

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

In the Matter of

CITY OF JERSEY CITY,
Respondent,

-and-

Docket No. CO-H-95-387

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,
Charging Party

CITY OF JERSEY CITY,
Petitioner,

-and-

Docket No. SN-96-02

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,
Respondent.

SYNOPSIS

In a consolidated unfair practice charge and scope of negotiations petition, a Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the City of Jersey City did not violate the New Jersey Employer-Employee Relations Act when it reorganized the police department, and changed the duties of certain superior officer positions. The Hearing Examiner found that the reorganization was based upon governmental policy considerations, not economic considerations.

The Hearing Examiner also recommended, however, that the Commission not restrain arbitration of the specific grievance raised by the scope petition. The Hearing Examiner found that the grievance concerned compensation and was, therefore, arbitrable, but the Hearing Examiner recommended a limit to any potential remedy due to its impact on the implementation of a subsequent governmental policy determination.

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. 98-11

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Appearances:

For the Respondent, Martin R. Pachman, attorney
(Robin T. McMahon, of counsel)

For the Charging Party, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 18, 1995, the Jersey City Police Superior Officers' Association ("PSOA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission")

alleging that the City of Jersey City ("City") violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The PSOA specifically alleged that starting on or about January 9, 1995, the City unilaterally changed "out-of-title" pay practices and policies, illegally commingled all superior officer ranks within the Department, and falsely redefined officers' position responsibilities, all to avoid out-of-title pay responsibilities imposed by past practices and prior agreement. The charge also alleged that the City refused to negotiate with the PSOA concerning changes in out-of-title pay procedures and compensation-related components of the City's "purported reorganization" (C-1).^{2/}

The PSOA seeks an order requiring the City to restore the status quo as it existed prior to January 9, 1995, and requiring the City to make whole all superior officers affected by the

^{1/} These subsections prohibit public employees, 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/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "J" refer to exhibits submitted jointly by the parties, those marked "CP" refer to charging party's exhibits, and those marked "R" refer to respondent's exhibits.

City's alleged failure to make proper payments for out of title work.

The primary issue in the unfair practice case is whether the City reorganized job duties/responsibilities of superior officers , (1) to have duties more logically reflect their rank and to improve the Departments operating efficiency and supervision or, (2) to simply save money by avoiding contractual out of title payments.

On July 10, 1995, the City filed a scope of negotiations petition with the Commission asserting that the assignment of duties and the structure of a table of organization are managerial prerogatives, and that the impact of the change in duties was not severable. The petition also referred to a demand for arbitration filed by the PSOA in 1995 (AR-95-614) over a 1992 grievance concerning District Detective Commanders. In the petition the City asserted that the demand for arbitration involved the same subject matter as the unfair practice charge, and it requested these matters be consolidated.

On July 25, 1995, the City moved before the Director of Unfair Practices to consolidate the scope of negotiations and unfair practice matters and to restrain the request for arbitration in AR-95-614 pending the outcome of the scope proceedings (C-5-1). The City is seeking the dismissal of the unfair practice charge, and to permanently enjoin the PSOA from arbitrating the grievance concerning District Detective Commanders.

On August 9, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing in the unfair practice charge (C-1). On August 21, the City filed an Answer admitting certain facts, but denying it had violated the Act, and it asserted several affirmative defenses, among them that it had a managerial prerogative to reassign duties pursuant to a departmental reorganization, and that any loss of out of title pay to superior officers resulting from the reorganization was a non-severable consequence of the managerial right (C-2).

Pursuant to N.J.A.C. 19:14-6.6, I've taken administrative notice that on January 2, 1996, the Chair's Special Assistant in a letter to the PSOA's counsel, noted that in the PSOA's brief in opposition to the City's motion to consolidate (C-4-1), the PSOA asserted that the grievance involved in the Scope Petition related to a dispute that began in July 1992, and did not involve the December 1994 reorganization. The PSOA, however, was requested to clarify the exact dates of the dispute it sought to arbitrate, and was asked to specify the last day to which the grievance applied.

The PSOA responded by letter of January 26, 1996, but did not provide "exact dates" or a "last day" as requested. The pertinent language in that letter provides:

Please be advised that in response to your recent letter the grievance at issue relates to a dispute that began in July, 1992 that is still on-going as of the present date; i.e. the City continues to violate the Collective Bargaining Agreement by not compensating Sergeants for functioning in acting capacities as District Detective Commanders; a position the PSOA submits

had clearly been viewed as being a Lieutenant's position prior to July, 1992.

Again it is submitted that the City's proffered facts with regard to this matter are completely inaccurate and that this dispute in no way relates again to the December 1994 reorganization.

On March 15, 1996, the Commission referred the scope of negotiations petition and the motions to consolidate and to temporarily restrain arbitration to me. On March 26, 1996, I held that the City's motion to dismiss the charge was mooted by the issuance of the Complaint. I granted the motion to consolidate the charge and petition, N.J.A.C. 19:14-6.3(a)(8), but declined to restrain arbitration since no arbitration hearing had been scheduled (C-7). In deciding to consolidate the charge and petition, I concluded in C-7, for purpose of the motion, that the PSOA's response in its January 26, 1996 letter to the Special Assistant showed that the grievance was intended to cover the period of time both before and after the reorganization.

There are three issues raised by the scope petition:

(1) whether the assignment of duties, and structure of a table of organization are managerial prerogatives; (2) whether the impact of any changes resulting from the reorganization of duties are negotiable; and (3) and whether the grievance filed in 1992 over the assignment of sergeants to District Detective Commander is arbitrable.

On April 17, May 16, and May 30, 1996, I conducted a hearing.^{3/} The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs, and reply briefs, the last of which was received on December 16, 1996.^{4/} Based on the entire record, I make the following:

FINDINGS OF FACT

1. The PSOA is the certified majority representative of all police officers employed by the City including the rank of sergeant and above, except for the Chief of Police. These titles, in ascending order of rank, are sergeant, lieutenant, captain, inspector and deputy chief.

2. The Jersey City Police Department is headed by a civilian Director of Police, to whom report the Chief of Police, several Deputy Chiefs, Inspectors, and others. The Department consisted of four Divisions prior to 1995: Operations, Investigations, Professional Standards, and Support Services. One Division, Professional Standards, was eliminated during the reorganization (3T49). Each Division is headed by a Division

^{3/} 1T refers to the transcript of the proceedings on April 17; 2T refers to the transcript of the proceedings on May 16, and 3T refers to the transcript of the proceedings on May 30.

^{4/} This decision was delayed due to circumstances requiring me to issue other decisions out of order.

Commander, a Deputy Chief or Inspector. The Department has divided the City into four Districts: North, East, South and West. Each District is headed by a District Commander holding the rank of Captain (C-5-1, Ex. B) (1T40).

3. Definitions

Bureau of Supervisors ("BOS") - also referred to as "City Command." The BOS is (was) the City-wide operations command group which is separate from the various police Divisions. It is (was) lead by a City Commander - usually the rank of Inspector or Deputy Chief. The BOS coordinates(ed) activities occurring in more than one District, and moves(ed) personnel resources from one District to another as required (C-5-1; Attachment B) (3T27-3T28). The Department appears to refer to "City Command" now, and does not use the "BOS" designation.

Captain in Charge - This position existed in 1988/1989 and may no longer exist. It was designed to place one captain in charge of the Patrol Division (Operations), and one designated as City Captain between 4:00 p.m. and 8:00 a.m.

City Captain - Also known as BOS Captain - was the captain placed in charge of the BOS or City Command during nighttime hours, presumably when no Inspector or Deputy Chief was on duty. The City Captain ordered the movement of vehicles and personnel from one District to another. This position no longer exists (3T26-3T28; 3T162).

