P.E.R.C. NO. 86-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HAMILTON,

Respondent,

-and-

Docket No. CO-85-219-171

AFSCME, Local 2475,

Charging Party.

Appearances:

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge that AFSCME, Local 2475 filed against the Township of Hamilton. The charge alleged the Township violated the New Jersey Employer-Employee Relations Act when it unilaterally changed work shifts from permanent to rotating at its water pollution control plant. The Commission finds that the Township did not violate the Act because it had the contractual right to make the change.

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Appearances:

For the Township of Hamilton, Paul Innes, Esq.

For the Charging Party, Carlton Steger,
Staff Representative, AFSCME

DECISION AND ORDER

On February 25, 1985, AFSCME, Local 2475 ("AFSCME") filed an unfair practice charge against the Township of Hamilton ("Township"). The charge alleges the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when it unilaterally changed work shifts from permanent to rotating at its water pollution control plant.

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

On June 21, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 2, 1985, the Township filed its Answer. It admits changing to rotating shifts, but denies that it violated the Act. It contends it had a managerial prerogative and contractual right to make the change in shifts.

On August 12 and 13, 1985, Hearing Examiner Judith E. Mollinger conducted hearings. The parties examined witnesses, introduced exhibits and argued orally.

On December 24, 1985, the Hearing Examiner issued her report and recommended decision. H.E. No. 86-29, 12 NJPER ___ (¶_____ 1986) (copy attached). She found the Township had changed the work shifts for its sewer plant operators without first negotiating with AFSCME. She summarily rejected the Township's contract and managerial prerogative defenses. Therefore, she concluded that the Township violated subsections 5.4(a)(1) and (5). She recommended the Township restore permanent shifts and negotiate in good faith over any proposed shift changes.

On January 24, 1986, the Township filed exceptions. It excepts to the following findings of fact: (1) no. 5 omits that the Township changed to steady shifts on a "trial basis" only; (2) no. 6 omits that the Township had, in the past, requested to negotiate changing shifts; (3) the acceptance of Hendrickson's testimony on the subject of negotiations for a successor agreement contending the testimony of another witness was more credible; and (4) the lack of factual findings on the size and importance of the Hamilton plant,

the critical situation that existed in November, 1984 concerning the plant's operation, and the improvement that has taken place since the change to rotating shifts. The Township objects to the Hearing Examiner's conclusions of law that the Township did not have a managerial prerogative or contractual right to make the change.[2/]

On February 14, 1986, following receipt of an extension, AFSCME filed its response. It urges the Hearing Examiner's recommendations be adopted.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-8) are accurate, but incomplete. We incorporate them, but note the report is devoid of any findings concerning the plant's operations and the reasons the Township decided to institute rotating shifts.[3/] Therefore, we add these facts.

The Township sewage treatment plant services Hamilton and Washington Townships. The plant purifies waste so it can be discharged into the Crosswicks Creek. Its function is of obvious import: the improper operation of the plant results in the discharge of untreated waste water into a creek which is used for drinking water. In addition, it would result in odor and health problems.

2/ The Township requested oral argument. We deny this request.

3/ We do not, however, find merit to the Township's other specific factual exceptions. We will not ordinarily disturb a Hearing Examiner's credibility determination or refusal to credit hearsay testimony.

The Department of Environmental Protection ("DEP") has regulatory authority over the plant. It classifies the plant as "Class IV." This is the largest and most complex class.

The plant has had operational problems for the last four years. Most significantly, it had not been meeting DEP's permit limits and has faced repeated equipment malfunctions. These malfunctions may have been caused, in part, by improper equipment operation due to the lack of training of plant operators.

In 1984, the plant's deficiencies had reached a critical stage. Because of the plant's continued failure to meet its permit limits, the DEP imposed a moratorium on the Township prohibiting it from authorizing new sewer lines. This moratorium has resulted in the cessation of all new development in the Township. DEP's technical assistance group reviewed the plant's operations. The group found instances of improper and negligent equipment operation. It recommended, among other things, that the Township require increased training of its employees. This recommendation was consistent with two earlier studies made by consulting firms retained by the Township in reviewing the plant's operations.

