

P.E.R.C. NO. 98-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Respondent,

-and-

Docket No. CO-H-96-320

KEARNY SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Town of Kearny violated the New Jersey Employer-Employee Relations Act by unilaterally changing the parties' overtime practice of assigning off-duty officers to replace absent officers. The Commission orders the Town to cease and desist from changing the overtime practice of assigning off-duty officers, negotiate in good faith with the Kearny Superior Officers Association concerning terms and conditions of employment of employees in that unit, and restore the practice of replacing an absent superior officer with an officer of the same rank rather than filling the vacant position with a lower-ranked officer in an acting capacity.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

STATE OF NEW JERSEY
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In the Matter of

TOWN OF KEARNY,

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Docket No. CO-H-96-320

KEARNY SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Boffa, Shaljian, Cammarata & O'Connor,
attorneys (Jeffrey G. Garrigan, of counsel)

For the Charging Party, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, attorneys (James M. Mets, of
counsel)

DECISION AND ORDER

On April 24, 1996, the Kearny Superior Officers Association filed an unfair practice charge against the Town of Kearny. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1), (2), (5) and (7),^{1/} by unilaterally

^{1/} 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

changing the parties' overtime practice of assigning off-duty officers to replace absent officers.^{2/}

The Association also filed a request for interim relief. On May 8, 1996, the Town agreed to the entry of an order requiring it to revert back to the procedures in effect before March 1, 1996, pending a final decision on the merits of the charge.

On July 19, 1996, a Complaint and Notice of Hearing issued. On August 8, the employer filed its Answer denying that it unilaterally changed the parties' agreed-upon overtime procedure and asserting that it had a managerial prerogative to set staffing levels.

On October 1, 1996, Hearing Examiner Robert C. Gifford conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On February 25, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-24, 23 NJPER 217 (¶28105 1997). Relying on City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), he found that the subject of the dispute was not mandatorily negotiable, but only permissively negotiable, and that, therefore, the employer did

^{1/} Footnote Continued From Previous Page

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."

^{2/} An allegation concerning a change in health benefits was deferred to binding arbitration.

not have an obligation to negotiate before deviating from its prior practice of using officers on overtime to replace absent officers of the same rank.

On March 24, 1997, the Association filed exceptions. It contends, in part, that the employer unilaterally changed the parties' agreement on overtime allocation and that the Hearing Examiner's reliance on Camden is misplaced. It argues that Camden involved procedures for assigning lower-ranked officers to higher ranks in an acting capacity, but that this case involves the replacement of officers with other officers of the same rank. It further argues that there was an agreement on the use of overtime, but that even if there was not, the employer had an obligation to negotiate before changing an established practice. Finally, the Association asserts that the Hearing Examiner failed to address the fact that the employer's motivation for the change was economic.^{3/}

On April 7, 1997, the employer filed an answering brief. It contends that there was no written agreement; the change implemented by its new police chief was on a permissive subject of negotiations and any practice is therefore not binding; and the assertion that its motivation was economic is speculative.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-10) with minor additions.

^{3/} We deny the Association's request for oral argument.

Since 1969, the patrol division has followed an overtime allocation system to replace absent officers whereby overtime is offered by rank and seniority on a rotating basis; preference is given to tour superiors in each rank. For example, if a tour captain is absent, the tour captain on the top of the tour captain's list would be offered the opportunity to replace that officer at overtime rates. Accepting or declining the overtime moves that person to the bottom of the list. If all tour captains decline the overtime, non-tour captains are offered the overtime by seniority on a rotating basis. If all captains decline the overtime, the desk lieutenant on duty becomes the acting tour captain and receives acting captain's pay. The system is applied in a similar way for other vacancies.