City Command - See Bureau of Supervisors

City Commander - Commander of the BOS/City Command.

Chief in Charge ("CIC") - On those shifts where the Chief of Police is not working a Deputy Chief, Inspector or Captain in the City Command is designated as CIC (3T27).

Desk Assistant - A police officer who takes complaints from citizens, and may also assist the Desk Officer (1T80).

Desk Officer - This was the pre-1995 position held by a lieutenant, but often filled by a sergeant in an out-of-title pay capacity. The lieutenant or sergeant staffed the main desk in each District on each tour. Responsibilities included maintenance of the desk blotter, providing service and information to the public, responding to emergencies, reviewing and signing all reports submitted during a tour of duty, and others (C-5-1, Ex. C).

Desk Sergeant - This was the new position created effective 1995 permanently assigning a sergeant to the former Desk Officer position. The Desk Sergeant served under the supervision of the Tour Commander, a lieutenant (C-5-1, Ex. C). After other changes this title was eliminated (3T161).

District Commander - Each District is headed by a Captain designated as District Commander. The four District Commanders report to the Commander of the Operations Division (C-5-1, Ex. B).

District Detective Commander - A superior officer holding this position is the commander of i.e., is responsible for supervising the rank and file detectives in any one of the four City districts. Prior to July 1992 the District Detective Commanders were lieutenants. After that date sergeants were assigned to that position (1T43-1T44, 3T112).

Division Commander - The Deputy Chief or Inspector in command of each Division (3T49).

Patrol District - This is the position of any one District that is subject to patrol duties. It may be the entire District. Each Patrol District is lead by a Patrol Sergeant. The Districts were going to be divided into sectors lead by Sector Sergeants, but the Sector Sergeant position was never created (C-5-1, Ex. C) (3T161-3T166).

Tour - Each work shift is designated a tour.

Tour Commander - This title was created effective January 1995. The Tour Commander is a lieutenant assigned as the Commander of each individual tour.

4. The PSOA and City are parties to a collective agreement effective from January 1, 1991 through December 31, 1995 (J-1).

Article 26 of J-1 provides for "out-of-title" pay in certain circumstances. It reads as follows:

Temporary Appointments:

Section 1. The practice of appointing employees to higher rank in an acting capacity is

discouraged and it is agreed that vacancies in such higher ranks shall be filled as soon as possible, as provided by law.

Section 2. An employee serving in any acting capacity shall receive the full pay of the rank in which he is acting, only after the completion of a full tour.

Section 3. The following formula shall be used to compute the number of calendar days:

1. An officer who works a single tour shall receive credit of one (1) calendar day.
2. Additionally, an officer who continues the assignment in the acting rank shall receive pay for the acting rank for all swings and tours on a day for day basis (J-1, p. 32).

Article 26 does not authorize an officer to decide whether he/she is entitled to out-of-title pay. The record shows that in order to receive out of title pay an officer had to be designated, or appointed, to perform in an acting capacity (3T127). The actual approval for working in an acting capacity had to be made by an officer at least two ranks above the officer seeking out of title compensation. A captain (District Commander), for example, may approve acting capacity to a sergeant acting as lieutenant, but the Division Commander must approve acting capacity for a lieutenant acting as a captain. Any request for out of title pay then must be approved by the Director of Police (3T128-3T131).

The payment of out-of-title pay, however, is not automatic just because a higher ranking officer is absent. For example, when a captain is scheduled off on a Friday and/or a

weekend the lieutenant working those days does not automatically receive out-of-title pay (3T58; 3T124; 3T127; 3T136-3T137).

J-1 also contains a grievance clause, Article 20, which concludes with binding arbitration.

The Scope Petition - District Detective Commanders

5. For approximately fifteen years prior to July 1992, the District Detective Commander position was held by a lieutenant (1T42-1T43). During that period of time prior to July 1992, if sergeants were assigned to work as District Detective Commanders for one or more tours of duty, they received out of title pay as a lieutenant as provided by Article 26 of the contract (1T43).

In July 1992 the Department permanently assigned sergeants to the District Detective Commander position but has not paid them out-of-title pay for performing that work since that time (1T44, 1T50-1T51). The PSOA filed a grievance in or about July 1992, over the City's failure to pay out-of-title pay for sergeants performing District Detective Commander duties (C-4-2, Ex. A). The grievance alleged a violation of Article 26, and Article 2 (the Maintenance of Standards article), and stated the nature of the grievance as:

The City of Jersey City violated the collective bargaining agreement by not compensating sergeants for filling in an acting capacity as District Detective Commanders thereby acting in the out of title position of Lieutenant.

The grievance was held in abeyance pending negotiations for a new collective agreement to succeed J-1 which was expiring on December 31, 1993.^{5/} Those negotiations included discussions to resolve the grievance. In October 1994 the parties negotiating committees reached a tentative agreement for a new contract which included language resolving the grievance. However, the PSOA membership rejected the tentative agreement and the grievance resolution (1T48-1T49, 1T71, 3T73; C-4-2, Ex. B).

On March 28, 1995 the PSOA filed a Request for Arbitration with the Commission (AR-95-614) (C-6) seeking to arbitrate its grievance and framing the issue as:

Has the Employer violated the Collective Bargaining Agreement, by failing to compensate Sergeants serving as District Detective Commanders (Lieutenants)?

The City filed the Scope Petition on July 10, 1995 (SN-96-2) (C-3) seeking to restrain the arbitration. The City stated in its Petition that the impact of the change in duties (for sergeants) flowed from its managerial right to reorganize the Department, and was not severable.

6. Michael Moriarty became the City's Director of Police effective January 1, 1994 (3T16-3T17). He has overall administrative, financial, and policy-making authority for the

^{5/} Although the grievance was held in abeyance, the City may not have formally agreed to hold it in abeyance (3T72-3T74). I need not resolve that matter to decide this case.

Department. The Chief of Police reports to the Director, but is in charge of the day-to-day operations of the Department (3T17).

One of Moriarty's goals upon assuming command was to reorganize the Department. He specifically looked at the District Detective Commander position to determine whether to move that position back into the Detective Division, and whether to continue assigning sergeants to that position or to reassign that work to lieutenants (3T68-3T60, 3T112). Moriarty moved the position back to the Detective Division, but ratified the 1992 decision assigning the District Detective Commander position to sergeants by maintaining that assignment. He explained that since detectives are essentially patrol officers, the next rank above that is sergeant, and he saw no need to jump two ranks - to lieutenant - to supervise the detectives. His assignment of District Detective Commander to sergeants was, as he testified, "the next logical step up" (3T68-3T69).

Moriarty had not discussed with his predecessor the rationale for the assignment of sergeants to District Detective Commander in 1992, but then Chief Sabo apparently told him (Moriarty) they made that change because there was no reason to jump from the rank of a police officer to a lieutenant to command that position. Moriarty was unsure of the accuracy of that information, but he concurred with that rationale as the basis to continue the assignment to sergeants (3T70). He thought there was an analogy between a patrol sergeant who supervises patrol

officers, and detective sergeants holding the position of District Detective Commander who supervisor rank and file detectives (3T64).

While I cannot credit Moriarty's hearsay testimony about what Chief Sabo said was the basis for the Departments assignment of sergeants to District Detective Commander in July 1992, I otherwise found Moriarty to be a reliable and trustworthy witness and I credit his testimony that he believed it was more logical to assign sergeants, rather than lieutenants to the District Detective Command positions. There was no evidence that financial consideration was ever a factor in Moriarty's decision.

