

P.E.R.C. NO. 99-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FRANKLIN,

Respondent,

-and-

Docket No. CO-H-98-44

FRANKLIN TOWNSHIP
PBA LOCAL 154,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Township of Franklin. The Complaint was based on an unfair practice charge filed by Franklin Township PBA Local 154. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by transferring a patrol officer from the afternoon shift to the day shift and prohibiting him from working overtime assignments, which allegedly contravenes an established practice of allocating overtime by seniority. The Commission finds that the Township did not unilaterally end the practice of allocating overtime by seniority, but deviated from it in this one instance because of a perceived need to more closely supervise and control the assignments of one patrol officer. Thus, the Commission concludes that this one breach of the overtime practice did not violate the Township's obligation to negotiate in good faith.

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.

P.E.R.C. NO. 99-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FRANKLIN,

Respondent,

-and-

Docket No. CO-H-98-44

FRANKLIN TOWNSHIP
PBA LOCAL 154,

Charging Party.

Appearances:

For the Respondent, Brian M. Cige, attorney

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

DECISION

On August 6, 1997, Franklin Township PBA Local 154 filed an unfair practice charge against Franklin Township. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} by transferring patrol officer Patrick Albani from the afternoon shift to the day shift and prohibiting him from working overtime assignments. The

^{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. (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."

prohibition allegedly contravenes an established practice of allocating overtime by seniority.

On September 5, 1997, the PBA's application for interim relief was denied. I.R. No. 98-3, 23 NJPER 537 (¶28263 1997).

On December 9, 1997, the Township filed a letter in lieu of an Answer, relying on documents it had previously submitted. It asserts that it had a managerial prerogative to protect its residents' health, safety and welfare. It further asserts that Albani was not prohibited from working all overtime assignments.

On May 19, 20 and 21, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On October 16, 1998, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 99-9, 24 NJPER 500 (¶29232 1998). He concluded that the Township acted pursuant to its managerial prerogative to deviate from an overtime allocation system in furtherance of its public safety concerns.

On October 29, 1998, the PBA filed exceptions contesting certain findings of fact. In addition, the PBA asserts that the Hearing Examiner erred in finding that the Township had a prerogative to prohibit Albani from working overtime due to a perceived question as to his "temperament."

On November 6, 1998, the Township filed an answering brief urging adoption of the Hearing Examiner's findings and recommendation.

We have reviewed the record. We incorporate the Hearing Examiner's finding of fact (H.E. at 3-12) with these modifications prompted by the PBA's exceptions. Although the record supports the Hearing Examiner's finding that Captain Joseph Linskey assured Albani that the shift change would not affect his overtime or outside work, we decline to find that Linskey lied when he stated otherwise in an affidavit. We add to finding 11 that Albani continued to patrol area 1 after his shift change. That area has the majority of domestic violence-related police calls (2T136 to 2T138). We modify finding 15 to state that Albani's March 1998 training was part of mandatory training (1T75).

N.J.S.A. 34:13A-5.3 requires negotiations before mandatorily negotiable terms and conditions of employment are established or changed. Overtime allocation systems are, in general, mandatorily negotiable. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Under the parties' overtime allocation system, patrol overtime assignments not requiring special skills are first offered to on-duty patrol officers by seniority.^{2/}

^{2/} The parties had an established practice of allocating overtime by seniority that could not be changed mid-contract without prior negotiations. It is generally beyond our jurisdiction to find that an established working condition rises to the level of a binding contractual commitment under arbitration precedent. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), app. pending App. Div. Dkt. No. A-2351-97T5.

On July 25, 1997, Albani was transferred to the day shift pending completion of an internal investigation. A memorandum from Linskey explained that Albani should receive closer supervision and guidance and that a supervisor should respond to all "self-initiated" and domestic violence calls that Albani would be involved in. The memorandum also specified that Albani would be restricted to the day shift and could not work overtime on either of the other shifts or switch shifts. From that date until May 8, 1998, when the restriction was lifted, Albani would have worked five patrol overtime assignments had Linskey's memorandum not prohibited such assignments being given him.

The Hearing Examiner found that the Township had a legitimate concern about Albani's temperament because of his on-the-job behavior. The Hearing Examiner concluded that these public safety concerns were not pretextual or arbitrary, and that the Township acted pursuant to a managerial prerogative. He recommended dismissing the Complaint.

