

H.E. NO. 2005-8

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

In the Matter of

CITY OF CAPE MAY,

Respondent,

-and-

Docket Nos. CO-2004-029

PBA LOCAL NO. 59,

Charging Party.

Appearances:

For the Respondent,
Anthony P. Monzo, Esq.

For the Charging Party,
Loccke & Correia, attys.
(Charles E. Schlager, Jr., of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 21, 2003, PBA Local No. 59-Cape May Unit, filed an unfair practice charge (CO-2004-029) against the City of Cape May. The charge alleges that on February 5, 2003, the City and the PBA executed a collective agreement extending from January 1, 2003 through December 31, 2006. The agreement sets forth "8-hour work periods," pursuant to Article 5, paragraph A. The parties allegedly "engaged in discussions of [changes to] work shift" after signing the agreement. On March 25, 2003, City Mayor Jerome Inderwies allegedly issued a memorandum ". . .unilaterally altering the manner and calculation in which police officers

would be compensated for overtime." The change allegedly repudiates the parties' agreement and long-standing practice.^{1/}

The charge also alleges that on April 16, 2003, the parties negotiated regarding work shift, compensation and senior officer pay and "verbally agreed" to "permit the City Police Department to implement a [12-hour] new work schedule prior to formal adoption and execution." City counsel was allegedly permitted "to draft either an addendum to the current contract or an entire new contract for signature. . . ." On June 4, 2003, the City allegedly issued a letter to the PBA advising of matters "on which the parties needed to agree" and on "disputed conclusions of law on work schedules and overtime." On June 6, the PBA issued a letter to the City, advising that there was "no agreement or resolution." On June 9, the parties allegedly met again and did not agree to terms. On the same date, the City issued a letter to the PBA advising that it would "revert to an eight-hour day," pursuant to the contractual work schedule. Police Chief Sorantino allegedly confirmed in a memorandum the reversion to an 8-hour workday. On June 11, 2003, the Chief allegedly issued another memorandum advising that the City would not revert to the 8-hour shifts and would ". . . continue to follow the 12-hour workday schedules."

^{1/} This allegation was withdrawn, pursuant to the PBA's request, at the hearing on May 10, 2004.

The PBA alleges that the City "repudiat[ed] contractual terms" and "refused to negotiate in good faith," violating 5.4a(1), (2), (5), and (7)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

On August 21, 2003, the PBA filed another unfair practice charge (CO-2004-054) against the City. The charge alleges that on July 3, 2003, the City repudiated the parties' collective agreement and violated a practice by unilaterally changing "the manner in which 'court time' is calculated." The next day, the City allegedly repudiated the agreement and violated a practice by unilaterally paying a regular pay rate instead of a premium rate to officers working in excess of the 84-hour work period. The City's actions allegedly violate 5.4a(1), (2), (5), and (7) of the Act.^{3/}

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

3/ This charge was withdrawn, pursuant to the PBA's request, at the hearing on May 10, 2004.

On January 15, 2004, a Complaint and Notice of Hearing and an Order Consolidating Cases issued. On January 30, 2004, the City filed an Answer, contending that the work shift change (alleged to have violated the Act in CO-2004-029) is an exercise of a managerial prerogative which increased efficiency, improved service, and reduced costs. The City also denied violating the Act regarding payment of overtime compensation. The City contends that "all officers have been paid-in-full based on a calculation of overtime using hours scheduled."

On May 10, 2004, I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs were filed by August 9, 2004.

Based on the record, I make the following:

FINDINGS OF FACT

1. Representatives of Local 59, PBA, and the City of Cape May signed a collective negotiations agreement extending from January 1, 2003 through December 31, 2006 (J-A).^{4/} Article 1 of the agreement (Recognition) provides that the PBA represents all city patrol officers and sergeants.

