

P.E.R.C. NO. 91-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Respondent,

-and-

Docket No. CO-H-89-303

KEARNY PBA LOCAL 21,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Kearny PBA Local 21 against the Town of Kearny. The charge alleges that the Town violated the New Jersey Employer-Employee Relations Act when it unilaterally required police officers to drive ambulances in emergencies, and failed to negotiate over the impact of those duties. The Commission finds that the assignments were consistent with the parties' practice and did not unilaterally change any terms and conditions of employment.

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Charging Party.

Appearances:

For the Respondent, Cifelli & Davie, attorneys
(Kenneth P. Davie, of counsel)

For the Charging Party, Schneider, Cohen, Solomon, Leder
& Montalbano, attorneys (David S. Solomon, of counsel)

DECISION AND ORDER

On April 14, 1989, Kearny PBA Local 21 filed an unfair practice charge against the Town of Kearny. The charge alleges that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when it unilaterally required police officers to drive ambulances in emergencies, and failed to negotiate over the impact of those duties.

^{1/} The charging party inadvertently listed subsections 5.4(b)(1) and (5). Subsections 5.4(a)(1) and (5) 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. (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...."

On July 25, 1989, a Complaint and Notice of Hearing issued. On August 4, the Town filed an Answer asserting that the assignment of ambulance driving is a managerial prerogative.

On October 20, 1989, Hearing Examiner Margaret A. Cotoia conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by January 31, 1990.

On August 21, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-5, 16 NJPER ____ (¶____ 1990). She found that assignment of police officers to drive ambulances in emergencies was consistent with the parties' past practice. She also found that the PBA never sought negotiations over any severable issues.

On September 17, 1990, after an extension of time, the PBA filed exceptions. It disagrees with the Hearing Examiner's finding that police officers had been assigned occasional ambulance duty after 1980 when a volunteer ambulance service was created. It argues that the assignment of duties unrelated to police work is mandatorily negotiable; no continuing emergency precluded negotiations, and the Town had to negotiate over the impact of the ambulance assignment.

On October 2, 1990, after an extension of time, the Town filed a reply urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-9) are accurate. We incorporate them here. We specifically adopt her finding that police officers occasionally performed ambulance duty after the volunteer service was created. The police chief testified that after 1980, police officers had "assisted in the ambulance." The PBA's president contradicted that testimony. The Hearing Examiner credited the chief's testimony and we have no basis to disturb that determination. We note also that before 1980, police officers drove ambulances regularly.

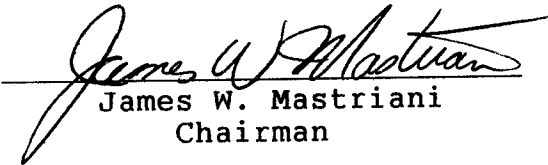
Given these facts, we find that the Town did not violate any negotiations obligation when it assigned police officers to perform occasional ambulance duties. Those assignments were consistent with the parties' practice and did not unilaterally change any terms and conditions of employment. See N.J.S.A 34:13A-5.3; cf. Phillipsburg Bd. of Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989).

We also dismiss the allegation concerning negotiations over issues related to the assignment of ambulance duties. We have found no change in any mandatorily negotiable terms and conditions of employment. The Hearing Examiner found that the PBA did not seek negotiations over any other issues. Absent a request, the Town had no obligation to negotiate any other issues.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Reid and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: Trenton, New Jersey
October 26, 1990
ISSUED: October 26, 1990

H.E. NO. 91-5

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

In the Matter of

TOWN OF KEARNY,

Respondent,

-and-

Docket No. CO-H-89-303

KEARNY PBA LOCAL 21,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss an unfair practice charge alleging that the Town of Kearny unilaterally assigned ambulance duty to police officers without negotiations.

The Hearing Examiner finds that police officers driving ambulances in emergencies, which was defined as a shortage of volunteers, was a past practice. The Hearing Examiner also finds that PBA Local 21 never made a demand to negotiate any severable, ambulance-related issues.

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.

H.E. NO. 91-5

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

In the Matter of

TOWN OF KEARNY,

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Docket No. CO-H-89-303

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Appearances:

For the Respondent
Cifelli & Davie, attorneys
(Kenneth P. Davie, of counsel)

For the Charging Party
Schneider, Cohen, Solomon,
Leder & Montalbano, attorneys
(David S. Solomon, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On April 14, 1989, Kearny PBA Local 21 ("Local 21") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). Local 21 alleges that the Town of Kearny ("Town") 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 required police officers to receive ambulance training and drive ambulances in emergencies. Local 21 contends that the Town's failure to bargain over the impact of the order and the additional workload caused by ambulance duty is an unfair practice.

