

P.E.R.C. NO. 2007-18

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-2005-226

PBA LOCAL 124,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Middletown violated the New Jersey Employer-Employee Relations Act by failing to negotiate with PBA Local 124 over the elimination of a reasonable period of shape-up or travel time for patrol officers called in for emergent or immediate overtime. The PBA had filed an unfair practice charge alleging that the Township violated the Act by eliminating the shape-up or travel time and by failing to implement the police chief's determination sustaining a PBA grievance challenging a change in that practice. The Commission orders the Township to negotiate with the Association over the elimination of this practice, restore the practice of compensating patrol officers for a reasonable period of shape-up or travel time, not to exceed one hour, when called for emergent or immediate overtime, make whole any officer who was denied a reasonable period of shape-up or overtime for emergent or immediate overtime, and post a notice of its violations. The Commission dismisses the allegation that the Township violated the Act by not complying with the police chief's grievance determination.

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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Appearances:

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

For the Charging Party, Klatsky Sciarabone & De Fillippo, attorneys (David J. De Fillippo, of counsel)

DECISION

This case comes to us by way of exceptions to a Hearing Examiner's decision finding that the Township of Middletown violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by (1) unilaterally discontinuing a past practice of paying patrol officers a reasonable amount of shape-up or travel time when called in for immediate or emergent overtime, and (2) failing to implement the police chief's determination sustaining a PBA grievance challenging a change in that practice. The Hearing Examiner recommended that both the past practice and grievance determination be reinstated and that the parties negotiate in good faith over any proposed modifications to the practice.

The case began on February 28, 2005 when PBA Local 124 filed an unfair practice charge against the Township. The charge alleged that the employer violated the Act by failing to implement a step two grievance determination of then Police Chief John Pollinger that continued a past practice of police officers' receiving "a reasonable period of time, not to exceed one hour, for travel/shape-up time," and by unilaterally rescinding the parties' past practice of compensating officers from the moment they accept a call-in assignment.

On June 22, 2005, a Complaint and Notice of Hearing issued on allegations that the employer violated 5.4a(1) and (5) of the Act.<sup>1/</sup> On June 27, the Township filed an Answer denying that the parties had the past practice alleged. By way of affirmative defense, the Township asserted that: Chief Pollinger did not have the authority to sustain the grievance; being paid for time not worked is illegal; a practice of illegal acts cannot constitute an enforceable past practice; and officials having the authority

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<sup>1/</sup> 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" and "(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." The Director of Unfair Practices declined to issue a Complaint on allegations that the employer violated 5.4(2), (3), (4) and (7).

to approve such acts neither knew of nor approved any previous occurrences of persons falsifying time records to get paid for time not actually worked.

On October 4 and 5, 2005, Hearing Examiner Deirdre Hartman conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On June 6, 2006, the Hearing Examiner issued her report and recommendations. H.E. No. 2006-9, 32 NJPER 251 (¶104 2006).

On July 12, 2006, after an extension of time, the Township filed exceptions. While the Township recites a Statement of Facts, it does not specify any question of fact to which exception is taken. See N.J.A.C. 19:14-7.3 (rules governing exceptions). As for questions of law, the Township argues that: there is no basis for finding a past practice establishing a contractual provision; it is not bound by Chief Pollinger's response to the grievance because the PBA did not file the grievance at step one of the grievance procedure or give the business administrator a copy of the grievance as required by step two; the chief does not have the authority to negotiate contractual pay provisions; and there was no unequivocally enunciated practice of granting paid shape-up/travel time of up to one hour. In particular, the Township claims that the Hearing Examiner did not recognize the difference between a call to immediately report for a storm/emergent event and a call on

limited advance notice to report to a fixed patrol shift. It argues that the diversity of experience and opinion as to the practice underscores the absence of authority of the then chief to negotiate the compensation issue.<sup>2/</sup>

On July 17, 2006, after an extension of time, the PBA filed an answering brief. It argues that the Hearing Examiner correctly concluded that the Township improperly rescinded the parties' past practice and repudiated the parties' grievance procedure.

