

P.E.R.C. NO. 99-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BOGOTA,

Respondent-Charging Party,

-and-

Docket Nos. CO-H-97-276,
CE-H-97-19, CE-H-97-20

PBA LOCAL 86,

Charging Party-Respondent

SYNOPSIS

The Public Employment Relations Commission dismisses a Consolidated Complaint. The Consolidated Complaint was based on unfair practice charges filed by PBA Local 86 and the Borough of Bogota. The charge filed by the PBA alleges that the Borough violated the New Jersey Employer-Employee Relations Act when, in January 1997, it established a civilian dispatcher position, announced that it planned to hire civilians to perform dispatching duties that had, since 1978, been performed exclusively by police officers, and refused to negotiate with the PBA over this issue. The charges filed by the Borough allege that the PBA violated the Act when it refused to negotiate over a health benefits proposal and when it refused, after an interim decision, to either negotiate over the use of civilian dispatchers or to submit the issue to a then-pending interest arbitration proceeding.

The Commission finds that this case, like Jersey City and POBA and POSA, 154 N.J. 555 (1998), implicates the "special position" of police officers and a governing body's broad discretion to administer its police department and determine what assignments are most appropriate for police officers to perform. The Commission concludes that the Borough made a policy determination as to how to best manage department resources and assign police officers and the Borough's proposal to hire civilian dispatchers is not mandatorily negotiable. In view of its ruling, the Commission does not address the Borough's allegation that the PBA violated the Act when it refused to negotiate over the civilianization issue.

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.

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PBA LOCAL 86,

Charging Party-Respondent.

Appearances:

For the Borough, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel)

For the PBA, Loccke & Correia, attorneys (Joseph Licata,
of counsel)

DECISION

On February 19, 1997, PBA Local 86 filed an unfair
practice charge alleging that the Borough of Bogota violated
5.4a(1), (3), (5), and (7)^{1/} of the New Jersey Employer-Employee

^{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."

Relations Act, N.J.S.A. 34:13A-1 et seq. when, in January 1997, it established a civilian dispatcher position, announced that it planned to hire civilians to perform dispatching duties that had, since 1978, been performed exclusively by police officers, and refused to negotiate with the PBA over this issue.

The PBA also sought an interim order restraining the Borough from unilaterally transferring unit work pending a final Commission decision. On April 9, 1997, Commission Designee Edmund G. Gerber issued an order so restraining the Borough. Borough of Bogota, I.R. No. 97-18, 23 NJPER 352 (¶28165 1997), motions for stay and leave to appeal den. App. Div. Dkt. Nos. AM-1171-96T5, M-5774-96 (5/6/97). On April 17, a Complaint and Notice of Hearing issued.

On May 8, 1997, the Borough filed two unfair practice charges alleging that the PBA violated 5.4b(3)^{2/} when it: (1) refused to negotiate over a health benefits proposal and (2) refused, after the interim decision, to either negotiate over the use of civilian dispatchers or to submit the issue to a then-pending interest arbitration proceeding. On May 19, a Complaint and Notice of Hearing issued and an order was entered consolidating the three charges.

^{2/} This provision prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

On May 23, 1997, the Borough filed an Answer denying that it had violated the Act and asserting that it had a managerial prerogative to implement its civilian dispatcher ordinance and to assign and transfer employees. It contended that using civilian dispatchers would enable it to assign more police officers to law enforcement, as opposed to dispatcher, duties and would reduce overtime costs.

Also on May 23, 1997, the PBA filed an Answer to the Borough's charges. It asserted that it was willing to negotiate over the issue of civilian dispatch assignments, but denied that it had violated the Act when it objected to the untimely submission of the issue to the appointed interest arbitrator.

On May 28, 1997, a hearing was conducted before Hearing Examiner Gerber, at which time he referred the Borough charge concerning its health insurance proposal to the interest arbitrator.^{3/} The parties made opening statements, examined witnesses, introduced exhibits and filed post-hearing briefs.