In 1982, then police chief Bielski began replacing tour lieutenants with sergeants rather than following the overtime allocation system. The Association grieved and the chief agreed to continue the existing system. Although the Hearing Examiner concluded that there was insufficient evidence to find that the parties then entered into a written agreement, he nonetheless found that there was an agreement to continue the system and that the chief subsequently issued a general order generally consistent with that system. To the extent the general order varied from the policy, it appears that the parties continued to follow the long-standing policy.

During the last round of contract negotiations, the Association asked that the overtime policy be placed in the contract. The employer did not have a problem with the policy, but wanted language permitting the chief to change the policy on ten days' notice. The parties ultimately agreed not to change the contract language on overtime. That language sets out compensation rates and states that, except for the traffic division, all overtime work shall be offered on a rotating seniority basis. Overtime in the traffic division is assigned first to members of that division. The contract does not quote or reference the 1982 general order or the 1969 policy.

In February 1992, a non-tour lieutenant complained to the chief about the overtime selection system. The chief responded with a memorandum explaining that overtime was distributed in accordance with his 1982 general order.

On January 23, 1996, deputy chief, now chief, Wilgus issued a standard operating procedure memorandum to the Association regarding a change in overtime policy, effective March 1, 1996. Under the new procedure, the Town could immediately fill a vacant post with a lower-ranked tour superior at acting pay rather than offer overtime to an off-duty superior officer. We add to the Hearing Examiner's findings that the chief erroneously believed that the Association had agreed to a contract provision, similar to one agreed to by the union representing rank-and-file officers, giving the chief the discretion to change the overtime allocation system

after notice to the union. The Association contract does not contain such a provision and the Association asserted that any change would be considered a contract violation.

We add also that the employer's decision to change the overtime system was motivated, at least in part, by the report of a consulting service (J-9). The consultant asked why there was not greater use of officers in an acting capacity. The chief responded that a written agreement had been made in the early 1980s with the Association. The chief was unable to find a copy of the agreement, but the consultant was given a copy of the 1982 general order. The consultant concluded that the contract did not require that only lieutenants serve as desk officers; if there was such an agreement its validity was questionable; the chief has the statutory authority to assign officers; and using a desk sergeant in an acting capacity could have substantially reduced overtime.

We add also that because the number of superior officers had been reduced, it became harder to replace absent officers with officers of the same rank (T118). In addition, part of the reason for changing the overtime system was budgetary (T115).

N.J.S.A. 34:13A-5.3 requires a public employer to negotiate before setting or changing mandatorily negotiable employment conditions. Police officers and firefighters may enter into enforceable agreements over permissive subjects of negotiations, but it is not an unfair practice for an employer to refuse to negotiate

before setting or changing permissively negotiable employment conditions. See Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78 (1981).

Since 1969, this employer has had a policy of replacing absent superior officers with officers of the same rank. Since 1982, a general order has been in effect stating such a policy. In 1996, the police chief changed the policy by issuing a new standard operating procedure. The Association alleges that the employer had to negotiate before changing the established practice. Our analysis begins with a discussion of whether the replacement/overtime practice concerns a mandatorily negotiable subject.

Camden held that the use of firefighters to temporarily fill in for absent superior officers was permissively, but not mandatorily, negotiable. In that case, the lower-ranked firefighters had been performing acting captain duties for 20 years and there was no assertion or proof that the practice had caused any operational problems. Camden is irrelevant because the Association is not seeking to enforce an agreement to have lower-ranked officers perform higher-ranked duties in an acting capacity. Instead, the Association is seeking to require the employer to negotiate before changing a practice of having superior officers of the same rank replace absent officers. In this situation, the employer and employee interests are different from those in Camden.

