STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of Interest Arbitration Between

TOWNSHIP OF IRVINGTON

"the Township or Employer"

and

PBA LOCAL 29
"the PBA or Union"

INTEREST ARBITRATION DECISION AND AWARD

Docket No: IA-2007-011

Before: Robert M. Glasson, Arbitrator

APPEARANCES

FOR THE TOWNSHIP:

Ramon Rivera, Esq.
Scarinci & Hollenbeck
Of Counsel & On the Brief

FOR THE PBA:

Fredric M. Knapp, Esq.
Knapp, Trimboli & Prusinowski
Of Counsel & On the Brief

Procedural History

The Township of Irvington (the "Township") and PBA Local 29 (the "PBA") are parties to a collective bargaining agreement (the "CBA") which expired on December 31, 2005. Upon expiration of the CBA, the parties engaged in negotiations for a successor agreement. Negotiations reached an impasse, and the PBA filed a petition with the New Jersey Public Employment Relations Commission ("PERC") on August 30, 2006, requesting the initiation of compulsory interest arbitration. The parties followed the arbitrator selection process contained in N.J.A.C. 19:16-5.6 that resulted in my mutual selection by the parties and my subsequent appointment by PERC on January 5, 2007 from its Special Panel of Interest Arbitrators.

I conducted mediation sessions on multiple dates with the parties. At the final mediation session on June 18, 2007, the parties signed a Memorandum of Agreement (the "MOA") for a five-year successor CBA with a term of January 1, 2006 to December 31, 2010. The MOA includes the terms of a comprehensive settlement of ten issues including salary, health insurance, prescription co-payments, detective allowance, training days, grievance procedure, bereavement leave, hours of work and overtime, legal services, and canine squad salaries. All of the above terms of the MOA were subsequently ratified by the membership of the PBA and approved by the Township. All of these terms of agreement have been implemented. In addition to the above terms, the parties agreed to continue direct negotiations on five (5) unresolved non-economic issues. The MOA provides as follows:

> The parties agree that the following issues have not been resolved. It is mutually agreed that the parties shall meet within sixty (60) days of execution of this agreement to seek to resolve the following issues. In the event that they are unable to do so, they shall be submitted to Arbitrator Glasson for final determination.

The MOA lists the following issues:

1. Police Related Shootings
2. Suspension Days
3. Seniority Assignment Bidding
4. Employee Rights, Minor Discipline
5. Shift Swapping

The parties continued direct negotiations and I conducted one additional mediation session in an effort to resolve the outstanding non-economic issues. Despite the parties' good faith efforts, the non-economic issues were not resolved and the parties agreed to waive a hearing and to submit briefs in support of their respective positions on each of the unresolved non-economic issues. The PBA filed the initial brief which was served on the Township and the arbitrator. The Township then filed a responding brief and the record was closed on May 15, 2008. Following the submission of the briefs, the parties again engaged in further direct negotiations in a final effort to reach resolution. Again, this proved unsuccessful and the matter is now before me for a final determination. The parties agreed to extend the time limits for the issuance of the award.

This proceeding is governed by the Police and Fire Public Interest Arbitration Reform Act, P.L. 1995, c. 425, which was effective January 10, 1996. While that Act, at N.J.S.A. 34:13A-16f(5), calls for the arbitrator to render an opinion and award within 120 days of selection or assignment, the parties are permitted to agree to an extension.

The parties did not agree on an alternate terminal procedure. Accordingly, the terminal procedure is conventional arbitration. I am required by N.J.S.A. 34:13A-16d(2) to "separately determine whether the net annual economic changes for each year of the agreement are reasonable under the nine statutory criteria in subsection g. of this section."

Statutory Criteria

The statute requires the arbitrator to:

decide the dispute based on a reasonable determination of the issues, giving due weight to those factors listed below that are judged relevant for the resolution of the specific dispute. In the award, the arbitrator or panel of arbitrators shall indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each factor.

(1) The interests and welfare of the public. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by P.L. 1976, c 68 (C.40A:4-45.1 et seq.).

(2) Comparison of the wages, salaries, hours, and condition of employment of the employees involved in the arbitration proceedings with the wages, hours and condition of employment of other employees performing the same or similar services with other employees generally:

(a) In private employment in general; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.
(b) In public employment in general; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.
(c) In public employment in the same or similar jurisdictions, as determined in accordance with section 5 of P.L. 1995, c. 425 c. 34:13A-16.2); provided, however, each party shall have the right to submit additional evidence concerning the comparability of jurisdictions for the arbitrator's consideration.