On September 15, 1997, the Hearing Examiner issued his report. H.E. No. 98-10, 24 NJPER 158 (¶29076 1998). He found that, under the unit work doctrine articulated in City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd 23 NJPER 325 (¶28148 1997), as well as other Commission and court

^{3/} The arbitrator ruled that the Borough's proposal could be submitted to interest arbitration. See Borough of Bogota, P.E.R.C. No. 98-104, 24 NJPER 130, 131 (¶29076 1998).

decisions, an employer may not unilaterally transfer unit work purely to effect economic savings. 24 NJPER at 159. Because he concluded that economic reasons had motivated the Borough to create a civilian dispatcher corps, he recommended that the Commission find that the Borough had violated the Act. Ibid.

With respect to the Borough's charge that the PBA had refused to negotiate over the transfer of unit work, he noted that the Borough's attempt to include a civilian dispatcher proposal in the pending interest arbitration proceeding was untimely.

Ibid.^{4/}

On October 7, 1997, the Supreme Court granted certification in Jersey City. See 152 N.J. 8 (1997). On November 25, the Commission Chair granted the Borough's request to stay the time for filing exceptions to the Hearing Examiner's report until after the Supreme Court's decision. The Supreme Court decision reversing our ruling was issued on July 9, 1998. See Jersey City and POBA and POSA, 154 N.J. 555 (1998).

On August 10, 1998, the City filed exceptions proposing that, in light of the Jersey City decision that had been issued after the Hearing Examiner issued his report, the Hearing Examiner's findings should be supplemented and modified in certain respects and asserting that, under the Supreme Court's analysis in

^{4/} The interest arbitrator reached the same conclusion and the Commission agreed with that ruling. Borough of Bogota, P.E.R.C. No. 98-104, 24 NJPER at 131.

Jersey City, the PBA's Complaint should be dismissed because the Borough has a managerial prerogative to assign civilians to perform dispatching duties. It also contends that the unit work doctrine does not require it to negotiate over the assignment of civilians to perform dispatching functions and moves to supplement the record to include: (1) evidence that non-police employees have performed dispatching duties and (2) a consultant's report recommending that the Borough stop using police officers as dispatchers. If we decide not to dismiss the PBA's Complaint, the Borough argues that we should hold that the PBA violated the Act when it refused to negotiate over its civilian dispatcher proposal.

On August 5, 1998, the PBA filed an answering brief. It contends that the Hearing Examiner's findings are accurate and that Jersey City did not fundamentally change the relevant legal issues in a transfer of unit work dispute. It urges us to adopt the Hearing Examiner's report, arguing that the Borough was primarily motivated by a desire to reduce police overtime costs and has not shown that it changed the manner in which it delivered police services. It opposes the Borough's motion to supplement the record, asserting that the proffered submissions are unrelated to Jersey City and that the Borough could have introduced them earlier. Finally, the PBA asks to supplement its response with a transcript from another unfair practice case, where the Borough's attorney, representing another employer, described and attempted to distinguish the civilianization plan here. It contends that

the Borough should be "judicially estopped" from contradicting those statements. The Borough objects to the submission and claims there are no grounds for estoppel.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings, except as modified or supplemented by this decision. We begin with some background on the Borough's police department.

The Borough has a 19-member police force consisting of the chief of police, one captain, two lieutenants, three sergeants and twelve patrol officers. We add to finding no. 2 that, since 1994, four officers -- a captain, lieutenant, sergeant and patrol officer -- have retired or died and have not been replaced (CP-5, pp. 50-51). We also supplement finding no. 2 to state that on each of the three daily shifts, Borough policy is to assign one police officer to dispatch duty and a minimum of two officers to patrol duty (T140). To maintain this staffing pattern, the Borough must incur overtime costs; officer illness generates additional overtime costs (T141).