7. On October 25, 1994 then PSOA President, Bob Dalton, sent a memorandum (C-4-2, Ex. B) to all District Detective Commanders past and present since July 1992, informing them of the status of the District Detective Commander grievance. He explained there may be some limitation on any potential remedy for the grievance. He said in pertinent part:

The Director believes that at worst the City will only be liable for out of title pay through the hearing date on the grievance and thereafter Sergeants will be permanently placed in that position without any compensation.

The Table of Organization now reflects Sergeants in the District Detective Commands which will remain hereafter.

On November 21, 1994 the Department issued a formal table of organization (R-1B), which memorialized sergeants as District Detective Commanders. R-1B showed that one sergeant/District Detective Commander from each district would supervise six

detectives. On November 23, 1994, Moriarty issued Policy Directive 10-94 (R-1A) formally establishing the Table of Organization (R-1B) issued two days earlier.

8. Sergeant Ronald Buonocore became president of the PSOA on April 4, 1995 (1T35). Both Buonocore and Moriarty provided affidavits in this matter which were entered into evidence (C-4-2, and C-5-2, respectively). In his affidavit Buonocore stated that the arbitration scheduled regarding the District Detective Commander issue did not at all relate to events occurring since Moriarty became Director (Item 5). He said it related to the grievance filed in July 1992 (Item 6). He also explained that the decision originally assigning sergeants to permanently serve in the District Detective Commander position was exclusively an economic decision designed to reduce escalating overtime costs (Item 11). The City did not present any reliable contrary evidence.

At hearing, Moriarty was asked if the District Detective Commander/out-of-title pay issue related to the 1995 Tour Commander reorganization he instituted. He responded "it did not relate" (3T112). But Moriarty further explained that during the reorganization process he reviewed the District Detective Commander position and determined that sergeant was the proper rank for that position (3T112).

I credit both Buonocore and Moriarty to this extent. I find that the District Detective Commander grievance/arbitration

was separate from - and did not directly relate to the Departmental reorganization of job duties and responsibilities that occurred in 1994 and 1995. I further find that for purposes of resolving the scope petition (SN-96-02) only, and not as a finding regarding the merits of the grievance, the Department's 1992 decision assigning sergeants to perform District Detective Commander duties was economically based.

I also find, however, that the grievance/arbitration relates to the reorganization to this extent: once Moriarty adopted the rank of sergeant as the proper rank to fill the District Detective Commander position because of the logical relationship of that title to rank and file detectives, economic considerations were no longer the basis for the assignment of sergeants to hold the District Detective Commander position. At that point government policy considerations became the basis for the assignment.

9. In addition to the District Detective Commander grievance, the Scope Petition concerned whether the impact of any changes resulting from the reorganization are negotiable/arbitrable. Pertinent facts are included within the following unfair practice findings.

The Unfair Practice Charge - The Basis For the Reorganization

10. Moriarty's issuance of the new Table of Organization in November 1994 (R-1A and R-1B) involved much more than

formalizing sergeants as District Detective Commanders. It was a reorganization of responsibilities affecting other sergeants as well as lieutenants through deputy chiefs. The charge in part concerns how changes resulting from the implementation of the new table of organization affects the working relationship between different pairs of superior officers, such as sergeants and lieutenants, lieutenants and captains, captains and deputy chiefs, and inspectors and deputy chiefs. One primary issue in the charge was why did Moriarty restructure the Department.

Moriarty decided to restructure the Department to ensure, among other things, that an officer's responsibility was commensurate with the rank of his position and that decisions were made at the appropriate level (3T19; 3T21-3T22). He also wanted to eliminate what he had observed was the undesirable practice of having most decisions made by the Director or Chief. Moriarty also wanted greater evaluation accountability and planned to achieve that by creating a structure where a sergeant would work with the same complement of police officers every day (3T21-3T22).

In his affidavit submitted in support of the PSOA's case Sgt. Buonocore maintained that many of the changes the City implemented as a result of the reorganization were "exclusively designed to reduce escalating 'out-of-title' salary payment costs" (C-4-2 item 18). On direct examination Moriarty was asked to comment on that allegation, he testified:

That was never a consideration. It was never a motivation in these things. And I don't think

out-of-title pay has changed a whole lot since I've been there.

So, again, that wasn't a motivation. The motivation was to get accountability or mechanisms for accountability, and also to have rank commensurate with responsibility (3T27).

I credit Moriarty's testimony that out-of-title costs was not the basis for implementing the reorganization in 1995. I observed him carefully. I found Moriarty to be a reliable witness, his testimony was forthright, it made sense, he was not evasive, his demeanor was relaxed, there was no reliable contradictory evidence, thus I credit his testimony. I further find that the basis for the reorganization was a governmental policy consideration: the desire to achieve greater accountability, rank appropriate decisions, and greater flexibility to use superior officers to manage the Department.

Sergeants and Lieutenants-

From Desk Officer to Tour Commander

11. Although the new table of organization was issued in November 1994, its implementation did not begin until January 1, 1995, except, of course, for the District Detective Command position which was already in place (3T32-3T34).

In each of the four districts a lieutenant is assigned to, and is in charge of, each shift (3T163).

Prior to the reorganization lieutenants held the Desk Officer position and normally did not go out into the "field"

(1T51, 3T25). Desk Officer duties included taking rollcall, making assignments, supervising officers and sergeants, reviewing reports and other duties (1T52-1T55) (C-4-2, Ex. D). During that time period when a sergeant served as Desk Officer for an entire tour when a lieutenant was not on duty, the sergeant received out-of-title pay pursuant to J-1 (1T55, 1T86, 3T100-3T101).

Sergeants, however, did not receive out-of-title pay pre-1995 for serving as Desk Officer for only part of a tour,^{6/} and only received out-of-title pay for performing a full tour of desk duty if a lieutenant was absent (out sick or on vacation), and the sergeant was designated to desk duty (1T82, 1T88-1T89). There was no evidence a sergeant received out-of-title pay for performing desk duties for a full tour when the lieutenant assigned to that tour was working.

12. Prior to the reorganization lieutenants were not regularly assigned to a particular District (3T22-3T23). As part of his reorganization Moriarty created the Tour Commander concept for lieutenants which he expected would replace the Desk Officer position. Moriarty determined that a lieutenant need not exclusively perform Desk Officer duties, he preferred a sergeant assume at least some of those duties to allow the lieutenant to supervise police officers in the field (3T35; 3T47-3T48).

^{6/} The PSOA is not claiming sergeants were entitled to out of title pay for performing only part of a tour as Desk Officer (3T100, 3T102).

The Tour Commander (lieutenant) was assigned to a particular District and was responsible for all officers on a given tour. A key element of the Tour Commander concept was that lieutenants should be available to go into the field to monitor operations and personnel (3T36; 3T38). This emphasis on field operations was in contrast to the prior practice where the lieutenant in charge of a shift remained at District headquarters and served as the Desk Officer for that shift (3T25). In order to free lieutenants for field operations, Moriarty created the position of Desk Sergeant. As set forth in a December 1994 memorandum:

District Desks shall be manned on all tours by Sergeants. Desk Sergeants shall be under the supervision of the Tour Commander. Desk sergeants, during their respective tour of duty, shall be responsible for the overall efficient operation of the District Desk duties, including maintenance of the Desk Blotter, proper prisoner treatment and detention and providing service and information to the public. (C-5-1, Attachment C, p. 4).

The organization chart reflected Moriarty's plan to have one Tour Commander (a lieutenant), one Desk Sergeant, and two Sector Sergeants for each shift in each District (3T36). Moriarty decided to implement this plan in phases and, at the time of the hearing, Districts had not yet been divided into the sectors necessary to put the Sector Sergeant concept into place (3T161). However, the Tour Commander and Desk Sergeant concepts were implemented in January 1995 (3T32-3T33). In addition, as of January 1995, each shift had two Patrol Sergeants assigned to the

field, each of whom was responsible for supervising one squad of police officers (3T36).