The Township decided that rotating shifts would improve training and employee evaluation. This decision was based in part on a recommendation from its consultant that "shift teams...rotate...for continued on the job training....Rotating shifts allow the Chief Operator to see the performance of each shift crew and provide continuing training as the shift rotates into the normal

(8 AM to 5 PM) day." Training should occur during the day hours because that is the only time outside vendors are available to conduct the training session.

The issue is whether the Township violated subsections 5.4(a)(5), and derivatively (a)(1), when it changed from permanent to rotating shifts without first negotiating with the union. The law is settled that for the Commission to find such a violation, the union bears the burden of proving: (1) a change (2) in a term and condition of employment (3) without negotiations. The Township, however, may defeat such a claim if it has a managerial prerogative or contractual right to make the change. e.g., State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Board of Education, P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

Here, the union met its burden of establishing the unilateral change. On January 28, 1985, the shift schedule at the Hamilton treatment facility changed from permanent to rotating. This change was made without negotiations. Thus, a violation will be found unless the change involved a managerial prerogative or the employer had a contractual right to make the change.

In this case, the parties negotiated work schedule and hours of work clauses. They provide, in pertinent part:

Section II CONTINUOUS OPERATIONS

> Employees engaged in continuous operations are defined as being any employees or group of employees, engaged in an operation for which there is regularly scheduled employment at

> periods other than regular work hours. Employees so assigned will have their schedules arranged in a manner which will assure, on a rotation basis, that all employees will have equal share of Saturdays and Sundays off, distributed evenly throughout the year...(emphasis supplied)(J-1, pp. 22, 23).
>
> Section III WORK SCHEDULE
>
> Except for emergency situations, work schedules shall not be changed unless the changes are mutually agreed upon by the Union and the Employer....

We first consider whether these clauses, under the circumstances here, are mandatorily negotiable. The test we must apply in making this determination is set forth in IFPTE Local 195 v. State, 88 N.J. 393 (1982):

> a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> Id. at 403-404.

Our application of these tests convinces us that the clauses in dispute are mandatorily negotiable. Work schedules and, in particular, a change from a steady to a rotating shift directly affect the work and welfare of the employees. In this case, there

is specific evidence that the schedule change will affect their work and welfare: child care arrangements will have to be made, second jobs may be forfeited and spouses will have to quit their employment to care for their children. We now must apply Local 195's third test.[4/] We are not persuaded that these clauses interfere with the Township's right to determine policy. Rather, the clauses are consistent with the well-established principle that hours of work are, in general, mandatorily negotiable. See IFPTE Local 195 v. State; Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 583 (1980); Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984); Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶14053 1983); State of N.J. (CWA and Local 195), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985); Township of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), appeal pending App. Div. Dkt. No. A-2408-85T6; Borough of Closter, P.E.R.C. No. 86-86, 11 NJPER 132 (¶16059 1985). See also Fire Fighters Union, Local 1186, etc. v. City of Vallejo, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Labor Relations Commission v. Town of Natick, 339 N.E.2d 900 (Mass. 1976); Int'l Brotherhood of Police Officers, Local 621 v. City of Hollywood, 7 FPER 12293 (Florida 1981); Niskayuna PBA and Town of Niskayuna, 14 PERB 3067 (New York 1981); In the Matter of the Arbitration between the Borough of Anbridge and the Anbridge PBA, 11 PPER 11263 (Pa. 1980). In fact, the clauses protect the Township's prerogative to determine policy by permitting changes in an "emergency." Accordingly, we reject the Township's managerial prerogative defense.

4/ The second test is not applicable.

We now must consider the Township's contractual defense. First, we reject their argument that the management rights and Section 1 of the Hours of Work clause gives it the reserved right to change schedules. These clauses do not meet the "clear and unequivocal" test required to authorize the change without negotiations. See Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). To the contrary, the parties' seniority clause provides:

> Where more than one workshift per day within a given classification is in effect, employees within such classification will be given preference of shifts on a seniority basis only when vacancies occur or changes in the number of employees per shift are being made.