2. Article 5 - "Hours of Work-Overtime" of the agreement defines the unit members' work schedules and sets forth a

^{4/} "J" represents exhibits submitted jointly by the parties, followed by a letter designated to each exhibit. "T" represents the transcript of the hearing, followed by the page number(s).

formula for overtime calculations, among other provisions. The section provides:

A. Work Schedule: The work schedule for the duration of this contract shall be as follows:

1. The present normal police work schedule shall consist of three (3) rotating forty (40) hour shifts of five (5) eight (8) hour work periods, including a forty-five (45) minute meal break and one fifteen (15) minute 'on-call' coffee break. So long as this work schedule remains in effect, the work periods of each shift shall commence at 8:00 a.m. (8-4), 4:00 p.m. (4-12), and midnight (12-8).
2. There shall be no minimum number of hours off between work periods or shift. However, there shall be no systematic or regular pattern of changes in scheduled work periods or shifts, which will result in an unreasonable number of hours off between scheduled work periods or shift.
3. The days off at the end of the five (5) work periods shall be consecutive. It is understood that so long as the current work schedule remains in effect, officers are scheduled to have forty-eight (48) hours off duty between 4-12 and 12-8 shifts, seventy-two (72) hours off duty between the 12-8 and 8-4 shifts, and forty-eight (48) hours off duty between the 8-4 and 4-12 shifts.
[J-A]

B. Overtime. The hourly rate, on which the overtime (x1.5) rate is to be calculated, shall be the employee's gross pay (base+longevity+holiday pay) divided by two thousand eighty (2,080) hours.

1. Employees covered by this agreement will be paid at the time and one-half (1.5) rate for the number of hours actually worked in excess of forty (40) hours on any shift.

C. Hold-Overs: In computing overtime payment, in accordance with Paragraph B above, no compensation shall be paid for up to thirty (30) minutes and one (1) hour compensation shall be paid for over thirty-one (31) minutes.

D. Recall To Duty: If an employee is recalled to duty, he shall receive a minimum guarantee of three (3) hours compensation at the premium rate set forth in Paragraph B provided said recall duty is not contiguous with the employee's normal shift. Should the employee be called out twice within the same three (3) hour period, he shall receive only one, three (3) hour minimum guarantee[d] compensation.

E. Pay Schedule: Overtime compensation shall be paid as submitted each pay period. [J-A]

3. Before 2002, the City employed 17 patrol officers (T46). In January 2002, the City hired 5 additional officers, pursuant to interlocal service agreements with contiguous municipalities, West Cape May and Cape May Point (T23; T46).^{5/} Two of the five

^{5/} On direct examination, Chief Diane Sorantino testified that before 2002, the City employed 12 patrol officers - 3 per shift on 4 shifts (T21, T23, T25). She also testified that in January 2002, 4 additional officers were hired (T21, T23). The number of patrol officers employed by the City before and after January 2002 is not disputed. I credit Chief Sorantino's cross-examination testimony because I infer that she intended to amend or correct her earlier testimony, which may have accurately reported the number of city patrol officers sometime before 2002.

added officers had been employed by West Cape May, where they had worked 12-hour shifts (T48; T49). From May through September in any given year, the City employs 10 to 15 "class two" (firearm-carrying) officers and 2 to 30 "class one" (not firearm-carrying) officers, "depending on how things pan out", according to Chief of Police Diane Sorantino (T47-48).

4. On an unspecified date in January 2003, patrol officer and PBA Local 59 representative Tony Genaro asked Sorantino to consider changing the then-current and long-standing patrol officer work schedule of 8-hour per day rotating shifts to 12-hour shifts. Sorantino replied that research on such a change was needed (T12; T18).

The PBA formed a committee to assess a possible change to 12-hour shifts (T83). Chief Sorantino separately consulted several individuals, among them an encouraging police captain of nearby shore municipality Stone Harbor Borough, which successfully used the 12-hour shift for many years (T18; T19). Most of the parties' subsequent meetings on the concept of the 12-hour shift were attended by Sorantino and Genaro only (T19).

Genaro told Sorantino that the officers wanted the shift change. He also reported that under the 12-hour shift schedule, officers would work fewer midnight shifts than they did under the 8-hour shift schedule; they would have every other weekend off-duty; and that their morale will improve (T24; T26).