After the Tour Commander and Desk Sergeant concepts had been in effect for about one month, it became apparent that there were sometimes too many superior officers on duty. Because of the Department's work schedule, there would be six or seven superior officers on duty two or three days of the week instead of the four officers contemplated by Moriarty (3T37). In a February 21, 1995 memorandum to Moriarty (R-3), Deputy Chief Arthur Pease, Operations Division Commander, recommended that the Tour Commander concept be modified so that Tour Commanders would start their shift in the precinct, relieve the prior Tour Commander, conduct roll call and see that an inspection of officers and equipment was performed (3T40-3T41). Pease also suggested that Tour Commanders could then go into the field for three hours and return at the end of the shift. Desk coverage would be provided for the three-hour period by either one of the Patrol Sergeants or by two sergeants on a staggered basis (R-3).

A March 30, 1995, directive to the field from the Acting Chief of Police (CP-3) implemented the bulk of the recommendations in Pease's memorandum, except that Tour Commanders were not directed to be in the field for any specific time period. CP-3 provided in pertinent part:

Readiness

The Tour Commander will determine where his/her presence will be most beneficial to tour

operations and may assume the Desk for all or part of the tour or may provide coverage by a Squad Sergeant or other personnel as deemed appropriate.

The Tour Commander or other personnel providing Desk coverage may however, be ordered or required to perform duties in the field, on short notice, and therefore must be fully equipped and ready at all times.

Tour Commanders were advised that they had overall authority and responsibility for the tour, and could determine "where his/her presence will be most beneficial to tour operations and may assume the Desk for all or part of the tour or may provide coverage by a Squad Sergeant or other personnel as deemed appropriate."

(CP-3). In March 1995, the 1994 organization chart was modified to eliminate one of the sergeant positions, and CP-3 no longer refers to "Desk Sergeants" (3T40; CP-3). I, therefore, find that the Desk Sergeant position was eliminated in March 1995.

On June 21, 1995, pursuant to Moriarty's Policy Directive 3-95 (R-4), the Acting Chief of Police issued General Order #8-95 (CP-5) dealing with supervisor scheduling, work schedules and assignment of senior management. Moriarty issued R-4 on June 16, 1995, to improve/refine the continuity of supervision in the Department. He pointed out problems in scheduling, and concluded that:

...an adequate number of lieutenants and sergeants will be assigned to each District and the scheduling of their work will be performed by the respective District Commander. (R-4, Section III A.)

The Order in CP-5 provided in pertinent part:

1) Lieutenants

Lieutenants assigned to Districts will serve as Tour Commanders whose primary function will be desk duty. Periodically, on each tour, Tour Commanders will respond into the field to inspect personnel and conditions within their District or to assume command of field incidents or operations where necessary.

In the event that two Lieutenants are on duty in a District, one will be assigned by the District Commander, to field Operations. (CP-5, p.2)

Moriarty did not see the Order in CP-5 before it went out (3T89), and stated that desk duty is only one component of a Tour Commander's responsibilities (3T98). Nevertheless, he did not supersede the Order when it came to his attention because he thought that it made clear that the Tour Commander was to go into the field whenever the Tour Commander thought necessary (3T105-3T106). The Order was intended to ensure that lieutenants knew they had overall responsibility for the tour (3T44).

After January 1995, sergeants who performed prior Desk Officer functions for a full tour did not receive out-of-title pay unless there were no lieutenants on duty and the sergeant was designated the Tour Commander (1T6; 3T42). The sergeants physical location--whether on the desk or not--does not determine out-of-title eligibility. Sergeants receive out-of-title pay when they are designated Tour Commander, even if they do not perform desk duty (1T82; 3T95-3T96). Thus, during the January-February 1995 period, Desk Sergeants did not receive out-of-title pay even though they were on the desk for an entire tour because Desk Sergeants had

been assigned desk duty as a result of the reorganization and because they had not been assigned to substitute for the Tour Commander (3T36; 3T102). Similarly, after the elimination of the Desk Sergeant position, a sergeant has not received out-of-title pay -- even if the Tour Commander assigned him to the desk for an entire tour -- where the Tour Commander/lieutenant was also on duty (3T108).^{7/}

Lieutenants - Captains

13. Under the schedule that existed prior to June 1995, lieutenants did not receive out-of-title pay when a captain was regularly scheduled off for the weekend or a day during the week (3T58; 3T124; 3T136-3T137). But when a captain is out ill or on vacation a lieutenant is entitled to out-of-title pay if designated acting captain by the appropriate authority (3T127, 3T137). But even in a week where the captain is mostly on vacation and out of title pay is approved for a lieutenant, the lieutenant does not receive the extra pay on days the captain was regularly scheduled off during the otherwise vacation week (2T13).

^{7/} The record contains several forms submitted by sergeants requesting out-of-title pay for performing desk duties for a full tour. These requests were submitted after January 10, 1995 and notations on the forms by supervising officers indicate that they were denied. In May 1995, Buonocore advised sergeants not to submit further requests, since they were routinely denied and the matter was being addressed through an unfair practice charge (1T64-1T65).

In June 1995, Chief Anglin, through Policy Directive 3-95 (R-4), required the District Commander Captains who normally worked a day tour, to work on the evening tour on a one-week rotational basis. Sometimes that evening tour is worked in City Command.

District Commanders (captains) were required to work the evening shift on a rotational basis, so that they could see their District's operations and evaluate employee performance during the shifts when most of their personnel were working (3T54-3T55). In R-4 Moriarty noted that District Commanders should routinely work during the evening hours from time to time, and in CP-5, Chief Anglin scheduled District Commanders to rotate once every six weeks to the evening tour, 4:00 p.m. to 12:00 midnight. Moriarty thought it was critical that senior managers work the night shift because 175 police officers had been on the job for less than 18 months, and the managers needed first-hand knowledge of their performance to be able to evaluate them (R-4). I credit Moriarty's explanation for why he wanted to rotate captains to the evening shift and find it was not economically based. It was based upon a need for greater supervision.

Lieutenant Tour Commanders who work the day shift that the captain normally works, have not received out-of-title pay during the week the captain works evenings (3T139-3T140). When a captain is working evenings, even if at City Command, he/she is not being replaced by the lieutenant (3T119). The captain is still working those days and available to perform as District Commander (3T140).

Similarly, when a captain that is working the evening rotational week is called to City Command, the evening Lieutenant Tour Commander does not receive out-of-title pay because the captain is still working (3T145).

Since January 1995, Lt. Ryan has served as acting captain for Capt. Harrison when Harrison has gone on vacation. The Lieutenant received out-of-title pay for that period of time, but was not paid out-of-title on the Fridays Harrison was regularly scheduled off (2T12-2T13). Ryan has also not been paid out-of-title, for doing many of the Captains duties on the days Harrison is scheduled off, or the weeks he is scheduled to work evenings (2T11-2T12). There was no evidence that Ryan was assigned to serve as acting captain when Harrison worked evenings or was scheduled off. Ryan did many of the Captains duties during those times, but not all of them. If it could wait for Harrison, Ryan let it wait (2T10-2T11). But when Ryan has been assigned as acting captain he performed all the Captain's duties (2T14).

Since January 1995, Lt. Wolleon has not been paid out of title pay for the weeks Capt. Motichka works evenings, but Wolleon has also not been paid out of title pay for those occasions when Motichka was out sick or on vacation (2T21-2T22). Wolleon, however, was not actually denied out of title pay for the sick and vacation times because he had not asked for out of title pay. Moriarty had suggested to him to file for out of title pay, but Wolleon made no such filing (3T60). I credit Moriarty's testimony.