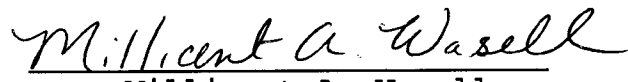
Under all the circumstances of this case, we adopt the recommendation to dismiss the Complaint. The Township had an undisputed practice of allocating overtime by seniority. This case does not present a situation where the Township unilaterally ended that practice and adopted a new one. It continued to accept that practice generally, but deviated from it in this one instance because of a perceived need to more closely supervise and control the assignments of one police officer pending an internal

investigation. We recognize that the restrictions may not have been implemented as planned, but they were imposed in good faith for legitimate public safety reasons. Under these circumstances, we cannot find that this single alleged breach of the overtime practice violated the Township's obligation to negotiate in good faith in violation of N.J.S.A. 5.4a(5) and, derivatively, a(1). Cf. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (mere breach of contract not an unfair practice).

ORDER

The 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

H.E. NO. 99-9

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

In the Matter of

TOWNSHIP OF FRANKLIN,

Respondent,

-and-

Docket No. CO-H-98-44

PBA LOCAL 154,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge alleging that the public employer violated 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The charge alleged that the Township unilaterally changed a term and condition of employment by denying overtime opportunities to one police officer whose conduct was the subject of an internal affairs investigation.

The hearing examiner recommended that the employer acted pursuant to a managerial prerogative when it denied the opportunities.

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 Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-9

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

In the Matter of

TOWNSHIP OF FRANKLIN,

Respondent,

-and-

Docket No. CO-H-98-44

PBA LOCAL 154,

Charging Party.

Appearances:

For the Respondent, Brian M. Cige, attorney

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 6, 1997, Franklin Township PBA Local 154 filed an unfair practice charge against Franklin Township. The charge alleges that on or about July 25, 1997, Township police captain Joseph Linskey transferred patrol officer Patrick Albani from the afternoon shift to the day shift and prohibited him from working overtime assignments. The prohibition contravenes an established practice of allocating overtime on the basis of seniority, thus allegedly violating sections 5.4a(5) and (1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

On September 5, 1997, a Commission designee issued an interlocutory decision denying the PBA's application for interim relief.

On October 27, 1997, a Complaint and Notice of Hearing issued.

On December 9, 1997, the Township filed a letter in lieu of an Answer, relying on documents it had filed earlier. The Township asserted that the matter was preempted by N.J.S.A. 40A:14-147 and that it has a managerial prerogative to protect the health, safety and welfare of its residents. It also asserted that Albani was not prohibited from working all overtime assignments.

On May 19, 20 and 21, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits.

Post-hearing briefs were filed by July 31, 1998.

Based upon the entire record, I make the following:

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

FINDINGS OF FACT

1. The Township is a public employer within the meaning of the Act. PBA Local 154 is an employee representative within the meaning of the Act and represents Township patrol officers for purposes of collective negotiations.

2. On the evening of June 22, 1997, patrol officer Patrick Albani and his partner were dispatched to an emergency. They arrested a Township resident in his home. Later that night a member of the arrestee's family filed a complaint against the officers, alleging an unjustified macing and a "false arrest without asking any questions" (CP-2).^{2/}

3. Following normal procedure, the desk sergeant delivered the complaint to the appropriate division commander--in this instance, patrol division commander Captain Joseph Linskey (1T24; 3T75). The next day, June 23rd, Linskey reviewed the "incident" report filed by Albani and was concerned that the officer "improperly evaluated" the incident (T75-T76). He promptly reported his concern to Police Chief Daniel Livak (CP-1).

Chief Livak concurred that an internal affairs investigation was warranted. On June 24, the citizen complaint and incident report were given to Lt. Novick, commander of the internal affairs unit, who in turn assigned the investigation to Lt. James Ferguson (3T77-3T78; 2T15; CP-2). Novick was also

^{2/} "CP" represents charging party exhibits; "R" represents Respondent exhibits; "C" represents Commission exhibits; "T" represents the transcript, preceded by the numbered day of hearing and succeeded by the page number.

instructed to contact the Somerset County Prosecutor, inasmuch as an improper use of force was alleged (1T29; 3T77-3T78). Novick soon reported to the Chief that the Prosecutor rejected any inquiry or evaluation until the department's investigation was completed (2T124). The Prosecutor allowed that "additional information could be screened by an assistant prosecutor" (CP-3).

