

P.E.R.C. NO. 98-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-H-94-387

MIDDLETOWN PBA LOCAL 124,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Middletown violated the New Jersey Employer-Employee Relations Act by unilaterally changing a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide. The Commission finds, under the facts of this case, that the Township had an obligation to negotiate with the Middletown PBA Local 12 before setting a new police officer's salary below step three.

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
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-H-94-387

MIDDLETOWN PBA LOCAL 124,

Charging Party.

Appearances:

For the Respondent, Dowd & Reilly, attorneys
Bernard M. Reilly, of counsel)

For the Charging Party, Klatsky & Klatsky, attorneys
(Michael A. Bukosky, of counsel)

DECISION

On June 22, 1994, Middletown PBA Local 124 filed an unfair practice charge against the Township of Middletown. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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. (7) Violating any of the rules and regulations established by the commission."

changing an established term and condition of employment.

According to the PBA, although experienced police officers start at step three of the salary guide, Anthony Gonzalez, an officer with over nine years' municipal department experience, was placed at step two of the salary guide when beginning employment.^{2/}

On July 3, 1996, a Complaint and Notice of Hearing issued. At the January 21, 1997 hearing, Hearing Examiner Perry O. Lehrer accepted the Township's earlier statement of position as its Answer. The parties then examined witnesses, introduced exhibits, argued orally, and filed post-hearing briefs.

On July 1, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-1, 23 NJPER 456 (¶28215 1997). He found that the unilateral placement of Gonzalez on the salary guide was consistent with the parties' past practice. Accordingly, he concluded that the employer had not violated its duty to negotiate in good faith. Absent any supporting evidence, the Hearing Examiner also recommended dismissing the 5.4a(3) and (7) allegations.

On August 11, 1997, the PBA filed exceptions. It asserts that it never acquiesced to the hiring of any experienced police officers at other than step three of the salary guide. It argues that if any officers were hired at different steps, the PBA did not have any notice or knowledge of that fact. In the one

^{2/} On August 15, the charge was amended to correct an error.

instance where the PBA did have knowledge, it asserts that it filed an unfair practice charge and that the matter was settled when the Township agreed to advance the officer to step three on the guide.

On August 18, 1997, the Township filed an answering brief. It asserts that PBA officials knew that it had hired experienced officers at other than step three. It urges adoption of the recommended decision and relies on its post-hearing brief.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-13), except as modified or rejected below.

We add to finding 10 that former Township administrator Bradshaw testified that there was an unwritten policy of hiring police officers with municipal police experience at an advanced step on the salary guide. According to Bradshaw, salaries were determined after discussions with the chief about the candidate's experience.

We add to finding 13 that Captain Scott's memorandum to Bradshaw requests a salary adjustment

in keeping with a policy adopted by the Police Department that gives credit to new Police Officers with prior experience in other departments and therefore do not have to be trained before being assigned to patrol duty.

This policy was adopted with the hiring of Ptl. Mehler in Sept. 1981 and will save the Township the cost of basic training and [enable] the immediate utilization of said employee.

We reject any implication in finding 18 that Officer Morrell or Officer McClelland changed their testimony about the Township's practice. The questions on direct and cross-examination required them to refine their definitions, but we detect no inconsistencies. Neither testified that salary guide placement was case-by-case. Both recognized that not just any experience qualified a new officer for placement on step 3. The officer had to have completed academy training and had to have experience in a permanent position in a municipal police department. Their testimony, the testimony of the former Township administrator, and the record evidence as a whole, demonstrates that since 1981, the Township has had a practice of placing new police officers with police academy training and at least one year's experience in a municipal police department at step three of the salary guide. The only time, before this case, that the Township deviated from that practice, the PBA responded by filing an unfair practice charge.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

The Commission has generally seen three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2) cases where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change; and (3) cases where the employer alleges that the representative has waived any right to negotiate, usually by expressly or impliedly giving the employer a right to impose a change.

In the first type of case, the representative alleges that the employer agreed to provide a benefit by an express contractual commitment or by an implied contractual commitment based on an established practice. Hill and Sinicropi, Management Rights, 20-22 (1986). To prove an implied commitment, the representative must show that the practice has been "(1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Id. at 23-24. If it succeeds, the employer will be bound to maintain the established past practice during the life of the contract. Section 5.3's duty to negotiate over proposed modifications is not at issue because there is nothing

to negotiate -- the representative claims it already has a binding contractual right. The Commission therefore usually defers such contractual claims to the parties' negotiated grievance procedures to resolve. State v. Council of N.J. State Coll. Locs., 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 326 (1978).