We read this clause to evidence the parties' intent that under normal circumstances the Township does not have the right to unilaterally change shifts. This is not the end of our analysis, however. The key clause, which the Hearing Examiner did not cite or apparently even consider, permits the Township to change shifts in the limited circumstance where an "emergency" exists. Our review of the record convinces us that the requisite "emergency" did exist. Emergency is defined as: (1) an unforeseen combination of circumstances or the resulting state that calls for immediate action; (2) a pressing need. Webster's New Collegiate Dictionary, 1981.5/

5/ We also take note that the General Provisions clause of the contract provides, at Section K:

> In an emergency, each and every employee shall be subject to call for overtime duty and it is each employees responsibility to cooperate and

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The Township was faced with a serious health problem caused by the plant's inefficient operation and failure to meet DEP's permit standards. By the fall of 1984, the plant's deficiencies had escalated to a critical stage. The DEP took the extraordinary step of imposing a moratorium prohibiting construction of a new sewer line extension. This has halted new development in Hamilton. The Township determined that one means of correcting this problem was to improve the training, supervision and evaluation of its sewer plant operators and that such improvement would best occur if these employees were placed on a rotating shift schedule. In fact, two outside consulting firms had made this recommendation.

Accordingly, we hold that the Township had the contractual right to make the change to rotating shifts because we find that the requisite emergency existed. We emphasize, however, that the Township's right was predicated on the somewhat unique situation it

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5/ Footnote Continued From Previous Page
accept such overtime work, when required. Emergency is hereby defined as that period of time when the health, safety, and general welfare of the public is in jeopardy. The determination as to what conditions constitute an emergency will be at the discretion of the Mayor or his designee, and will not be subject to the grievance procedure. (Emphasis supplied).

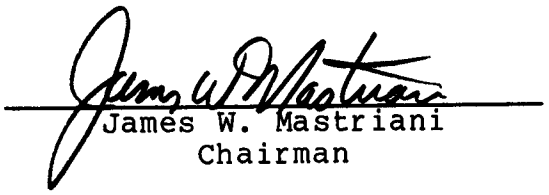
This clause, if applicable, would conclusively establish that the requisite emergency existed. We do not, however, read that definition to apply here: the definition appears to pertain for purposes of determining mandatory overtime. Further, the parties did not bring this clause to our attention. Presumably, if they believed it were applicable, they would have.

was faced with. When the emergency ceases, it will be obligated under its agreement with AFSCME to return to steady shifts. While we cannot say, at this time, precisely when that will be, certainly the lifting of the moratorium will be strong evidence that the emergency has passed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
April 18, 1986
ISSUED: April 18, 1986

H. E. NO. 86-29

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

In the Matter of

TOWNSHIP OF HAMILTON,

Respondent,

-and-

Docket No. CO-85-219-171

AFSCME, Local 2475,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Township violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally, and without prior negotiations with AFSCME, changed the shifts of its Sewage Plant Operators effective January 28, 1985. The Hearing Examiner, citing longstanding precedent of the Courts and the Commission, concluded that the Township was obligated to negotiate with AFSCME prior to the Township's decision to change the shifts of its operators.

By way of remedy, the Hearing Examiner recommends that the Township be ordered to restore the status quo ante immediately (i.e.--restore the shifts of the Sewage Plant Operators to those in effecct prior to January 28, 1985) and thereafter negotiate in good faith with AFSCME regarding any proposed change in shifts prior to implementation.

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.

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STATE OF NEW JERSEY
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Appearances:

For the Township of Hamilton
Paul Innes, Esq.

For the Charging Party,
Carlton Steger, Staff Rep.

HEARING EXAMINER'S
REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 25, 1985, by AFSCME, Local 2475 ("AFSCME") alleging that the Township of Hamilton ("Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, AFSCME alleges that the Township violated §5.4(a)(1) and (5)[1/] by

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

unilaterally initiating a change in shifts from permanent to rotating in the operation of its Water Pollution Control Plant, without negotiating the change with AFSCME.

On June 21, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. N.J.A.C. 19:14-2. (C-1)[2/]

Hearings were held on August 12 and August 13, 1985, at which time the parties were given an opportunity to examine witnesses and present relevant evidence. Both parties argued orally on August 13, 1985, and no post-hearing briefs were filed. The last transcript was received on November 6, 1985.

Position of the Parties

The Township makes three arguments contending that it has not engaged in any unfair practices. First, it raises a contractual right to change the schedule for the sewer operators, citing Article II, "Management Rights" and Article VI, "Hours of Work."

1/ Footnote Continued From Previous Page

restraining or coercing 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."

2/ Commission exhibits are designated as (C), Joint exhibits as (J) and the Township's exhibits as (R). AFSCME offered no exhibits.