4. On July 22, 1997, Ferguson gave his internal affairs investigation report to Captain Linskey (2T19; CP-2). The "recommended disposition" was "not sustained", meaning that the investigation failed to prove or disprove allegations in the civilian complaint (Contrast the disposition, "unfounded," which means that the investigation revealed that the alleged incident did not occur. Other available dispositions are "exonerated" and "substantiated") (CP-2; 2T64). Accordingly, no discipline was recommended.

5. On July 24, 1997, Linskey wrote a memorandum to Chief Livak disagreeing with Ferguson's recommendation (1T43; CP-2). Linskey wrote that the call was "handled improperly"; that "little effort was made to ask pertinent questions and determine what exactly had occurred prior to police arrival"; and that "Albani made no attempt at conflict resolution." He wrote:

I find that Officer Albani's conduct was contrary to all of the domestic violence training that our officers have had, contrary to the mission and goals of this police department, contrary to the community policing philosophy...and contrary to basic police procedure.

[CP-2]

Linskey wrote that Albani wrongly took a "strong-arm approach" and that the complaint is "substantiated." He recommended "appropriate disciplinary action."

Chief Livak agreed with Linskey's recommendations (1T125). In the past, Linskey had disagreed with other internal affairs recommendations and the Chief had disagreed with Linskey. The Chief's decision was final (1T125; 2T50).

6. On the same day, officer Albani, (accompanied by Lt. Ferguson, who was also Albani's supervisor) was summoned to Captain Linskey's office (2T23; 2T9). Linskey advised Albani that the incident which prompted the citizen complaint did not concern domestic violence; and that he was now reassigned to the day shift, pending completion of an investigation (2T95).

Albani testified that Linskey also told him that he will receive additional training in responding to domestic violence calls (2T108). Ferguson did not corroborate Albani's testimony. Linskey could not recall when he and the Chief agreed that Albani should receive more training (1T74). I credit Albani's testimony which was unrebutted by both superior officers and corroborated by Linskey's memorandum.

Albani told the Captain of his concern about the schedule change and asked if his overtime allocation would be reduced. Linskey replied that the change would not affect his overtime or "outside work" (i.e. security duties, usually performed in police in uniform, for which the municipality receives a fee) (2T24).

Before his reassignment, Albani was the most senior patrol officer on squad #5 of the afternoon shift, working from 2 p.m. to 10 p.m. four days per week (2T26; 1T59; CP-6). Another afternoon shift was 3 p.m. to 11 p.m. (2T47). The day shift extends from 6 a.m. to 2 p.m. and 7 a.m. to 3 p.m. (1T46). The night shift is from 10 p.m. to 6 a.m. and 11 p.m. to 7 a.m. (2T47).

7. On July 25, Linskey issued a memorandum to "all supervisors", advising that Albani is "reassigned to the day shift pending completion of a pending internal investigation" (C-1). Albani was reassigned to squad 9 on the day shift, where he had little or no seniority for overtime assignments (2T27). The memorandum also stated that Albani should receive "closer supervision and guidance" and that a supervisor "should respond to all calls/self initiated activities possible that he is involved in." He also directed a supervisor to respond to "all domestic calls that [Albani] is involved in." Finally, Linskey wrote that Albani is restricted to the day shift and "may not work overtime or switch shifts for either of the other shifts" (C-1).

8. Sometime between June 22 and July 25, Linskey reviewed Albani's personnel file, including performance evaluations, "...to see if this [the June 22 complaint] was a one-time incident or if there were similar problems" (1T106; 1T132). Evaluations may note conduct which "needs improvement but is not necessarily discipline" (2T57).

The parties stipulated that Albani's evaluations from January 1995 to December 1997 revealed no criticism of his ability to deal appropriately with the general public on domestic violence matters (2T83). Linskey identified three occasions--in April 1994, May 1994 and September 1996--which purportedly show that Albani was argumentative and/or unnecessarily aggressive (1T133; 3T131; R-1; R-4). Albani was "counseled" for each incident, which was noted in his personnel file (1T132-1T133). "Counseling" is not a form of discipline (1T163). Linskey was concerned about Albani's "temper" (1T134).