This is not the first type of case. The PBA makes no claim that the employer was bound by an established past practice or other contractual obligation.

In the second type of case, an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim, or cannot prove, an express or implied right to impose that change without negotiations. Such a change triggers the duty to negotiate under section 5.3. As stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment ... even though that practice or rule is not specifically set forth in a contract.... Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

Thus, unlike in the first type of case, the representative need not show an actual contractual entitlement or a binding past

practice.^{3/} Indeed if an entitlement or binding past practice could be shown, what would be left to negotiate? To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating.

This is the second type of case. The PBA alleges that the Township unilaterally changed the existing practice of starting trained and experienced officers on step three of the salary guide. The PBA does not claim an express or implied contractual right to prevent discontinuance.

In the third type of case, the employer asserts that the representative has clearly waived any right to negotiate. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122,

^{3/} Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981), imprecisely stated that an established practice arises from the mutual consent of the parties, implied from their conduct. For purposes of ascertaining whether negotiations must precede a change, an employment condition need only exist and need not arise by an agreement of the parties, expressed or implied. Similarly, Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982), at first blush, appears to blur the distinction between a binding practice and an existing employment condition by stating that "a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement." That statement, however, was made in the context of an employer's obligation to preserve the status quo during successor contract negotiations. It did not concern the nature of a past practice during a contract.

140 (1978). A waiver will be found, for example, if the representative has expressly agreed to a provision authorizing a change or impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). A representative need not show that a contract or practice entitles employees to a benefit; the employer must instead show that a contract or practice constitutes a waiver of the right to negotiate. If the employer carries that burden, it has the right to make the change unilaterally. As with the first type of case, there is nothing to negotiate.

This is also the third type of case. The employer asserts that, by its acquiescence, the PBA has waived its right to negotiate over starting salaries for experienced police officers

The PBA argues that the parties' practice was to place trained and experienced police officers on step three of the salary guide when they began employment. Since Gonzalez was hired at step two, the PBA contends that the Township unilaterally changed an employment condition without first negotiating.

The Township argues that initial salaries were set on a case-by-case basis and that any practice not found in the contract

can be changed when conditions change. It notes that police salaries have escalated in the past several years and that there is an increasing fiscal squeeze on taxpayers.

Initial placement on the salary guide is a mandatorily negotiable issue. In general, an employer cannot set a new employee's starting salary without first negotiating with the majority representative. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986); Stanhope Bor. Bd. of Ed., P.E.R.C. No. 90-81, 16 NJPER 178 (¶21076 1990), Gloucester Tp., P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986); Somerset Cty., P.E.R.C. No. 86-136, 12 NJPER 453 (¶17171 1986); see also Middlesex Cty. Pros., P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990), aff'd 255 N.J. Super. 333 (App. Div. 1992) (credit for prior governmental service mandatorily negotiable).

In this case, the parties did not negotiate starting salaries. However, since at least 1981, police officers who have completed academy training and who have worked at least one year in a municipal police department have been placed on step three of the salary guide. Whether that practice was unwritten, as testified to by former administrator Bradshaw, or written, as evidenced by the 1982 memorandum from Captain Scott to Bradshaw, it was an existing employment condition and the Township would normally have an obligation to negotiate before changing it.

We agree with the Hearing Examiner that the exact limits of the practice are not clear. Officers without experience as a

permanent employee in a municipal police department of at least one year have been placed below step three. However, the one time an officer with the requisite experience was hired below step three, the PBA filed an unfair practice charge. We need not consider the terms of the settlement to note that the Township was on notice that if it deviated from the practice, as that practice concerned employees with the requisite experience, the union would challenge the Township's action.

Officer Gonzalez had worked nine years as a full-time municipal police officer. He had also worked as an officer for the New Jersey Department of Human Services. He thus falls well within the practice concerning officers who have been trained and have had at least one year of experience in a municipal police department.