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

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

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

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999),

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<sup>2/</sup> The Township attached to its exceptions a newspaper editorial about this case that is not in the record. The PBA has objected and we do not consider the editorial.

aff'd 166 N.J. 112 (2000); see also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

There is no dispute that shape up/travel time is a mandatorily negotiable term and condition of employment. This is so even though employees are not actually at work every minute. Contract clauses calling for such payment are common and indeed the Township itself has negotiated such clauses with its blue and white collar employees. See, e.g., State of New Jersey, P.E.R.C. No. 98-52, 23 NJPER 68 (¶28299 1997) (permitting arbitration over travel time grievance); PERC Database of Public Sector Contracts at <http://www.perc.state.nj.us/publicsectorcontracts.nsf>. In addition, the employer has granted a similar benefit to employees in its detective and traffic divisions. Requiring negotiations over this issue protects the employees' interest in being compensated for any disruption to their off-duty time without significantly interfering with an employer's ability to ensure the continuous delivery of government services.

In this case, the overwhelming weight of the evidence proves that for 25 years, patrol officers have been paid for shape-up or travel time when called for emergent or immediate overtime. We disagree with the Township that shape-up or travel time is a new term and condition of employment that could only be established through negotiations involving the Township council. Police officers called in on overtime have historically been paid from

the beginning of a shift, even if they arrive a reasonable amount of time after the shift begins. The Township acknowledges that officers in the detective and traffic divisions are compensated for shape-up/travel time despite the lack of any authorizing ordinance or contract language. We reject the argument that a working condition such as this cannot be established by a police chief, deputy police chief, or shift commander in charge of a shift of patrol officers. If the leadership of the Township's police department has treated its patrol officers the same way it treats its detectives and traffic officers, the Act requires that the Township take certain steps before changing that treatment. As in Middletown, we are not holding that the PBA had a contractual right to have the practice maintained, but if the Township wished to make a change, it had to negotiate with the PBA in good faith. 334 N.J. Super. at 514.<sup>3/</sup>

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3/ In re Grievance of Transportation Employees, 120 N.J. Super. 540 (App. Div. 1972), certif. den. 62 N.J. 193 (1973), a case cited by the Township, is distinguishable. There, the Legislature had granted the Civil Service Commission the authority to promulgate regulations concerning work hours for State employees. The employees' Civil Service job description set their work hours at 40 hours per week and no one in the Department of Transportation had the authority to grant them a 35 hour work week. Here, no State agency has determined that patrol officers called in on an emergent basis cannot be paid from the time they are called in or from the beginning of a shift. Perry v. Borough of Swedesboro, 204 N.J. Super. 103 (Law Div. 1985), aff'd 214 N.J. Super. 488 (App. Div. 1986), certif. den. 107 N.J. 153 (1987), another case cited by the Township, is also distinguishable since there is no claim in this case to any  
(continued...)

Shape-up/travel time after an officer is called in on overtime is not specifically addressed by the parties' contract. It could have been, as evidenced by the blue and white collar negotiations unit contracts that do so. But it was not. Instead, there was a practice of paying patrol officers from the time a shift began, subject to a reasonableness limitation.<sup>4/</sup>

We recognize that the 11 witnesses who testified about the practice painted somewhat different versions of the same past practice picture. However, we reject any suggestion that because one witness testified that the practice was up to one-half hour, and others testified that it was up to an hour, we should find that there was no established practice at all. The Hearing Examiner found, and we agree, that the testimony, viewed as a whole, establishes that officers received a reasonable amount of shape-up/travel time and that one hour was the outer limit of reasonableness.

Under these circumstances, paid shape-up/travel time was an established working condition and the employer had an obligation

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3/ (...continued)  
statutory entitlement to shape-up or travel time.

4/ This is not a case where superior officers contravened a collective agreement by, for example, paying salaries higher than those negotiated, or granting employees additional holidays beyond those set by contract. An employer may lawfully restore terms and conditions of employment to levels set by a contract despite contrary past practices. See, e.g., Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980).



to negotiate before changing that working condition. Accordingly, we will order the Township to restore the established working condition pending negotiations over changing it.