Albani acknowledged the incidents and the counselings, including twenty sessions with a psychologist or psychiatrist which purportedly revealed "nothing wrong" (3T22-3T24). Linskey and Albani characterized the incidents differently (3T85-3T95; 2T24; 2T166-2T173).^{3/}

9. Albani's bi-annual performance evaluations from 1995 through 1997 are favorable and his superior officer "raters" (sergeants) uniformly recommended him for promotion. Linskey "signed off" or approved three such evaluations (CP-15, 16, 17, 18, 19; 2T34).

^{3/} Albani and Linskey vigorously contested each other's conduct at a 1994 altercation with teenagers at a local carnival. Both filed departmental charges against the other. Although the charges were dismissed, Linskey relied on the carnival incident as one of the three examples of Albani's bad "temper" (3T88-3T90; 3T23).

Albani's conduct on June 22, 1997 was not reported in his evaluation for that period because a "determination" is pending (2T52). Albani explained the apparent contradiction between his favorable evaluations and Linskey's concerns:

Linskey felt that I was too aggressive and my evaluations said I was a good, aggressive officer... I worked in a tough area of town, he [Albani's immediate supervisor] wanted me to be very pro-active. And then Captain Linskey would say that's too aggressive. Then I look at my evaluations, and I'm recommended for promotion. ...So I don't know what the Chief or the Captain wanted because my superiors told me something else. [3T21]

10. The internal affairs investigation report on the June 22 incident was forwarded to the County Prosecutor. On September 2, 1997, the prosecutor called and wrote to Linskey, advising that "no criminal charges have been authorized against officer Patrick Albani" (1T43; CP-3).

On the same date, Albani was given a notice of a 30 day "suspension for violation of departmental rules" (CP-4). The two-page memorandum from Linskey and approved by Chief Livak enumerates 21 alleged violations of departmental rules, together with a narrative of the June 22nd incident. Albani acknowledged receipt of the notice and requested a hearing (CP-4). No disposition was reached on this departmental charge by the date of hearing (1T125).

11. In general, fewer domestic violence calls are received by the Township police department during the day shift than during

either the afternoon or evening shifts (1T50; 2T58). Linskey testified that restricting Albani's "primary hours" to the day shift would "limit the involvement in domestic violence type calls and have a better opportunity to provide the supervision that we thought was needed..." (1T50).

In fact, Albani responded to eight domestic violence calls in the nine months following his reassignment to the day shift. He responded to only four such calls in the eight months preceding his reassignment (CP-13; 1T95-1T97). Albani acknowledged that after his reassignment to the day shift he patrolled predominantly in a "two-man car" and his assigned partner(s) were virtually always senior to him (2T135-2T136). Accordingly, Albani was not the senior officer on five of the eight domestic violence calls after his reassignment to the day shift (CP-13).^{4/} It appears that he was unassisted on the three other calls.

12. Patrol overtime assignments not requiring special skills are first offered to on-duty patrol personnel "on a seniority basis" (CP-14; 1T100). If on-duty patrol officers reject the offered overtime, "the junior on-duty officer shall be assigned..." If the junior officer on-duty does not want the assignment, he or

^{4/} Linskey asserted in an affidavit that Albani's access to overtime on later shifts was restricted to limit his exposure to "most, if not all, domestic violence calls which he is not to participate in, pending the completion of the pending investigation" (CP-5). Linskey conceded at hearing that "Albani could participate [in domestic violence calls] but had to have supervision" (1T57).

she may seek a substitute, based on a promulgated order of seniority (CP-14). A patrol overtime assignment is usually one 8 hour shift. A "non-patrol" overtime assignment is a specified police action such as a drug sweep (1T67).

Other overtime assignments are either "completions" or "non-specific" (1T140-1T141). A "completion" is work which began on the regular shift but extends for a limited period into the following shift so that it might be completed. "Non-specific overtime" refers to foreseeable public safety needs (e.g., security at school parent-teacher nights); officers may elect in advance to perform these functions rather than be "held over" from their regular shifts.

Albani worked "completion" overtime assignments on August 10, October 19 and December 13, 1997 (1T140). Albani was not prohibited from "non-specific" overtime assignments after July 25th but none were offered (1T141). Albani worked non-patrol overtime assignments on December 4 and 21, 1997 (1T67; CP-7).