We reject the Township's argument that it had a right to change the practice because police salaries had increased. Changes in employment conditions must be addressed through the collective negotiations process. N.J.S.A. 34:13A-5.3. Unilateral action is destabilizing and contrary to the express requirements of the Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

We also reject the Township's argument that the PBA waived its right to negotiate by permitting similar unilateral actions. While some employees began employment below step three,

they all lacked at least one year's municipal department experience. Even if those placements could be viewed as deviations from a past practice, the record does not show that the PBA acquiesced in those deviations and thereby waived its right to negotiate. Two PBA representatives testified that they had no knowledge of any deviation from the alleged practice. The Township presented no contrary evidence. Contrary to the Township's suggestion, the PBA was not obligated to call as witnesses the PBA presidents from 1987 through 1992. If the Township wanted to rebut the current officers' testimony that the PBA had no knowledge of any deviations from the established practice, the Township should have called those earlier officers or other Township witnesses with first-hand knowledge of the facts.

The Township had an obligation to negotiate over starting salaries. It unilaterally established a policy of placing officers with police academy training and at least one year of municipal police department experience at step three of the salary guide. The PBA did not object to that practice. The only time that the PBA was aware of a deviation from that practice, it filed an unfair practice charge. Thus, the PBA cannot be said to have acquiesced to any deviations from the practice. Under these facts, we conclude that the Township had an obligation to negotiate with the PBA before setting Gonzalez' salary below step three.

We reiterate that the Township is not bound to maintain its practice. It is simply required to negotiate before changing

it. See Hunterdon Cty. If conditions have changed and the Township believes that the practice should be discontinued, it is free to take that position in negotiations.

In the absence of exceptions, we dismiss the 5.4a(3) and (7) allegations.

ORDER

The Township of Middletown 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 a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide.

2. 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, particularly by unilaterally changing a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide.

B. Take this action:

1. Restore the practice of starting new police officers with police academy training and at least one year's municipal police experience at step three of the salary guide.

2. Negotiate in good faith with Middletown PBA Local 124 over possible changes to the practice of paying trained and experienced police officers at an advanced step on the salary guide.

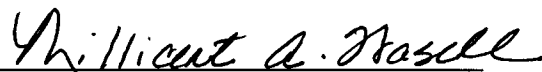
3. Change Officer Anthony Gonzalez' starting salary guide placement to step three and make him whole for any losses incurred by placing him at a lower step.

4. 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.

5. 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.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: November 20, 1997
Trenton, New Jersey
ISSUED: November 21, 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 a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide.

WE WILL cease and desist from 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, particularly by unilaterally changing a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide.

WE WILL restore the practice of starting new police officers with police academy training and at least one year's municipal police experience at step three of the salary guide.

WE WILL negotiate in good faith with Middletown PBA Local 124 over possible changes to the policy of paying trained and experienced police officers at an advanced step on the salary guide.

Docket No. CO-H-94-387

TOWNSHIP OF MIDDLETOWN

(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. 98-1

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

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-H-94-387

MIDDLETOWN PBA LOCAL 124,

Charging Party.

Appearances:

For the Respondent, Dowd & Reilly
(Bernard M. Reilly, of counsel)

For the Charging Party, Klatsky & Klatsky
(Michael A. Bukosky, of counsel)

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Township of Middletown did not violate the New Jersey Employer-Employee Relations Act by unilaterally placing a newly hired police officer on Step 2 of the salary guide. The Hearing Examiner found that the unilateral placement of the new hire on the salary guide was consistent with the past hiring practice of the parties.

A Hearing Examiner's 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. 98-1

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

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-H-94-387

MIDDLETOWN PBA LOCAL 124,

Charging Party.

Appearances:

For the Respondent, Dowd & Reilly
(Bernard M. Reilly, of counsel)

For the Charging Party, Klatsky & Klatsky
(Michael A. Bukosky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 22, 1994, the Middletown PBA Local 124 ("PBA" or "Charging Party") filed an unfair practice charge against the Township of Middletown ("Township" or "Respondent") alleging that the Township violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4(a), subsections (1), (3), (5) and (7),^{1/} when it hired Officer Anthony Gonzalez at Step 2 of the

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees

Footnote Continued on Next Page

salary scale without consulting the majority representative, PBA. The Charging Party maintains that a police officer with Gonzalez's prior experience should be hired at Step 3 on the salary scale in conformity with past practice. The Charging Party requests as a remedy that Officer Gonzalez be placed on the correct salary step and awarded back pay.

The charge was amended on August 15, 1994 to correct an error in the original charge. The amendment did not allege any additional violations.