The Borough's lieutenants and sergeants regularly perform dispatch duties. We supplement finding no. 2 to state that patrol officers are occasionally assigned to the dispatch desk (T84), and that the dispatcher answers incoming calls and radio messages, dispatches patrol units, maintains a telephone log and performs motor vehicle computer checks in response to patrol officer calls (T46; CP-1, Exhibit 2). The officer also dispatches

Borough fire, police auxiliary, first-aid and rescue services (T46). Dispatching services have been performed by police officers for over 20 years.^{5/}

In January 1997, the Borough adopted an ordinance establishing the position of civilian police dispatcher. Juan Dominguez, a Borough councilman and Chair of its Police Committee, submitted a certification explaining the circumstances surrounding the adoption of the ordinance and also testified at the hearing. Both parties cite that information to support their respective views of the purpose and motivation for the ordinance, as did the Hearing Examiner in concluding that the ordinance was motivated by reasons of economy. 25 NJPER at 159. The Hearing Examiner's finding no. 4 states, in part:

Juan Dominguez, Chair of the Police Committee since 1994, testified that using civilian dispatchers would get superior officers out on the street and thereby improve supervision, and provide an additional officer to be deployed as needed sixty or seventy percent of the time.

^{5/} We reject the Borough's exception to this finding. The transcript citation noted by the Hearing Examiner (T107), together with other parts of the record (T103), supports the Hearing Examiner's conclusion. We deny the Borough's motion to supplement the record to include an interlocal services agreement whereby the Borough and five other communities agreed that the City of Hackensack would provide central 911 dispatching services for the six municipalities. While we may open the record to receive additional evidence, N.J.A.C. 19:16-8.1, we decline to do so here where the information was available at the time of the hearing; the Borough has not explained why it was not submitted then; and the ordinance does not suggest that Borough employees other than police officers perform dispatching services provided by the Borough.

It would also reduce the cost of overtime. At the interim relief proceeding, however, the Borough took the position that the ordinance was enacted for reasons of economy. According to the Certification of Dominguez, [footnote omitted] the Borough has reduced the size of its department of public works by 50% by privatizing certain functions and restructuring its operation. Nevertheless, in early 1996, the Borough faced a financial short-fall of \$107,900 and further it anticipated that State aid would be reduced by approximately \$102,000 during that year. In light of this short-fall, the Mayor and Council waived their salaries for 1996 and 1997; the position of Borough Administrator was reduced from full-time to part-time; the planning board and board of adjustment were abolished and a joint planning/zoning board was established; the position of secretary to the building department/planning board was reduced from full to part-time and the Borough subcontracted work formerly done by an accounts payable clerk and two custodians. These actions resulted in a savings of \$375,000 in two years.

The average salary rate paid to Borough police officers is about \$26.00 per hour. The Council found it could hire civilian employees to perform the same dispatch duties at a salary of approximately \$8.50 per hour. There are times when officers were assigned dispatch duty while they are on overtime. Then, the rate is about \$39.00 per hour. [25 NJPER at 158]

The Borough argues that the Hearing Examiner disregarded parts of Dominguez's certification and testimony and disputes the Hearing Examiner's conclusion that the Borough adopted the ordinance for reasons of economy. It asks us to find that the Borough was motivated primarily by staffing concerns in adopting the ordinance.

We find that the Hearing Examiner accurately summarized most of Dominguez's certification and testimony, although we

supplement his findings in certain respects. We supplement finding no. 4 to state that the Borough planned to hire three full-time civilian dispatchers who would provide dispatching services on 15 of the 21 weekly shifts, at a savings of approximately \$40,000 to \$70,000 annually in overtime costs (T122; T143).^{6/} We supplement finding no. 4 to state that Dominguez certified that, although civilian dispatchers would allow the Borough to reduce costs and limit overtime payments, the Borough did not intend to lay off police officers after civilian dispatchers were hired (CP-6, paragraph 15). At the Borough's request, we further add that, according to Dominguez, overtime was the only line item in the police budget that could be reduced without laying someone off (T144).