I also credit Moriarty's testimony that it is not necessary for a lieutenant to perform his captain's administrative duties when the captain is working the evening shift or has a regularly-scheduled day off (3T56-3T58). Moriarty explained that captains have clerks to assist them and, while a captain is on evening shift, he is expected to perform the same tasks as always (3T58;3T56-3T57).

Lt. Ryan's testimony is not inconsistent with Moriarty's. Ryan stated that when his Captain had a regularly-scheduled day off or was serving on the evening shift, he sometimes responded to inquiries from the public or made last-minute schedule changes ordinarily handled by the captain (2T10-2T11). However, he acknowledged that he did not perform all the Captain's "mundane duties" as he did when the Captain was on vacation (2T10;2T11). While Wolleon stated that he had to handle all of his Captain's in-basket work when Motichka rotated to a different position every four to six weeks (2T20), I credit Moriarty's testimony that this was not a necessary consequence of the Captain's rotation schedule. Moriarty candidly acknowledged that Frank Motichka, Ryan's Captain, did not have the administrative assistance that other captains had, but he also stated that there was no reason why Motichka could not perform his administrative work while on the evening tour (3T60-3T61). Moriarty also recognized that Ryan might, in fact, perform some administrative work because "[i]f the Captain wants to push off some of his work to the Lieutenant and the Lieutenant accepts it, that's their relationship between that command" (3T118).

Captain or Deputy Chief or CIC in
City Command

14. Prior to June 1995 Deputy Chief's functioned as Division Commanders, and Inspectors were assigned to City Command where they often worked as CIC. As a result of R-4, Inspectors were transferred to serve as Division Commanders, and Deputy Chiefs were transferred to City Command (3T48-3T49).

R-4 provides in pertinent part:

C. Assignments of JCPD Senior Management
Personnel

Rotation of senior management personnel would be beneficial to both the organization and personnel in that it would keep the incumbents from becoming stale in their work area, would help to develop them as well rounded police professionals and would bring new ideas for both operational and administrative improvement. Once a manager has conquered the challenges of a new assignment, he tends to become too familiar with the subject matter and is less likely to recommend innovative ways of solving recurring or long-term problems. Consequently, it is in the best interest of the organization and city to rotate senior management personnel through as many different job assignments as possible. For the development of the incumbent Inspectors to enhance their managerial and administrative expertise, they shall be rotated through each of the Divisions as Commander. To enhance the operational knowledge and expertise of the incumbent Deputy Chiefs under current operational conditions, they shall be assigned to the City Command to serve as Chief in Charge of the City while the Chief of the Department is not on duty.

Chief Anglin implemented that policy by his order in CP-5. The transfers were made to "cross-train" senior management (3T48). Eventually, these individuals may be transferred back to

the position they held prior to the issuance of CP-5 (3T48). Inspector Peter Behrens was transferred to commander of the Support Services Division in June 1995, and was subsequently re-assigned to the City Command in April 1996 (2T25; 2T45).

Prior to 1995 when a captain was assigned to City Command to replace an Inspector, the captain received out-of-title pay as an Inspector (3T158). Since 1995 when a captain is assigned to City Command to replace a Deputy Chief, the captain receives out of title pay as an Inspector, rather than Deputy Chief pay (3T11-3T13, 3T147).

Moriarty testified that the Inspectors and Deputy Chiefs are appropriate titles for holding City Command positions because both titles are authorized to perform CIC duties (3T147, 3T159). Therefore, he concluded that captains assigned to City Command should only receive Inspectors pay because that is the next rank above a captain that is appropriate for City Command (3T147). Moriarty said there was no reason to pay someone more than was necessary (3T160). I credit Moriarty's testimony to the extent it shows that both Inspectors and Deputy Chiefs are appropriate to work City Command, and credit his veracity as to why he thought captains should receive Inspector pay when replacing a superior in City Command. I make no finding, however, as to what out of title rate captains should receive when working in City Command. That is a matter for arbitration.

Inspectors

15. During Moriarty's term of office, and prior to CP-5, Inspectors and Deputy Chiefs were both high-level supervisors who reported directly to the Chief of Police (2T36;C-5-1, Attachment B, p. 3). However, Inspectors assisted the Chief by being in the City Command and in charge of the Department when the Chief was not on duty, while Deputy Chiefs were in charge of the three divisions within the Department (operations, support services, investigations) and assisted the Chief in an administrative rather than operational capacity (2T37-2T38).

Historically, there has not been a clear delineation between Deputy Chief and Inspector duties. When the City Command was initially established in 1972, Deputy Chiefs served as CICs (2T46) and there was no Inspector title (2T47). There were periods of time when both Inspectors and Deputy Chiefs worked side-by-side in the City Command and each title served as CIC (2T45-2T46). During these periods, a captain served as CIC when neither an Inspector nor Deputy Chief was available, and the captain received out-of-title pay as a Deputy Chief (2T46). In mid June 1995 Moriarty decided to switch the duties of Inspectors with those of Deputy Chiefs, and vice versa, as the beginning of a rotating process to enable senior police personnel to enhance their managerial and administrative expertise and their operational knowledge of all high level police positions. That led, in part, to the issuance of R-4 cited earlier. The duties of

the City Command positions and the Division Commander positions after the Inspector/Deputy Chief switch were the same as they had been before the switch (3T54).

Moriarty did not switch the Inspectors and Deputy Chiefs as a permanent assignment, and did not do it to avoid out of title pay or to save money. The City did not save money by making the assignment. I find Moriarty instituted the rotational assignment to enhance the Inspectors and Deputy Chiefs administrative and operational expertise. Some Inspectors may go back to City Command and Deputy Chiefs may go back to Division Command (3T152-3T155). Inspector Peter Behrens has already been reassigned to City Command (2T45). Behrens has been denied requests for out of title pay as a Deputy Chief since June 1995 for those times he was required to perform overtime duties in City Command while still technically assigned to be a Division Commander (prior to April 1996) (2T42-2T43, 2T45).

In fiscal years 1993, 1994 and 1995, the City made out-of-title payments to Inspectors who filled in for vacationing or sick Deputy Chiefs (R-2; 2T38-2T39). These payments represented out of title compensation for Inspectors serving as Division Commanders because, under the 1992 organization structure subsequently modified by Moriarty, Deputy Chiefs held Division Commander positions (C-4, Attachment B, p. 3-4).

Inspectors who were transferred to Division Commander positions under General Order #8-95 continued to receive Inspector

pay (3T154). They were not paid on an out-of-title basis when they assumed the Division Commander positions (2T31-2T32). The City made no out-of-title payments for Inspectors in an acting Deputy Chief category after May 1995 (R-2).

