P.E.R.C. NO. 2004-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KEANSBURG,

Respondent,

-and-

PBA LOCAL NO. 68,

Charging Party.

Docket Nos. CO-H-2001-92
CO-H-2001-243
CO-H-2002-59
CO-H-2002-147

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Keansburg violated the New Jersey Employer-Employee Relations Act by repudiating the grievance procedure it negotiated with P.B.A. Local No. 68 when it refused to implement grievance decisions sustained at steps one and two between August 2000 and November 2001, except for grievances sustained by the Chief of Police or Deputy Chief in favor of an immediate family member or grievances that were later withdrawn by the PBA and settled.

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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CO-H-2002-59
CO-H-2002-147

Appearances:

For the Respondent, McElroy, Deutsch & Mulvaney, LLP, attorneys (Thomas P. Scrivo, of counsel; C. Michael Rowan, on the brief in support of exceptions)

For the Charging Party, Klatsky & Klatsky, attorneys (David J. DeFillippo, of counsel)

DECISION

On October 16, 2000 and March 9, March 26, August 31 and November 29, 2001, PBA Local No. 68 filed four unfair practice charges and amendments to those charges alleging that the Borough of Keansburg violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4), (5) and (7),[1/] by refusing to implement a series of employer

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the

(continued...)

determinations at step one and two of the parties' grievance procedure that sustained grievances filed by the PBA. The charges also allege that the employer violated the Act when its Acting Public Safety Director ordered that any grievance determinations by the Police Chief at step two would be tentative pending written approval by the Director.

The Director of Unfair Practices consolidated the charges and issued a Complaint and Notice of Hearing. The employer's Answer and amended Answers deny that it violated the Act, and contend that grievance determinations cannot violate State law or the collective agreement.

On July 10, 2002, the PBA moved for summary judgment. On July 30, the employer filed a response and cross-motion for summary judgment. On August 5, the Commission Chair referred the motions to the Hearing Examiner.

On March 3, 2003, the Hearing Examiner issued his decision on the motion and cross-motion. H.E. No. 2003-15, 29 NJPER 123

1/ (...continued)
exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

(¶39 2003). He granted the PBA's motion for summary judgment on the allegation that the employer repudiated the parties' collective negotiations agreement and therefore violated the Act when it refused to implement the grievance determinations issued at steps one and two, except he denied the motion as it pertained to grievances sustained by the Chief or Deputy Chief in favor of an immediate family member or to grievances that were eventually settled or withdrawn.

The Hearing Examiner denied the PBA's motion as it pertained to an allegation that the employer sought authorization from the New Jersey Department of Personnel to lay off eight unit members. He also denied the PBA's motion as it pertained to the directive to the Chief not to issue final grievance determinations at steps one and two.

The Hearing Examiner granted the employer's cross-motion as it pertained to the direction to the Chief not to issue final grievance determinations. He otherwise denied the employer's cross-motion.

The matter was scheduled to proceed to hearing on the remaining allegations. On September 9, 2003, the Hearing Examiner granted the PBA's request to withdraw the remaining allegations so that the Hearing Examiner's decision would resolve all issues raised by the Complaint and the matter would be ripe for Commission review.

On September 23, 2003, the employer filed exceptions. It argues that the Hearing Examiner erroneously rejected its argument that the PBA had an obligation to pursue all four steps of the grievance procedure before filing an unfair practice charge. The Borough also specifies how it believes the contract does not permit granting the grievances and asserts that the step one and two grievance determinations were the product of bias and collusion with the PBA.

On September 25, 2003, the PBA filed a response and cross-exceptions. The PBA asserts that the employer's exceptions are untimely, the Hearing Examiner correctly concluded that the employer repudiated the parties' grievance procedure, the employer's collusion allegation is nonsense, and the Hearing Examiner erred in granting the employer's cross-motion limiting the Chief's ability to resolve grievances.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 8-18).

The employer's exceptions are untimely. On September 9, 2003, the Hearing Examiner informed the parties that his decision on the motion and cross-motion was now a Report and Recommended Decision to which exceptions could be filed within ten days. Exceptions were due on September 22. (Three days are added to the ten to allow for receipt of the Hearing Examiner's letter.)

See N.J.A.C. 19:10-2.1(b). Exceptions were not filed until September 23. We will not consider the exceptions.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions. Such grievance procedures shall be utilized for any dispute covered by the terms of the collective negotiations agreement. Ibid.

N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative or to refuse to process grievances presented by the majority representative. We have previously held, in similar circumstances, that an employer's refusing to honor the binding decision of its grievance representative constitutes a refusal to negotiate in good faith, and, in particular, an unjustifiable refusal to honor the grievance procedures it negotiated for the resolution of contractual disputes. Passaic Cty. (Preakness Hosp.), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985); see also AFSCME, District Council 90 v. Dauphin Cty., 32 PPER 25 (¶32007 2000). That principle applies here.

The employer's reliance on the fact that the PBA had a right to appeal decisions it did not agree with is misplaced. Once the

employer's designated representative issued decisions the PBA agreed with, the PBA had no reason to pursue any of the grievances.

The employer later ordered that the Chief not issue any binding decisions without clearance from his superiors. The Hearing Examiner found that such action was lawful and protected the employer from further decisions it did not agree with. We reject the PBA's exception to that determination. Step two of the grievance procedure provides:

> If the grievance is not settled at the first step, the grievant may make a written request for a second step meeting within five calendar days after the answer at the first step. The Chief of Police shall set a meeting within five calendar days after the request or for such time as is mutually agreeable. Said second step meeting shall be between the Chief of Police with the Association representative or the Association attorney, if requested by the grievant. The Chief of Police's answer to the second step shall be delivered to the Association within five calendar days after the meeting.