Also at the Borough's request, we supplement finding no. 4 to state that the Borough council was aware that superior officers performed dispatch work and approved the hiring of civilian dispatchers so that superior officers' skills could be more effectively used (CP-6, paragraph 14; T130; T138-T140). They understood that superior officers would be relieved of dispatching duties and assigned to investigative work; to drug, alcohol or crime prevention programs; or to ride with patrol officers and provide supervision (CP-6; paragraph 14; T138-T140). Similarly,

^{6/} The Borough initially planned to hire six part-time civilian dispatchers as well but, at the time of the hearing, it was not certain whether it would do so or whether civilian dispatchers would be used on six of the 21 shifts (T122).

Dominguez stated that the Chief had advised him that hiring civilian dispatchers would allow him to put an additional car on the street or have superior officers perform additional supervisory or administrative duties (T130). The Hearing Examiner implicitly credited this testimony when he commented that he "did not question Dominguez's testimony ... that hiring civilian dispatchers will improve supervision and give the department greater flexibility in assigning staff." 25 NJPER at 159.^{7/} Finally, we reject the third sentence in finding no. 4, which suggests that the Borough made different arguments at the interim relief proceeding than it did at the hearing. At both stages, the Borough stated that it was concerned both with reducing overtime costs and increasing the police presence in the community.

Based on the Hearing Examiner's findings, as supplemented and modified here, we conclude that the Borough adopted the ordinance to reduce police overtime costs, maintain department resources and avoid layoffs, improve supervision, and increase the availability of superior and other police officers for patrol, supervisory, administrative, investigative or community-based duties. The Borough's financial condition was an impetus for initiating the Borough's review of its police dispatching

^{7/} For this reason, we do not address the PBA's contention that the Hearing Examiner was not required to credit this testimony. Nor do we consider the Borough's objection that it should have been allowed to question a PBA witness on how superior officers would be used if civilian dispatchers were hired. That information was elicited from Dominguez.

function, but the ordinance was also a way to improve supervision, increase flexibility of assignment, and reduce expenditures without layoffs.

Those factors are legally significant in applying the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) and which, under Jersey City, we must now apply in resolving this type of dispute. In doing so, we will focus on all of the circumstances surrounding a civilianization proposal or program, including the effects of implementing it. Because the balancing test requires a weighing of the parties' respective interests, the employer's dominant "motivation" is not necessarily determinative.

In this vein, we reject exceptions by the Borough and the PBA that relate to the Hearing Examiner's conclusion that the ordinance was motivated by reasons of economy. The Borough argues that the Hearing Examiner should not have relied on Sergeant Zelinsky's hearsay statement that the police chief told him that the civilian dispatcher ordinance was intended to save money. The Borough argues that the ordinance was enacted by council members and the PBA did not show that the chief knew of their motivation. We need not dwell on this point in view of our finding that the Borough considered multiple factors in adopting the ordinance, including a desire to reduce overtime costs. Similarly, we reject the PBA's contention that the Borough should be judicially estopped from contradicting its attorney's description of the ordinance in unrelated proceedings. The PBA highlights statements

by the attorney that the ordinance was intended to save overtime costs, a point which the Borough does not appear to dispute and which we have included in our findings.

We turn now to a discussion of Jersey City, which provides the framework for our decision. In Jersey City, the Supreme Court held that Local 195's "fundamental test" for negotiability must be explicitly applied to determine whether, in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. 154 N.J. at 568, 574. In so holding, it reversed our ruling that the employer had violated the Act and disapproved of our approach of analyzing such disputes solely by means of the unit work doctrine. That doctrine holds that the shifting of work from employees within a negotiations unit to other employees outside the unit generally is mandatorily negotiable unless the employer has exercised its managerial right to reorganize the way it delivers government services, the union had waived its right to negotiate over the transfer of unit work, or the duties had been historically performed by non-unit personnel. See Jersey City, P.E.R.C. No. 96-89, 22 NJPER at 252 and cases cited therein.

Jersey City involved a department-wide program where the City assigned civilians to perform a variety of jobs formerly performed by police officers. 154 N.J. at 561-567. The program, as noted by our Hearing Examiner and the Court, was intended to maintain the resources of the department and reduce crime or fear of crime by increasing the number of police officers in field

positions. 154 N.J. at 561, 573. We analyzed changes under this program on a job-by-job basis and concluded that a negotiations obligation attached in several instances where the City had simply substituted a civilian for a police officer without changing the nature or structure of the jobs -- and had not shown either that the union had waived its right to negotiate or that the work had been shared with non-unit employees. 22 NJPER at 252-254.