Economic Information

13. As illustrated in Exhibit R-2, the City incurred out-of-title pay costs both before and after January 1995. In fiscal years 1993 (7/92-6/93) and 1994 (7/93-6/94), the City paid totals of \$21,862 and \$5,365, respectively, for sergeants acting as lieutenants (R-2). I credit Moriarty's uncontradicted testimony that the reduction in out-of-title pay for fiscal 1994 was attributable to the promotion of many new lieutenants, which reduced the need for out-of-title pay to sergeants (3T31-3T32). The figures for fiscal years 1993 and 1994 for other positions were:

1993	Deputy Chief acting as Chief:	\$ 687
1994	Deputy Chief acting as Chief:	\$ 1,362
1993	Inspector acting as Deputy Chief:	\$15,641
1994	Inspector acting as Deputy Chief:	\$ 5,887
1993	Captain acting as Inspector:	\$ 2,904
1994	Captain acting as Inspector:	\$ 2,968

1993	Lieutenant acting as Captain:	\$	0
1994	Lieutenant acting as Captain:	\$	328

In fiscal year 1995 (7/94-6/95) (which includes the July-December 1994 period, before Moriarty's organizational plan had been put into place) out-of-title pay for sergeants acting as lieutenants was \$10,510 and, in fiscal 1996 (7/95-6/96), \$10,376 (R-2). Out-of-title payments for fiscal years 1995 and 1996 for other positions were as follows:

1995	Deputy Chief acting as Chief:	\$1,752
1996	Deputy Chief acting as Chief:	\$2,583
1995	Inspector acting as Deputy Chief:	\$3,070
1996	Inspector acting as Deputy Chief:	\$ 0
1995	Captain acting as Inspector:	\$5,524
1996	Captain acting as Inspector:	\$3,957
1995	Lieutenant acting as Captain:	\$3,829
1996	Lieutenant acting as Captain:	\$4,650

In light of the fact that the City's overall out-of-title pay costs have not decreased significantly, I credit Moriarty's testimony that his decisions were not motivated by a desire to reduce out-of-title pay costs (3T27).

ANALYSISTHE UNFAIR PRACTICE CHARGE

The allegations in the charge essentially raise the question of why did the City reorganize the Department? If the reorganization was done to avoid out of title payments the City violated the Act. If the reorganization was done, however, to enhance the Department's operations and supervision it was a managerial prerogative and the City would not have been obligated to negotiate over the implementation of the reorganization. Compare, City of Jersey City (Jersey City No. 1), P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd App. Div. Dkt. No. A-6290-95T2 (5/5/97); Tp. of Maplewood, P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985); City of Jersey City (Jersey City No. 2), I.R. No. 91-5, 16 NJPER 476 (¶21205 1990).

The PSOA's allegation that the City unilaterally changed out of title pay practices, illegally commingled superior officer ranks, and falsely redefined superior officer responsibilities solely to avoid out of title payments was not supported by the evidence. The PSOA's allegation that the City refused to negotiate over compensation related components of the reorganization was similarly not established.

Additionally, the PSOA has not shown that the City denied requests for out-of-title pay in circumstances which, prior to January 1995, would have been approved. While the parties may disagree whether Article 26 applies to situations which have

arisen for the first time since January 1995, the City's disagreement with the Charging Party's contract interpretation does not constitute an unfair practice. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Cf. Manalapan-Englishtown Bd. of Ed., D.U.P. No. 93-41, 19 NJPER 292 (¶24151 1993) (good faith dispute over whether contract language applies in light of allegedly changed circumstances should be resolved through grievance procedure).

I find that the City reorganized the Department for the reasons Moriarty expressed, to achieve greater responsibility, accountability and supervision, and enhance operational knowledge of the Department. I found Moriarty to be a reliable and trustworthy witness and I credited his testimony. While the PSOA inferentially challenged Moriarty's explanation for the reorganization, it did not offer evidence directly contradicting his explanation.

Saving money was not the basis for the reorganization, and the City did not repudiate the out-of-title pay provision. The evidence shows that the City has honored Article 26 since January 1995, and, in some instances, paid more out of title pay since 1995 than in prior years.

The thrust of the PSOA's complaint goes to the application of Article 26 to the new circumstances that were created by the reorganization. Some of those circumstances rule out the application of Article 26 because they are the impact of the

managerial prerogative to reorganize, such as the assignment of full time desk duty to Desk Sergeants, and the assignment of City Command and Division Command duties to both Inspectors and Deputy Chiefs. Compare Twp. of Maplewood; Warren County, P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985). Some of those circumstances are arbitrable, however, because they involve only compensation issues requiring the interpretation of Article 26, such as what level of out of title pay a captain should receive (Inspector or Deputy Chief) for being assigned to an acting capacity in City Command. Compare City of Garfield, P.E.R.C. No. 94-11, 19 NJPER 442 (¶24205 1993); Twp. Cherry Hill, P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992); City of Jersey City No. 2. The unfair practice charge is not the place to litigate over the interpretation of Article 26. That must be done through the grievance procedure.

Generally, an employer violates subsection 5.4(a)(1) and (5) when it unilaterally changes a mandatorily negotiable term and condition of employment without negotiations. Neptune Bd. of Ed., P.E.R.C. No. 90-55, 16 NJPER 30 (¶21015 1989), recon. granted P.E.R.C. No. 90-64, 16 NJPER 125 (¶21048 1990), req. for stay den. P.E.R.C. No. 90-76, 16 NJPER 173 (¶21071 1990), aff'd NJPER Supp.2d 248 (¶201 App. Div. 1991), certif. den. 126 N.J. 333 (1991). A violation of subsection 5.4(a)(1) and (5) will also be found where an employer has repudiated 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). Accord

Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995). However, an alleged breach of contract does not warrant the exercise of the Commission's unfair practice jurisdiction. State of New Jersey (Dept. of Human Services). Nor will a violation be found where it is determined that the employer has not in fact changed a term and condition of employment. See New Jersey Highway Auth. (Garden State Parkway), P.E.R.C. No. 93-106, 19 NJPER 271 (¶24136 1993) (complaint dismissed where Charging Party did not prove factual predicate for its unfair practice claim).

In its post hearing brief, the PSOA relied on several grievance related cases to support its argument here. Those cases concerned the arbitrability of compensation related grievances and the Commission found they were arbitrable because the predominant issue was compensation, not the managerial prerogative to assign duties. See City of Garfield (19 NJPER 442); Twp. Cherry Hill; Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992); Town of W. New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991) aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993); City of Jersey City No. 2; East Brunswick Bd. Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp. 2d 285 (¶229 App. Div. 1992).

While relevant to the extent they support the proposition that compensation related issues that do not adversely impact the implementation of managerial prerogatives are negotiable, those

cases do not support the finding of a violation here. By reorganizing the Department, the City changed the duties of several officers. Since those changes were implemented as part of the City's governmental policy determination to enhance the Departments operation, no negotiations were required. See, Paterson Police PBA, Local No. 1 v. City of Paterson, 87 N.J. 78, 92 (1981); Local 195, IFPTE v. State, 88 N.J. 393 (1982). A discussion of the impact of those changes on specific titles follows.

Sergeants Serving as Lieutenants

The PSOA alleges that, after January 1995, the City unilaterally discontinued its practice of paying sergeants for functioning as Lieutenant/Desk Officers. Its argument is based on the assumption that the performance of Desk Officer functions for an entire shift constituted, both before and after January 1995, service as an acting lieutenant. However, the PSOA did not prove that, prior to 1995, "acting status" flowed solely from service as a Desk Officer, as opposed to taking an absent lieutenant's position in the chain of command, assuming responsibility for the shift, and performing Desk Officer and all other duties typically performed by lieutenants at that time.

The PSOA established only that, prior to January 1995, sergeants received out-of-title pay when there was no lieutenant on duty and, as a result of that temporary vacancy, a sergeant

temporarily filled the position. The PSOA did not show that, prior to January 1995, a sergeant would receive out-of-title pay for performing Desk Officer functions for a full tour, despite the fact that a lieutenant was on duty and thus in charge of the shift.

The City did not violate the Act with respect to how Article 26 applied to sergeants after January 1995 because the change in sergeant assignment and duties subsequent to January 1995 were implemented as part of the reorganization of duties that led to the creation of the Tour Commander position. Avoiding out of title pay was not the basis for the change, thus, no negotiations requirement was present.

There were three primary changes affecting sergeants. The Desk Sergeant position that existed in January-February 1995, the February-June 1995 period during which lieutenants were generally expected to work part of the desk and part in the field, and the period after June 1995 when lieutenants were generally assigned the desk duties similar to the pre-1995 period.