The employer ordered the Chief to no longer issue any "ultimate" settlements without prior written approval. That edict does not appear to repudiate the terms of the parties' grievance procedure and thus did not violate the Act.

Finally, we note that the employer argued that the grievances were not meritorious. The Hearing Examiner discussed those contractual defenses at length. We need not address them because, as the Hearing Examiner stated, the contractual merits

of the grievances are not relevant to the issue of whether the employer repudiated the grievance procedure. Having found that it did so, we adopt the Hearing Examiner's recommendations.

ORDER

The Borough of Keansburg is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the grievance procedure it negotiated with PBA Local No. 68 when it refused to implement grievance decisions sustained at steps one and two between August 2000 and November 2001, except for grievances sustained by the Chief of Police or Deputy Chief in favor of an immediate family member or grievances that were later withdrawn by the PBA and settled.

2. Refusing to negotiate in good faith with the PBA concerning terms and conditions of employment, particularly by repudiating the grievance procedure it negotiated with PBA Local No. 68 when it refused to implement grievance decisions sustained at steps one and two between August 2000 and November 2001, except for grievances sustained by the Chief of Police or Deputy Chief in favor of an immediate family member or grievances that were later withdrawn by the PBA and settled.

B. Take this action:

1. 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.

2. 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 Consolidated Complaint are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: November 17, 2003
Trenton, New Jersey
ISSUED: November 18, 2003

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the grievance procedure we negotiated with PBA Local No. 68 when we refused to implement grievance decisions sustained at steps one and two between August 2000 and November 2001, except for grievances sustained by the Chief of Police or Deputy Chief in favor of an immediate family member or grievances that were later withdrawn by the PBA and settled.

WE WILL cease and desist from refusing to negotiate in good faith with the PBA concerning terms and conditions of employment, particularly by repudiating the grievance procedure we negotiated with PBA Local No. 68 when we refused to implement grievance decisions sustained at steps one and two between August 2000 and November 2001, except for grievances sustained by the Chief of Police or Deputy Chief in favor of an immediate family member or grievances that were later withdrawn by the PBA and settled.

CO-H-2001-92
CO-H-2001-243
CO-H-2002-59
CO-H-2002-147

Docket No.

BOROUGH OF KEANSBURG

(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"

d:\percdocs\notice 10/93

H.E NO. 2003-15

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

In the Matter of

BOROUGH OF KEANSBURG,

Respondent,

-and-

PBA LOCAL NO. 68,

Charging Party.

Docket Nos. CO-H-2001-92
CO-H-2001-243
CO-H-2002-59
CO-H-2002-147

SYNOPSIS

A Hearing Examiner grants in part and denies in part a Charging Party's Motion for Summary Judgment and the Respondent's Cross-motion for Summary Judgment on a Complaint based upon multiple charges principally alleging that the public employer violated 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act by negotiating in bad faith. The PBA specifically alleged that the Borough refused to implement a series of employer determinations at steps 1 or 2 which sustained grievances filed by the majority representative. The Motion sought judgment that the Borough had repudiated the grievance procedure.

A portion of the Cross-motion for Summary Judgment was granted in part because the Hearing Examiner determined that the public employer had a right to determine its representative at step 2 of the grievance procedure. The PBA had alleged that an Acting Public Safety Director's order to the Chief (the employer representative expressly designated at step 2 of the contract) that all his determinations at step 2 shall be "tentative," pending written approval, had repudiated the grievance procedure, violating 5.4a(5) of the Act. The Hearing Examiner determined that the employer's directive was within its right to be free from employee organization interference with its selection of a grievance representative, pursuant to 5.4b(2).

The Hearing Examiner denied portions of the Motion and Cross-motion concerned with alleged discriminatory conduct and with grievances sustained on behalf of unit members by member of his immediate family.

H.E NO. 2003-15

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

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BOROUGH OF KEANSBURG,

Respondent,

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PBA LOCAL NO. 68,

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Docket Nos. CO-H-2001-92
CO-H-2001-243
CO-H-2002-59
CO-H-2002-147

Appearances:

For the Respondent
McElroy Deutsch & Mulvaney, attorneys
(Thomas P. Scrivo, of counsel and on the brief)
(Paul R. Castronovo, on the brief)
(C. Michael Rowan, on the brief)

For the Charging Party
Klatsky & Klatsky, attorneys
(David J. DeFillippo, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

On October 16, 2000, PBA Local 68 filed an unfair practice charge (CO-2001-92) against the Borough of Keansburg. The charge alleges that in August and September 2000, the PBA filed four grievances on behalf of four unit members at step 1 of the four-step grievance procedure set forth in the 2000-2003 collective agreement between the PBA and the Borough. The grievances concerned "timely payment of off-duty work" and were all sustained by the Chief at step 2. The charge alleges that on

October 5, 2000, the Borough Manager informed the PBA president that the Borough would not implement the determinations on the grievances , advising that the Chief had no authority to rule on "matters of finance." The charge alleges that the Borough's conduct repudiates the negotiated grievance procedure.

On March 9, 2001, the PBA filed another charge (CO-2001-243) alleging that in the previous month, the PBA filed other contractual grievances regarding compensation for unit employees which were sustained by the Chief, the implementations of which were refused by the Borough (counts 1-3). The grievances allegedly concerned compensation for "extra-duty assignments," "sick-time buy-back," and longevity. The charge also alleges that the Borough unilaterally recouped "overpayments" to a unit employee on March 9, 2001. On March 16, the PBA filed an amended charge, alleging that the Borough's conduct violates 5.4a(1),

(2), (3), (4), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 26, 2001, the PBA filed a second amended charge alleging that the Borough unilaterally violated a past practice of compensating unit members for at least a full three hours for performing "extra-duty" assignments. Three unit members allegedly performed such assignments between January 26 and 30, 2001, and were not paid in keeping with the parties' practice. The amended charge further alleges that the PBA filed grievances regarding compensation for the disputed "extra-duty" assignments, which were sustained by the Chief at step 2 on or about March 2, 2001.