A Complaint and Notice of Hearing issued on July 25, 1989. On August 4 the Town filed an Answer denying all allegations of the Charge and asserting that requiring police officers to drive ambulances is a managerial prerogative.

On October 20, 1989, I conducted a hearing.^{2/} The parties examined witnesses and introduced exhibits.^{3/} Post-hearing briefs were filed by January 31, 1990.^{4/}

^{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. (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/} "T" refers to the hearing transcript dated October 20, 1989.

^{3/} Exhibits are designated as follows: Joint exhibits are "J", Local 21's exhibits are "CP" and the Town's exhibits are "R".

^{4/} Local 21 attached a New Jersey Department of Personnel job description for police officer to its brief and labeled it "Exhibit A". By letter of January 30, 1989, the Town objected to any consideration of Exhibit A since it was not introduced into evidence at hearing. I sustain the objection. Exhibit A cannot be considered in this report since it was not submitted at hearing and no provision was made on the record for its submission with the post-hearing brief.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Local 21 represents a unit of all Kearny police officers below the rank of sergeant. The Town and Local 21^{5/} are parties to a contract that expired on December 31, 1988 (J-1).^{6/}

2. Before 1980, Kearny police officers drove ambulances regularly (T16-T17, T20, T74). Six or seven officers were assigned to ambulance duty, working in shifts of two (T74). The Kearny Volunteer Emergency Rescue Squad ("KVERS") was started in 1980-81 to operate ambulances (T14, T20, T74). The parties have not negotiated ambulance duty for police officers since the KVERS was created (T17).

3. Chester Bielski ("Bielski") is the Kearny Chief of Police. He has been a member of the department, holding various ranks, for 27 years (T71-T72). Clifford A. Melesky ("Melesky") is a police officer employed by the Town of Kearny and has been the President of Kearny PBA Local 21 for the past five years (T12).

4. After the KVERS was formed police officers were relieved of most ambulance duty (T74). Although the KVERS continued

^{5/} The parties stipulated that the Town is a public employer within the meaning of the Act and that Kearny PBA Local 21 is a public employee representative within the meaning of the Act.

^{6/} There is an amendment to that contract which the parties agree does not affect the issues in the Charge.

to handle most ambulance duties from its creation until March 1989, there were occasions where police officers assisted with ambulance duty (T75).^{7/} Bielski characterized ambulance duty for officers as a "continued assigned duty" (T84). Bielski stated that:

"In fact, the police officers have been performing ambulance duty from the time I came on the job until now. It's just that with the advent of the volunteers, most of the ambulance work was done by the volunteers and there have been instances over the last eight years which I'm sure the PBA is aware of where police officers have assisted in the ambulance." (T92).

Melesky contradicted Bielski's testimony that police officers performed ambulance duty after the KVERS was created. On direct examination, Melesky stated that during his tenure as PBA President it has not been the function of officers to operate ambulances (T14). However, since Melesky testified that the KVERS operated ambulances (T14), I find that Melesky was referring to the regular, day-to-day operation of ambulances rather than occasional operation. On cross examination, Melesky was asked if "...for more than eight years now, the patrolmen haven't driven ambulances at all...?", to which he responded "that's right" (T21). Melesky did not elaborate on this response either on cross or redirect examination and I do not credit it to mean that police officers did not occasionally drive ambulances. Bielski's assertions that police officers occasionally drove ambulances after the KVERS was formed

^{7/} Bielski also testified that there are police officers who are KVERS members, but I find this as an aside, without relevance to his testimony that officers have assisted with ambulance duty after the KVERS was created.

appear throughout his testimony on direct examination (T74, T75, T76) even in response to questions that do not address the subject directly (T84, T92). Bielski did not contradict his testimony on cross-examination. I credit it. Based on the above testimony, I find that police officers were assigned occasional ambulance duty after the creation of the KVERS.

5. Bielski learned in March 1989 that there was a shortage of KVERS volunteers and that the squad could not always perform ambulance duties. The Town relied more on mutual aid pacts with other communities and Bielski became concerned with the ability of the KVERS to respond to emergencies (T75). Bielski, the KVERS and police department administrators met and decided to implement an order allowing police officers to be trained as ambulance drivers. Officers would drive ambulances when only one KVERS member was available and in emergencies (T76). The order formalized the eight or nine year department practice of police officers assisting the KVERS when it was understaffed (T76).

6. On March 22, 1989, Bielski issued the order to all personnel regarding ambulance training (CP-1). The order stated that "It is now necessary to train members of this department in the operation of Kearny ambulances. In certain emergencies police officers may be called upon to drive ambulances." The order provided for assignment to a 45 minute training session conducted by members of the KVERS and stated that "After completion of training police personnel may be utilized only in bona fide emergencies."

Bielski did not discuss the order with Melesky before he issued it. Melesky did not know that police officers would be trained and used as ambulance drivers until he read Bielski's order (T13).

