant, Lieutenant, Captain and Deputy Chief" (J-1).<sup>2/</sup>

2. N.J.S.A. App. A:9-40.1 provides that every municipality in the State of New Jersey "...shall appoint a municipal emergency management coordinator from among the residents of the municipality" (J-2). The appointment is for a term of three years (J-2). During most of 2002 and perhaps earlier, the "OEM coordinator position was held by Edward C. Wengerter, a civilian and non-unit employee, who received an annual salary of \$15,000" (stipulation; T6).

3. In early 2002, Town Commissioner/Director of Public Safety Silverio Vega advised the Director of Police, Joseph M.

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<sup>2/</sup> "J" refers to joint exhibits; "T" refers to the transcript of the proceeding, followed by a page number; "CP" refers to charging party exhibits; "R" refers to respondent exhibits.

Pelliccio that he was dissatisfied with the OEM Coordinator and wanted the position to be placed within the police department (T33-T34).

4. On October 15, 2002, Director Pelliccio issued a memorandum to all police personnel advising that effective immediately, the West New York OEM will be under the direction of administrative services division of the West New York police department (J-3). He wrote that in emergencies, personnel "will contact" Captain Michael Caliguero, the "commander" of the administrative services division (J-3).

5. On October 30, 2002, Association counsel sent a letter to Town Administrator Richard Turner, requesting to negotiate "...over the increased workload and expanded job responsibilities..." (J-5). Counsel requested that no "further actions be taken" until the parties met (J-5).

On November 14, 2002, Town counsel sent a letter to Association counsel requesting that all future correspondence be directed to his attention (J-5). On November 20, 2002, Association counsel wrote to the Town counsel, requesting a "list of dates" on which they might meet to negotiate over "increased workload" (J-5). The parties never met to negotiate (T16).

7. On November 25, 2002, the Town passed a resolution appointing Captain Caliguero as the OEM Coordinator until April 30, 2004, the remainder of the unexpired term of resignee Edward

Wengerter (J-4). On December 5, 2002, Director Pelliccio issued a memorandum to all Town police personnel advising of the appointment and resolution (J-4).

8. As Captain of the administrative services division, Caliguiro is responsible for maintaining the record room, and administering sick leave, the "training area," the "court system", and all licensing (T57). He reports directly to Director Pelliccio (T57). Caliguiro also oversees police personnel and civilians assigned to his division.

9. As the OEM coordinator, Caliguiro ensures that the Town is "functioning or capable of functioning" during an emergency (T58). His duties include attending county and State meetings, consulting on grant applications, and recouping funding for hurricane damage, blackouts, snowstorms and the "orange alert" (T58). The OEM Coordinator is also called to the scene of specific emergencies, including "bombing or other explosion, riot, plane crash, serious fires with fatality, serious fires with injuries or displacement, hazardous materials incident, serious incident[s] involving West New York housing and serious incident[s] involving the Board of Education" (T28; J-4). As the OEM Coordinator, Captain Caliguiro reports directly to the Mayor (T59).

10. Caliguiro has documented his attendance or participation in 37 emergencies as the OEM Coordinator (J-8; J-

9). He would not normally respond to such emergencies as the head of the administrative services division (T18; T30; T73; T74). The Town does not dispute Caliguiro's attendance records at emergencies as OEM Coordinator from November 4, 2002 through March 4, 2004 (J-8; J-9).

11. Director Pellicio conceded on the record that the OEM duties performed by Captain Caliguiro account for ten (10) percent or less of his regular shift (T38-T40). He also conceded that Captain Caliguiro has not relinquished any of his responsibilities as captain of the administrative services division (T39). Asked on cross-examination how he derived the "10 percent" estimate, Pellicio replied: "For the amount of time that I see that he puts into it, and a lot of that is all done on overtime. When he's called in, he does reports, his reports are done on overtime" (T40). Pellicio acknowledged that J-8 and J-9 report Caliguiro's OEM duties performed on overtime as captain (T41). During his regular shift, Caliguiro performed such OEM duties as attending municipal county and State meetings and training sessions, consulting on grant applications, and maintaining the Town's certification under an emergency management plan (T41; T45; T46; T48; T58; T59; T61-T62; T64; T65). Caliguiro testified that he spends "roughly 10 [percent] to 15 percent" of his regular shift as captain performing OEM duties (T66). He testified that he continues to perform all of

the captain responsibilities he performed before his appointment, "just with an addition" [i.e., the OEM duties] (T66). I credit Pelliccio's and Caliguiro's testimonies.