The Court analyzed this dispute by applying the Local 195 negotiability test, which states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405]

In applying the first prong of this three-part test, the Court concluded that the civilianization program intimately and directly affected the employees' work and welfare because, although no employee had lost his job, the presence of civilians reduced the opportunities of the remaining officers to bid for desired schedules and potentially diminished their overtime

opportunities. It then concluded that no preemption issues were implicated. In applying what it found to be the dispositive third prong, the Court stressed the "special position" of police officers, the broad discretion accorded to public entities that administer police departments, and its prior recognition that, in the non-police context, the substantive decision to transfer or reassign an employee is predominately a policy determination and therefore not mandatorily negotiable. 154 N.J. at 570-573. While it noted the Hearing Examiner's legal conclusion that civilianization had been undertaken for economic reasons, it found that the record supported the City's position that its actions were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that "[b]ecause the City implemented the reorganization primarily for the purpose of improving the Department's effectiveness and performance[,]" the City's actions constituted an inherent policy determination that would, under Local 195 and N.J.S.A. 40A:14-118, be impermissibly hampered by negotiations. Id. at 573.

The Court also held that it would reach the identical result if it applied the unit work rule. Id. at 575. It reasoned that the City had, based on a consultant's recommendation, reorganized its police force to increase the percentage of the force engaged in operational duties. Id. at 581.

The Court also suggested that employee interests may be more heavily weighted, and that the unit work doctrine may come into play, where the employer's only reason for transferring unit work is to save money. The Court commented that "if money is the ultimate issue for the employer, the employer will not be concerned with who performs the job as long as it is performed in a manner that will effectuate cost savings." 154 N.J. at 582. However, it added that that rationale for prohibiting a shift of unit work does not apply where the purpose of the change is not to save money, but rather to free up more police personnel for field jobs. Ibid.

Like Jersey City, this case implicates the "special position" of police officers and a governing body's broad discretion to administer its police department and determine what assignments are most appropriate for police officers to perform. We think the employee and employer interests are similar to those in Jersey City and that the balancing test yields the same result as in that case.

As in Jersey City, the PBA has an interest in retaining overtime opportunities which will be reduced under the proposal. As in Jersey City, the Borough has no plans to lay off any officers as a result of hiring civilian dispatchers. The unit's work, however, will be narrower in scope, leaving unit employees more vulnerable to layoffs in the future. See Jersey City, 154 N.J. at 575-576 (rationale for private-sector rule requiring

negotiations before workers in the bargaining unit are replaced by non-unit workers is to provide the union with an opportunity to negotiate an acceptable alternative, one that would not result in loss of jobs and reduction in union membership); cf. Bergen Cty., H.E. No. 91-39, 17 NJPER 292, 298 n.16 (¶22129 1991), adopted P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991) (transfer of unit work resulted in loss of unit jobs because, although no unit employees were laid off, their positions were abolished and they were placed in vacant positions).

With respect to the Borough, it has interests in improving supervision, increasing the number of officers available for investigative, patrol, community-based, or administrative duties, and assigning duties in a manner that allows it to respond to fiscal exigencies while avoiding police layoffs. We conclude that the balance weighs in the Borough's favor and that negotiations would significantly interfere with the Borough's governmental policy decision to civilianize dispatching functions to accomplish these goals.

We appreciate the PBA's argument that the Borough does not propose to change the manner in which dispatching services are provided. While we agree that this may be a factor to be considered in this type of dispute, Jersey City instructs that an employer may have a prerogative to assign police officers to field positions even if there is no change in the nature or structure of the jobs from which they were transferred.