7. Melesky and Bielski discussed the order shortly after it issued. Melesky told Bielski that ambulance service was not part of assigned police duties and that police officers did not want to be involved (T13). Bielski stated that he was responsible for protecting the Town and that police officers would have to operate ambulances in emergencies (T14). Bielski explained that emergencies would be determined by a two part test - when there was only one ambulance squad volunteer available and that officers would only be used in emergency situations (T76-T77). However, Bielski never defined emergency situations beyond a shortage of volunteers (T14, T29-T30, T76-T77).

8. Since the ambulance order issued, officers have operated ambulances when the KVERS was understaffed (T17). When police officers go on ambulance runs, there is at least one member of the KVERS present (T39). Officers drive ambulances and assist KVERS members with carrying patients (T17-T18, T40, T80). Officers assist on emergency runs which both Melesky and Bielski defined as when the KVERS is short of people (T17, T77). Bielski's definition of emergency is not related to the nature of an ambulance call, which would be impossible because calls are not classified as emergency or non-emergency when they come in (T45-T46). Bielski stated that he was not aware that officers were used for

non-emergency situations such as routine transportation and that alleged use of officers for non-emergencies was never brought to his attention (T77).^{8/} I credit Bielski's testimony that officers were used for emergencies only and that emergency was defined as a shortage of KVERS volunteers.

9. After Bielski issued the ambulance order, most of the police officers were trained by KVERS members who taught them to drive ambulances. The training sessions lasted 45 minutes and were conducted during regular work hours (T22).

10. From January 1, 1989 to October 17, 1989, there were 2,322 ambulance runs in the Town of Kearny. Police officers were used on ambulance runs 37 times (R-2, T79).^{9/} The types of duties officers performed on ambulance runs is not reflected in R-2 (T80). The ambulance runs averaged under one hour (T80).

11. Some Kearny police officers perform non-traditional police duties. Twelve officers hold the titles of mechanic, carpenter, dispatcher, records room clerk, administrative clerk and

^{8/} Melesky considers emergencies as transport to the hospital and non-emergencies as transportation to a doctor's office (T19-20). However, Melesky has not driven an ambulance since the March 1989 order was issued (T21) and could not distinguish between calls where officers drove and those where officers lifted patients (T46).

^{9/} R-2 is an October 17, 1989 letter from Captain Jerry Calabrese of the KVERS to Bielski listing the number of ambulance runs for 1989 and the number of runs on which an officer assisted. It is not clear if officers were used on 37 runs from January 1, 1989 to the date of R-2 or from the effective date of the order (April 1, 1989) to the date of R-2.

maintenance employee (T84, T27, T91). The police department rules and regulations (R-1) list neither these duties nor ambulance driving (T73, T22). Bielski considers ambulance driving a regular police duty, equivalent to the above-duties. He characterizes ambulance duty as related to an officer's duty to protect the life and health of Kearny citizens (T92). Bielski stated that the ambulance order was issued consistent with past practice and with the other jobs listed above (T92). Melesky does not believe ambulance driving is part of police officers' assigned duties, although he described officers' duties as including "any other police related function" (T25).

12. If Local 21 had the opportunity to negotiate with the Town regarding officers performing ambulance duty, it would seek to negotiate over insurance to protect from lawsuits, pension coverage, coverage of the differential between ordinary and accidental disability,^{10/} additional compensation for additional duties, proper training by qualified instructors, compensation for that training if it is outside of the regular work day, proper protective

^{10/} Melesky stated that compensation for injuries incurred when working on any duty assigned by the police department, including ambulance duty is covered by accidental (2/3 of an employee's salary) or ordinary (40% of an employee's salary) disability and the Division of Pensions determines which type of disability shall apply (T28, T32). Melesky would like to negotiate with the Town concerning payment of the difference between 40% and 2/3's disability in cases where an officer is awarded the lower sum for an injury incurred while on ambulance duty (T36). He is concerned that officers who are injured on ambulance duty could be awarded the lower amount (T45).

equipment and clothing and training for handling aids patients (T15-T16). The Town did not negotiate any of these items before it implemented the ambulance order (T16). There is no record evidence that Local 21 demanded to negotiate any of these items after Bielski issued the ambulance order.

Analysis

Local 21 alleges that the Town violated subsection 5.4(a)(5) of the Act when it issued the ambulance order without negotiations. In order to find that an employer violated its obligation to negotiate, an employee representative must prove that a change occurred in a term and condition of employment without negotiations. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985); State of New Jersey (Ramapo State Coll.), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985). Local 21 contends that the order requiring police officers to drive ambulances and receive ambulance training was such a unilateral change. The Town contends that Bielski's order memorialized an existing past practice of occasional ambulance driving by police officers and was not a change in terms and conditions of employment.