1/ These subsections prohibit public employers, their representatives of agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization, (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

The amended charge also alleges that on February 28, 2001, the Borough sought authorization from the New Jersey Department of Personnel to layoff 10 employees, 8 of whom were police officers, including the PBA president, vice-president and secretary. The request was approved by the DOP on March 19, 2001. The PBA alleges that the Borough's conduct is intended to retaliate and discriminate against its organization and membership for engaging in protected conduct, violating 5.4a(1), (2), (3), (4), (5) and (7) of the Act.

On August 20, 2001, a Complaint and Notice of Hearing, together with an Order Consolidating Cases issued. On August 30, 2001, the Borough filed an Answer, denying that it engaged in any unfair practice. The Borough contends that grievance awards cannot violate state law or the collective agreement. It provided specific contractual defenses to the various grievances cited in the Complaint.

On August 31, 2001, the PBA filed a third unfair practice charge (CO-2002-59) against the Borough. The charge alleges that on or after August 3, 2001, the Borough failed to respond to an "officer in charge" grievance for compensation on behalf of a Detective Thompson, a member of the PBA unit. The grievance was sustained by the Chief on or about July 11, 2001. The charge also alleges that on or about August 3, 2001, the Borough failed to implement the second step determination of the Chief on an

overtime pay grievance filed on behalf of Officer Rongo, a member of the PBA unit. The Borough's actions allegedly violate 5.4a(1), (2), (3), (4), (5) and (7) of the Act.

On September 18, 2001, a Complaint and Order Consolidating Cases issued. On September 28, 2001, the Borough filed an Answer to the recently-consolidated Complaint, denying that it engaged in an unfair practice. The Borough contends that grievance awards cannot violate state or federal law, nor exceed the scope of the collective negotiations agreement.

On November 29, 2001, the PBA filed a fourth unfair practice charge (CO-2002-147) against the Borough. The charge alleges that in September 2001, the PBA filed a contractual grievance on behalf of a Lieutenant Michael Pigott contesting the Borough's failure to compensate him for performing "off-duty" work on September 3, 2001. The grievance was sustained by Deputy Chief James Pigott on September 26. The charge alleges that the Borough has refused to implement the grievance determination.

The charge also alleges that on September 7, 2001, the PBA filed a grievance on behalf of unit member Patrolman Sheehan, contesting overtime compensation paid for work performed during the pay period ending September 2. On September 15, 2001, Deputy Chief Pigott allegedly sustained the grievance but the Borough has refused to implement its terms. On July 10, 2002, the PBA withdrew this allegation from the Complaint.

The charge also alleges that sometime in October 2001, the Borough advised unit member Captain Allfrey that four vacation days were deducted from his paycheck. The PBA promptly filed a contractual grievance on behalf Allfrey, contesting the deduction of four days. On October 30, 2001, Deputy Chief Pigott sustained the grievance and the Borough has refused to implement his decision. The Borough's actions allegedly repudiate the grievance procedure, violating 5.4a(1), (2), (3), (4), (5), (6) and (7) of the Act.

On February 27, 2002, the PBA filed an amended charge to CO-2002-147, alleging that on February 20, the Borough's recently appointed Acting Manager and Public Safety Director directed the Chief or any member of the police department not to "settle any grievance at the first or second level without prior written authority from the Director of Public Safety." The Borough's action allegedly repudiates the parties' grievance procedure. The charge also alleges that on or about November 1, 2001, the Borough adopted rules and regulations for the police department, some of which concerned mandatorily negotiable terms and conditions of employment. The charge alleges that on December 13, 2001, January 8 and February 6, 2002, the Borough refused to negotiate in good faith concerning the Rules and Regulations, violating 5.4a(1), (2), (3), (4), (5), (6) and (7) of the Act.

On March 18, 2002, the Borough filed a reply to the amended charge, denying that it violated the Act. I regard the reply as the Borough's Answer.

On March 26, 2002, a Consolidated Complaint and Notice of Hearing was issued on all PBA charge filings except the February 25, amended charge. On or about April 6, 2002, I ordered that the Consolidated Complaint include the PBA's February 25 amended charge.

On July 10, 2002, the PBA filed a Motion for Summary Judgment. On July 30, the Respondent filed its opposition to summary judgment and cross-motion for summary judgment. The Borough contends that it had no duty to implement grievance determinations which violate the law or the agreement, or were the result of collusion or bias. The Motion also asserts that the Borough retains the right to select its grievance representative and lawfully promulgated regulations under N.J.S.A. 40a:14-118. On August 5, 2002, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. On August 27, the PBA filed a reply together with a certification.

* * * *

Summary Judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. PBA Local 68 and the Borough of Keansburg signed a collective negotiations agreement extending from July 1, 2000 through June 30, 2003. Article 1 of the agreement recognizes the PBA as the exclusive representative of all members of the police department, excluding crossing guards, dispatchers, clerical employees, the deputy chief of police and the police chief.

Article V of the agreement sets forth the grievance procedure. The section entitled, "Procedure to be followed" states in a pertinent part:

> If any dispute arises under this Agreement, it shall be settled in the manner provided for in this Article . . . . A grievance shall be settled in the following manner . . . .

Step 1 provides that within five or ten days, the "aggrieved employee," the "employee Association," the "Borough" or "immediate supervisor" shall attempt to "resolve the matter informally." A timely failure to act is considered "an abandonment of the grievance."