Chief Sorantino understood that under a 12-hour shift schedule, eight or more officers in two squads were on-duty and eight or more officers in two squads were off-duty. In her view, fewer shift changes would mean less "lost" time during changeovers than occurred on the 8-hour rotating shift schedule (T22). The 12-hour shift schedule would also create a larger pool of available overtime assignees than was available under the 8-hour shift schedule (T24). Sorantino testified:

[A]ll the research or information that I received and that officer Genaro conveyed to me was how positive this [change to 12-hour shifts] would be, what a benefit this would be to the officers. [T25]

I credit her unrebutted testimony.

5. Chief Sorantino asked City Administrator Luciano Corea, Jr. "what we would have to do to make [the change to 12-hour shifts] happen" (T19). In particular, they discussed compensation for "the extra 104 hours that were going to be worked in the course of that year" (T26). She explained in later testimony that the 12-hour shift schedule required officers to work 104 hours more annually than they worked under the 8-hour shift schedule (T54). City representatives believed that the 12-hour shift was an "opportunity to cut costs . . . [specifically] court time, compensatory time-off payments, and sick leave time-off . . ." (T27; T53). From 2000 to 2003, the City paid "significant" overtime compensation to officers working the

8-hour rotating shift schedule (T54).

Sorantino recalled no citizen complaints about departmental performance, nor any inherent "problems" with the 8-hour shift schedule (T52; T57; T58). She admitted that it had "worked for many years, [including] 2002" (T52).

6. In or around February 2003, the parties signed a successor collective agreement extending from January 1, 2003 through December 31, 2006 (T84; J-A). The parties had not "discussed" the work schedule in their negotiations leading to the agreement, according to PBA representative Genaro (T85). I credit Genaro's un rebutted testimony, and infer that the parties had not negotiated regarding any proposal to alter the work schedule provision (See finding no. 2).

7. On an unspecified date in February or March, 2003, City Administrator Corea met with PBA counsel and representatives Genaro and (officer) John Campbell to discuss changing to 12-hour shifts (T79-T80). On or about the same date, the PBA presented an unexecuted "memorandum of agreement" to City representatives (T88; T92). The memorandum, subject to separate ratifications, proposed a revised "work schedule" article which by its terms was to ". . . have the effect of being part of the collective bargaining [agreement] and remain in effect . . . unless specifically revised through negotiations" (J-C). The article set forth that "the regular work week . . . shall consist of

twelve hour days of work followed by [an unspecified number of] days off of work over a fourteen day work cycle. . . ." The third paragraph provided:

This work schedule produces one hundred four (104) hours of scheduled work per year over and above the typical 40-hour work week. This time shall be reflected in the negotiated wage schedule and/or in special compensatory time to be determined by the parties. [J-C]

Other provisions concerned overtime compensation, leave time-off and a maximum number of work hours in any twenty-four hour period.

8. City representatives did not sign the proposed memorandum. On or around the date of the meeting, the PBA, particularly representative Genaro, was "comfortable" about going to a 12-hour shift because "we thought we could move forward" (T87). Genaro testified:

When we left the meeting and it was just myself and John [Campbell] and [PBA counsel], we felt comfortable enough to present it to the Board or to the rest of the guys to move forward. [T95]

Chief Sorantino did not attend the meeting but believed or understood that a "verbal agreement" had been reached on "economic terms" by the parties (T29).

9. On an unspecified date not long after the meeting, the PBA and the patrol officers were advised that the City "would be switching to the 12-hour shift" (T80). Representatives Genaro

and Campbell promptly spoke with Mayor Jerome Inderwies and City Administrator Corea, complaining that "nothing was in writing and that [the PBA] wanted something in writing prior to the officers [having to work] the schedule" (T81). The parties discussed "economic terms" or "financial issues" (T82). No evidence indicates that the parties signed a document memorializing any or all terms and conditions of employment attendant to an implementation of a 12-hour shift schedule for patrol officers.