Second, the Township argues that an emergency necessitated the change and it has no obligation to negotiate changes in an emergency--i.e., in this case the need for training of plant personnel since 1980 and a recent Department of Environmental Protection (DEP) moratorium on sewer extensions or additional sewer hookups, beginning November 1984.

Third, that schedule changes are a managerial prerogative--not subject to negotiations.

AFSCME contends that, first the contract does not provide a managerial right to implement rotating shifts and in fact specifically provides that shift selection shall be by seniority--Article III Section IG.

Second, the training need has existed for over four years and in fact the Union has accommodated the Township's need by scheduling personnel to "days" for specific periods of time for training, often a month or two, but employees received either minimal training or none at all. This is still the case; no training was accomplished.

Third, AFSCME points out that the Township made the unilateral changes shortly before negotiations were to begin for a successor contract.

Fourth, AFSCME contends the Township never raised the matter as an emergency either with the employees or with the union. In fact, the contract did provide for schedule changes in an emergency. However, emergencies are not endless; nor did the

Township discuss with the union any need for improved work performance or discipline or supervision.

Fifth, the DEP order resulted from faulty equipment and breakdowns not the fault of the employees.

Finally, work schedules include work shifts and work schedules are mandatorily negotiable.

FINDINGS OF FACT

Upon the entire record, the Hearing Examiner makes the following:

1. The Township of Hamilton is a public employer within the meaning of the Act and is subject to its provisions. (1 Tr 7).[3/]

2. AFSCME, Local 2475 is a public employee representative within the meaning of the Act and is subject to its provisions. (1 Tr 8)

3. The operative collective negotiations agreement was effective during the term January 1, 1983 through December 31, 1984 (J-1).[4/] The pertinent provisions of the agreement are as follows:

3/ References to Transcript proceedings are as follows: August 12, 1985 as 1 Tr; August 13, 1985 as 2 Tr.

4/ Article XIII, "Term," provides for automatic renewal upon certain conditions. Since there was reference at the hearing to negotiations in late 1984 (1 Tr. 25, 33, 34), it is assumed that J-1 was not automatically renewed but continued in effect pending negotiations for a successor agreement: Piscataway Twp. Bd/Ed, P.E.R.C. No. 91 (1975).

> Article II, "Management Rights," It is recognized that the management of the Township...retains the rights, including but not limited to, select, schedule and direct the working forces,...except as may be otherwise specifically limited in this agreement or by law. (J-1, p. 7).
>
> Article III, "Seniority," Section IG, Where more than one work shift per day within a given classification is in effect, employees within such classification will be given preference of shifts on a seniority basis only when vacancies occur or changes in the number of employees per shift are being made...(J-1, p. 10).
>
> Article VI, "Hours of Work," "Workweek," Section 1, The workweek shall consist of five (5) consecutive eight (8) hour days, Monday through Friday, inclusive, except for employees in continuous operation... (emphasis supplied)
>
> Section II, "Continuous Operations," Employees engaged in continuous operations are defined as being any employees or group of employees, engaged in an operation for which there is regularly scheduled employment at periods other than regular work hours. Employees so assigned will have their schedules arranged in a manner which will assure, on a rotation basis, that all employees will have equal share of Saturdays and Sundays off, distributed evenly throughout the year...(emphasis supplied)(J-1, pp. 22, 23).

4. At the time of the hearing, there were 37 employees in the Respondent's sewage treatment facility, twelve of whom were classified as Sewage Plant Operators who qualified for the position by Civil Service examination. These operators' duties are set forth in a job description (R-1) which, inter alia, provides that under direction they operate, adjust and regulate sewage plant pumps, valves and other equipment and take periodic readings of relevant gauges, etc.

5. Prior to April 1980, the Sewage Plant Operators were scheduled to work on rotating shifts around the clock (2 Tr. 105). AFSCME requested that the rotating shifts be changed to permanent non-rotating shifts; and the Township acceded to that schedule in 1980 (1 Tr. 14; 2 Tr. 105, 106). The permanent non-rotating shifts continued for Sewage Plant Operators until January 28, 1985 (1 Tr. 15, 23).