(3) The overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received.

(4) Stipulations of the parties.

(5) The lawful authority of the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by the P.L. 1976, c. 68 (C.40A:4-45.1 et seq.).

(6) The financial impact on the governing unit, its residents and taxpayers. When considering this factor in a dispute in which the public employer is a county or municipality, the arbitrator or panel of arbitrators shall take into account to the extent the evidence is introduced, how the award will affect the municipal or county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes element, or in the case of a county, the county purposes element, required to fund the employees' contract in the preceding budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers on the local unit; the impact of the award on the ability of the governing body to (a) maintain existing local programs and services, (b) expand existing local programs and services for which public moneys have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public moneys have been designated by the governing body in its proposed local budget.

(7) The cost of living.

(8) The continuity and stability of employment including seniority rights and such factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.

(9) Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by Section 10 of P.L. 2007, c. 62 C. 40A:4-45.45)

Discussion and Analysis

The issues to be decided in this matter are all non-economic issues. These issues were unresolved following the parties' agreement to a comprehensive five-year CBA which resolved all economic issues including but not limited to salary and health insurance. I am required to make a reasonable determination of the issues, giving due weight to the statutory criteria which are deemed relevant. Each criterion must be considered and those deemed relevant must be explained. The arbitrator is also required to provide an explanation as to why any criterion is deemed not to be relevant.

I have carefully considered the evidence as well as the arguments of the parties. I have examined the evidence in light of the statutory criteria. Each criterion has been considered, although the weight given to each factor varies. I have discussed the weight I have given to each factor. I have not determined the total net economic annual changes for each year of the agreement given the nature of the issues which have no direct financial impact on either the Township or the PBA.

It is undisputed that many of the statutory criteria are not applicable in this matter. The parties did not submit evidence and argument regarding many of the statutory factors. The amended statute specifically requires the arbitrator to consider the CAP law in connection with this factor. I find that statutory factor (g) (5) is not relevant in this matter. There is nothing in this award that could impact on or cause the Township to exceed its authority under the CAP law. I also find that factor (g) (6), "the financial impact on the governing unit, its residents and taxpayers" is not relevant since neither party has argued that there is a financial impact from the non-economic issues. The parties did not submit evidence or argument regarding statutory factor (g) (7), the "cost of living" and I find that statutory factor (g) (7) is not relevant in this matter. Neither party submitted evidence or argument regarding statutory factor (g) (3), "the overall compensation presently received by the employees." I find that statutory factor (g) (3) is not relevant in this matter. There are no stipulations of the parties concerning substantive matters and I find that statutory factor (g) (4) is not relevant in this matter.

I find that statutory factor (g) (1), "the interests and welfare of the public" and statutory factor (g) (2), the "comparison of the. . . . conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing the same or similar services with other

employees generally" are relevant in this matter. These are the two factors that the Township and the PBA emphasized in their written submissions.

The Township and the PBA have made effective arguments in their briefs in support of their respective positions. I shall now review the parties' arguments made in the briefs followed by my analysis and my decision.

Issue 1
Police-Related Shootings

PBA Argument

The PBA submits that the CBA must include a provision concerning interviews with police officers after police-related shootings. The PBA proposes that the following new provision regarding "Police-Related Shootings" be added to the CBA:

> In the event of a police-related shooting, the officer involved shall receive administrative leave for stress for a minimum of one (1) to two (2) days with pay. No report will be required of the Officer involved for a period of twenty-four (24) hours from the incident. The Officer shall also have the opportunity to consult with an attorney prior to submitting his report."

The PBA submits that other jurisdictions with comparable crime rates have analogous provisions within their respective police departments. For example, the New York City Police Department imposes a "reasonable" waiting period before interviewing an officer who is involved in a shooting. The New York City Police Department Procedure No. 206-13 provides in pertinent part:

> A uniformed member of the services in the rank of detective, sergeant, lieutenant or captain and above, who is the subject of an official investigation or a witness in an official investigation, shall be given a reasonable period of time to obtain and confer with counsel prior to questioning. Interrogations of members of routine, non-critical matters should be scheduled during business hours on a day when the member is scheduled to work.
>
> Interrogations of detectives, sergeants, lieutenants, and captains and above in emerging investigations, where there is a need to gather timely information, should usually be done after all preliminary steps and conferrals have been completed and

> the member to be questioned has been afforded a reasonable time to obtain and confer with counsel. In determining what is a reasonable period of time, consideration should be given to the nature of the investigation, the need for the Department to have the information possessed by the member in a timely manner, and the stage the investigation is at when the need to question the member has been determined. The emergent nature and exigent circumstances of each investigation will determine the length of time afforded the member before questioning is conducted. However, in all cases the determination as to what is a reasonable time will be made by the captain (or above) in charges of the investigation. (E-28 at 29).

