

H.E. No. 2007-6

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

In the Matter of

BERNARDSVILLE BOROUGH,

Respondent,

-and-

Docket No. CO-2004-253

PBA LOCAL 365,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Borough of Bernardsville did not unilaterally alter an established employment condition when it issued Department Memo 2004-5, concerning compensatory time procedures. Specifically, the Hearing Examiner found that the evidence did not demonstrate the alleged practice permitting the automatic early release of 12-hour-shift officers, without requiring them to report to headquarters to work, or use leave on days they attended 8-hour, off-premises training. She found that the memo reiterated existing policies, requiring such decisions to be handled on individual bases.

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,  
Apruzzese, McDermott, Mastro & Murphy, attorneys  
(Robert J. Merryman, of counsel)

For the Charging Party,  
Loccke, Correia, Schlager, Linsky & Bukosky, attorneys  
(Michael A. Bukosky, of counsel)

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

On February 20, 2004, Bernardsville PBA Local 365 filed an unfair practice charge with the Public Employment Relations Commission against the Borough of Bernardsville (Borough), alleging that the Borough violated section 5.4a(1) and (5)<sup>1/</sup> of

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

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act),<sup>2/</sup> when on February 6, 2004, the Borough discontinued a practice of permitting officers assigned to full-day, off-site training to leave from and return directly to their homes, without reporting to headquarters and without using compensatory time to make up the difference between the actual training time and their 12-hour shifts. The PBA also alleges that the Borough refused its demand to negotiate over the alleged change or impact from the change in the practice.

On August 4, 2004, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 18, 2004, the Borough submitted an Answer denying that it changed a past practice, refused to negotiate in good faith, or otherwise violated the Act. On January 9 and 10, 2006 and February 23, 2006,<sup>3/</sup> I conducted a hearing at which the parties examined witnesses and

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2/ The Director declined to issue a complaint on the alleged violations of sections 5.4a(2), (3), (4), (6) and (7), finding that no alleged facts supported these allegations (C-1).

3/ The hearing was initially scheduled for October 13, 2004, however, neither party was available and the hearing was rescheduled to March 16, 2005. In May 2005, because they were engaged in negotiations for a successor collective agreement, the parties asked that the charge be held in abeyance and I granted their request. In Fall 2005, I was notified that they had resolved their agreement without resolving the unfair practice charge, and the hearing was rescheduled.

introduced exhibits.<sup>4/</sup> Both parties filed post-hearing briefs, and the Borough filed a reply brief. Based upon the entire record, I make the following:

**FINDINGS OF FACT**

1. PBA Local 365 represents approximately 12 patrol officers employed in the Borough's police department (1T27; 3T13). The Borough and PBA are parties to a series of collective negotiations agreements, the most recent of which was effective from January 1, 2001 through December 31, 2004 (J-1)<sup>5/</sup>. Article XIV "Compensation," paragraph E provides, "Compensatory time may be taken at the employee's discretion with the approval of the Department Head." J-1 is silent as to the alleged benefit the PBA seeks to defend here, the right to go directly to and from home to off-site training, without charging leave or reporting to headquarters to complete a 12-hour shift (J-1; 2T39-2T40).

2. In 1994, the Borough instituted a schedule based on a 28-day cycle, under which officers work 12-hour shifts, (also called the "Pitman schedule"), two days on, two days off, three days on, two days off, two days on, three days off, and alternate

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<sup>4/</sup> Transcript citations for the hearing on January 9, 2006 are referred to as "1T-"; for the hearing on January 10, 2006 are "2T-"; and for the hearing on February 23, 2006 are referred to as "3T-".

<sup>5/</sup> At the time of the hearing, the parties were completing their successor agreement which was not placed into this record.

between 36 and 48 hours per week (1T29, 1T73-1T74; 3T14-3T15). At the end of the year, officers are credited with compensatory time, equal to their hours worked in excess of 2080 hours (3T14-3T15). Such time is often saved for later use, as with other forms of paid leave.

3. In 1994, then-patrol Lieutenant William Sorgie identified the timekeeping issue under the new 12-hour shift (3T18-3T19). On April 25, 1994, by memo, he notified patrol officers "that an officer attending training for only 8 hours owes the Borough 4 hours" and, until the way it would be handled was determined, training was suspended (R-2; 3T19). To resolve the issue, Sorgie decided on a case-by-case basis whether an officer would be required to report to headquarters before and after training, and whether compensatory leave was required (3T19-3T20, 3T24-3T25).