Employees have a negotiable interest in receiving compensation for work performed in their own job titles and overtime

compensation often forms a significant part of an employee's annual earnings. Unlike cases, like Camden, where employees are seeking to work out-of-title, employees seeking to work in-title are presumably the most qualified to perform that work and the employer's interest in using other employees in an acting capacity is primarily in saving money. That interest can be addressed through the collective negotiations process and does not automatically outweigh the employees' reciprocal interest in earning money so as to preclude negotiations. See N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (grievances challenging use of junior employees at straight-time rates rather than senior employees at overtime rates legally arbitrable). We thus hold that the overtime allocation dispute in this case is mandatorily negotiable. Accord Bound Brook Tp., P.E.R.C. No. 88-30, 13 NJPER 760 (¶18287 1987) (grievance challenging assignment of police desk duty to detective instead of to police officers in accordance with contractual overtime allocation system mandatorily negotiable); cf. City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997); (grievance challenging assignment of non-unit firefighters to replace absent superior officers at least permissively negotiable); City of Jersey City, P.E.R.C. No. 93-75, 19 NJPER 157 (¶24080 1993) (grievance challenging assignment of non-unit firefighters to replace absent superior officers at least permissively negotiable).

Having found that the issue in dispute is mandatorily negotiable, we conclude that the employer violated the Act by unilaterally changing that term and condition of employment. The prior system of replacing absent superior officers with officers of the same rank has been in effect for over 20 years. To find a violation, we need not decide whether the parties ever entered into an agreement over this issue, whether oral or written. The Association is not alleging that the employer repudiated such an agreement or seeking an order directing compliance with such an agreement for the life of the contract. Rather the Association states that we "should rule that based on the Town's economic motivation for unilaterally changing terms and conditions of employment, it was required to bargain with the Association prior to making [the] change." Brief at 14-15.^{4/}

As for the appropriate remedy, a unilateral change in a mandatorily negotiable term and condition of employment is usually remedied by an order to restore the status quo before the change.^{5/} Accordingly, we will do so in this case.

Absent any exceptions, we dismiss the 5.4(a)(2) and (7) allegations.

^{4/} We urge our Hearing Examiners to require charging parties to specify, at hearing, their exact 5.4(a)(5) claims and proposed remedies and to require respondents to specify their exact defenses.

^{5/} There is no evidence about specific economic losses to individual employees.

ORDER

The Town of Kearny 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 unilaterally changing the overtime practice of assigning off-duty officers to replace absent officers of the same rank.

2. Refusing to negotiate in good faith with the Kearny Superior Officers Association concerning terms and conditions of employment of employees in that unit, particularly by unilaterally changing the overtime practice of assigning off-duty officers to replace absent officers of the same rank.

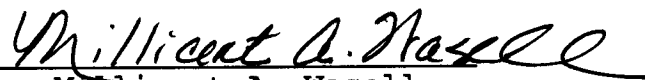
B. Take this action:

1. Restore the practice of replacing an absent superior officer with an officer of the same rank rather than filling the vacant position with a lower-ranked officer in an acting capacity.

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

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: August 28, 1997
Trenton, New Jersey
ISSUED: August 29, 1997



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 unilaterally changing the overtime practice of assigning off-duty officers to replace absent officers of the same rank.

WE WILL cease and desist from refusing to negotiate in good faith with the Kearny Superior Officers Association concerning terms and conditions of employment of employees in that unit, particularly by unilaterally changing the overtime practice of assigning off-duty officers to replace absent officers of the same rank.

WE WILL restore the practice of replacing an absent superior officer with an officer of the same rank rather than filling the vacant position with a lower-ranked officer in an acting capacity.

Docket No. CO-H-96-320

TOWN OF KEARNY
(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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 97-24

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-96-320

KEARNY SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that a public employer violated subsections 5.4(a)(1), (2), (5) and (7) of the Act. The charge alleged that the employer unilaterally changed the parties' overtime practice of assigning overtime to off-duty police officers to replace absent officers. Applying the Appellate Division decision in City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), the Hearing Examiner found that the subject of replacement was permissively negotiable; and since the parties' collective agreement was silent on the issue, their practice was irrelevant.

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. If no exceptions are filed, the recommended decision shall 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.