Step 2 provides:

> If the grievance is not settled at the first step, the grievant may make a written request for a second step meeting within five calendar days after the answer at the first step. The Chief of Police shall set a meeting within five calendar days after the request or for such time as is mutually agreeable. Said second step meeting shall be between the Chief of Police with the Association representative or the Association attorney, if requested by the grievant. The Chief of Police's answer to the second step shall be delivered to the Association within five calendar days after the meeting.

Step 3 specifically allows "the grievant" to make written request for a meeting with the Borough Manager, provided that the grievance is not settled at the second step. The Borough Manager then convenes a meeting with the same parties and in the same manner as prescribed for the Chief of Police at step 2.

Step 4 permits that "in the event the grievance is not resolved to the satisfaction of any parties herein referred to," the grievance shall be "taken to binding arbitration" in a prescribed manner. A separate section entitled, "Borough Grievances" specifies that grievances "initiated by the Borough shall be filed directly with the Association" and a procedure is set forth for a meeting. It also permits the dispute to be arbitrated, provided that the grievance is "not resolved to the satisfaction of the grievant."

The agreement also sets forth provisions on "Longevity Pay" (Article VIII), "Overtime" (Article IX), "Sick Leave" (Article XIV), and "Severability" (Article XXII).

2. On August 30, 2000, PBA President William Pedone filed a contractual grievance at step 1 alleging that several unit members had not been paid in a "timely manner" for performing "special assignments." On August 31, Pedone filed a grievance at step one challenging a calculated overtime rate paid to unspecified unit members. On September 1, he filed a grievance at step one contending that unit member Patrolman B. O'Hare was not provided a uniform maintenance allowance. On September 6, 2000, Pedone filed a grievance at step 1 contending that Patrolman B. O'Hare was improperly denied seven hours compensation for work performed on August 18. Sometime before October 5, 2000, all grievances were sustained at step 2. The "uniform allowance" grievance was sustained by Deputy Chief James Pigott, acting as Chief O'Hare's

designee. The September 6 "compensation pay" grievance was also sustained by Deputy Chief Pigott at step 2, acting as the Chief's designee.

On October 5, 2000, Borough Manager Suzanne Veitengruber wrote to the PBA President that the Borough would not implement the grievance determinations. She wrote that the Chief has "no authority to rule on matters of finance" and that the PBA may proceed to step 3 of the grievance procedure. On October 6, PBA President Pedone sent a memorandum to the Borough Manager advising that the PBA did not intend to proceed to step 3 because it received a "favorable ruling at step 2." The current Borough Manager, Edward Striedl, filed a July 30, 2002 certification stating that the Borough has paid the unit members for "off-duty" work, referring to the "special assignments," about which the August 30 grievance was filed.

3. On February 13, 2001, PBA President Pedone filed a grievance with Deputy Chief Pigott at step 1 contesting the "underpayment for special duty assignment" of three unit members. The grievance asserted that the officers were owed "an additional $5.00 per hour" for the assignment. On February 20, 2001, Deputy Chief Pigott issued a memorandum to Pedone, sustaining the "underpayment" grievance.

4. On February 26, 2001, Pedone filed another grievance with Deputy Chief Pigott at step 1 contesting "underpayment for special

duty assignment" of five other named unit members. The written grievance sought compensation for each unit member, totaling $540. On March 2, Chief O'Hare issued a memorandum to PBA President Pedone, sustaining the grievance at "step 2." The memorandum also sets forth a notation that a copy was issued to the Borough Manager. On March 5, 2001, Chief O'Hare issued a memorandum to Borough Manager Veitengruber, recapping the dates and actions of the most recent "underpayment" grievance, noting that "all paperwork are enclosed."

5. On December 14, 1999, Deputy Chief Pigott issued a memorandum to "all police department employees" advising anyone wishing to buy sick and vacation time must apprise him by February 1, 2000, and that a PBA "contract sick and vacation time buy back" will be payable in the first pay period of February 2001. On December 23, 1999, Patrolman B. O'Hare submitted the completed, requisite form indicating that he wished to "buy back" 15 sick days.

On February 13, 2001, the PBA President filed a step 1 grievane with the Deputy Chief, protesting the Borough's failure to pay Patrolman B. O'Hare "the sick leave buy back time he was entitled to receive." The grievance acknowledges that other similarly situated unit employees had been compensated. The grievance contends that the Borough's omission violates the "sick leave" provision (Article XIV) of the agreement.

On February 23, 2001, Chief O'Hare issued a memorandum to the PBA President, sustaining the February 13 grievance. A copy was sent to the Borough Manager. Chief O'Hare is the father of Patrolman B. O'Hare.

6. On February 13, 2001, unit employee Detective Michael Thompson filed a step 1 grievance claiming certain contractual benefits owed, pursuant to his alleged date of hire (August 3, 1987), a date apparently disputed by the Borough. The benefits claimed are longevity pay and vacation time.

On February 16, 2001, Inspector Joseph Auer issued a memorandum to Chief O'Hare sustaining the grievance at step 1, specifically agreeing that Thompson was owed "the requested buy back time for the year 2000." On February 20, Borough Manager Veitengruber issued a memorandum to Thompson, advising that his longevity has been adjusted to his date of hire as a police officer (as opposed to another title). On February 22, Chief O'Hare issued a memorandum to Thompson, sustaining the grievance at "step 2." Copies were sent to the Borough Manager and the PBA. On February 23, Veitengruber issued a memorandum to Chief O'Hare, advising that she had adjusted Thompson's pay rate, resulting in his need to "refund some salary ($936) that was overpaid since July 1, 2000." The Borough Manager asked the Chief to advise ". . . if this should be deducted in one or two pay periods" and in the absence of a reply, the deduction "will be done in the pay of March 9, 2001."