In terms of our order, we agree with the Township that the witnesses testified about two different scenarios. The Hearing Examiner found that most situations involved requests to report to fixed shifts and that officers were usually paid from the start of the shift. For that scenario, our order does not entitle an employee called in an hour and a half in advance of a fixed shift to report late and be paid from the beginning of a shift. That would not be reasonable. Another scenario involves officers asked to report immediately, such as for a storm. For that scenario, our order restores the practice of paying officers from the time they are called in, subject to a reasonableness limitation. In those circumstances, officers would not be paid from the beginning of the shift. In either scenario, an officer would not be paid more than the one hour of shape-up/travel time authorized by the chief, but the officer could be paid less. Our order does not make one hour the standard entitlement. One hour is an outside limit.

The unfair practice charge also alleges that the Township violated the Act when it failed to comply with the then police chief's decision to sustain a grievance challenging the change in

working conditions. The PBA had filed a grievance at step two -- directly with the chief. The grievance alleged that officers had been paid by custom and practice from the time that they accepted an assignment, not from the time they arrived at headquarters. The chief found nothing in the contract that dealt with the issue. Therefore, he relied on "past practice" and decided that officers called in on an emergent basis would be granted a reasonable period of time, not to exceed one hour, for shape-up/travel time and that they would be paid for the entire shift under those circumstances.

An unjustifiable refusal to honor negotiated grievance procedures and binding decisions of authorized grievance representatives violates the obligation to negotiate in good faith. Borough of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003); Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985). If the parties are not bound by the results of the intermediate steps of a grievance procedure they intended to be binding, then the procedure will be ineffective in quickly and inexpensively resolving disputes.

The PBA alleged in its charge that the Township is bound by the chief's decision and the Hearing Examiner agreed. Among other things, the Township argues that the PBA cannot obtain the sanctuary of a binding decision without fully following the grievance procedure. In particular, the Township contends that

the PBA failed to file its grievance at step one and circumvented step two by not furnishing a copy of the grievance to the business administrator, as required by the procedure. The Hearing Examiner rejected the Township's first contention, finding that the PBA frequently skipped step one when the gravamen of the grievance involved a policy issue.

We believe that if the PBA had filed its grievance at step one with the then-deputy chief, the person who later objected to the chief's grievance determination, the Township would have been on notice of this issue and would likely have intervened and sought to prevent the chief from sustaining the grievance. We also believe that if the PBA had served a copy of its grievance on the business administrator, he also would likely have intervened. Instead, the administrator first learned of the grievance after the chief had sustained it (2T286). Under these circumstances, we are not convinced that the Township repudiated or flouted the parties' grievance procedure in violation of its obligation to negotiate in good faith. Contrast Passaic Cty. The parties negotiated a procedure that would have protected against the chief acting without administration knowledge and that procedure was apparently not followed. Accordingly, under the particular circumstances of this case, we dismiss the allegation that the Township violated the Act by not complying with the chief's grievance determination.

ORDER

The Township of Middletown is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the elimination of a reasonable period of shape-up or travel time when called for emergent or immediate overtime.

B. Take the following action:

1. Restore the practice of compensating patrol officers for a reasonable period of shape-up or travel time, not to exceed one hour, when called for emergent or immediate overtime.

2. Make whole any patrol officer who was denied a reasonable period of shape-up or travel time for emergent or immediate overtime.

3. Negotiate in good faith with PBA Local 124 over any proposed change to or elimination of compensation to patrol officers for shape-up or travel time associated with emergent or immediate overtime.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately

and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: September 28, 2006

Trenton, New Jersey



**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 failing to negotiate with the Association over the elimination of a reasonable period of shape-up or travel time when called for emergent or immediate overtime.

WE WILL restore the practice of compensating patrol officers for a reasonable period of shape-up or travel time, not to exceed one hour, when called for emergent or immediate overtime.

WE WILL make whole any patrol officer who has denied a reasonable period of shape-up or travel time for emergent or immediate overtime.

WE WILL negotiate in good faith with PBA Local 124 over any proposed change to or elimination of compensation to patrol officers for shape-up or travel time associated with emergent or immediate overtime.

Docket No. CO-2005-226

TOWNSHIP OF MIDDLETOWN  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372