H.E. NO. 97-24

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

In the Matter of
TOWN OF KEARNY,

Respondent,

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Docket No. CO-H-96-320

KEARNY SUPERIOR OFFICERS ASSOCIATION,
Charging Party.

Appearances:

For the Respondent,
Shaljian, Cammarata & O'Connor, attorneys
(Jeffrey G. Garrigan, of counsel)

For the Charging Party,
Schneider, Goldberger, Cohen, Finn, Solomon, Leder &
Montalbano, attorneys
(James M. Mets, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 24, 1996, the Kearny Superior Officers Association filed an unfair practice charge against the Town of Kearny. The charge alleges that the Town violated subsections 5.4(a)(1), (2), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act,

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in

N.J.S.A. 34:13A-1 et seq. (Act) by unilaterally changing the overtime practice. ^{2/} The Town denies that it violated the Act and asserts that it has a managerial prerogative and contractual right to make the overtime changes.

The parties agreed to a temporary restraining order pending the outcome of a hearing regarding the Association's allegation that the Town unilaterally changed the procedure for assigning overtime. Pursuant to the parties' agreement, on June 3, 1996, a Commission Designee temporarily restrained the Town from unilaterally changing the replacement procedure and ordered the Town to immediately reinstate the prior procedure. Town of Kearny, I.R. No. 96-25, 22 NJPER 207 (¶27109 1996).

A Complaint and Notice of Hearing was issued on July 19, 1996 (C-1).^{3/} The Town filed an Answer on August 8, 1996, denying it violated the Act (C-2). On October 1, 1996, I conducted a

1/ Footnote Continued From Previous Page

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."

2/ The Association's charge also alleges that the Town violated the Act when it announced that it was changing its health insurance coverage. By letter dated May 22, 1996, the Director of Unfair Practices deferred the matter to the parties' contractual grievance/binding arbitration procedures.

3/ The Commission's exhibits will be referred to as "C".

hearing at which time the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by December 24, 1996.

Based upon the entire record, I make the following:

Findings of Fact

1. The Town and Association have an expired collective negotiations agreement effective from January 1, 1992 to December 31, 1994. The Association represents all "sworn employees or members of the Police Department of the Town of Kearny, New Jersey, with the rank of sergeant, lieutenant, or captain, now employed or hereinafter employed" (J-1).^{4/} The agreement contains an overtime provision and a management rights clause.^{5/}

2. The work week for superior officers in the uniform tour patrol division consists of four days on and two days off. Each day consists of three shifts; a morning shift (6 am - 2 pm), an afternoon shift (2 pm - 10 pm) and an evening shift (10 pm - 6 am) (T18).^{6/} Each tour consists of one captain, one desk lieutenant, one street sergeant, and a sergeant in the second precinct (T18, T97, T98).

3. The uniform tour patrol division followed an overtime allocation policy for about 18 years (T16, T19, T39, T58, T76).

^{4/} The parties' joint exhibits will be referred to as "J".

^{5/} According to the agreement, overtime for the uniform tour patrol division is offered on a rotating seniority basis.

^{6/} The transcript will be referred to as "T".

Overtime is offered by rank and seniority on a rotating basis. (T19-T20, T36, T38, T40-T41, T116). Preference is given to tour superiors in each rank (T19, T116).

If a tour captain's post is vacant (i.e. tour captain is sick or on vacation), the roster, listing tour superiors in accordance with Finding #3, determines overtime priority. The tour captain on the top of the tour captains list is the first to be offered overtime. If the tour captain accepts the overtime, he will work the tour shift at the captain's overtime rate and his name then goes to the bottom of the tour captains list. Similarly, if the tour captain declines the overtime, his name goes to the bottom of the tour captains list. If all of the tour captains decline the overtime, non-tour captains are then offered the overtime by seniority on the same rotating basis as the tour captains (T20, T36-T38, T40-T41, T64, T100-T101, T116, T119-T120, T131, T135-T137).