4. Kevin Valentine has been the Borough Police Chief for five years, and, from 1998 to 2000, served as the patrol lieutenant in charge of scheduling (3T12-3T13). As lieutenant, Valentine also arranged with each officer individually at the time he scheduled training whether compensatory time was required (3T44). With approval, officers went home early following full-day training (3T36, 3T39-3T40, 3T42-3T43).

When he became Chief in 2000, he explained the case-by-case policy to the current patrol-Lieutenant Frischmann, and assumed

that officers who went home early following training were doing so with Frischmann's approval (3T40-3T41, 3T46-3T47).

5. Officers are scheduled for full-day, off-site training several times a year at schools outside of Bernardsville, requiring travel (1T20, 1T25, 1T28). Occasionally, because of the training location, the location of an officer's home, and traffic patterns, reporting to headquarters (or using accrued compensatory leave) to complete a 12-hour shift is impractical and not required (3T22-3T24). Some courses require preparation or homework beyond actual class time, which Chief Valentine believes equates to a full 12-hour shift (3T21-3T24). Officers assigned to the Somerset County Emergency Response Team ("SCERT") are considered to be on-duty for 12 hours, regardless of their actual time (3T31-3T33).

6. A personnel audit performed in late 2003 revealed that officers in the patrol division had accumulated large amounts of compensatory time (3T56-3T57). One of Chief Valentine's management objectives is to reduce or control the unnecessary accumulation of large amounts of compensatory time (3T56-3T57).

The audit also revealed that officers were not using compensatory leave at the end of full-day, off-site training, and were going directly home without reporting to headquarters to complete their 12-hour shifts (3T18). Valentine stated, "Officers were apparently just going home after training without

getting permission, and were not charging compensatory time, and, that was not a permissible use of scheduling under the 12-hour schedule. . ." (3T17-3T18, 3T25-3T26). Some officers were properly charging compensatory time or returning to the Borough to work (3T26). Valentine had not been aware of this inconsistency because he saw compensatory time recorded on time sheets, and assumed that officers were following the procedure and obtaining permission from the patrol lieutenant (3T47-3T48).

The Issuance of Department Memorandum 2004-5 (R-1)

7. On February 4, 2004, Valentine issued Department Memorandum 2004-5 (R-1) to all personnel to remind officers of the procedures they should be following (3T16, 3T60).

R-1 states:

A recent staffing review has created an awareness of the amount of comp time that exists for Officers and Dispatchers in the Police Department. In order to keep the comp time situation from adversely effecting the operations of the Department we have previously established guidelines for Officers to follow regarding the use of and accumulation of this time. As such Officers and Dispatchers are reminded of the following:

1. Officers should use their scheduled comp time at the rate of at least 25 hours quarterly.
2. Excessive amounts of any comp (earned or scheduled) time should not be allowed to accumulate.
3. All comp time should be used before the end of the calendar year. Any carry overs must be requested in writing prior to the end of the year.
4. Requests for time off that cause overtime situations are considered on a case by case basis, but are generally discouraged and may be denied. . . .

5. Personnel assigned to 12 hour shifts are sometimes assigned to training or other special assignments that may end prior to the end of the shift. All time must be accounted for. If a class ends early and you would like to go home, you are free to use comp time after obtaining the appropriate approval. Otherwise, you are expected to return to work to complete your shift.

6. Personnel attending daily training classes are expected to arrive at work and go to training from H.Q. If a car is available, you may use it, if not, you will be reimbursed for the mileage. After the class is complete you return to the Borough where you may be released at that time. We realize that it may not always be practical to report to the Borough prior to going to an assigned class. There are times when it is more convenient to attend a class directly from home. This is permitted as long as you obtain prior approval from a supervisor.

7. You are expected to use comp time for any time you plan to take off and to request it as far in advance as possible in advance.

8. Classes that run over multiple days will be scheduled on a case by case basis. The Lt. Will adjust or arrange schedules to facilitate this type of training as required. In any event, you are still expected to use comp time for any extra time off resulting from short days.

8. By issuing R-1, Valentine did not intend to make substantial changes in the procedures (3T17). He testified that the first few points are reiterated annually, so that "everybody is clear on how the department intends to use and manage comp time" (3T17-3T18). R-1 is regarded by Valentine as a typical housekeeping order. Periodically, often at the start of the year, he disseminates orders concerning procedures or issues



which he feels need to be reiterated and clarified to the patrol division (3T16).<sup>6/</sup>

9. He did not believe that officers were abusing the system, but that they misunderstood their responsibilities (3T45-3T46, 3T60-3T61). No one was disciplined for failing to follow the procedure between 2000 and 2004 (3T47).