The parties stipulated that Albani would have worked patrol overtime assignments on July 29, 1997, August 16 and 27, 1997, December 2, 1997 and January 23, 1998 had he not been prohibited by Linskey's July 25, 1997 memorandum (3T64-3T65; 3T67). The parties disputed whether Albani would have worked patrol overtime on December 25, 1997 (3T68). No other patrol officer has been prohibited from working patrol overtime while on assignment to the patrol division (1T120).

13. Throughout 1997, a minimum of six patrol officers was required on each of the three shifts (2T70). (Officers in administrative or investigative divisions are excluded.) Linskey testified that the day shift had the greatest "available" supervision, meaning, "there are any number of supervisors available during normal business hours" (1T92). Such assistance is contemplated by the Township's "community policing" policy (1T138).

Linskey conceded that only one supervisor was required to be on-duty during the day shift in the patrol division (where Albani was reassigned after July 25, 1997). Two supervisors were required on each of the other two patrol shifts (1T91). Linskey did not rebut that it was "uncommon" for a supervisor from the administrative or investigative divisions to be dispatched to the patrol division (2T74).

14. On December 17, 1997, Albani wrote a memorandum to his supervisor advising that as the months after July lapsed, he was receiving less supervision on domestic violence calls (CP-10). He also wrote that he had not yet "been sent to a school on domestic violence" (CP-10).

On December 24, Lt. Novick wrote a memorandum to Albani, advising that "When staffing permits, a supervisor will respond with you to any domestic violence call you are detailed to." If a supervisor was unavailable, a "senior officer" would assist. Novick admonished, "At no time should you be alone at domestic violence calls." Finally, the memorandum notes that Albani will receive "domestic violence training" (CP-12).

Linskey received a copy of Albani's memorandum (1T80). No evidence indicates that Linskey wrote or authorized Novick's memorandum. Copies were distributed to four superior officers (not Linskey) and to Chief Livak (CP-12).

15. Albani received training in responding to domestic violence calls in March and in early May, 1998 (2T110). Albani acknowledged that he was "taught a lot of things, a lot of avenues to use. Some of them I didn't agree with..." (3T39).

On May 8, 1998, Albani was returned to "unrestricted" duty, based on Linskey's recommendation (3T39; 3T102-3T103).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires negotiations over "terms and conditions of employment." 5.3 also provides that "modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." A failure to comply with these mandates constitutes an unfair practice.

N.J.S.A. 34:13A-5.4a(5) and 5.4b(3). A unilateral imposition of an employment condition is the antithesis of legislative policy.

Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

The Act does not define "terms and conditions of employment," although the Legislature has specified some examples. See, e.g. N.J.S.A. 34:13A-5.3 (grievance and disciplinary review procedures); N.J.S.A. 34:13A-5.5 (representation fees), N.J.S.A.

34:13A-23 (extracurricular activities); and N.J.S.A. 34:13A-26 and 27 (withholding of increment except for teaching performance reasons). The Commission has been entrusted with determining the negotiability of other subjects. N.J.S.A. 34:13A-5.4(d).

A subject involving police and fire employees may be mandatorily negotiable, permissively negotiable, or non-negotiable. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). A scope-of-negotiations issue may arise, as in this case, when a unilateral change is contested in an unfair practice charge. A public employer faces unfair practice liability only if the dispute is mandatorily negotiable. See, e.g., Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 597 (¶12265 1981).

The Commission has issued numerous cases governing the negotiability of overtime issues. In City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), the Commission distinguished between a police department's prerogative to require employees to work overtime and its duty to negotiate over the allocation of overtime opportunities among employees. The Commission added:

Even though the allocation of overtime is a generally negotiable subject, there are still specific limitations on negotiability designed to insure that the employer will obtain a sufficient number of qualified employees to perform the necessary overtime tasks. Thus, if an urgent situation necessitates that the police department meet its manpower needs without instant compliance with the negotiated allocation system, it has the reserved right to make the necessary assignments to protect the public interest. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). Also, if an employer needs a particular employee with special skills and

qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus insure that its needs are met. In re Local 196 and State of New Jersey, 88 N.J. 383, 8 NJPER 13129 (1982). In addition, an employer may reject an employee's request to work overtime, despite a negotiated system distributing overtime on a voluntary basis, if that employee is unqualified or physically incapable of doing the required work. In sum, the allocation of overtime is a mandatory subject of negotiations, provided that the employer remains assured that it will be able to obtain enough qualified and physically sound employees to perform the tasks at hand. [Id. at 450]