If all of the tour and non-tour captains decline the overtime, the desk lieutenant on duty becomes the acting tour captain and receives acting captain's pay. The overtime roster for lieutenants is used to fill the desk position at the lieutenant's overtime rate (T25, T29-T30, T36-T38, T100-T101, T116, T119-T120, T131, T136-T137).

In the event the desk lieutenant's post is vacant and none of the lieutenants accept the overtime, the street sergeant will staff the desk at acting capacity pay and the street sergeant's post

will not be filled (T29-T30, T100-T101, T116, T131-T132, T136-T137).^{7/}

4. In September or October 1982, Chief Chester W. Bielski began replacing tour lieutenants with sergeants rather than following the overtime allocation policy. The Association grieved this action, the parties held a meeting "and there was an arrangement made where [Bielski] agreed to carry on with the system that was in place ..." (T21).

Retired Captain Anthony Gouveia testified that the parties may have entered into a written agreement at this meeting regarding the use of overtime. Gouveia attempted but could not find a written agreement to present at hearing. When questioned on cross-examination whether he signed the written agreement, Gouveia testified that he could not recall whether he did, nor could he recall whether the parties signed an agreement at the meeting. He then testified that the parties' agreement was verbal (T21-T23, T25-T28, T31-T32, T45, T49, T84-T85). Neither party submitted into evidence a written agreement regarding the use of overtime. I find that there is insufficient evidence to conclude that a written agreement ever existed.

^{7/} I find that the overtime allocation policy and the overtime provision in the parties' collective agreement are not the same. The policy gives preference to tour superiors in each rank while the contract does not. Nevertheless, Chief Thomas Wilgus intends to continue using the overtime allocation policy when overtime is offered (T147).

5. Chief Bielski issued a general order dated October 15, 1982, to establish a policy for minimum manning and replacement.

(J-2). It provides:

The purpose of this order is to set the minimum number of superior officers assigned to each tour of duty and the guidelines of how they will be replaced if an absence occurs.

A. The following officers will be assigned to each of the three daily tours of duty.

- 1 Captain - Tour Commanding Officer
- 1 Lieutenant - Headquarters Desk
- 1 Sergeant or Lieutenant - Second Precinct Desk
- 1 Sergeant - Street Supervisor when available

B. Coverage of assignments when an absence occurs will be as follows:

1. Where there is a requirement for the call-in of a superior officer for overtime, the offer of such overtime shall be to tour superior officers in order of seniority in rank on a rotating basis.

2. Where the offer of overtime has been given to tour superior officers in the manner described above and none accepted the offer, the offer will then be extended to non tour duty superiors of the same rank.

3. In the event that the offer of overtime is turned down by ranking tour and non tour officers the overtime is then offered to the next lower rank tour superior officer in order of seniority on a rotating basis. If the offer is accepted by the lower rank officer the compensation will be at the higher rate of pay.

Example: If a sergeant is assigned to headquarters desk duty he will be paid at the rate of pay received by a lieutenant.

4. When the need for coverage is on the second precinct desk the offer will be made to tour sergeants only, not lieutenants.

5. If there is a street sergeant and an opening occurs on the second precinct desk the street sergeant will be re-assigned to the second precinct desk and paid at a sergeants pay rate, but not replaced on the street.

6. If there is a lieutenant on the desk at headquarters and at the second precinct and the opening occurs on the headquarters desk the lieutenant assigned to the second precinct is to be re-assigned to headquarters desk with the street sergeant, if there is one working, being re-assigned to the second precinct desk. If there is no street sergeant, a sergeant will be hired on overtime to cover the second precinct desk.

7. In any event sergeants assigned street supervision will not be replaced on an overtime basis when there is none assigned or the street supervisor sergeant is re-assigned for one reason or another.