The Director of Unfair Practices issued a Complaint and Notice of Hearing on July 3, 1996. After an unsuccessful attempt by the parties to submit a completely stipulated record, I conducted a hearing on January 21, 1997, at which the parties examined witnesses and presented exhibits.^{2/} At the hearing, Respondent requested that its statement of position submitted on June 27, 1994 be considered as its Answer to the Complaint. No objection was made by the Charging Party and I accepted the

1/ Footnote Continued From Previous Page

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. (7) Violating any of the rules and regulations established by the commission."

2/ The transcript from the hearing will be referred to as "1T." Commission exhibits will be referred to as "C", joint exhibits will be referred to as "J" and Charging Party exhibits will be referred to as "CP."

statement of position as the Answer (1T7). The Township specifically denied that a past practice existed which would require the hiring of Gonzalez at Step 3.

The parties filed post-hearing briefs on April 9, 1997.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Township is a public employer and the PBA is an employee representative within the meaning of the Act (1T11-1T12).

2. The parties jointly submitted a Partial Stipulation of Uncontested Facts, signed and dated January 21, 1997, which was entered into evidence and marked as "J-1." I will specifically incorporate relevant "uncontested facts" in these findings.

3. As of April 1, 1994, the last contract executed between the parties was for the years 1991 and 1992 (J-2). At that time, the parties were in negotiations for a successor agreement for the years 1993 through 1995. Patrolmen were being paid at the 1992 rates specified in J-2 (J-1). There were four salary steps provided for in J-2:

Patrolman in first year of service	\$27,294
Patrolman in second year of service	34,272
Patrolman in third year of service	41,812
Patrolman in fourth year of service	47,979

4. The successor contract covering the period of 1993 to 1995 was arrived at through a combination of negotiations and an

interest arbitration award rendered on November 18, 1994. The following salary steps went into effect for patrolmen for the year 1994 (J-1):

Patrolmen in first year of service	\$30,149
Patrolmen in second year of service	37,857
Patrolmen in third year of service	46,185
Patrolmen in fourth year of service	52,998

5. J-2 and the 1993-1995 contract were silent concerning the initial placement on the salary guide of new police officers hired with prior law enforcement experience (J-1).

6. Under both contracts, patrolmen automatically advanced a salary step for every year of service with the Township (1T26 and 1T109).

7. Article II, Section D of J-2 provides:

This Agreement shall not be modified in whole or in part by the parties hereto except by an instrument in writing duly executed by both parties.

Article XXII, Section C of J-2 entitled Arbitration, provides in pertinent part:

The arbitrator shall be bound by the provisions of this agreement....He shall have no authority to add to, modify, detract from, or alter in any way the provisions of this agreement or any amendment or supplement thereto.

J-2 does not contain a maintenance of benefits clause that would generally preserve terms and conditions of employment not specifically mentioned in the contract.

8. Anthony Gonzalez began working as a patrolman for the Township on April 1, 1994 (1T138). Prior to working for the Township, he was employed by Atlantic Highlands as a full-time police officer for nine years. He also worked as a law enforcement officer for the State of New Jersey, Department of Human Services from 1978 to 1985. In total, Gonzalez had fifteen years of law enforcement experience before being hired by the Township (1T125 and 1T126). Gonzalez was certified as a law enforcement officer by the police academy in 1980 (1T129).

9. Gonzalez was initially hired at Step 2 on the salary guide with a promise of advancement to Step 3 in six months instead of the usual one year wait in light of his training and experience (CP-11). Gonzalez's salary placement was unilaterally determined by the Township. The PBA was never consulted or requested to approve either the salary step or the accelerated step advancement (1T129 and 1T139).

10. The contracts between the parties since 1976 had a four step salary guide. Each of those earlier contracts was also silent regarding the initial placement on the salary guide of officers hired with law enforcement experience (J-1).