#### Demand for Negotiations

10. On February 16, 2004, PBA Counsel wrote to the Borough, demanding negotiations and maintenance of the status quo regarding the training and compensatory time policy as it pertained to full-day, off-site training and the ability of officers to go home early without returning to complete their 12-hour shifts or be compelled to use compensatory time (1T35; CP-2). The Borough never responded to the letter (1T35; C-2).

#### The PBA's Version of the Practice

11. Patrolman Jon Paul Tay was hired June 2002 (1T19). Tay has attended training courses in child safety seat inspection, methods of instruction, firearm instruction, sub-gun instruction, and standardized field sobriety testing, most of which were full-day or multiple-day courses (1T20-1T21). Before R-1 was

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<sup>6/</sup> Although Valentine stated that over the years, multiple memoranda had been issued, he did not produce any of these. He acknowledged that there is no written procedure dealing with going home after training (3T46). I credit his testimony that there were also verbal reminders of procedures.

issued, Tay was not aware of a policy requiring him to report to or return to headquarters on training days, or use compensatory time to make a full 12-hour shift, because his training officer, Sergeant Remian, had advised him to report directly to training from home and go home directly after training (1T22-1T24).

12. In the beginning of 2004, Tay noted a change in that if he went to off-site training, and the class was 8 hours, he would either have to return to work for 4 hours, or use compensatory time to be able to go directly home from the training (1T21-1T22). After R-1, Tay went to a 40-hour field sobriety testing training class, scheduled from Monday to Friday. He and Lieutenant Frischmann determined that he would use an hour of compensatory time per day because he was on work time while traveling to the course. For a sub-gun class, he did not use any compensatory time because that class was farther away (1T23).

13. Brian Testa has been employed as a patrol officer since 1997, and is the president of PBA Local 365 (1T26-1T27). Testa believed that, before R-1, with respect to off-premises full-day training, officers left from their homes, went directly to school, returned home when classes ended, and did not go to headquarters to work those days (1T31). The PBA defines all-day training as 7 to 8 hours in length, though this is not the department's formal definition, and views the right to go home early after training, without being required to use compensatory

time as a "benefit" (1T32-1T34, 1T52, 1T58-1T59, 1T65; 2T3; 2T13-2T14).

14. When he received R-1 in early 2004, Testa polled several officers who had have been employed by the Borough in excess of ten years, and they all agreed with him that the memo represented a change in the practice (1T37, 1T68-1T69; 2T27). Testa did not poll the captain, who has been employed for a long time, and, in discussions with Valentine, Testa learned that the chief disagreed with him about the practice (2T40). Testa acknowledged there were instances where officers attended full-day, off-site training and used compensatory leave to complete their 12-hour shift (2T34-2T36). Testa also acknowledged that R-1 permits officers to go home early without using leave on 8-hour training days with prior approval (2T37-2T38).

15. After filing the unfair practice charge, Testa compiled documents which show the PBA's understanding of the practice (1T37-1T38, 1T48, 1T64; CP-1). CP-1 is a compilation of the Borough's time/attendance records and certain training certificates for selected dates between 1998 and 2003 (1T38; CP-1). The time records show, among other items, "hours worked" and "compensatory time used" (1T38). In these examples, the officers recorded 8 total hours per day; and in no instance does it appear they recorded having worked 12 hours on the selected

training days. The "total hours" computations only make sense if officers were given credit for 8 and not 12 hours.<sup>7/</sup>

16. The Borough also compiled and placed into the record examples illustrating its' version of the practice in the form of time sheets, requests to use compensatory leave and training assignment sheets (1T2, 1T7; R7-R16, R-18, R-19).

17. I find the following relevant examples:<sup>8/</sup>

1998-1999

On September 30, 1998, Officer Jeff Tallmadge attended training at the Morris County Police Academy ("MCPA"), reported 8 work hours and no compensatory time (1T53-1T55; CP-1 page 15).

On March 31, 1999, Officer Tallmadge attended Breathalyzer re-certification school, reported 8 work hours and no compensatory time (1T49-50; CP-1 page 10).

On June 2, 1999, Officer Jim Smith attended school in Morris County, recorded 8 hours and no compensatory time (1T63; CP-1, page 30).