C. This order will take effect as of this date and supersedes all other orders on this subject.

Gouveia and Corbett testified that Bielski's general order accurately describes the policy that existed from 1969 to the present (T16, T22, T58, T62). I credit their testimony to the extent that they were under the impression that they were following Bielski's general order. However, Chief Thomas Wilgus correctly draws a distinction between the policy and the general order (T119-T120). Under the policy, if all captains refused overtime and a lieutenant was called in, he would fill the desk lieutenant's post at the overtime rate. The desk lieutenant would fill the captain's post at acting capacity pay. According to the general order, the desk lieutenant remained at his post and an off-duty lieutenant would fill the captain's post. The general order states that the

off-duty lieutenant would be compensated at "the higher rate of pay." It is unclear to me whether "the higher rate of pay" was intended to be overtime or acting capacity pay. For purposes of this decision, the rate of pay is irrelevant. What is relevant is that the parties, erroneously claiming to follow Bielski's general order, are actually following the long-standing policy of initially offering overtime to off-duty superiors to replace absent tour superiors. Bielski's general order was issued one or two weeks after the parties' meeting (T22).

6. In or about February 1992, a non-tour lieutenant complained to the chief about the tour overtime selection (T59-T60, T88). On February 10, 1992, Chief Bielski issued a memo regarding "overtime distribution" for superior officer tours (J-3, T59-T60). Bielski explained in his memo that overtime was distributed in accordance with his general order of October 15, 1982, and attached the general order to his memo (J-3).^{8/}

7. On or about January 15, 1996, Deputy Chief (now Chief) Wilgus issued a standard operating procedure memo to Association representative Captain James Corbett, regarding "a change in the overtime policy" (J-4, J-6, T63-T64, T66, T95-T96, T100, T110-T111). It provides:

To formulate a replacement procedure for the
Patrol Division, Captains, Lieutenants and
Sergeants.

^{8/} I reiterate that the parties followed the long-standing policy rather than the general order.

When the Tour Commander is on sick leave/vacation, the Desk Lieutenant will be elevated to the position of Acting Captain and will be paid the prevailing Captain's salary for the duration of that specific tour of duty.

The Street Supervisor will then be elevated to the position of Acting Lieutenant and will be paid the prevailing Lieutenant's salary for the duration of that specific tour of duty.

On the occasion when both the Captain and Lieutenant will need to be replaced for a specific tour of duty, a Captain will be hired at the prevailing overtime rate utilizing the present overtime rotation procedure and if available, the Street Supervisor will be elevated to the Acting Lieutenant position and paid the prevailing Lieutenant's salary for that specific tour of duty.

On the occasion when the Lieutenant will need to be replaced for a specific tour of duty and there is no assigned street supervisor for that specific tour of duty, a Lieutenant will be hired at the prevailing overtime rate, utilizing the present overtime rotation procedure.

On those tours of duty encompassing, holidays, critical/major incidents or severe weather conditions, at the discretion of the on-duty tour commander, any tour in which a street supervisor is not assigned, on a case to case basis, a Street Supervisor may be hired at the prevailing overtime rate utilizing the present overtime rotation procedure.

On those occasions when the tour commander deems it appropriate to ensure that a street supervisor is on duty for a specific tour, and a vacancy would be created by instituting an Acting Captain or Lieutenant, the street supervisor's position will remain status quo and the Lieutenant or Captain will be replaced by utilizing the present overtime rotation procedure and paid at the prevailing overtime rate.

On those occasions when a Sergeant is hired it will be the responsibility of the tour commander who initiated the hiring, to document the reasons in a memorandum to the Chief's office.

NOTE: A replacement Sergeant will not be hired during a weekday 0600-1400 hours tour unless extreme extenuating circumstances arise which are appropriately documented.

8. Under Wilgus' new procedure the Town could immediately fill a vacant post with a lower ranked tour superior at acting capacity pay rather than offering overtime to off-duty superiors (T146). Wilgus intends to continue to offer overtime in accordance with the parties' policy when overtime is offered (T147).