According to the PBA, this procedure applies anytime a New York City Police Officer discharges his/her firearm and/or whenever the officer or his attorney invokes it. Clearly, the numerous factors, as outlined in the above procedure, make this type of clause essential to both the accurate reporting of the incident and the protection of an officer's rights.

The PBA asserts that this type of provision is particularly necessary in Irvington because of its extremely high crime rate. For example, Irvington ranks number two in Essex County, second only to the Newark, in the total number of violent crimes based upon the 2006 census. (E-29). In 2006, in Irvington, the total number of murders, rapes, robberies, and aggravated assaults was 1,321 compared to an average of 292 for all municipalities in the County of Essex. Id. Further, out of the top 15 Urban Cities in the Uniform Crime Report, the Irvington ranked number five for the last five years behind Newark, Camden, Jersey City, and Elizabeth, respectively, which are all cities with much larger populations than Irvington. Id.

The purpose for the police-related shooting proposal, therefore, is vital in an area of the County where there is a high incidence of violent crime and a great possibility for an officer to either discharge his weapon or be fired upon. Any officer involved in such an incident should not have to provide a statement within twenty-four (24) hours of the incident

in order to ensure that the officer is no longer in shock or in any other impaired mental state while preparing his or her report. This reasonable waiting period strengthens the accuracy of police officer reports in these serious incidents, and affords the officers enough time to recover from the extremely stressful incident involving a shooting.

According to the PBA, this provision also protects the Township from future liability against any possible claims or lawsuits arising from any such incident as it ensures greater accuracy in its police and internal affairs reports. The PBA points out that the Township has offered no reason or governmental prerogative not to include such a provision and has made no showing that this provision is a detriment or otherwise harmful to the Township's interests.

Thus, the PBA requests that the current CBA include a new provision providing for a waiting period for an interview after an officer involved in a shooting discharged a weapon in the performance of his duties.

Township Argument

The Township is opposed to the inclusion of the PBA proposal for administrative stress leave and limits on the questioning of police officers following a police-related shooting. The Township contends that the PBA's proposal is counter to public policy and is not mandatorily negotiable. The Township contends that a mandatory administrative stress leave, after any weapon discharge, including a period of no questioning, is detrimental and injurious to the public welfare. Furthermore, such a provision places a substantial limitation on the Township's policymaking powers. An obligation of all police officers is to prevent, alleviate and solve criminal activity within the municipality and protect public safety. As such, police employment policies and provisions must conform to the safety and

investigatory obligations of the police officers. Crime detection and investigation are quintessential police functions. Camden County Prosecutor v. Camden County Assistant Prosecutors Ass'n, P.E.R.C. NO. 2007-9, 32 NJPER 117 (2006). It has been deemed traditional police work in that one sees the process through from initial investigation to apprehension. Camden County Sheriff, 27 NJPER 71 (2000).

According to the Township, the most critical time for any criminal investigation is the time contemporaneous to the incident. To provide police officers with administrative leave for stress following a criminal incident involving a weapon would not only impede the investigation, but it would hinder public and officer safety. Officers would be unavailable for questioning, to gather evidence, and to assist the investigation which he or she may have personal knowledge about.

Moreover, comparable jurisdictions within New Jersey have not included provisions for "Police-Related Shootings" or "Administrative Leave for Stress" in their CBAs. The Township contends that the PBA is erroneous in citing the New York City Police Department as a comparable jurisdiction. The Township notes that comparable cities in crime, population and location, such as East Orange and Newark, do not provide for such "stress leave" in their CBAs. (See City of East Orange Collective Bargaining Agreement, attached hereto as Exhibit "B," and City of Newark Superior Officers' Agreement, attached hereto as Exhibit "C") Further, the current CBA already includes a provision for sick leave should an officer be injured.

The Township submits that there is no basis to include an administrative stress leave provision for a police-related weapon discharge in the CBA.

Discussion

The PBA's proposal, requesting a "24-hour" waiting period before an officer involved in a "police related" shooting can be interviewed, is made on the basis that an officer may be under stress or in a "mentally impaired" state from the effects of the shooting and therefore should not be required to submit a report of the shooting for twenty-four hours. The Township is opposed to the PBA's proposal arguing that the proposal is not a mandatory subject of negotiations and would hinder the Township's ability to investigate the circumstances of the shooting incident.