2000

On March 31, 2000, Officer Brian Kelly attended State Police Drug Interdiction training at the MCPA, a

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<sup>7/</sup> I infer that they were paid as if they had recorded 12 hours because of PBA President Testa's testimony that he never received less than a full pay check, and there is no evidence in the record that there were complaints by other officers who also recorded only 8 hours on training days that they received less than full paychecks because of recording 8 and not 12 hours (1T59).

<sup>8/</sup> I only rely on examples in the record which are clear, and concern off-site, 8-hour long training. Excluded are in-service, on-site, part-day training, and Somerset County emergency team duty (R-3; R-5; R-6; R-17; 2T57; 3T33).

full-day training, and requested 2 hours compensatory time (R-9; 2T35-2T36; 3T26-3T28, 3T50-3T51).

On June 12, 2000, Officer Douglas Seals attended cultural diversity training at the Raritan Valley Community College, a full-day class, and used one and one-half hours compensatory time at the end of his shift (R-10, R-19; 2T34-2T35; 3T65).

On September 4, 2000, Officer Schlittler attended high risk motor vehicle stops training, a full-day course, at the Morris County Police Academy, and used one and one-half hours compensatory time (2T27-2T28; 3T29-3T31; R-11 (A, B), R-19).

On September 13 and 14, 2000, Officer Tallmadge attended school, recorded 8 regular hours, and used no compensatory time (1T52-1T53; CP-1 page 14).

On September 20, 2000, Officer Schlittler used one and one-half hours of compensatory time, and attended high risk motor vehicle stops training at Morris County Police academy, a full-day course (3T29-3T31, 3T64-3T65; R-11).

## 2001

On March 30, 2001, Officer Jim Smith attended cell block management at the Bergen County Department of Corrections, charged 10 hours work and used 2 hours compensatory leave (R-14).

On April 6, 2001, Officer Tallmadge attended the MCPA, recorded 8 regular hours and used no compensatory time (1T51-1T52; CP-1 page 12).

On April 30, 2001, Officer Tallmadge attended cell block management at Union County Police Academy and used 5 hours of compensatory time (R-13). (Note: although Testa testified that this example was a half-day school based on his having attended cell block management, I rely on the documents which show that Tallmadge recorded 7 hours work and used 5 hours compensatory time).

On May 22, 2001, Officer DeFilippis attended cell block management/suicide awareness training at Morris County

Police Academy, and used 2 hours compensatory time at the end of his shift (R-12).

On September 21, 2001, Officer Tallmadge attended training at the Somerset County Police Academy, recorded 8 regular hours and no compensatory time (1T52; CP-13).

On October 10, 2001, Officer Brian Testa attended drug identification at the Somerset County Police Academy, recorded 8 work hours and 4 vacation hours (R-15).

## 2002

On January 23, 2002, Officer Ed DeFilippis attended training at the Bergen County Law and Public Safety Institute, recorded 8 regular hours and used no compensatory time (1T46; CP-1 pages 5-6).

On May 14, 2002, Officer DeFilippis entered 8 regular hours, with no compensatory time recorded and a certificate for firefighters/police training shows that DeFilippis completed training on that date (1T45; CP-1, pages 3-4).

On September 27, 2002, Officer Testa attended training, recorded 8 hours regular work hours and no compensatory time (CP-1, page 27).

On October 17, 2002, Officer Testa attended training, recorded 8 hours work and no compensatory time (CP-1, page 23).

On October 31, 2002, Officer Chris Denker attended report writing training and used 6 hours compensatory time (R-8).

On December 4, 5 and 6, 2002, Officer John Gardner attended school, recorded 8 hours and did not use any compensatory time (1T64; CP-1 page 33).

On December 12, 18, 19, 2002, Officer Brian Kelly attended training, recorded 8 regular hours and did not record any compensatory time (1T56; CP-1 pages 20-21).

2003

On March 11, 2003, Officer Jeffrey Melitski attended drug identification training at Somerset County police academy, and used two and one-half hours compensatory time (R-7).

On April 15, 2003, Officer Tallmadge attended training, recorded 8 regular hours and charged no compensatory time (1T51; CP-1 page 11).

On June 3, 2003, Officer Jon Tay attended training, recorded 8 regular work hours and used no compensatory time (CP-1, page 28).

On June 4, 5, and 6, 2003, Officer Testa attended training, recorded 8 regular hours, and used no compensatory time (1T59-60; CP-1 page 24).