9. By letter dated January 24, 1996, Corbett responded to Wilgus' memo. Corbett objected to the change in the overtime policy and wrote:

Any deviation of the current SOA overtime policy, which is delineated in the well known General Order Re: Town Superiors dated October 15, 1982, would be considered by the SOA to be a violation of the Contract (J-5, T66).

10. The parties stipulated that the Town will save money under Wilgus's procedure (T68-T69).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." The N.J. Supreme Court wrote of this provision: ...Stated negatively, this rule, known as the prescription against unilateral change of the status quo, prohibits an employer from unilaterally altering the status quo concerning mandatory bargaining topics, whether established by expired contract or by past practice,

without first bargaining to impasse. [Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Assn., S. Ct. Dkt. No. A-102-95, 5/8/96, slip op. at p. 5].

"Mandatory bargaining topics" are by definition within the scope of collective negotiations. The Commission determines in the first instance whether a "matter in dispute" is within the scope of negotiations. N.J.S.A. 34:13A-5.4(d). Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers:

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. 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 and 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.... [Id. at 92-93].

The scope of negotiations for police officers is broader than for other employees (N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations). I need only consider whether the alleged change was a mandatory subject, since the subsection allegedly violated (5.4(a)(5)) only prohibits unilateral changes in mandatorily negotiable terms and conditions of employment. See, e.g., Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127, 128 (¶15065 1984).

Local 195, IFTPE V. State, 88 N.J. 393 (1982), provides the balancing test for determining whether a subject is mandatorily negotiable:

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].

The issue here is whether the Town had the prerogative to unilaterally change how it replaced absent officers. The parties' long-standing policy required the Town to initially offer overtime to off-duty superiors of equal rank to fill the vacant post. The Town chose to change how it replaced absent officers by initially using a lower rank tour superior on duty at acting capacity pay to fill the vacant post. However, if a circumstance arises where the Town deems it necessary to offer overtime, it intends to follow the parties' long-standing policy of offering overtime to superior officers of equal rank, giving preference to tour superiors.

In City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), the City sought a restraint of binding arbitration of a grievance. The union contended that the City changed the parties' collective negotiations agreement when it restricted the opportunity of firefighters to serve as acting captain and earn extra pay. The union further contended that there existed a long-standing practice of having

firefighters temporarily serve as acting captains. The City asserted that it had a contractual right to assign ranking captains to fill in for absent captains. The Commission "recognized that temporary assignments to replace absent officers are not mandatorily negotiable, although they may be permissively negotiable." City of Camden at 19 NJPER 17. The Commission wrote:

Given our precedents and the unique circumstances of this case, we conclude that continuing to have firefighters serve as acting captains temporarily would not substantially limit the employer's governmental policymaking powers and therefore is permissively, but not mandatorily, negotiable. [Id. at 19 NJPER 17].

However, since the issue arose in the context of whether the grievance was arbitrable, the Commission did not reach the contractual merits of the case. Id.; See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). It never had to decide whether the right to make temporary assignments was rooted in the parties' contract or past practice.

The appellate division affirmed the Commission's decision and added:

[W]e hold that past practices are irrelevant in the context of this dispute because the contract was silent on the issue and it was one that is only permissively negotiable. Because such an issue is by definition not mandatorily negotiable, the option to make it a matter for negotiation is a managerial prerogative and must necessarily be at the employer's option. [City of Camden at 20 NJPER 322].

Further, the court held:

It seems to us from the foregoing that the only way to distinguish a situation where an employer

is exercising a managerial prerogative in connection with a permissibly negotiable issue from one where the parties have come to some agreement concerning that issue is to require evidence that the employer has affirmatively given up its prerogative by placing the issue on the table for negotiation. [Id. at 323].