We also recognize that, unlike Jersey City, see 154 N.J. at 581, the record here establishes that cost savings -- reduction of overtime costs -- was one of the objectives for hiring civilian dispatchers. But it was not the only goal or the only effect: for example, superior officers regularly assigned to dispatch would be available for other duties. Nothing in Jersey City indicates that an employer's interests may not be found to predominate because, in a particular civilianization context, cost savings are one concern.^{8/}

Further, we believe the Borough was concerned with "who would do the job," 154 N.J. at 582, in the sense that it concluded that police officers, particularly superior officers, should concentrate on supervisory, investigative, administrative or community-based assignments instead of serving as dispatchers. We thus conclude that, as in Jersey City, the Borough made a policy determination as to how to best manage department resources and assign police officers to best use their skills.^{9/}

^{8/} The PBA stresses that Jersey City described the interim relief decision in this matter as an example of a transfer of unit work effected "purely to effect economic savings." 154 N.J. at 576, 580. The Court simply cited the decision as an example of the Commission's application of the unit work doctrine without endorsing the designee's analysis. The Hearing Examiner's findings after a plenary hearing and our review of the record indicate that economics was not the only basis for the Borough's action.


^{9/} In finding a negotiations obligation in transfer of unit work cases, we have sometimes noted the absence of a governmental policy reason for assigning work to one group

For all these reasons, we conclude that the Borough's proposal to hire civilian dispatchers is not mandatorily negotiable and that the 5.4a allegations should be dismissed. In view of this ruling, we need not address the Borough's contention that the PBA violated the Act when it refused to negotiate over this civilianization issue.^{10/}

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: February 25, 1999
Trenton, New Jersey
ISSUED: February 26, 1999

9/ Footnote Continued From Previous Page

of employees rather than another. See Rutgers, the State Univ., P.E.R.C. No. 79-72, 5 NJPER 186, 187 n.3 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980); see also City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988) (grievance alleging that employer violated contract by assigning police dispatching work to non-unit clerks was arbitrable; employer was concerned with reducing overtime costs and did not show that overtime hours police formerly worked were being used to provide direct police services).

10/ Nor do we consider its motion to supplement the record with a consultant's study, apparently prepared after this litigation began, recommending that the Borough hire civilian dispatchers.

H.E. NO. 98-10

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

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-and-

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PBA LOCAL 86,

Employee Representative/Respondent.

SYNOPSIS

A Hearing Examiner recommends that the Commission order the Borough of Bogota to assign police dispatcher duties to police officers.

The Hearing Examiner also recommended that an unfair practice charge filed by the Borough be dismissed. It was alleged that PBA Local 86 committed an unfair practice when it objected to the Borough's submission of this issue (the assignment of dispatch duties to civilians) to the interest arbitrator.

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.

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PBA LOCAL 86,

Employee Representative/Respondent.

Appearances:

For the Respondent/Charging Party - Borough
Dorf & Dorf, attorneys
(Gerald L. Dorf, of counsel
Sandro Polledri, on the brief)

For the Respondent/Charging Party - PBA
Loccke & Correia, attorneys
(Joseph Licata, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On February 19, 1997, Bogota PBA Local 86 filed an unfair practice charge with the Public Employment Relations Commission alleging that the Borough of Bogota committed an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7)^{1/} when, in January 1997, it created a civilian dispatcher

^{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

position and announced that dispatching duties which have been performed exclusively by police officers would now be done by civilian dispatchers. The Borough refused to negotiate over this change in terms and conditions of employment.

The PBA also sought an interim order restraining the Borough from unilaterally transferring unit work while the parties were in interest arbitration for a successor agreement. As Commission Designee, I executed that order pending a final Commission decision in this matter. Borough of Bogota, I.R. No. 97-18, 23 NJPER 352 (¶28165 1997) motions for stay and leave to appeal denied App. Div. Dkt. No. AM-1171-96T5.

On May 8, 1997, the Borough filed two unfair practice charges against the PBA. Each alleges that the PBA violated §5.4(b)(3) of the Act.^{2/} CE-97-19 alleges that the PBA refused to negotiate a health benefit proposal, and CE-97-20 alleges that the

1/ Footnote Continued From Previous Page

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."