For the following reasons, I shall deny the PBA's request for a "24-hour" waiting period before an officer involved in a "police related" shooting can be interviewed.

First, comparability is one of the factors that must be measured in deciding the PBA's proposal. This is a critical element in evaluating the PBA's proposal. Evidence of such language in comparable New Jersey jurisdictions would suggest that other departments have chosen to provide such waiting periods for the reasons stated by the PBA. However, there is nothing in the record showing comparable jurisdictions in New Jersey with provisions in CBAs regarding "waiting periods" or administrative leave for stress when an officer is involved in a shooting incident.

Second, the record is unclear as to who has primary responsibility to investigate "deadly force" incidents in municipalities. While the record includes no guidance on this, I am aware that there are Attorney General Law Enforcement Directives that apply in the review of the use of deadly force by law enforcement. Attorney General law Enforcement Directive No. 2006-5, issued on December 13, 2006, provides in relevant part as follows:

WHEREAS, in order to promote statewide uniformity and accountability, it is appropriate for the Attorney General, in cooperation and consultation with the County Prosecutors, to issue and enforce revised and updated procedures for review of the use of force by law enforcement officials statewide;

NOW, THEREFORE, I, Stuart Rabner, Attorney General of New Jersey, by virtue of the authority vested in me by the Constitution and the Statutes of the State, do hereby direct that:

> 3. When a law enforcement officer employed by a municipality or county agency is involved in the use of deadly force as defined in Paragraph 1, the County Prosecutor's Office in the county of occurrence will conduct the investigation. * * *
>
> 8. The Attorney General may issue and periodically revise Standards governing the investigation of the use of deadly force by law enforcement officers. These Standards may govern the composition, operations, supervision and investigation protocols of the SRT (Attorney General's Shooting Response Team), and may also govern investigations conducted by the County Prosecutors' Offices. Any Standards issued by the Attorney General pursuant to this Paragraph are fully incorporated into this Law Enforcement Directive as if set out fully herein, shall be binding upon all affected law enforcement agencies, and shall automatically supersede and take precedence over any rules and regulations, standard operating procedures, guidelines or protocols issued or employed by the affected law enforcement agencies.

This AG Directive places the responsibility for the investigation with the County Prosecutor's Office and makes the "standards governing the investigation of the use of deadly force by law enforcement officers" "binding upon all affected law enforcement agencies." The investigation of the use of deadly force and/or police-related shooting incidents are conducted by police agencies outside of the municipal police department in which the incident occurred. Establishing an automatic 24-hour waiting period could impinge on the ability of investigative agencies to conduct a timely investigation of the police-related shooting and/or deadly force incident involving a police officer. Investigations of these matters are very sensitive and subject to strict rules as to who may question a police officer immediately following an incident involving the use of deadly force and/or a police-related shooting.

For all of the above reasons, the PBA's proposal is hereby denied.

Issue 2
Suspension Days

PBA Argument

The PBA proposes that the CBA include a provision which prohibits disciplinary suspensions being scheduled to preclude officers from working off-duty jobs and that all suspensions should be based on an eight-hour day. The PBA proposes the inclusion of a new provision in the current CBA entitled "Suspension Days," which provides the following:

> "Days of an employee's suspension shall not be scheduled so as to preclude an employee from working "jobs in blue assignments." Suspension days shall be based on an eight (8) hour day."

The PBA submits that the above proposed language is necessary so that an officer who is disciplined is not penalized essentially twice for the same disciplinary action. For example, under the current 4/4 schedule, an officer who receives a four (4) day suspension may be required to serve the beginning of the suspension on the last two (2) days of his or her days on-duty. The officer is then still suspended during the four (4) days he or she is off-duty and is thus precluded from working any "Jobs-In-Blue" assignments while off-duty, before finishing the remaining two (2) days of his suspension. In this scenario, the officer loses the opportunity to be assigned to any off-duty work under the "Jobs-In-Blue" program in addition to being suspended. This can and has been utilized by the Township in the past to impose an "additional" penalty for already suspended officers.

Furthermore, suspension days should be based on an eight (8) hour day instead of the Township's proposed eleven and one-quarter (11.25) hour day to minimize the financial impact on the suspended officer. According to the PBA, scheduling suspension days on an eleven and one-quarter (11.25) hour shift, as opposed to an eight (8) hour shift, penalizes the officer financially for a greater amount of time, as other benefit days are only calculated upon

an eight (8) instead of an eleven and one-quarter(11.25) hour day. The PBA submits that suspension days which penalize an officer, should be based on a longer day than benefit days, which are contractually guaranteed to the officers.