Long Branch remains good law. City of Elizabeth, P.E.R.C. No. 97-115, 23 NJPER 234 (¶28112 1997); City of Camden, P.E.R.C. No. 94-63, 20 NJPER 50 (¶25017 1993); Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992); Borough of Little Ferry, P.E.R.C. No. 88-143, 14 NJPER 67 (¶19024 1987); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88). A public employer has a right to deviate from a negotiated allocation system when necessary to protect the public interest. Hudson at 19 NJPER 4.

The allocation system in this case was not negotiated but it has been provided by an implied contractual commitment based on an established practice. The PBA has shown--largely through employer testimony and documents--that patrol overtime allocation by seniority has been unequivocal, clearly enunciated and acted upon, and readily ascertainable over many years as a fixed and established practice accepted by both parties. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016

1998), app. pend App. Div. Dkt. No. A-2351-97T5; Hill and Sinicropi, Management Rights, 23-24 (1986). Thus, the Township is bound to maintain the established past practice during the life of the contract, unless the deviation is to protect the public interest. Long Branch; Hudson.

In City of Camden, the Commission held that the City has a non-negotiable right to determine that certain overtime (firefighter) positions require special skills and qualifications and that only employees with those skills and qualifications may work in those positions. The facts in that scope of negotiations case indicated that some overtime employees could not operate specialized equipment, rendering them "unqualified," in both the City's and the Commission's views.

A legitimate question about a police officer's temperment, derived from documented on-the-job behavior, is no less a threat to public safety than a firefighter's asserted incapacity to operate particular firefighting equipment. Much testimony concerned the merits of 1994 and 1996 arrest incidents involving Albani that were noted in his personnel file. Albani was counseled, though not disciplined for his conduct. He also received job-related psychological counseling. The record shows that Linskey and the Chief viewed the merits of Albani's June 1997 domestic arrest incident differently than internal affairs investigator Ferguson and the County Prosecutor. Even Ferguson's recommended disposition, "not sustained", by definition acknowledges uncertainties between

what was alleged and what was demonstrated. On the other hand, officer Albani openly contested Linskey's conduct in one of the 1994 incidents on which Linskey relied to illustrate Albani's bad temper.

The PBA argues that Albani is "qualified" to work patrol overtime on the afternoon shift because no special skills are mandated. It relies on Park Ridge Bor., P.E.R.C. No. 87-55, 12 NJPER 851 (¶17328 1986), where the Commission declined to restrain arbitration of a grievance alleging that the employer had improperly denied an employee overtime opportunities. The employer asserted that it had "suspended" the employee from overtime opportunities because of absenteeism. The Commission wrote, "...there is nothing in the record that would show that [the employee] is not qualified to perform the assignment." Id. at 12 NJPER 852.

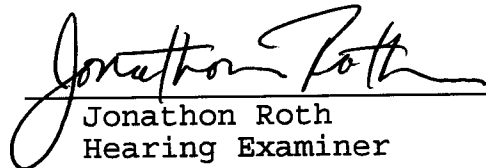
A dispute over "qualifications" is not an unfair practice. The precedential value of Park Ridge Bor. is that a grievance over an employer's denial of overtime opportunities is generally arbitrable. The arbitrability of a grievance based on the facts of this police case is problematic, at best. N.J.S.A. 34:13A-5.3, amended by P.L. 1996, c.115; State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993).

Enforcement of Linskey's July 25, 1997 directive waned over the succeeding months. And Albani did not receive training in responding to domestic violence until March and May 1998, which finally led to his return to unrestricted duty. These facts do not demonstrate that the Township's public safety concerns were

pretextual. Nor does the evidence show that the Township acted arbitrarily in denying afternoon shift patrol overtime opportunities to Albani. More domestic violence calls are received on that shift than on either of the two other shifts and Albani's conduct on June 22, 1997 raised a question about his professional capacities in those instances. The Township responded pursuant to its prerogative.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.



Jonathon Roth
Hearing Examiner

Dated: October 16, 1998
Trenton, New Jersey