6. In negotiations for a successor agreement to J-1, specifically on December 7, 1984, Thomas Hendrickson, a negotiator for AFSCME asked John Ricci, the Respondent's Business Administrator, what the situation was going to be insofar as rotating shifts, to which Ricci responded: "The operations are going to go around the clock in January." (1 Tr. 33, 34). Ricci also told Hendrickson that the Respondent was not going to bargain on it, "...that this was what was going to be done and that is all there is to it..." (1 Tr. 34). The Township never placed any proposal on the negotiating table concerning a change from permanent shifts to rotating shifts (1 Tr. 25).

7. Sometime in January 1985, there was a meeting in the Water Pollution Control office, at which Hendrickson was the spokesman for AFSCME. Present for the Respondent were Thomas Horn, the Superintendent of the Division of Water Pollution Control, Thomas Anderson, the Assistant Superintendent, and Harry Bernasi, the Public Works Director. (1 Tr. 26). The subject of the meeting was the Township's decision to implement rotating shifts. Bernasi

stated that the operators "...will begin a rotating shift January 28, 1985..." (1 Tr. 27). Hendrickson and others present for the Charging Party strongly objected on the ground that there had been no negotiations on the subject (1 Tr. 27-29). Bernasi's reply was that "...We are not worried about the union, we are going to do it no matter what. This is the way it's going to be, take it or leave it..." (1 Tr. 29).[5/]

8. The Township adduced considerable evidence in support of its decision to change the shifts of its Sewage Plant Operators from permanent to rotating. Horn testified without contradiction that continuing education and evaluation of Sewage Plant Operators is essential to efficient operation of the Respondent's sewage treatment facility. Horn personally takes an average of four courses per year in connection with the licenses which he holds (2 Tr. 6). Two consultants retained by the Respondent have recommended continuous training for Sewage Plant Operators (2 Tr. 21-24, 92-94; R-4). Horn testified that the Respondent's top-level supervision for Sewage Plant Operators is provided by the Superintendent or Assistant Superintendent and a foreman, and that it is best to provide training for operators during daylight hours (2 Tr. 35, 38). Under the non-rotating shift schedule, operator training had

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5/ Horn, as a witness for the Respondent, acknowledged on cross-examination that Bernasi might have said something like "...We're not worried about the union, this is the way it's going to be. Take it or leave. If you don't like it, take us to court..." (2 Tr. 81).

not been adequate (2 Tr. 36). With the rotating schedule, top-level supervision is able to monitor each operator for one month out of every three months and this has resulted in improved performance in the operation of the facility (2 Tr. 38-41, 52, 53).[6/] Received in evidence, is the training schedule for the "Cloromat" operation, indicating that all of the Sewage Plant Operators received training between March 1, 1985 and July 31, 1985 (R-3). Horn testified that the "Cloromat" operation has improved with the training provided (2 Tr. 32).

DISCUSSION AND ANALYSIS

Did The Township Violate Subsections (a)(1) And (5) Of The Act When It Unilaterally Implemented A Change To Rotating Shifts For Its Sewage Plant Operators Without First Negotiating With AFSCME?

Clearly, working hours (shifts, starting times, etc.) are a term and condition of employment: Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1, 6, 7 (1973)(Englewood) and Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975)(Hillside).

6/ The witnesses for the AFSCME did not dispute the Township's objective in seeking additional training and testified that it was important that the operators be properly evaluated (1 Tr. 57, 78). Hendrickson testified that under the rotating shift schedule the Sewage Plant Operators "...are all being evaluated better (1 Tr. 40)."

The Supreme Court in Englewood said: "Surely working hours and compensation are terms and conditions of employment within the contemplation of the...Act..." The Commission in Hillside considered a dispute concerning a change in working hours without an increase in total working time. Stating that the issue was controlled by Englewood, the Commission added that it "...cannot be disputed that, as the new schedule alters the hours of their employment...it is a term and condition of employment." (1 NJPER at 57).