On February 28, Thompson filed a grievance at step 1, objecting to the Borough Manager's calculations, including her proposed "refund" set forth in her February 23 memorandum. On February 29, Inspector Auer issued a memorandum to Chief O'Hare, sustaining the grievance at step 1. On March 2, 2001, the Borough Manager issued a memorandum to Chief O'Hare about Thompson's grievance, disputing the "authority to change a date of hire" and advising that she will continue to follow "special labor counsel's advice on this matter." She further wrote that the "entire amount" of the overpayment would be deducted from Thompson's March 9 paycheck.

7. On February 20, 2001, the Borough Manager issued a memorandum to unit employee Lieutenant Michael Pigott advising that "no authority" exists to "pay longevity based on the hiring an individual in . . . a job title [other than police officer]" and that his longevity has been "adjusted retroactive to July 1, 2000, . . . to the date of hire as a police officer."

On February 26, 2001, Officer Pigott filed a step 1 grievance with Deputy Chief James Pigott contesting both longevity and vacation benefits, pursuant to his purported date of hire. On March 2, the Deputy Chief issued a memorandum sustaining the grievance and providing four reasons for the decisions. Copies were sent to the Chief and Borough Manager. Also on March 2, Chief O'Hare scheduled a second step grievance meeting regarding Lieutenant Pigott's grievance. On March 5, the Chief issued a memorandum to the Borough

Manager sustaining the grievance at step 2. The Borough did not implement any terms and conditions sustained at step 2.

8. On July 12, 2001, unit employee Thompson filed a step 1 grievance with Inspector Joseph Auer, protesting the Borough's failure to compensate him at "officer-in-charge" rate of pay during June 18 - 24 and July 2 - 8, 2001, dates on which Auer was on vacation. The previous day Chief O'Hare issued a memorandum to Borough Manager Veitengruber advising that Thompson had been the "officer in charge" of the detective bureau from June 18 - 22.

On July 30, 2001, PBA President Robert Sheehan issued a memorandum to the Borough Manager, advising in part that Chief O'Hare had sustained the Thompson OIC grievance. The memorandum asked when the grievant could expect payment. On August 3, 2001, Chief O'Hare issued a memorandum to Veitengruber, advising that she had not responded to the memorandum and requesting of her "the status of the memorandum and of the Thompson grievance." The Borough did not compensate Thompson.

9. On July 2, 2001, unit employee Patrolman Scott Rongo filed a step 1 grievance with Sergeant William Nagle protesting the Borough's failure to pay him an overtime rate for work performed on June 14, 2001. The grievance was forwarded to Deputy Chief Pigott on July 5, 2001. On July 19, 2001, the Deputy Chief issued a memorandum to Borough Manager Veitengruber advising that Rongo has

> filed a grievance since he did not receive his overtime pay at the rate of time and a half.

> The Chief of Police spoke with you concerning this matter. Patrolman Rongo was ordered to remain on duty and complete paperwork needed for a suspicious death investigation. Please see that [he] receives his overtime pay at time and a half.

On July 30, PBA President Sheehan issued a memorandum to Borough Manager Veitengruber, advising in part that Rongo had not been compensated for the work at the overtime rate of pay. On August 3, Chief O'Hare issued a memorandum to Veitengruber, advising that Patrolman Rongo's receipt of overtime pay was outstanding. The Borough did not compensate Rongo at the overtime rate of pay.

10. On September 7, 2001, Patrolman Robert Sheehan filed a step 1 grievance with Sergeant Dennis Valle protesting the Borough's failure to compensate him properly during the pay period ending September 2. He wrote that he was compensated at a regular rate of pay for 13.5 hours, when he should have been compensated at the overtime rate of "time and one-half." On September 9, Sergeant Valle issued a memorandum to Deputy Chief James Pigott, advising that he "agreed" with Sheehan about his grievance; specifically, that he had worked "13.5 hours of overtime and was only compensated at his regular rate of pay." On September 15, the Deputy Chief issued a memorandum to Sheehan, advising that he had "reviewed the documentation" on the grievance and decided to "find in favor of the PBA" at step 1 of the grievance procedure. The Deputy Chief wrote three reasons for his decision in the memorandum.

Sheehan was not compensated at the overtime rate of pay.

11. On October 19, 2001, unit employee Captain Allfrey filed a grievance with Deputy Chief Pigott protesting an "improper deduction from [his] paycheck," specifically, a deduction of "4 days overpayment of vacation time." Allfrey wrote that there has been a "past practice of giving employees full paychecks when they have been completely out of vacation and/or sick time . . . ." On October 30, Deputy Chief Pigott issued a memorandum sustaining the grievance.

The Borough did not implement the terms of the sustained grievance, contending that the purported practice "never existed" (Striedl affidavit, p. 10).

12. On February 20, 2002, Acting Borough Manager and Public Safety Director Edward Striedl issued a memorandum to Chief O'Hare regarding his "appropriate authority" in the PBA grievance procedure. The memorandum advises in a pertinent part:

> Effective immediately, neither you nor any middle manager from the Borough of Keansburg Police Department will ultimately settle any grievance at the first or second step level without prior written authority from the Director of Public Safety. In accordance with this current contractual grievance procedure, you may continue to negotiate a potential settlement, as in the past, but your discretion to ultimately settle any grievance of the first or second step levels is constrained by this order . .. . . This constraint on your discretion and that of your middle managers applies to all grievances but is particularly necessitated when any grievance implicates an expenditure of municipal funds and/or resources.