10. On or about April 20, 2003, the City implemented a 12-hour work schedule for patrol officers (T85). The implementation was approved by the Mayor, City Administrator and Chief Sorantino (T28). It was unopposed by the PBA. Genaro testified: "We had some verbal terms in place so that we could move forward with the 12-hour shift" (T85). He also believed that the terms "would be put into the form of a contract" (T86). The record does not reveal what specific "terms," if any, were "in place" by April 20. On April 23, Chief Sorantino issued a memorandum to Genaro memorializing their discussion of the number of and length of time for break periods for officers on the 12-hour shift (J-F). Genaro and Sorantino "discussed other items that came about as [they] went along. . ." (T34). I infer that after April 20, 2003, Genaro and Sorantino discussed other employment matters pertaining to the 12-hour shift.

11. On May 28, 2003, City counsel issued a letter to PBA counsel requesting "discussion" of two drafts of a proposed "amended contract." The letter also requests that PBA counsel review enclosed provisions of a draft (J-F).

12. On June 4, 2003, City counsel sent a letter to PBA counsel, acknowledging receipt of his correspondence advising of "several key changes to the contract that the City of Cape May failed to negotiate with PBA Local 59." City counsel listed as "resolved" three "negotiable" issues - 104 annual overtime hours; a method for calculating overtime compensation; and a formula for incorporating paid leave into a 12-hour shift schedule. City counsel wrote that the parties had also "agreed" to elimination of a pay differential and an increase in longevity compensation; and an increase in the number of hours "permitted" for compensatory time-off. City counsel also wrote that the "economic impact from the change in work days has been negotiated in good faith" and that the only "outstanding" issue is the method for "calculating overtime" (J-G). City counsel invited further discussion.

13. On June 6, PBA counsel wrote a letter to City counsel disputing the "agreements" set forth in the June 4 letter. In pertinent parts, PBA counsel contested the legality of the City's "control [of] police work schedules," and demanded a reversion to

"the work schedule set forth in the negotiated and recently executed agreement" (J-H).

14. On June 9, City counsel wrote a letter to PBA counsel, acknowledging a recent meeting of the parties at which they were "unable to resolve the outstanding issue regarding the calculation of overtime." I infer that the parties met between June 6 and 9, 2003. City counsel wrote:

Based upon your unwillingness to resolve this matter based on terms and conditions that were previously agreed-upon, the City has no alternative but to revert to an eight-hour day pending the outcome of a Scope of Negotiations petition which I will be filing on behalf of the City. [J-I]

15. Also on June 9, Chief Sorantino issued a memorandum to all police employees advising: "Due to the fact that the PBA has failed to reach an agreement with the City based on the 12-hour workday, effective Sunday, June 15, 2003, at 0000 hours, all officers will resume an 8-hour workday" (J-J).

16. On or about the same date, Chief Sorantino, the City Administrator and City counsel discussed the reversion to the 8-hour shift (T61). Chief Sorantino generally recalled another discussion about the shift schedule with officer Genaro but did not recall if it was a "formal discussion" (i.e., negotiations among the public employer and the majority representative) (T64).

17. On June 11, Chief Sorantino issued a memorandum to all police employees advising that her June 9 memorandum was

"rescinded." She wrote: "This department will continue to follow the 12-hour work day schedule" (J-K). Sorantino testified that the PBA asked for the 12-hour shift and ". . .we're going to stay on it" (T72). She testified that the 12-hour shift was functioning well and that City representatives had "put their time and effort into it [changing and issuing schedules]" (T72, T73). I credit her testimony.

18. On June 13, City counsel wrote a letter to PBA counsel, advising that the City "decided to continue with a 12-hour work day" and that the affected officers will be compensated "based upon an 84-hour shift every two weeks." He also repeated that a Scope of Negotiations petition will be filed with the Commission (J-L).

19. Also on June 13, PBA counsel wrote a letter to City counsel, disputing in a pertinent part, "[any] government policy reason for the schedule change [to a 12-hour shift]" (J-M). PBA counsel also wrote that in light of an apparent refusal to revert to an 8-hour schedule, the PBA filed "a first step grievance" (J-M).