11. The following individuals with prior law enforcement experience were hired as patrolmen from 1980 through 1994:^{3/}

<u>Name</u>	<u>Year Hired</u>	<u>Prior Experience at Date of Hire</u>	<u>Step Hired</u>	<u>Academy Certified</u>	<u>Salary</u>
Henry (1T34 and 1T146)	1980	1 year, 3 months as police officer for Asbury Park	1	Yes	\$10,921
Mehler (1T33 and 1T146)	1981	2 years, 0 months as police officer with Egg Harbor	3	Yes	\$18,235
R. Deickmann (1T35 and 1T146)	1983	1 year, 6 months as police officer with Red Bank	3	Yes	\$21,112
Hansen (1T35 and 1T146)	1983	4 years, 2 months as police officer for Ocean Township	3	Yes	\$21,112
Braun (1T35 and 1T146)	1983	4 years, 3 months as police officer in Atlantic Highlands	3	Yes	\$21,112
Murdoch (1T36 and 1T147)	1985	4 years, 6 months as police officer in Atlantic Highlands	3	Yes	\$24,397
Barner (1T36, 1T37 and 1T147)	1986	4 years, 3 months as police officer with Holmdel	3	Yes	\$26,349
Donovan (1T36, 1T37 and 1T147)	1986	4 years, 11 months as police officer with Holmdel	3	Yes	\$26,349

^{3/} Officer Pollinger was hired in 1977 with two years prior experience. I do not find his hire to be relevant because it was made before 1981, the date the Charging Party asserts the past practice commenced. I do, however, include the hire of Officer Henry in 1980 because the past practice allegedly was applied retroactively to him.

<u>Name</u>	<u>Year Hired</u>	<u>Prior Experience at Date of Hire</u>	<u>Step Hired</u>	<u>Academy Certified</u>	<u>Salary</u>
Hall (1T36, 1T37 and 1T147)	1986	5 years, 9 months as police officer with Asbury Park	3	Yes	\$26,349
Morrell (1T36, 1T37 and 1T147)	1986	6 years, 9 months as police officer for Highlands	3	Yes	\$26,349
Maguire (1T37, 1T66, 1T147)	1987	7 years, 0 months: 1 year as State Capitol Police Officer and 6 years as police officer with Holmdel	3	Yes	\$28,457
F. Deickmann (1T42, 1T43, 1T75 and 1T147)	1987	Less than 1 year, never finished probationary period as patrolman for Sea Bright	1	No	\$18,577
Coangelo (1T46 and 1T147)	1987	1 year, 6 months with Department of Human Services as a provisional employee	1	No	\$18,577
Finck (1T45, 1T46, 1T148)	1987	Full time special officer, then provisional patrolman for Highlands	2	Yes	\$23,324
Chenoweth (1T37, 1T41 and 1T148)	1988	2 years, 0 months as police officer with Marlboro	3	Yes	\$29,666
Fuerst (1T46 and 1T148)	1988	Monmouth County Sheriff's Department as a prison guard	1	No	\$19,367
Wiatrak (1T37, 1T38 and 1T148)	1990	2 years, 9 months with Monmouth County Sheriff's Department as a regular sheriff's officer	3	Yes	\$35,293
Weber (1T47, 1T53, 1T72 and 1T148)	1993	11 months as a police officer for Atlantic Highlands then worked security for State Park Service	1	Yes	\$30,149

<u>Name</u>	<u>Year Hired</u>	<u>Prior Experience at Date of Hire</u>	<u>Step Hired</u>	<u>Academy Certified</u>	<u>Salary</u>
Roese (1T38, 1T148)	1993	8 years, 0 months as police officer for Spotswood and Old Bridge	2	Yes	\$36,054
Ward (1T47, 1T48, 1T148 and 1T149)	1994	9 months experience as a regular sheriff's officer with the Monmouth County Sheriff's Department	1	Yes	\$30,149

12. On or about August 5, 1981, then Police Chief, Joseph M. McCarthy, requested that Michael K. Mehler be hired as a patrolman at the third salary step "based upon his experience and training." (CP-9). Mehler was in fact hired at the third salary step.

13. On or about January 7, 1982, Captain Arthur Scott requested that Patrolman Henry's salary be advanced to the next step in light of the salary Mehler was hired at. It was Captain Scott's belief that a policy had been adopted by the police department that gives credit to new police officers with prior experience in other departments (CP-10).

Officer Henry's salary was advanced to the next salary step, Step 3, six months ahead of schedule, on or about January 15, 1982, due to the salary level Mehler was hired at and in recognition of Henry's prior service (1T96).

14. Officer Roese was hired by the Township at Step 2 in 1993. Upon learning of this, the PBA filed an unfair practice charge with the Commission against the Township on September 27, 1993, asserting that Roese should have been hired at Step 3 in light of his prior law enforcement experience and in keeping with past

practice. That charge was ultimately settled between the parties by advancing Roese to Step 3 six months earlier than the normal one year step progression. The settlement agreement expressly provided that the terms "shall not be considered a precedent for any future employment/salary decision." (1T39 and J-3).