13. On November 1, 2001, Borough Manager Veitengruber issued new "Rules and Regulations" for the Keansburg Police Department. On December 13, PBA counsel wrote to Borough counsel Todd Gelfand, advising of the PBA's objections to 10 various and enumerated regulations concerning "Educational Equivalency;" "On Duty;" "Probationary Period;" "Seniority;" Establishing Elements of Violation;" "Physical Fitness for Duty;" "Eligibility Requirements for Deputy Chief and Chief of Police;" "Hearing Authority;" "Disciplinary Code;" and part-time "off-duty" employment. PBA counsel requested a meeting. On January 8, 2002, PBA counsel sent a letter to Borough counsel, repeating his request for a meeting regarding the rules and regulations. A third similar letter was sent on February 6, 2002. (The PBA has not set forth any mandatorily negotiable subjects which the Borough has allegedly refused to negotiate).

The Borough did not respond to any correspondence.

ANALYSIS

The PBA contends that undisputed conduct - principally, Borough Manager Veitengruber's refusals to implement grievances sustained by the Chief or his designee at step two of the contractual grievance procedure - repudiated the collective agreement, amounting to a refusal to negotiate in good faith in violation of 5.4a(5) of the Act.

The Borough contends that the grievance procedure is self-executing, permitting the PBA to unilaterally pursue a grievance to binding arbitration. If the consequence of any "step" determination is not to the employee's satisfaction, the employee may seek a determination at the next step, successively, all the way to arbitration at step 4. The PBA in this case assertedly "did not fully utilize the grievance procedure set forth in the collective [negotiations] agreement." The Borough also argues that it has no duty to implement grievance determinations that violate the law or the agreement. Sustaining the PBA's grievances would variously violate an opinion of the N.J. Department of Community Affairs, several contract provisions, and the Local Government Ethics Law, N.J.S.A.40A:9-22.1 et seq.

In Passaic Cty. (Preakness Hosp), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985), the Commission found that a public employer violated 5.4a(5) of the Act when it refused to implement or appeal an adverse decision at step 3 of the contractual grievance procedure. The grievance procedure at step 3 required a meeting of the public employer and majority representative, followed by a written decision by the employer designee within seven days of the meeting. The contract further provided that either party dissatisfied with the grievance resolution at step 3 may request binding arbitration (step 4) within 10 days of receipt of the written decision. By separate memorandum, the parties agreed that

appeals to step 4 not filed within the prescribed time limit are "deemed to be untimely and the third step decision will stand without appeal." In the case, the employer designee issued a third step decision, finding that the Hospital breached its sick leave obligations and directed it to credit its employees (after their first year of employment) with 15 days sick leave at the beginning of the calendar year, etc. The Hospital failed to appeal the decision and continued its previous practice of accruing sick leave credits which the designee had found to be illegal.

The Commission had "no hesitancy in concluding that the Hospital's conduct constituted a refusal to negotiate in good faith . . . ." The union "pursued the negotiated grievance procedure, [winning] a binding ruling through those grievance procedures and the Hospital then failed to comply with that ruling and the parties' negotiated procedures for appealing that ruling." Id. at 11 NJPER 137.

The Borough contends that Preakness Hospital is distinguishable because its own grievance procedure does not provide an option to appeal ". . . in the event it receives an unfavorable determination" (brief at p. 33). Its inability to seek review at step 3 is "particularly significant, considering Chief O'Hare's improper conduct" at step 2, in which he "rubber-stamped each and every grievance he received" (brief at p. 34). The Borough further contends that unlike the employer in Preakness Hospital, it has no

comparable "separate agreement" with the PBA providing that a step 2 determination was binding if it did not timely seek an appeal.

The PBA in this case did what our policy prescribes; it pursued the negotiated grievance procedure, winning binding rulings at step 2 and the Borough failed to comply with them. See State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The Borough's contentions largely signify a frustration with the procedure to which it assented - the express designation of the Chief as the employer representative at step 2. The Borough did not negotiate an avenue of appeal if the Chief sustains a grievance. Preakness Hospital affirmed the notion that grievance procedures negotiated for the resolution of contractual disputes must be "honored." It did not authorize a public employer to consciously disregard or repudiate procedures which do not include an avenue of employer appeal prior to binding arbitration. In most instances, Borough Manager Veitengruber refused to implement or consciously ignored the Chief's determinations on grievances for compensation or benefits authorized by step 2. In some other instances, she revised the Chief's determinations, resulting in adverse changes in terms and conditions of employment to grievants. Almost all those actions repudiated step 2 of the grievance procedure.

In AFSCME, District Council 90 v. Daupin County, 32 PPER ¶32007 (Final Order 2000), a County of the Commonwealth of Pennsylvania and

AFSCME negotiated an agreement with a five-step grievance procedure. Steps 3 and 4 provided:

> Step 3: If the grievance is not settled at step 2 it may be presented in writing within 7 days after the Administrtor's response is received to a panel in the Office of County Personnel. Said Personnel Panel shall respond to the Union Steward within 7 days of receipt of the grievance. Said time limit may be extended by mutual agreement.
>
> Step 4: If agreed to by both the County and the union, grievances not resolved at the third step may be presented to the Pennsylvania Bureau of Mediation in lieu of step 5 (Arbitration).

AFSCME filed a grievance on behalf of a unit employee who had been discharged from her position without just cause. At step 3, the designated "personnel panel" sustained the grievance and directed that the employee be reinstated with all lost wages, benefits, etc. AFSCME was satisfied with the panel decision and did not request mediation or arbitration. The Administrator of the public employer wrote to AFSCME, requesting that the majority representative agree to mediation and if not, the letter would serve as the employer's notice of intent to proceed with arbitration.