20. On July 28, 2003, the City petitioned for a Scope of Negotiations determination regarding a "work schedule change for police officers represented by PBA Local 59" (SN-2004-9). On August 15, 2003, the Commission Chair asked the City to explain why our Scope of Negotiations jurisdiction should be exercised,

inasmuch as no negotiability dispute arose during the course of negotiations for an agreement or no demand for arbitration of a grievance was pending pursuant to N.J.A.C. 19:13-2.2(a)(4). On August 29, the City advised:

. . . This matter involves the City of Cape May's decision to change the Cape May Police Department work schedule from an 8-hour period to a 12-hour period. The City and PBA Local 59 met on several occasions to negotiate economic terms of this work shift change. However, no agreement was reached. (emphasis added.) As a result, PBA Local 59 filed an unfair practice charge based on the work shift change. {City of Cape May, P.E.R.C. No. 2004-22, 29 NJPER 483, 484 (¶151 1003)}

On October 30, 2003, the Commission issued City of Cape May. The Commission declined to exercise its Scope of Negotiations jurisdiction and dismissed the petition.

ANALYSIS

N.J.S.A. 34:13A-5.3 requires negotiations over "terms and conditions of employment." 5.3 also provides that "when an agreement is reached on the terms and conditions of employment it shall be embodied in writing and signed by authorized representatives of the public employer and the majority representative." A public employer may violate its obligation to negotiate in good faith under section 5.3 by repudiating a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

An employer will not be liable for abrogating a contract clause if the subject matter of the provision is outside the scope of negotiations. In such unfair practice charge cases, there is no dispute over whether the employer, in fact, refused to honor the agreement. Resolving the negotiability dispute thus resolves the unfair practice charge. See City of Newark and Newark Council No. 21, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994) (app. dism. App. Div. Dkt. No. A-6524-93T1 (1/3/95)).

A subject involving police and fire employees may be mandatorily negotiable, permissively negotiable, or non-negotiable. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). A public employer faces unfair practice liability only if the dispute is mandatorily negotiable. See, e.g., Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594, 597 (¶12265 1981). Paterson, at 92-93, outlines the scope of negotiations analysis for police and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and

firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

The City of Cape May asserts a managerial prerogative to change its 8-hour work shifts for police officers to 12-hour shifts. It contends that the 12-hour shift increases efficiency, improves services and reduces costs.

The Commission has issued numerous cases governing the negotiability of police work schedules. In City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (133153 2002), the Commission granted the employer's request to restrain arbitration of a grievance contesting its order to return police officers from 12-hour shifts to 8-hour shifts. The police chief had certified that problems caused by the 12-hour shift were "insurmountable," referencing a departmental police lieutenant's letter setting forth concerns about a reduction in the number of officers on the evening shift; fatigue among officers after nine or ten hours on duty; and a lack of continuity of supervision. 28 NJPER 419. The Commission reviewed pertinent court cases and legislation:

Beginning with its first scope of negotiations case, Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973), the Supreme Court has held work hours to be a term and condition of employment requiring negotiations. See also Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589, 594 (1980); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. of Ed. Sec'ys, 78 N.J. 1, 8 (1978); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973). Recognizing that the subject of work hours encompasses work schedules setting the hours and days employees will work, the Court has held that work schedules are generally negotiable. Local 195 at 411-412. Accord Hardin and Higgins, The Developing Labor Law, 1158 (4th ed. 2001).

The Legislature has expressly designated work hours as a negotiable condition of employment for police officers and firefighters. The Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq., repeatedly refers to "hours" as an employment condition. See N.J.S.A. 34:13A-16g(2), N.J.S.A. 34:13A-16g(8), and N.J.S.A. 34:13A-21. These references embody the labor relations assumption that work hours are mandatorily negotiable.

Consistent with the Supreme Court's cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that the work schedules of police officers and firefighters are mandatorily negotiable. See Teaneck; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); Borough of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd 10 NJPER 79 (¶15044 App. Div. 1983); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd NJPER Supp.2d

129 (¶109 App. Div. 1983); Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd NJPER Supp.2d 97 (¶80 App. Div. 1981). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. See Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992). Mt. Laurel requires us to examine the facts of each case in making a negotiability determination. [Id. at 28 NJPER 420]

Relying upon the chief's unrebutted certification, the Commission found a "particularized need to change a work schedule to effectuate a governmental policy" and restrained arbitration.