15. In reviewing the past hires, I observe a pattern of hiring officers with municipal law enforcement experience and academy certification at Step 3 salary beginning with Mehler in 1981 to Maguire in 1987. F. Deickman is the first officer with municipal law enforcement experience hired without academy certification. He was hired in 1987 at Step 1 on the salary guide. Beginning with F. Deickman in 1987 there is no readily discernible hiring pattern. Officers were hired with varying degrees of experience. Some of the officers had academy certification and some of the officers did not have academy certification. The only conclusion I draw is that if an officer did not have academy certification, he was hired at Step 1 no matter what his level of experience (See, F. Deickman in 1987, Coangelo in 1987 and Fuerst in 1988 in finding 11). However, having academy certification plus prior law enforcement experience did not guarantee advanced salary step placement, let alone placement at Step 3 (See, Weber in 1993 and Ward in 1994 in finding 11). If an officer had academy certification and some level of prior law enforcement experience, he may have been hired at an advanced salary step (See, Finck in 1987 at Step 2, Chenoweth in 1988 at Step 3, Wiatrak in 1990 at Step 3 and Roese in 1993 at Step 2 in finding 11.)

16. From at least 1980 to the present, the Township never consulted with the PBA over the hiring of individuals with prior law enforcement experience or their starting salaries (1T101 and 1T102). Except with regard to the Roese settlement, the Township and PBA have never negotiated over the issue of initial placement on the salary guide of new hires with experience (1T106 and 1T107). Nothing in the record suggests that the PBA demanded negotiations over initial placement of new hirees.

17. Herbert E. Bradshaw was the Township Administrator from 1981 to 1988 (1T121). He was involved in the hiring process of new police officers with past police experience. During his tenure, starting salaries for officers with prior experience were determined on a case-by-case basis. He would consult with the Police Chief and decide initial step placement based on the individual's experience (1T123).

Individuals who had to attend the police academy to get certified training were always hired at Step 1 (1T122). An individual who had completed academy training and had prior law enforcement experience would possibly be hired at an advanced step on the salary guide (1T122 and 1T123). The rationale, in part, was the savings the Township realized from not having to pay for a new hire's academy training (1T63).

Bradshaw's testimony is consistent with the particulars on the hiring history chart (See, finding 11) and my conclusions about the chart (See, finding 15).

18. Robert J. Morrell, Jr. is employed as a patrolman by the Township. He has been PBA President since 1992, served on the PBA Executive Committee since 1988 and been on the Contract Negotiating Committee for the three contracts covering 1991 until 1999 (1T24 and 1T25). Morrell could not articulate exactly what the Township's past practice was in hiring police officers with experience. First, he stated that the past practice was an individual with prior police experience and police academy certification would be hired at Step 3 on the salary guide (1T27). Then Morrell refined his definition of the past practice to be past police experience with either a municipal, county or state agency and completed probationary period plus academy certification (1T54). Morrell thereafter altered his understanding of the past practice when he testified that the past practice required more than a year experience and police academy training (1T58 and 1T59).

When questioned further, on both direct and cross-examination, Morrell testified that not just any law enforcement experience would qualify a person for Step 3 hiring. The type of law enforcement experience, not just the amount, also needed to be considered. Each individual would have to be looked at on a case-by-case basis, considering the length and nature of the law enforcement experience and whether or not the individual was academy certified (1T57, 1T86, 1T87 and 1T89).

Ronald McClelland is a patrol officer for the Township. He has been the Vice President of the PBA since 1992 and has held

various officerships in the PBA and served on PBA committees throughout the 1980's and 1990's (1T97 and 1T103). McClelland also had difficulty in articulating precisely what the past practice was, changing his understanding under direct and cross examination (1T98, 1T99, 1T108, 1T111, 1T112, 1T113, 1T115 and 1T116).

McClelland, however, did testify that one consideration for advanced step salary placement was the kind of law enforcement experience a person had. He, too, believed that length of experience and academy certification considered alone, or applied mechanically, was not enough to qualify for Step 3 placement under the past practice (1T112, 1T113, 1T115 and 1T116).

Because Morrell and McClelland could not clearly articulate what the Township's established practice was with respect to starting salaries for new hires with prior experience, I cannot rely on their testimony to prove the existence of a past practice. However, they both testified that the quality of a new hire's experience is a factor as well as police academy certification, which was corroborated by Administrator Bradshaw's testimony. Therefore, I credit Morrell's and McClelland's testimony in this regard and find that the hiring practice of the Township took into account at least three factors: the amount of experience, the type of experience and whether an individual had police academy certification. The salary step a new hire was placed on was determined on a case-by-case basis after considering at least these three factors.