The Pennsylvania Labor Relations Board found that the employer's refusal to abide by the decision of its panel at step 3 of the contractual grievance procedure "constitute[d] a clear repudiation of that collectively bargained provision. By repudiating that contractual provision, the County unilaterally altered the employees' terms and conditions of employment in direct

violation of Section 1201 a(5) of PERA." Id. At 32 PPER 26. Relying upon a previous decision, Moshannon Valley School Dist. v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991), the Board wrote:

> The employer in Moshannon Valley, like the employer here, conveniently ignored the fundamental fact that the decision it sought to appeal was its own decision made by its designated manager or agent (emphasis supplied). The County cannot ignore the decision of its own agent, who acted in accordance with the express authority of the agreement. [32 PPER 26]

The same rationale applies in this case (excepting specified grievances) and is consistent with the Commission's reasoning in Preakness Hospital. The Borough Manager disagreed with and disavowed the Chief's decisions at step 2 or those of his designee, who acted under express authority of the contractual grievance procedure. The Borough cannot ignore the decision of its agent.

It is true that in some unfair practice cases, a self-executing grievance procedure may be a valid defense to a charge that the employer refused to negotiate in good faith by failing to process a grievance at a particular step (emphasis added). See, e.g., New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986); Borough of Mountainside, D.U.P. No. 85-17, 11 NJPER 6 (¶16003 1984). But the Commission distinguished that line of cases in Preakness Hospital and in Human Services, citing a repudiation of a term and condition of employment as an example of a case (though interrelated with a contract claim), in which it would exercise its authority under 5.4a(5) to remedy specific indicia of

bad faith. The Borough did not merely "fail to process" a grievance; it refused to follow numerous determinations of its designated agent, flouting the parties' negotiated procedure.

The Borough has asserted contractual defenses to the PBA's charges of repudiation, variously citing Articles IV (Policemen's Rights), VII (Salaries), VIII (Longevity Pay) and IX (Overtime). The Borough also claims that it has approved an ordinance in December 2000, requiring municipal compliance "in all respects" with a "Local Finance Notice" issued by the New Jersey Department of Community Affairs (CFO No. 2000-14). That Notice sets forth recommendations for overtime compensation, outside employment and the creation of a "trust fund for the collection of fees from private persons or entities." The Borough concededly "established an hourly rate of $30 by ordinance" (brief at p. 37). The Borough also claims "collusion" between the Chief and PBA, evidenced by his sustaining of all the disputed grievances. It also claims that Chief O'Hare and Deputy Chief Pigott violated the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., because they used their official positions "to secure unwarranted privileges for others" and acted separately in matters "where he or a member of his immediate family has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independent judgment." N.J.S.A. 40A:9-22.5(c) and (d). Finally, the Borough asserts as a defense and in its cross-motion that the

promulgated rules and regulations ". . . are [a] managerial prerogative that may be unilaterally adopted." It contends: "These regulations address such items as soliciting gifts, consuming alcohol, conduct toward the public, discipline, citizen complaints and the like. The relevant case law shows that none of these items is mandatorily negotiable" (brief at p. 52). No case law was cited.

The contractual merits of the disputed PBA grievances are not relevant to the legal issue raised by much of the Complaint and the Motion - the refusal to negotiate in good faith and specifically, serial repudiations of the grievance procedure. The Commission usually defers contractual disputes to the parties' grievance procedure. "Unfair practice liability requires more than simple contract violations: for example, a showing that an employer has acted in bad faith by repudiating a clear cut contractual obligation." State of New Jersey and CWA, P.E.R.C. No. 2000-36, 26 NJPER 12 (¶31001 1999). The undisputed facts demonstrate that liability, and are distinguishable from mere differences of opinion in contract interpretation.

A statute or regulation will not preempt negotiations unless it speaks in the imperative and fixes an employment condition specifically, expressly and comprehensively. See, e.g., Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Local 195, IFPTE v. State, 8 N.J. 393 (1982). In limited circumstances, negotiations may also be preempted if the legislature

vests an agency or committee with the power to take a certain action and such action is taken. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 97-136, 23 NJPER 343 (¶28157 1997), rev'd on other grounds, 24 NJPER 432 (¶29200 App. Div. 1998). The DCA "Notice" does not speak imperatively and a municipal ordinance does not preempt negotiations over mandatorily negotiable subjects, including compensation. Accordingly, I dismiss these Board defenses. I do not find however, that the PBA is entitled to judgment in its favor regarding grievances sustained by the Chief or Deputy Chief in favor of his immediate family member and not implemented by the Borough. I agree with the Borough that all such actions implicate N.J.S.A. 40A:9-22.5(d). See also Care of Tenafly v. Zoning Bd. of Adj., 307 N.J. Super. 362, 370 (1998).

Borough Manager Striedl has certified that the Chief sustained every grievance at step 2 over a period of months. This fact about alleged "collusion" between the Chief and the PBA does not establish a "genuine issue of material fact" under Brill which requires a plenary hearing.

* * *

Acting Public Safety Director Striedl issued a memorandum to Chief O'Hare limiting the Chief's authority at step 2 of the grievance procedure to a "negotiated potential settlement" until he received "prior written authority" for "ultimate settle[ments]." I recommend that the Borough's action comports with its rights under

the Act and that the Borough is entitled to summary judgment on this portion of its cross motion.

Neither the employer nor the majority representative may interfere with each other's choice of representatives for negotiations and grievance processing or insist upon negotiating over the identity of those representatives. Matawan Reg. Bd. Of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980); General Electric Co. v. N.L.R.B., 412 F.2d 512, 71 LRRM 2418 (2d Cir. 1969). N.J.S.A. 34:13a-5.4b(2) expressly prohibits an employee organization from interfering with, restraining or coercing a public employer's selection of its representatives for negotiations or grievance adjustments. N.J.S.A. 34:13a-5.4a(1) and (5) implicitly prohibit a public employer from interfering with, restraining or coercing an employee organization's selection of its representatives. See, e.g., Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991); Bergen Pines Hosp., P.E.R.C. 91-98, 17 NJPER 254 (¶22117 1991).