The record in this matter reveals no specific operational problem with the contractual 8-hour shift schedule. Chief Sorantino conceded that it had "worked" for many years, including 2002. Unlike the effects of the 12-hour shift described in Millville, the 8-hour shift in Cape May did not subvert supervision, safety, adequate staffing or otherwise implicate a governmental policy determination.

The record demonstrates that Cape May's primary interest in the 12-hour shift is economy; the City anticipates savings in overtime, sick leave, etc. Even if the City's projections are

correct, labor cost issues alone do not make the subject of work schedules non-negotiable. Cumberland Cty., P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997). The City has also cited as an advantage of the 12-hour shift an increase in the available pool of off-duty officers that could be assigned in emergencies. The record does not indicate any instances of deficient emergency coverage. Under all the circumstances, I recommend that the City's "permanent" change to a 12-hour shift schedule was mandatorily negotiable.

The PBA has alleged that the City has "repudiated contractual terms" and violated 5.4a(5) and (1) of the Act by refusing to revert to the 8-hour shift schedule set forth in Article V of the 2003-2006 collective agreement. In Human Services, the Commission wrote that a claim of repudiation,

. . . is most clearly illustrated by an employer's decision to abrogate a contractual clause based on its belief that the clause is outside the scope of negotiations [citation omitted]. Thus, we will entertain unfair practice cases [pursuant to section 5.4a(5)] in which an employer has already repudiated a clause based on such a belief . . .

[10 NJPER 42]

The record shows that in early 2003 the parties negotiated over the change to a 12-hour shift schedule but had not agreed upon compensation. The PBA presented the City a "memorandum of agreement" for signature. On the strength of its belief in and demand for a forthcoming written agreement memorializing the new

work schedule and attendant compensation matters, the PBA consented to work the 12-hour shift schedule in April, 2003. The PBA's conduct may be characterized as an interim accommodation to the City or a temporary or conditional waiver of Article V rights, pending the execution of a written agreement. The parties continued negotiating after implementation to no avail, evidenced in part and in detail by letters between counsel from May 28 to June 9, 2003. The gist of these facts was admitted by City counsel in a letter to the Commission regarding a companion case. It was also uncontested at hearing.

The Chief's June 9, 2003 order declaring the prospective reinstatement of the 8-hour shift schedule effectively ended the PBA's period of interim accommodation to the 12-hour shift or its temporary waiver of Article V rights. The City was obligated to revert to terms and conditions in the collective agreement. Chief Sorantino rescinded her reversion order on June 11. Having found no managerial prerogative justifying its decision to maintain the 12-hour shift schedule, I recommend that the City repudiated the "work schedule" provision of the collective agreement, thereby violating 5.4a(5) and (1) of the Act.^{6/}

^{6/} The record does not indicate that the City violated 5.4a(2) and (7) of the Act. I recommend that these allegations be dismissed.

RECOMMENDED ORDER

The City of Cape May is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the work schedule provision (Article V) of the 2003-2006 collective negotiations agreement.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerns terms and conditions of employment of employees in that unit, particularly by repudiating the work schedule provision (Article V) of the 2003-2006 collective negotiations agreement.

B. Take this action:

1. Rescind Chief of Police Sorantino's memorandum dated June 11, 2003 regarding the "12-hour schedule."

2. Reinstate the "8-hour schedule" set forth in Article V of the 2003-2006 collective agreement between the City of Cape May, New Jersey and Local 59, PBA.

3. Post in all places where notices to employees are customarily posted, copies of the attached notices marked as Appendix "A". Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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



Jonathan Roth
Hearing Examiner

Dated: February 18, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 4, 2005.

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the work schedule provision (Article V) of the 2003-2006 collective negotiations agreement.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerns terms and conditions of employment of employees in that unit, particularly by repudiating the work schedule provision (Article V) of the 2003-2006 collective negotiations agreement.

WE WILL rescind Chief of Police Sorantino's memorandum dated June 11, 2003 regarding the "12-hour schedule."

WE WILL reinstate the "8-hour schedule" set forth in Article V of the 2003-2006 collective agreement between the City of Cape May, New Jersey and Local 59, PBA.

Docket No. CO-2004-029

City of Cape May
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372