12. Director Pelliccio informed Caliguiro at the outset that the only compensation he would receive for the OEM position was overtime, as set forth in the collective negotiations agreement, for time worked beyond his regular hours (T17; T35-T36; T44; T49-T50; T61). Caliguiro has received overtime compensation at a rate of time and one half of his pay as captain for time worked beyond his regular schedule (T61).

13. When Caliguiro was on vacation leave, an order was issued temporarily assigning Lieutenant Albert Bringa OEM duties (T17-T18; T22; T27; J-8). A Sergeant Flores has assisted Captain Caliguiro in performing his OEM duties on three occasions (T17; T22; T27; T44; J-8).

#### **ANALYSIS**

The New Jersey Employer-Employee Relations Act requires negotiations over "terms and conditions of employment." N.J.S.A. 34:13A-5.3 The Act requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Id. The unilateral imposition of working conditions contradicts the Legislature's goal that terms and



conditions of public employment be established through bilateral negotiation between the public employer and a majority representative. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). However, this collective negotiations scheme also recognizes that some matters are outside the scope of negotiations because agreement on them would significantly interfere with the determination of governmental policy. See Local 195, IFPTE v. State, 88 N.J. 393 (1982).

Employees may seek to negotiate for contractual protections against being required to assume duties outside their job titles and beyond their normal duties. See, e.g., New Jersey Highway Authority and IFPTE Local 193 (Toll Supervisors of America, AFL-CIO), P.E.R.C. No. 2002-76, 28 NJPER 261 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div. 2003); In re Byram Tp. Bd. Of Ed., 152 N.J. Super. 12, 25 (App.Div. 1977); Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 97-49, 22 NJPER 403 (¶27220 1996); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Nutley Tp., P.E.R.C. No. 89-65, 15 NJPER 28 (¶20012 1988); Borough of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987); Kearny Tp., P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Parties negotiate over compensation for a position given the amount, nature and difficulty of the work required. Obtaining contractual protection against the imposition of unrelated and out-of-title duties protects the integrity of the equation

between the negotiated salaries and the required work.

Woodstown-Pilesgrove Reg. Ed. Ass'n. 81 N.J. 582 (1980);

Somerset Raritan Valley Sewerage Auth. It inhibits the potential abuse of imposing extra duties without affording employees any opportunity to seek extra pay. West Windsor Tp. v. P.E.R.C., 78 N.J. 98 (1978).

Employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶161606 1985) (fire officers required to perform police duties connected to fires); Monroe Tp. Bd. Of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (under "housekeeping exception," bus drivers required to pump gas); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982) (firefighters required to go on fire patrols). Moreover, employers may unilaterally make assignments necessary to respond to emergencies such as riots or strikes. See, e.g., City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983) (firefighters required to help quell riots); Camden Bd. of Ed., P.E.R.C. No. 80-3, 5 NJPER 286 (¶10157 1979) (administrators required to do other duties during strike).

In Township of Maplewood, P.E.R.C. No.97-80, 23 NJPER 106 (¶28054 1997), the Commission held that the employer had a managerial prerogative to have firefighters assume ambulance/EMS

responsibilities and to create a firefighter/EMT job title. The Commission found that such a decision is a governmental policy determination, based upon the changing nature of public needs and the prompt delivery of vital services. Id., citing Local 195; Paterson; cf. Maplewood Tp., P.E.R.C. No 86-22, 11 NJPER 521 (¶16183 1985) (consolidation of police and fire dispatching functions).