This case is similar to Camden because the Town and the Association had a long-standing policy governing how absent officers were replaced and the Town unilaterally changed it. Accordingly, I find that the issue of how absent officers are replaced is permissively negotiable. See Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 109 (¶90 App. Div. 1982).^{9/}

Applying the court's holding in Camden that past practice is irrelevant to permissively negotiable subjects, I find that the Town did not "affirmatively give up" its prerogative to choose how it would replace tour superiors; nothing in the collective agreement suggests that the parties negotiated a replacement procedure. Although the Town continued to follow the parties' policy by initially offering overtime to replace absent officers, the policy

^{9/} In Kearny, the Town sought a restraint of arbitration of a grievance. The union contended that the Town failed to comply with the collective negotiations agreement when it assigned a sergeant to be in charge of the Town's traffic division, contrary to the past practice of assigning a captain to be in charge of that division. The Commission held that the Town's decision to assign superior officers other than captains to fill particular positions within the department was permissively negotiable, and therefore, the grievance was arbitrable to the extent that the issue was provided under the parties' agreement.

was not part of a written agreement. The court in Camden, citing Paterson Police PBA Local No. 1 stated:

[A] permissive item remains in effect only during the term of the agreement. The public employer is free to delete any permissive item from a successor agreement by refusing to negotiate with respect to that item. Its inclusion in an existing agreement does not convert such an item into a mandatory subject. [Camden at 20 NJPER 323].

The Association asserts that the Town has unilaterally changed how it allocates overtime assignments to Association members. I disagree. While the number of overtime opportunities for captains may decrease, the same overtime rotation will be used to allocate overtime when overtime is offered. Compare Tp. of Middletown, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), (Township's decision to use rotation, rather than seniority, to fill vacant posts is at least permissively negotiable).

In Tp. of Bound Brook, P.E.R.C. No. 88-30, 13 NJPER 760 (¶18287 1987), the Township sought a restraint of binding arbitration of a grievance. The union contended that the Township violated the parties' agreement when it reassigned a detective to cover a desk rather than assigning overtime. The Township asserted that it exercised its prerogative to set staffing requirements and to reassign officers to meet those needs. The Commission held:

Based upon the facts of this case, we find this grievance to be arbitrable. The Township had a managerial prerogative to determine which posts should be staffed It exercised that prerogative by scheduling coverage of the desk. [footnote omitted]. Once the Township determined that this post should be covered, it could legally agree that a vacancy caused by leave of absence be temporarily filled by a qualified

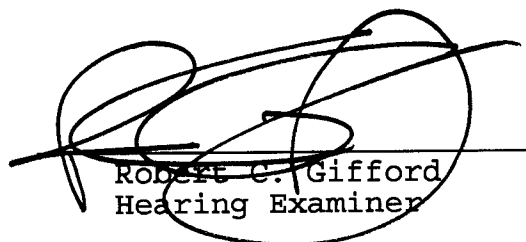
officer selected pursuant to a negotiated procedure for allocating overtime work. [citation omitted]. There is no dispute as to the qualifications of the pool of officers who could have covered the desk, nor is there any question of the Township needing to fill the vacancy on an emergent basis. On balance we find that the grievance relates to the mandatorily negotiable issue of the allocation of overtime opportunities. [Bound Brook at 13 NJPER 761].

Had I found that the issue in dispute was a mandatory subject of negotiations, rather than permissive, the evidence of a long-standing practice (i.e., initially offering overtime to off-duty superiors of equal rank to replace absent officers) would prove a term and condition of employment, over which the Town would have to negotiate before changing. In that circumstance, I would be obliged to view this case in the same way the Commission viewed the employer's conduct in Bound Brook. See also N.J. Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988). But the appellate decision in Camden convinces me that the subject matter is not mandatorily negotiable.

Therefore, I find that the Town did not violate the Act by failing to negotiate the replacement procedure.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.


Robert C. Gifford
Hearing Examiner

Dated: February 25, 1997
Trenton, New Jersey