19. In December of 1996, the parties executed a new contract covering the years 1996 through 1999. The contract continues to be silent with regard to initial placement on the salary guide of new hires with prior law enforcement experience (J-1).

ANALYSIS

The Charging Party contends that the Respondent unilaterally broke from a longstanding past practice when it hired Officer Gonzalez at Step 2.

N.J.S.A. 34:13A-5.3 provides in part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

At the outset, the Township argues that the Commission should not take jurisdiction of this case because it involves a mere contract dispute that is best resolved through the parties' grievance procedure. The Township further argues that if the Commission exercises jurisdiction, the Commission, like an arbitrator, is limited to interpreting the four-corners of the contract between the parties. Because the contract expressly prohibits an arbitrator from adding to, deleting or modifying the contract and because the contract does not contain a maintenance of benefits clause, the Township maintains that the Commission should not consider past practice. Lastly, the Township contends that consideration of the parties' past practice is only appropriate to

interpret an ambiguous provision contained in a contract not as here where the contract is completely silent with regard to the hiring of officers with prior law enforcement experience.

The Commission has the exclusive power to prevent anyone from engaging in any unfair practice. N.J.S.A. 34:13A-5.4(c). The allegations of this case transcend a mere contract dispute and require more than simple contract interpretation. What is alleged here is that the Township modified an existing rule governing working conditions without first negotiating with the majority representative, the PBA. If true, and if the Township did not have a managerial prerogative or contract authorization to do so, the modification would violate the Act, specifically subsection 5.4(a)(5), making it wholly appropriate for the Commission to exercise jurisdiction and consider the merits of the claim. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

In considering the charge, the Commission is not limited to a review of the collective agreement. Terms and conditions of employment can also be found in the parties' past practice. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). A past practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt. rev'd in pt., 180 N.J.Super. 440 (App. Div. 1981). Where a collective agreement is **silent** or ambiguous

on the issue at hand, past practice controls. Generally, a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. (emphasis added). County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). The Charging Party has the burden of proof to establish the existence of a past practice. City of Elizabeth, P.E.R.C. No. 82-74, 8 NJPER 121 (¶13052 1982).

Initial salary placement is mandatorily negotiable. An employer cannot set a new hire's starting salary without first negotiating with the majority representative. Belleville Bd. of Ed., 209 N.J.Super. 93 (App. Div. 1986); Stanhope Borough Bd. of Ed., P.E.R.C. No. 90-81, 16 NJPER 178 (¶21076 1990), Tp. of Gloucester, P.E.R.C. No. 87-42, 12 NJPER 805 (¶17305 1986) and County of Somerset, P.E.R.C. No. 86-136, 12 NJPER 453 (¶17171 1986).

For the reasons stated below, I do not find that the Charging Party has met its burden of proving that an established practice existed of hiring police officers with prior law enforcement experience at Step 3 on the salary guide. Therefore, I recommend that the allegations of the Complaint indicating a subsection 5.4(a)(1) and (5) violation be dismissed.

In reviewing the past hiring "practice" of the Township as a whole, it cannot be said that the Township hired all officers with law enforcement experience at Step 3. Starting with Mehler in 1981 through the hiring of Maguire in 1987, there was a pattern of hiring

officers with varying degrees of municipal law enforcement experience and academy certification at Step 3 on the salary guide. However, a pattern alone does not establish a past practice which also requires mutual understanding between the parties. United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970).

After the hiring of Maguire in 1987, there is no discernible hiring pattern. These more recent hires, which deserve greater weight, do not establish a practice as alleged by the PBA. One of the problems in this case is that the PBA has not clearly articulated the alleged past practice, which is its obligation. Nevertheless, under any asserted version, the PBA failed to demonstrate an established practice. For example, if the past practice is that any law enforcement experience resulted in Step 3 placement, then Patrolmen F. Deickman, Coangelo, Finck, Fuerst, Weber and Ward should have been hired at Step 3. If, on the other hand, the alleged past practice also required academy certification, then Finck, Weber and Ward would have been hired at Step 3. If the alleged past practice was the pattern that ended in 1987--prior municipal law enforcement experience plus academy certification--then Wiatrak, who worked for the Monmouth County Sheriff's Department, should never have been hired at Step 3 in 1990.