To effectuate that governmental policy determination, the Township may create a firefighter/EMT title distinct from the present firefighter title and similar to that used in Civil Service communities, so long as it negotiates over salaries and employment conditions for negotiations unit employees in that new title. See, e.g., Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills H.S. Dist. Bd. Of Ed., 176 N.J. Super. 35 (App. Div. 1980); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990). It may also determine the staffing levels for a firefighter/EMT position and hire or promote the needed number of employees into that position. Paterson at 96-98; City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. Den. 88 N.J. 476 (1981). And it may determine hiring qualifications and require EMT training. See, e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993); City of Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990). But as the Township acknowledges in its brief supporting reconsideration, p.13, it must still negotiate over severable issues such as higher salaries or stipends for ambulance/EMS duties. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 240, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Avalon.

[Township of Maplewood at 23 NJPER 111]

The Association does not contest the assignment of the OEM duties to Captain Caliguero and other members of the police force as within the managerial prerogative of the Town. (Charging Party brief at p.4.) However, the Association maintains that the assignment has resulted in an increase in duties and that compensation for such additional duties is mandatorily negotiable. The Town denies that the position resulted in an increase of duties outside of the officers' job titles. The Town asserts that the new duties are incidental to or comprehended within the officers' current duties and therefore, non-negotiable. (Respondent's brief, p. 16-17).

The title of OEM Coordinator was previously not within the police department and was compensated \$15,000 annually. In October, 2002, the position was moved to the department and Captain Caliguero was designated to fill it. Although Caliguero now performs some OEM duties during his regular shift, he has other OEM duties, including the duty to respond to specific emergencies set forth on the department's notification list, which are likely to occur at other times. Caliguero has responded to thirty seven (37) emergencies as OEM Coordinator between November 4, 2002 and March 10, 2004. He writes reports on each emergency; consults for grant applications; secures recoupment of funds and attends State and county meetings. He

would not perform the vast majority of these duties as administrative captain.

The Association demanded negotiations over the severable economic consequences of the Town's exercise of the prerogative to create (i.e., incorporate within the police department) the OEM position and assign the duties to the administrative division captain and to other unit employees in his absence. See City of Elizabeth. The Town's refusal to negotiate violates 5.4a(5) and derivatively a(1) of the Act.<sup>3/</sup>

#### RECOMMENDED ORDER

I recommend that the Commission ORDER the Town of West New York to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the West New York Police Supervisors Association concerning compensation for the performance of duties assigned to the position of OEM Coordinator.

2. Refusing to negotiate in good faith with the West New York Police Supervisors Association concerning compensation

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<sup>3/</sup> No facts suggest that the Town's actions violated 5.4(a)(3) of the Act. I dismiss that allegation.

for the performance of duties assigned to the position of OEM Coordinator.

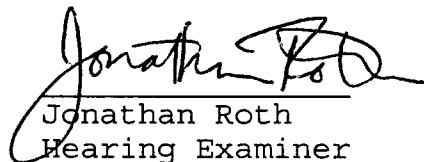
B. Take this action:

1. Immediately enter into negotiations with the Association concerning compensation for the performance of duties assigned to the position of OEM Coordinator retroactive to November 25, 2002.

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

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

The remaining allegations in the Complaint are dismissed.

  
Jonathan Roth  
Hearing Examiner

Dated: July 20, 2005  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in

accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by August 2, 2005.



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 Act, particularly by refusing to negotiate in good faith with the West New York Police Supervisors Association concerning compensation for the performance of duties assigned to the position of OEM Coordinator.

**WE WILL** negotiate in good faith with the West New York Police Supervisors Association concerning compensation for the performance of duties assigned to the position of OEM Coordinator.

**WE WILL** immediately enter into negotiations with the Association concerning compensation for the performance of duties assigned to the position of OEM Coordinator retroactive to November 25, 2002.

Docket No. CO-H-2003-237

Town of West New York  
(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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372