Of significant importance is the decision of the Appellate Courts in Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976)(Galloway), aff'd in part and rev'd. in part 149 N.J. Super. 346 (App. Div. 1977), further aff'd in part and rev'd. in part 78 N.J. 1 (1978). In Galloway the Commission had found that a unilateral alteration of shift hours related to terms and conditions of employment and, upon finding a violation of §5.4(a)(5) of the Act, the Commission ordered restoration of the status quo. The Appellate Division affirmed the Commission in this respect, finding that the alteration of the working day effected changes in terms and conditions of employment, and that the implementation of the changes had a chilling effect on collectively negotiated rights, amounting to a refusal to negotiate in good faith (149 N.J. Super. at 351). Although there was no appeal to the Supreme Court from this aspect of the decision of the Appellate Division, the Supreme Court

nevertheless noted its agreement with the resolution of this issue in the court below: 78 N.J. at 8.[7/]

In Clifton Board of Education, P.E.R.C. No. 80-104, 6 NJPER 103 (1980)(Clifton) the Commission affirmed the Hearing Examiner (H.E. No. 80-24, 6 NJPER 16), who had found a violation of §§(a)(1) and (5) of the Act when the employer in that case unilaterally changed the hours of its custodians as follows: a custodian who had been scheduled from 2:00 p.m. to 11:00 p.m. or 3:00 p.m. to 12:00 midnight was rescheduled to 9:00 a.m. to 6:00 p.m., and another custodian was rescheduled to 2:00 p.m. to 11:00 p.m. instead of 11:00 p.m. to 7:00 a.m. or 12:00 midnight to 8:00 a.m. (6 NJPER at 17). The Commission agreed with the Hearing Examiner's distinguishing of Irvington PBA Local No. 29 v. Town of Irvington, 170 N.J. Super. 539 (1979)(Irvington) on the ground that Irvington involved a change in the shift hours in a Police Department while Clifton involved a change in the working hours of custodians employed by a Board of Education. Such a distinction had been suggested by the Appellate Division in Irvington (see 170 N.J. Super. at 546). Again, the Board of Education in Clifton was ordered to restore the status quo ante as the Commission had ordered in Galloway.

7/ See also, North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (1978), aff'd. App. Div. Docket No. A-698-78 (1979)(North Brunswick).

In Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶14053 1983)(Cape May) the Commission held that the unilateral change, in work hours of maintenance employees from a 6:00 a.m. to 2:00 p.m. shift, five days per week with one hour for lunch to a 3:00 p.m. to 11:00 p.m. shift was a mandatory subject of negotiations. The County there asserted that the change had been made because its superintendent had observed that the ability to clean the facilities was greatly frustrated in the daytime by the presence of office personnel.

After making the threefold analysis dictated by the Supreme Court in Local 195, IFPTE v. State, 88 N.J. 393, 404, 405 (1982)(Local 195), the Commission in Cape May concluded that the arbitrability-negotiability of a change in hours, such as was therein involved, would not significantly interfere with the determination of governmental policy since the dominant issue involved was the concern of the maintenance employees in preserving their existing hours of employment (9 NJPER at 98). The Commission cited in support of its decision, inter alia, Englewood and Galloway.

In Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (1985), aff'g. H.E. No. 85-32, 11 NJPER 190 (1985)(Elmwood Park), the Commission found that the Board violated §§5.4(a)(1) and (5) of the Act when it unilaterally changed the shifts of its maintenance employees from 7:00 a.m. to 4:00 p.m. and 3:00 p.m. to 11:00 p.m. to a new schedule of 3:00 p.m. to 12:00 midnight. The Commission, citing Section 5.3 on proposed new work rules, and the

cases of Englewood, Cape May and North Brunswick, held that hours of work are a fundamental term and condition of employment. See also, State of New Jersey (CWA & Local 195), P.E.R.C. No. 86-64, 11 NJPER ___ (10/18/85) and In re Township of Mt. Laurel, P.E.R.C. No. 86-72, 11 NJPER ____ (11/19/85).

The Commission noted, also, that the contract did not clearly and unequivocally authorize the change, Sayreville Board of Education, P.E.R.C. No. 83-105, 9 NJPER 138 (1983); and ordered the restoration of the status quo ante and negotiations.