A past practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part 180 N.J. Super 440

(1981). If an employer unilaterally changes a term and condition of employment, it has the burden to negotiate prior to the change. However, when an employer makes no change in an existing practice and does not increase or change employee duties, then the employer has no obligation to negotiate.

The parties' contract (J-1) is silent on the issue of police driving ambulances. If the contract is silent, past practice prevails and I must define that past practice as determined by the conduct of the parties. Kearny police officers drove ambulances regularly before 1980. After the KVERS was formed, police officers were assigned to drive ambulances on an occasional basis from 1980 to 1989 when there was an emergency, which was defined as a shortage of volunteers. I find that the occasional driving of ambulances in emergencies by Kearny police officers was a past practice.

Bielski's order required police officers to drive ambulances in "certain emergencies." Since Bielski issued the ambulance order, police officers have operated ambulances when the KVERS is understaffed, which Bielski defined as emergency situations. This is not different than the parties' past practice of using officers when there was a shortage of KVERS volunteers. Both the parties' definition of emergency as a shortage of volunteer drivers and the use of police officers in emergencies are consistent before and after Bielski's order. After the order issued, police officers were used on less than two and one-half percent of all

Kearny ambulance runs.^{11/} I find that the occasional, emergency use of officers to drive ambulances after Bielski's order was consistent with the parties' past practice.

The only element of Bielski's order that deviated from the established practice of using police officers to drive ambulances was its training requirement. However, the training was one 45 minute session on paid work time. The training did not increase or change the ambulance assignment duties which pre-existed the order. It is the only change from past practice and is at most de minimis.^{12/} I find that Bielski's order memorialized the existing past practice of occasional ambulance driving by police officers in emergency situations.

^{11/} According to R-2, there were 2,322 ambulance runs in the Town of Kearny from January 1, 1989 to October 17, 1989, and police officers were used on runs 37 times as of the latter date. It is not clear if police officers were used on 37 runs from January 1, 1989 to October 17, 1989 or if officers were used 37 times from the effective date of Bielski's order (April 1, 1989) to October 17, 1989. If police officers were used on 37 runs from January to October of 1989, they were used on .016% of all ambulance runs. If officers were used on 37 runs from April to October of 1989, the average of 8 runs a day (the total number of runs divided by the number of days from 1/1/89 to 10/17/89), times the number of days from 4/1/89 to 10/17/89 (200) is 1600 runs. If officers were used on 37 ambulance runs from the date of Bielski's order, they were used on .023% of Kearny ambulance runs. Using either calculation, officers were used on less than 2.5% of Kearny ambulance runs.

^{12/} The Commission has found that changes resulting in slight increases in workload are de minimis. See Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 87-41, 12 NJPER 804 (¶17307 1986); Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 82-84, 8 NJPER 220 (¶13089 1982); Pompton Lakes Bd. of Ed., P.E.R.C. No. 82-85, 8 NJPER 221 (¶13090 1982); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980).

My finding of past practice is limited to the use of police officers to drive ambulances when there is a shortage of KVERS volunteers. The Town cannot use police officers for ambulance duty beyond the narrow definition of the parties' past practice without negotiation.^{13/}

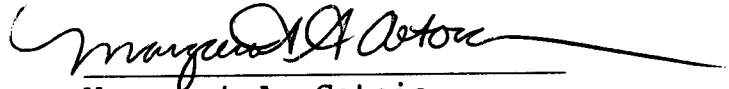
Although the Town did not have an obligation to negotiate over an order that memorialized past practice, Local 21 argues that the Town should have negotiated over items related to the impact of ambulance duty, including training, insurance, pension coverage, compensation, equipment and clothing. A majority representative has the obligation to initiate negotiations over any severable issues. Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987). Local 21 had an obligation to demand negotiations over impact related items. There is no record evidence that it did so after the ambulance order was issued. Although Local 21 filed this charge, the filing of an unfair practice charge does not constitute a request to negotiate. Willingboro Bd. of Ed., P.E.R.C. No. 89-43, 15 NJPER 692 (¶20280 1989); Trenton; Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 509 (¶15625 1984). Therefore, in the absence of a demand to negotiate impact items by Local 21, I cannot find a

^{13/} An employer retains the right to temporarily assign personnel to meet emergent staffing requirements. Bor. of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). Therefore, to the extent that the Town might experience greater emergent conditions than a shortage of KVERS volunteers, it retains the right to use police officers to meet its emergent needs prior to negotiations.

violation. However, the parties are not precluded from negotiating ambulance-related terms and conditions of employment in negotiations for a successor agreement.^{14/}

CONCLUSION

I recommend that the Complaint be DISMISSED.


Margaret A. Cotoia
Hearing Examiner

DATED: August 21, 1990
Trenton, New Jersey

^{14/} See Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981).