In Middletown Tp. Bd. of Ed., P.E.R.C No. 94-46, 22 NJPER 35 (¶27017 1995), the Commission restrained arbitration of several grievances contesting the number and identity of Board representatives at grievance hearings. The grievance procedure limited the number and identity of Board representatives at those hearings. The Commission acknowledged exceptions to the statutory principles, particularly noting circumstances that would "prevent

the adjustment of grievances." Id. at 22 NJPER 36. See also Rutgers, The State Univeristy, P.E.R.C. No. 99-44, 25 NJPER 10 (¶30004 1998).

I find that the Borough cannot be constrained to the "identity" of one representative at step 2 of the grievance procedure. "Ultimate" authority is vested in the employer and not in a representative. The Board essentially took no action regarding its representative at step 2 until Striedl issued the February 20, 2002 memorandum. Before that date, the Borough countenanced the Chief's authority at step 2 and refused to implement his determinations, thereby repudiating the grievance procedure. Veitengruber's October 5, 2000 directive/letter to the PBA president almost supplanted her authority for the Chief's but specifically encouraged the PBA to proceed to step 3 instead (see finding no. 2). Though seemingly indistinguishable in effect, the difference between Veitengruber's action and Streidl's some 16 months later was that the former repudiated the grievance procedure and the latter followed it. Nothing in the undisputed facts suggests that on or after February 20, 2002, the Chief's "potential settlement(s)" interfered with the adjustment of grievances. "Interference" cannot be narrowly defined as denying a grievance which otherwise would be sustained; the majority representative in those instances has the right to proceed to the next step, consistent with all self-executing grievance procedures ending with binding arbitration. See State of New Jersey

(Office of Employee Relations), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); New Jersey Transit Bus Operations, Inc. Under all these circumstances, I recommend that the Borough is entitled to summary judgment seeking dismissal of the February 27, 2002 amended charge alleging in part that the February 20 memorandum repudiates the grievance procedure.

The PBA seeks summary judgment on an amended charge that the Borough violated 5.4a(5) of the Act by refusing to negotiate over 10 specified sections of police department rules and regulations promulgated in the fall of 2001. The Borough also seeks summary judgment in the cross-motion, contending that it has no duty to negotiate over the sections because they all are an exercise of managerial prerogatives. Neither party has asserted any subject of negotiation for which the claims of mandatory negotiability and managerial prerogative are made; I do not believe that the parties have adequately identified the scope of negotiations dispute.

Both parties are entitled to partial summary judgment. The PBA is granted summary judgment regarding all portions of the sections which are mandatorily negotiable and the Borough is granted judgment regarding all portions of the sections which implicate a managerial prerogative. Generally, hiring and promotional criteria are not mandatorily negotiable while "procedures" for hiring or promotion are. See State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1970); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App.

Div. 1981). Probationary employees have an expectation of permanent employment and should be included in units with other regular employees. Cherry Hill Tp., P.E.R.C. No. 30 (1970). Rates paid by outside vendors for off-duty police work are mandatorily negotiable. Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987). Management or approval of outside employment is not mandatorily negotiable. City of East Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985). Public employers may require its employees to periodically demonstrate their fitness for physical tasks required of their positions. PBA Local 174 and Tp. of Bridgewater, P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983, aff'd 196 N.J. Super. 258 (App. Div. 1984). Advance notice of the requirements is mandatorily negotiable. N.J. Highway Auth., P.E.R.C No. 86-75, 12 NJPER 31 (¶17011 1985). Minor discipline of police officers (except State Police) may be submitted to binding arbitration. P.L. 1996, C. 115, amending N.J.S.A. 34:13A-5.3. Procedures related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined are mandatorily negotiable, provided they do not conflict with procedures set by N.J.S.A. 40a:14-147 et seq. City of East Orange, P.E.R.C No. 97-85, 23 NJPER 123 (¶28059 1997).

The parties may wish to file a scope of negotiations petition with the Commission. N.J.A.C. 19:13-2.1 et seq.

Finally, I find that material factual issues persist regarding the Borough's motive on February 28, 2001, when it sought

authorization from the New Jersey Department of Personnel to layoff 8 unit members. I deny the PBA's motion on this portion of the Complaint.

CONCLUSIONS

The PBA is entitled to summary judgment on those portions of its motion seeking a determination that the Borough violated 5.4a(5) and derivatively a(1) of the Act by repudiating the grievance procedure of the parties' collective agreement, particularly by refusing to implement grievance decisions sustained at steps 1 or 2 between August 2000 and November 2001; except the motion is denied regarding grievances sustained by the Chief or the Deputy Chief in favor of an immediate family member; and the motion is also denied regarding those grievances set forth in the Complaint and later withdrawn by the PBA, which were eventually "settled."

The PBA is not entitled to summary judgment on the portion of its motion seeking a determination that the Borough violated 5.4a(1), (2), (3) and (4) of the Act by seeking authorization from the New Jersey Department of Personnel to layoff 8 unit members on or about February 28, 2001. Genuine issues of material fact persist, requiring a plenary hearing. Nor is the motion granted regarding the allegation that on or about February 27, 2002, the Borough repudiated the grievance procedure and violated the Act by directing the Chief "not to settle" grievances at steps 1 or 2.

The Borough's cross-motion for summary judgment is denied except for that portion seeking judgment on the PBA's allegation that on or about February 27, 2002, it repudiated the grievance procedure and violated the Act by directing the Police Chief "not to settle grievances at steps 1 or 2. I grant this portion of Borough's cross-motion.

I shall advise the parties in writing of hearing dates so that they may present evidence on portions of the Complaint and Answer not resolved by this decision.

Jonathan Roth
Hearing Examiner

DATED: March 3, 2003
Trenton, New Jersey