The only conclusions one could draw from reviewing the past hires as a whole are officers who did not have academy certification were always hired at Step 1 and officers with academy certification

who had prior experience would possibly be hired at an advanced step, though not necessarily Step 3. These conclusions comport with the testimony of Administrator Bradshaw, which I have credited above.

The evidence did not demonstrate that the Township mechanically applied a rigid formula. Rather, the evidence showed that the Township evaluated each new hire on a case-by-case basis considering at least three factors: the length of experience, the type of experience and whether the person had academy certification.

In hiring Gonzalez, the Township acted consistent with its practice dating back to 1980. The Township unilaterally determined Gonzalez's starting salary, not at all including the PBA in the process, as it had done for the past fourteen years.

Until the Roese matter in 1993, the PBA had never challenged the Township's hiring practice of unilaterally placing a new officer with experience on the salary guide. The only time the PBA ever attempted to negotiate the starting salary of a new hire with experience was during the Roese settlement which was after his salary had been set, and by the settlement's very terms, of no precedential value to either party. Over the years, the PBA had acquiesced to the Township's hiring policy.

The Commission faced similar circumstances in South River Bd. of Ed., P.E.R.C. No.86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987), and Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). In South River Bd. of Ed., the Commission found that the school board's elimination of

part-time teacher's study hall supervision period and consequent reduction in teacher's hours and compensation without prior negotiations, was not unlawful where such unilateral action was consistent with past practice. There, the Commission stated that the Association had waived its right to negotiate by routinely permitting the Board to make similar changes in the past. Id.

In Watchung Borough, the Borough had a policy that gave it total discretion over whether to make disability payments. The Commission found that the Borough did not violate the Act when it did not give holiday pay to police officers on disability leave because it had acted consistent with past practice and policy.

In the present case, while the initial placement on the salary guide is a mandatorily negotiable subject, the PBA waived its right to negotiate over Gonzalez's placement by acquiescing to the Township's practice of unilaterally placing new hires on the salary guide. The Township, in essence, like the Borough in Watchung Borough, has always retained discretion over how much credit to give an officer with prior law enforcement experience. By setting Gonzalez's salary without consulting the PBA, the Township did not deviate at all from its past hiring practice.

In so finding, the PBA has not waived for all time its right to negotiate over the issue of initial placement on the salary guide of police officers with experience. The parties are obligated

to negotiate over this issue for future contracts.^{4/} See, Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 241 (¶12108 1981).

Based on the foregoing, I find that the Charging Party has not met its burden of proving that a longstanding practice existed of automatically hiring officers with prior law enforcement experience at Step 3 on the salary guide.

That is not to say that the Township has not recognized and rewarded academy-trained new officers with experience. Gonzalez, himself, was hired at an advanced step with an accelerated step jump in recognition of his past experience. However, this does not lead to the conclusion that the Township must hire academy-trained officers with experience at Step 3.^{5/}

^{4/} I note that the parties were well aware that the issue of initial placement on the salary guide for officers with experience was an open one during the last contract negotiations. For whatever reason, they chose not to address it.

^{5/} A mechanical application of the past practice alleged by the Charging Party would bring about incongruous results and could ultimately foster divisiveness in the unit. For example, a patrolman who started with the Township and has worked for 24 months and who is thoroughly familiar with the operation of the department would only be entitled to Step 2 salary. Under any version of the Charging Party's past practice, a new hire from another jurisdiction with no knowledge of the local customs of the department and with 13 months experience would be entitled to Step 3 salary. Also, under the Charging Party's theory of past practice, a new hire with 15 months prior experience would be entitled to the same starting salary as a new hire with 15 years prior experience.

There was no evidence presented to support a finding that the initial placement of Gonzalez on Step 2 of the salary guide was motivated by union animus. Hence, under Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), I recommend that the subsection 5.4(a)(3) allegation be dismissed. Similarly, no evidence was introduced to find a subsection 5.4(a)(7) violation, and thus, I also recommend that this part of the charge be dismissed.

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

CONCLUSIONS OF LAW

The Township of Middletown did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) or (7) by unilaterally placing Officer Gonzalez on Step 2 of the salary guide.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the Complaint be dismissed.



Perry O. Lehrer
Hearing Examiner

Dated: July 1, 1997
Trenton, New Jersey