The implementation of the Desk Sergeant position permanently assigned desk duties to the sergeant. Since it was part of the reorganization which I found was based on governmental policy considerations rather than merely compensation issues, there was nothing left to negotiate. See, City of Paterson; Local 195. Additionally, while the desk duties were permanently assigned to the Desk Sergeant position they were not lieutenant duties, thus, the Desk Sergeants could not have been in an acting lieutenant position when performing Desk Sergeant duties.

The elimination of the Desk Sergeant position, of course, changed that scenario with Lieutenant/Tour Commanders being assigned desk duties. But the assignment of those duties back to lieutenants--both during the February-June 1995 period and thereafter--did not establish that a sergeants assignment to those duties for a whole tour placed him/her in an acting Lieutenant/Tour Commander position sufficient to trigger Article 26. Both the title, and section one, of Article 26 seem to require the "appointment" of a sergeant to an acting Lieutenant/Tour Commander position. The PSOA has not demonstrated that any sergeant appointed to an acting position since January 1995 has been denied out of title pay. Issues over whether sergeants were actually appointed to acting capacity could be resolved through the grievance procedure, but not this charge.

Finally, this matter is also distinguishable from Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd NJPER Supp.2d 118 (¶98 App. Div. 1982) relied upon by the PSOA. In that case, the Commission found that an employer violated subsections 5.4(a)(1) and (5) by unilaterally changing an established salary practice. The Board had hired a "part-time" itinerant teacher who received a lower salary and benefit package than full-time itinerant teachers. The Commission ruled that the Board had violated the Act by unilaterally altering the salary structure for "itinerant teacher." The part-time teacher performed the same duties and had the same workload as the

full-time itinerant teachers. The Commission concluded that the alleged conversion of the position from full-time to part-time was a change in name only, designed to camouflage the employer's attempt to avoid its contractual obligations and have the same work performed for less money.

In contrast, the PSOA here has not shown that a sergeant on desk duty for an entire shift, while a lieutenant is in charge of that tour, is performing the same duties as a lieutenant. The record demonstrates that lieutenants, both before and after 1995, had duties beyond serving as Desk Officer, including supervising the sergeants on that tour and assuming overall responsibility for the tour. In addition, unlike the employer in Deptford, the City's actions here were not designed to avoid its contractual obligations: I have credited Moriarty's testimony that his organizational decisions were not motivated by a desire to reduce out-of-title pay costs and, as discussed above, the City continues to make out-of-title payments pursuant to Article 26.

Lieutenants Serving as Captains

The PSOA contends that the City unilaterally changed its out-of-title pay practices when, after January 9, 1995, it denied out-of-title pay to lieutenants who performed the duties of a captain when the captain was on a regularly-scheduled day off or when the captain served on the night shift on a rotating basis. Again, the PSOA's case turns on whether it has established that, prior to January 1995, lieutenants received out-of-title pay when

they performed certain duties normally performed by a captain, as opposed to temporarily taking the place of an absent captain in the chain of command.

I have found that, both before and after 1995, lieutenants received out-of-title pay when they were appointed to act in place of a captain who was sick or on vacation. The parties' disagreement centers on whether the City changed out-of-title pay practices by refusing such payments for lieutenants when: (1) their captain has a regularly-scheduled day off; (2) their captain works on the evening shift; and (3) their captain works on the evening shift but is "bumped up" to the City Command. Situations (1) and (2) affect day-shift lieutenants, since captains normally work the day shift. Situation (3) affects night-shift lieutenants during those weeks when a captain is working the evening shift on a rotational basis.

The PSOA did not show that, prior to 1995, a lieutenant was considered to be acting as a captain and paid at that rate when the District's captain had a regularly-scheduled day off. Indeed, the only testimony concerning pre-1995 out-of-title pay practices for lieutenants was Moriarty's statement that he did not think that "historically" lieutenants received out-of-title pay when their captain had a regularly-scheduled day off during the week. Thus, the PSOA has not met its burden of proving a change in out-of-title pay practices in this circumstance.

Nor did the PSOA show that the City changed its out-of-title pay practices by refusing to pay day-shift lieutenants out-of-title pay when their captains rotated to the night shift. First, since lieutenants were not rotated to the night shift until June 1995, the City could not have changed its out-of-title pay practice with respect to this type of situation. Second, and more generally, the PSOA did not show that a lieutenant received out-of-title pay for those tours where no captain was scheduled to be on duty and a lieutenant was therefore the highest-ranking officer on the tour. For example, there was no evidence that lieutenants received out-of-title pay on weekends, when captains were not on duty or that, prior to June 1995, evening and night shift lieutenants received out-of-title pay because captains were always assigned to the day shift.

A similar analysis applies to situations where a captain who rotated to the evening shift was "bumped up" to the City Command. Since the assignment of captains to the evening shift is a new practice, there can be no unilateral change in the manner in which Article 26 was or was not applied to the above-described situation. No testimony was presented that evening shift lieutenants in fact assumed the captains' duties when a captain who rotated to the evening shift was also assigned to the City Command.

The record does show that certain day-shift lieutenants might, as a result of the decision to rotate captains to the

evening shift, have to assume more of the duties typically performed by a captain than would an evening or night shift lieutenant: for example, inquiries from members of the public who might want to speak to the captain typically arise during the day. However, the evidence does not show that day lieutenants were actually appointed to an acting capacity when captains rotated to the evening shift, and any arbitrable claims which might arise from a measurable increase in workload do not establish a unilateral change in out-of-title pay practices. Additionally, any issue over whether lieutenants were appointed to acting captain positions should be resolved through the grievance procedure.

Captains Serving in City Command

The PSOA contends that captains who are assigned on an acting basis to the City Command should receive Deputy Chief pay because, as a result of General Order #95-8, Deputy Chiefs are now serving in the City Command.

The City, instead, is adhering to the out-of-title pay practice preceeding 1995 by paying captains serving in City Command at the Inspector rate of pay. That action is consistent with the pre 1995 organizational structure when Inspectors exclusively served in City Command. The PSOA did not prove that, in the six months prior to January 1995, captains serving in the City Command received Deputy Chief pay.

The record shows that both Inspectors and Deputy Chiefs are authorized to serve in City Command, and that Inspector Behrens, has been reassigned thereto. Thus, the issue here is compensation, what should captains be paid when acting in City Command?

The City did not violate the Act because it made out of title payments, albeit, at a lower rate. Disagreements over what rate to pay are arbitrable, and should be resolved through the grievance procedure.

Inspectors Serving as Division Commanders or Back to City Command

Moriarty transferred Inspectors into Division Commander positions to perform work previously performed by Deputy Chiefs and, conversely, transferred Deputy Chiefs to perform work previously performed by Inspectors.^{8/}

The PSOA argues that the City violated the Act by assigning Inspectors to Division Command and not paying them out of title pay as a Deputy Chief. That argument lacks merit.

Historically, there has been a close relationship between the Inspector and Deputy Chief positions and duties. They are both high-level positions and their occupants report directly to the Chief of Police. Moriarty switched Inspector and Deputy Chief assignments to cross-train superiors holding those positions so

^{8/} The PSOA does not challenge the reassignment of Deputy Chiefs to perform City Command duties at their Deputy Chief rate of pay.

they could perform both jobs. Since Inspectors were assigned Division Command positions as part of the reorganization that was implemented for governmental policy reasons, the Inspectors were not serving in an acting capacity in that position, thus, the City did not violate the Act by not paying them out of title pay.