On June 16, 2003, Officer Kelly attended training from 7:30 a.m. to 3:30 p.m. at the police academy, recorded 8 regular hours and charged no compensatory time (1T55; CP-1 page 19).

18. Between 1998 and 2003, these 26 examples show that 16 instances, or about 62 percent, support the PBA's version of the practice, and 10 examples, or about 38 percent, support the Borough's version. There was at least one example of the use of compensatory time after full-day, off-premises training in every year between 2000 and 2004, when R-1 was issued.

**ANALYSIS**

The issue in this case is whether the Borough unilaterally altered an established employment condition when it issued Department Memo 2004-5, concerning compensatory time procedures. The evidence does not demonstrate the alleged established working condition, or that the issuance of R-1 altered a past practice,

and, therefore, the Borough was not obligated to negotiate before issuing it. I recommend that the charge be dismissed. The PBA argues that the memo changes the established practice permitting early release of 12-hour-shift officers, without requiring them to use leave on days they attended 8-hour, off-premises training. The Borough disputes the alleged practice, and asserts that the memo merely reiterates existing policies, requiring early-release decisions to be handled on individual bases.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing employment conditions:

"Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Middletown Tp., 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) ("Middletown").

In Middletown, the Commission identified three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2)



cases where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change; and (3) cases where the employer alleges that the representative has waived any right to negotiate, by expressly or impliedly giving the employer a right to impose a change.

This case is the second type: the PBA alleges that an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim an express or implied right to impose that change without negotiations. Such a change would trigger the duty to negotiate under section 5.3.

Regarding the second type, the Commission wrote:

. . . To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating.

[Middletown at 24 NJPER 30]

From the inception of the 12-hour shift, the Borough announced its interest in full accountability for the 12-hour shift (R-2). As lieutenant, Valentine required an accounting for the discrepancy between 8-hour training and the 12-hour shift on a case-by-case basis, and he later instructed the current lieutenant that this was the procedure. Valentine was also aware that the Borough had a financial and legal obligation to account for employees' time.

The record supports this version of the practice. The examples show that over roughly five years, officers recorded compensatory time after full-day, off premises training in more than one-third of the instances. No explanation was offered to account for why officers would charge leave if they were not required to do so. PBA President Testa acknowledged there were instances where officers attended full-day, off site training and used compensatory time to complete their 12-hour shifts. Testa further acknowledged that R-1 allows officers go directly to training from home and return home without being required to charge leave, with prior approval. The PBA did not refute the examples of officers who used compensatory time after training.

Based on the above, I find that the record supports the Borough's explanation of the practice: on an individual basis and with permission officers may leave from home and return directly home when they attend full-day, off-premises training without being required to use compensatory leave. Charging Party has not met its burden of proof. The personnel audit in 2003 led to the issuance of R-1 in February 2004. R-1 did not change an existing working condition, or trigger a negotiations obligation.

Both parties assert that a practice be analyzed as: "1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties" (Respondent's post-

hearing brief, p.15; Charging Party's post-hearing brief, p. 14). This arbitration-type standard is appropriate to the first type of unilateral change case in Middletown, concerned with express or implied contractual rights.<sup>9/</sup> However, I found that this case represents the second Middletown type. Neither party asserts an express or implied contractual right. Even if this were the correct standard, I would find that the Charging Party had not met its burden of proof for the reasons already discussed.

Initially, in its Answer, the Borough argued that the early release of officers after full-day training was not mandatorily negotiable (C-2, page 4), but it appears to have withdrawn this argument. In its post-hearing brief, the Borough does not contend that the parties could not negotiate training procedures, but that they have not done so (Respondent's post-hearing reply brief, page 5). In asserting its' financial and legal policy interest in making sure officers account for their time, the Borough acknowledged the possibility that all 12 hours of an officer's shift could be accounted for by travel, length of training, and preparation or homework. The parties can negotiate the issue in their next collective negotiations.

Based on the above, I find that the PBA has failed to carry its burden of proof.

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<sup>9/</sup> See also, Borough of Somerville, P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984); W. Essex Regional School Bd of Ed., H.E. No. 2001-12, 27 NJPER 88 (¶32033 2001).

**CONCLUSIONS OF LAW**

The Borough of Bernardsville did not violate 5.4a(1) and (5) of the Act.

**RECOMMENDATION**

I recommend the Commission ORDER that the Complaint be dismissed.

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Elizabeth J. McGoldrick  
Hearing Examiner

DATED: March 20, 2007  
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 March 30, 2007.