In the instant case the collective negotiations agreement (J-1) likewise does not provide any basis for finding a waiver by AFSCME of its right to contest, in this forum, the decision of the Township to unilaterally place the Sewage Plant Operators on a rotating shift. For example, Article II, "Management Rights," recites only that the Township has retained the right to "select, schedule and direct the working forces...except as they may be otherwise specifically limited in this agreement or by law." This provision by its terms does not give the Township the right to change from permanent shifts to rotating shifts without negotiations. Additionally, Article VI, "Hours of Work," fixes the workweek except for "employees in continuous operations." This, however, does not in any way cover the situation of a change from a permanent shift arrangement to a rotating shift arrangement. Similarly, the provision in Article VI on "continuous operations" affords no basis for unilateral action in shift changes by the

Township since it merely defines "continuous operations" as those employees who work other than regular workhours and who "on a rotation basis" must have their schedules arranged so that they will have an equal share of Saturdays and Sundays off throughout the year. It is noted that Article III, "Seniority," provides in §IG that where there is more than one shift a day within a classification those employees will be given shift preference on a seniority basis for vacancies or changes in the number of positions. If this latter provision is to mean anything it contradicts the Township's assertion that it has the right to change unilaterally to rotating shifts since there could be no implementation of seniority preference in the context of a rotating shift.

Thus, the Hearing Examiner concludes that there has been no contractual waiver by AFSCME of its right to negotiate with the Township prior to implementation of the latter's decision to change from permanent shifts to rotating shifts for its Sewage Plant Operators: North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978).

The parties in their oral argument addressed the case of Clementon Sewerage Authority, P.E.R.C. No. 84-49, 9 NJPER 669 (1983), aff'g. H.E. No. 84-19, 9 NJPER 624 (1983). In that case the Commission found a violation of §§(a)(1) and (5) of the Act when the employer unilaterally changed the work schedule of Plant Operators so that one operator on a rotating basis worked from 8:00 a.m. to

4:30 p.m. Wednesday through Sunday and the remaining Plant Operators worked the traditional workweek of Monday through Friday. The employer argued that the change to a staggered workweek reduced the amount of overtime expense and provided for better and more reliable coverage on Saturdays and Sundays. The Commission, in affirming its Hearing Examiner, cited numerous decisions of the Courts and the Commission in support of the necessity of a public employer to negotiate prior to unilateral implementation of changes in the workweek schedule. See, for example, Borough of Roselle v. Roselle Borough PBA, Local No. 99, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980)(Roselle), aff'd. App. Div. Docket No. A-3329-79 (1981) and Ocean County Board of Health, P.E.R.C. No. 82-6, 7 NJPER 441 (¶12196 1981)(Ocean County). In Clementon, the Commission ordered the restoration of the former workweek schedule and negotiations with AFSCME concerning any proposed changes in the workweek schedule prior to implementation.

In conclusion, the Hearing Examiner here notes that the need for training has existed for more than four years, beginning prior to 1980 and the problems with DEP for almost as long. Therefore, I find no circumstances which operate to prevent a finding of a violation of the Act. Compare: Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (1981). Also, there is no issue of the appropriate level of manning as was the situation in City of Northfield, P.E.R.C. No. 82-95, 8 NJPER 277 (1982).

CONCLUSION OF LAW

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following conclusion:

The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally, and without prior negotiations with AFSCME, instituted a rotating shift for its twelve Sewage Plant Operators effective January 28, 1985.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with AFSCME with respect to changes in the shifts of its Sewage Plant Operators.

2. Refusing to negotiate in good faith with AFSCME concerning terms and conditions of employment, including the implementation of changes in the shift hours of its Sewage Plant Operators in the negotiations unit represented by AFSCME.

B. That the Respondent Board take the following affirmative action:

1. Immediately restore the status quo ante as of January 28, 1985, with respect to the shift hours of the Sewage Plant Operators whose shifts were changed on January 28, 1985 and

thereafter negotiate in good faith any proposed changes in the shifts of the affected Sewage Plant Operators with AFSCME prior to implementation.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

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

Judith E. Mollinger
Hearing Examiner

Dated: December 24, 1985
Trenton, New Jersey

Appendix A

NOTICE TO ALL 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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with A,SCME with respect to changes in the shifts of our Sewage Plant Operators.

WE WILL NOT refuse to negotiate in good faith with AFSCME concerning terms and conditions of employment, including the implementation of changes in the shifts of Sewage Plant Operators in the negotiations unit represented by AFSCME.

WE WILL immediately restore the status quo ante as of January 28, 1985 with respect to the shifts of the Sewage Plant Operators whose shifts were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shifts of our Sewage Plant Operators with AFSCME prior to implementation.

TOWNSHIP OF HAMILTON
(Public Employer)

Dated _____ By _____
(Title)

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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 Telephone: (609) 292-9830