Similarly, Moriarty's decision to cross-train Inspectors and Deputy Chiefs to perform both Division Command and City Command positions was a governmental policy determination that enhanced the duties/responsibilities of both titles. As a result of that managerial change in duties--which was not based on economic considerations--the City had the right to assign either title to either position as a regular assignment. Negotiations over that change would adversely impact on the policy the City was attempting to implement. City of Paterson; Local 195. Thus, an Inspector reassigned from Division Command to City Command on a periodic basis, is not working out-of-title.

Such periodic reassignments, however, must be distinguished from temporary reassignments of Inspectors to fill in for absent Deputy Chiefs. Just because Inspectors can be assigned to either position, does not mean they are not entitled to out-of-title pay when serving in an acting position for a Deputy Chief. Compensation issues arising therefrom can be addressed through the grievance/arbitration provisions of the collective agreement. There is no evidence here that the City has refused to process such grievances.

The City did not violate the Act with respect to whether Inspector Behrens was entitled to additional compensation for performing overtime duties. Issues of whether he was serving in an acting capacity, and/or whether he was entitled to overtime compensation are for an arbitrator to decide.

Allegation over Compensation Related Components

While the charge stated that the City had refused to negotiate over compensation-related components of the City's "purported re-organization," it introduced no evidence that it demanded negotiations over these alleged components. Therefore, there is no basis for concluding that the City violated subsections 5.4(a)(1) and (5) by refusing such negotiations.

Cherry Hill Tp., P.E.R.C. No. 97-33, 22 NJPER 375 (¶27197 1996); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984); City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J.Super. 382 (App. Div. 1985). See also Town of Kearny, P.E.R.C. No. 91-42, 16 NJPER 591 (¶21259 1990).

THE SCOPE PETITION

District Detective Commander

The City's petition to restrain arbitration of the grievance concerning the District Detective Commanders requires a different analysis than the unfair practice charge. The City contends that the grievance is time-barred and, in any case, is legally non-arbitrable because it implicates the City's managerial prerogative to determine its organizational structure.

The Commission's jurisdiction in scope-of-negotiations matters is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, I do not consider the contractual merits of this grievance or any contractual defenses the City may have.

An allegation that a grievance is time-barred is an issue of contractual arbitrability for the arbitrator and, therefore, I will not restrain arbitration on that basis. Ridgefield Park. Nor will I restrain arbitration on the basis that arbitration would significantly interfere with a governmental policy determination.

City of Paterson states the test for determining whether a subject involving police and firefighters is an employment condition or a non-negotiable governmental policy.

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 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.

[87 N.J. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C.. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). No preemption issues are raised here, so Paterson bars the District Detective Commander arbitration only if it would substantially limit the City's governmental policymaking powers.

Generally, an employer has a managerial prerogative to structure a table of organization, establish job categories and assign duties to those categories. Bergen Pines Cty. Hosp., P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986). However, it must negotiate over terms and conditions of employment for those positions, including compensation for assigned duties. East Brunswick. Thus, compensation for work performed in a different pay category is, as a rule, mandatorily negotiable. See Cherry Hill

Tp., P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992) (captain could arbitrate claim that he was assigned and was performing deputy chief duties; Bor. of Rutherford, (sergeant could arbitrate claim that he was entitled to out-of-title pay for performing duties which had previously been performed by a lieutenant); Town of West New York, (permitting arbitration over claim that deputy chiefs were assigned to act as chiefs and were entitled to be paid as such); East Brunswick (allowing arbitration over claim that assignment of additional duties required compensation under another pay category). Obtaining contractual protection against the imposition of out-of-title duties protects the integrity of the equation between negotiated salaries and the required work. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997).

On the other hand, an employer has a right to assign or transfer individual employees to accomplish its mission--even when those determinations may reduce opportunities for overtime, shift differential or, by logical implication, out-of-title pay. See City of Long Branch, P.E.R.C. No. 92-53, 17 NJPER 506 (¶22248 1991) (city has managerial prerogative to transfer an employee to meet governmental policy goal of matching the best qualified employee to a particular job, even when it results in loss of shift differential or premium pay). Accord Warren Cty. Freeholder Bd. Further, the Commission has held that reduced opportunities for shift differential or out-of-title pay may be a non-severable consequence of an employer's decision to re-organize or determine how best to

deploy its personnel. For example, in City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (121131 1990), the Commission restrained arbitration of a lieutenant's grievance protesting his transfer from the command of the detective division to a lieutenant position on the midnight shift. The Commission found that the transfer was not disciplinary and that the lieutenant's loss of differential pay--received as a result of irregular work hours in the detective division--was a non-severable consequence of the re-organizational decision.

Thus, the key to deciding whether the impact of changes resulting from a reorganization of duties is negotiable, is whether negotiations would adversely impact on the employers implementation of a governmental policy. City of Paterson; Local 195. The assignment of desk duties to sergeants, and City Command and Division Command duties to Inspectors, for example, were based on a governmental policy determination, whereas the original assignment of sergeants to District Detective Command positions was not.

The District Detective Commanders are seeking a determination, as did the employees in East Brunswick, Rutherford, West New York and related cases, that they are performing duties which require that they be compensated at the pay rate negotiated for a higher-level position. I conclude that the grievance is legally arbitrable under this line of cases. The City's reliance on such cases as Garfield (16 NJPER 318), Warren, Long Branch and Maplewood Tp. (11 NJPER 521), is misplaced. None of the employees in those

cases contended that they were required to perform work more appropriate to a position with a higher negotiated pay rate. Instead, they protested the loss of differential or out-of-title pay which flowed either from a particular assignment within their job category or which they were eligible for, based on their position, as a result of a particular organizational structure. Their differential pay could not be preserved without negating a discrete managerial decision to transfer an employee or re-organize services.

In contrast, here I have found that the City did not establish that the original assignment of sergeants to perform District Detective Command duties in 1992 was based upon a governmental policy consideration. The grievance, therefore, is arbitrable.

But since the City did prove that Moriarty's 1994 decision to keep sergeants in the District Detective Command position was based upon a governmental policy determination, any award issued as a result of the arbitration should not extend beyond the point of Moriarty's decision.

Other Grievances

Grievances over what out of title rate captains should be paid while serving in City Command, and grievances over whether Inspectors should be paid out of title pay when temporarily replacing absent (sick or on vacation) Deputy Chiefs in either City Command or Division Command are arbitrable. Both circumstances predominantly concern compensation, and do not interfere with the City's assignment of personnel.

Accordingly, based upon the above findings and analysis I make the following:

CONCLUSIONS OF LAW

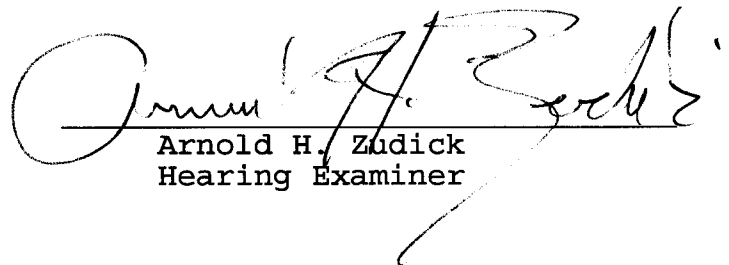
The City did not violate the Act by implementing a police department reorganization in 1995.

The grievance in AR-95-614 is arbitrable.

RECOMMENDATIONS

1. I recommend that the unfair practice complaint be dismissed.

2. I recommend that the Commission issue an **ORDER** denying the City's request to restrain the arbitration in AR-95-614, but that it grant a restraint to the extent that any award that may be issued not extend beyond that time in 1994 when Moriarty decided to retain sergeants in the District Detective Command position for policy reasons.


Arnold H. Zudick
Hearing Examiner

Dated: September 26, 1997
Trenton, New Jersey