2/ This subsection prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

PBA refused to negotiate the use of civilian dispatchers. At the hearing (see below), CE-97-19 was deferred to the interest arbitration proceeding (T14). CE-97-20 specifically alleges that following the issuance of the interim relief order, the Borough wrote to the interest arbitrator expressing its willingness to negotiate over the transfer of dispatcher work to civilians. The PBA objected to the submission of this issue to the interest arbitrator since it was not included in the original submissions to the arbitrator. The interest arbitrator found that the civilian dispatcher issue was not timely raised and would not consider that issue in his decision (T14).

On May 19, 1997, a complaint and notice of hearing and an order consolidating cases was issued. A hearing was conducted on May 28, 1997. Both parties filed briefs by August 4, 1997.

FINDINGS OF FACT

1. The Bogota police force consists of 12 patrolmen, 3 sergeants, 2 lieutenants, 1 captain and a chief of police. PBA Local 86 represents all patrolmen, sergeants and lieutenants in the police force.

2. For over twenty years (T107), all police, fire and ambulance dispatching in the Borough has been performed by members of the police department. Sergeants and lieutenants regularly perform dispatch duties. The captain may do dispatch work once or twice a month.

3. On January 4, 1997, the Borough Mayor and Council adopted an ordinance creating the position of civilian dispatcher and on January 30, 1997 the ordinance passed on the second reading.

4. Juan Dominguez, Chair of the Police Committee since 1994, testified that using civilian dispatchers would get superior officers out on the street and thereby improve supervision, and provide an additional officer to be deployed as needed sixty or seventy percent of the time. It would also reduce the cost of overtime. At the interim relief proceeding, however, the Borough took the position that the ordinance was enacted for reasons of economy. According to the Certification of Dominguez,^{3/} the Borough has reduced the size of its department of public works by 50% by privatizing certain functions and restructuring its operation. Nevertheless, in early 1996, the Borough faced a financial short-fall of \$107,900 and further it anticipated that State aid would be reduced by approximately \$102,000 during that year. In light of this shortfall, the Mayor and Council waived their salaries for 1996 and 1997; the position of Borough Administrator was reduced from full-time to part-time; the planning board and board of adjustment were abolished and a joint planning/zoning board was established; the position of secretary to the building department/planning board was reduced from full to part-time and the Borough subcontracted work formerly done by an

^{3/} This certification was made part of the record (T115-T118).

accounts payable clerk and two custodians. These actions resulted in a savings of \$375,000 in two years.

The average salary rate paid to Borough police officers is about \$26.00 per hour. The Council found it could hire civilian employees to perform the same dispatch duties at a salary of approximately \$8.50 per hour. There are times when officers were assigned dispatch duty while they are on overtime. Then, the rate is about \$39.00 per hour.

Dominguez' Certification concludes, the implementation of a civilian dispatch unit would put more officers "on the street" at the same time the Borough would realize an over-all cost savings through the reduction of over-time costs.

A day or two after Local 86 filed its unfair practice charge (February 19, 1997), Police Commission Dominguez called Sergeant Zelinsky, who is on Local 86's negotiating committee, at home. Dominguez was upset that the charge was filed and talked of the economic condition of the Borough and its tax base. Dominguez stated that Local 86's acts would prevent the Borough from saving money since the use of civilian dispatchers would save taxpayers the cost of overtime (T99-T100). Zelinsky responded that even though the charge was filed, the Borough and PBA could still negotiate. However, Dominguez responded that "at this point, we'll continue to litigate the issue" (T101, T152).

Sometime after February 6, 1997, Chief of Police Gary P. Kohles informed Sergeant Zelinsky that the Borough was hiring

civilian dispatchers as a means of saving money (T63). This testimony was never rebutted by the Borough and I so credit it.

I don't question Dominguez testimony at the hearing that hiring civilian dispatchers will improve supervision and give the department greater flexibility in assigning staff. However, I find that those reasons were not what motivated the Borough. As made clear in Dominguez's certification and in his telephone conversation with Zelinsky, the Borough was looking for ways to save money and using civilian dispatchers would accomplish that. Although Dominguez did state in his affidavit that the use of civilian dispatchers would put more officers on the street, there is no mention of improving supervision or staffing flexibility in either his Certification or his telephone conversation with Zelinsky. Similarly, Chief Kohles' statement to Sergeant Zelinsky reveals the state of mind of the Borough. I find that the creation of a civilian dispatcher corps was motivated for reasons of economy.

5. The City never asked Local 86 to negotiate (T65) and declined Zelinsky's offer to Dominguez of February 19. Although the Borough made a reference to its willingness to discuss/negotiate this issue, their attorney's letter of April 15, 1997 was the first time the Borough formally sought to include this issue in the interest arbitration which took place on May 13, 1997 (T67).

6. The Borough dispatchers received 14,535 calls in 1996. This works out to 1.6 calls per hour.

7. The Borough offered no testimony in support of its charge that Local 86 refused to negotiate, other than its letter to the interest arbitrator of April 15, 1997. The letter was written subsequent to the issuance of the interim relief decision I.R. 97-18. It offers to discuss/negotiate the transfer of dispatch work from the police officers unit to a civilian dispatcher unit. As discussed above, the arbitrator ruled that the introduction of this issue into interest arbitration was untimely, and he would not consider it.

ANALYSIS

Transferring unit work is mandatorily negotiable. However, when there is a reorganization of functions, a transfer of unit work is a managerial prerogative and non-negotiable. See City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), app. pending App. Div. Dkt. No. A-006290-95T2, S. Ct. 44,268.

Here, the Board did not attempt to reorganize the City's work force to insure the efficient delivery of governmental services. Rather, the Borough began a transfer of unit work to employees who can be hired at a lower cost. The nature of the work remains the same. Transfers of unit work purely to effect economic savings is not a reorganization. Jersey City. The City is required to negotiate with the PBA before it can take such unilateral action. Moreover, the announcement of such an intended action constitutes an unfair practice. Township of Riverside, P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994).

A unilateral change of a term and condition of employment during the pendency of interest arbitration constitutes a violation of N.J.S.A. 34:13A-21.

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

As to the Borough's charge that the PBA refused to negotiate the transfer of unit work. N.J.A.C. 19:16-5.7 requires the parties to submit their final offer in interest arbitration at least 10 days before the hearing. Although the rule grants discretion to the arbitrator to relax this notice requirement, the Borough has not demonstrated that the interest of justice required the interest arbitrator to exercise such discretion. The Borough's attempt to include the transfer of unit work was untimely. County of Middlesex, P.E.R.C. No. 97-63, 22 NJPER 17 (¶28016 1996).

Accordingly, I recommend the Commission find the Borough of Bogota committed an unfair practice when without negotiations it attempted to transfer dispatch work to civilians and it refused to negotiate over this issue.

I further recommend the Commission find PBA Local 86 did not commit an unfair practice when it objected to the Borough's attempt to include this issue into the interest arbitration hearing.

RECOMMENDED ORDER

I recommend the Commission ORDER:

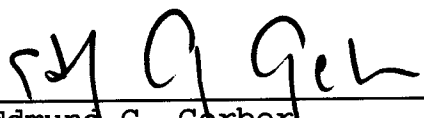
A. That the Borough of Bogota:

1. Cease and desist from transferring the dispatch duties currently being performed by members of the police department who are represented by PBA Local 86 to employees outside the unit without negotiating with PBA Local 86. If the Borough seeks to negotiate such a transfer of work, such negotiations will take place independently from the current interest arbitration proceeding.

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

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

B. The Borough's unfair practice complaint (CE-H-97-20) that PBA Local 86 refused to negotiate in good faith concerning the issue of transfer of unit work is dismissed.



Edmund G. Gerber
Hearing Examiner

Dated: September 15, 1997
Trenton, New Jersey



RECOMMENDED



NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from transferring the dispatch duties currently being performed by members of the police department who are represented by PBA Local 86 to employees outside the unit without negotiating with PBA Local 86.

Docket No. CO-H-97-276

Borough of Bogota
(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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"