Further, minor discipline as set forth in the New Jersey Department of Personnel ("DOP") regulations, N.J.A.C. 4A:2-2.9, constitutes a suspension of five days or less; however, the Department of Personnel - Merit System Board, the administrative agency designated to interpret the regulations, has ruled that this regulation means 40 working hours or less of suspension. See In the Matter of William Brennan (MSB, decided July 7, 1998). Thus, a four (4) day suspension based upon an eleven and one-quarter (11.25) hour shift would actually constitute major discipline under the pertinent Civil Service regulation and again, result in a greater penalty that which was originally imposed.

The PBA contends that an officer must be suspended based upon the eight (8) hour shift and not an eleven and one-quarter (11.25) hour shift consistent with other non-working days referenced in the contract.

Township Argument

The Township is opposed to any restrictions on the scheduling of disciplinary suspensions. The Township maintains that when the dominant concern is its managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Paterson Police PBA v. Paterson, 87 N.J. 78, 91 (1981). In Local 195 and Paterson Police PBA Local No. 1 v. City of Paterson, supra, the Court held that if negotiations over a particular matter, including work schedules, would significantly interfere with the determination of a governmental policy, the matter was not negotiable. See also Borough of Paulsboro, 14 NJPER 30 (1987). It follows that scheduling of suspensions, which would also significantly interfere with government

policy, is also not negotiable. Suspensions in and of themselves interfere with government policy and it is neither the duty nor the responsibility of the municipality to schedule them in accordance with the convenience of the suspended officer. When an officer is suspended for due cause, it is the managerial prerogative of the municipality to determine when the suspension should be imposed, taking in consideration manpower needs of the municipality and overtime constraints of the other employees required to fill in for the suspended officer. Furthermore, if the Township included this provision in the CBA, it would appear to be acquiescing wrongful conduct which is contrary to governmental policy. Negotiations over the ability to set a suspension policy around the schedule of the suspended officer would significantly interfere with the Township's ability to set policy and would cause a hardship to the Township and other dedicated officers. This is clearly and inherently a management prerogative pertaining to the determination of governmental policy which cannot be delegated to an arbitrator. New Jersey State Policemen's Benevolent Ass'n. v. Irvington, 80 N.J. 271, 296 (1979).

Discussion

The PBA seeks to have suspension days based on an eight (8) hour day instead of the current eleven and one-quarter (11.25) hour day. The PBA contends that scheduling suspension days based on an eleven and one-quarter (11.25) hour shift penalizes the officer since other benefit days are calculated upon an eight-hour day. The PBA also notes that DOP defines minor discipline as a suspension of five days or less and has ruled that minor discipline means 40 working hours or less of suspension time. Thus, a four-day suspension at eleven and one-quarter hours per day is a total of 41 working hours and would constitute major discipline.

A review of the CBA shows that the current eleven and one-quarter (11.25) hour day for patrol officers and ten (10) hour day for non-patrol officers resulted from the change in work schedules in the 2003-2005 CBA. The new work schedule, effective January 1, 2004, replaced the 4-2 schedule under which patrol officers worked an 8.5-hour day and the 5/2 schedule under which non-patrol officers worked an 8-hour day. Article IX, Section 3, of the 2003-2005 CBA provides, in relevant part, as follows:

Section 3

1. **Work Schedules**

(a) Effective January 1, 2004, the parties agree to the implementation of a trial work schedule. The Patrol Division shall be a 4/4 schedule that amounts to 2080 hours worked per year (hours worked, if any, over 2080 shall be paid at premium rate). Patrol officers shall work four (4) consecutive days at eleven and one-quarter (11.25) hours on-duty, followed by four (4) consecutive days off-duty.

(b) Non-patrol officers shall work a 4/3 schedule consisting of four (4) ten (10) hour days with three (3) days off-duty.

(c) All accrued time, which includes vacation time, compensatory time, personal time and any other time applicable under the collective bargaining agreement, shall be converted to hours and then modified as per the 4-4 schedule or 4-3 schedule.

3. Conversion of "Contractual Days" and other leave time

- Vacation Days: All vacation days shall be converted to hours based on a 11.25 hour day. For example, an officer who has twenty-nine (29) 8.5 hour working days vacation shall have those days converted to 21.9 days. (29 x 8.5 = 246.5 hours/11.25 = 21.9 days).

- The compensatory time set forth in Article IX, Section 2 (4) and (5) and Article XV, paragraph 2, shall be converted to 8.5 hours per day.

- Current leave bank accumulation shall remain unchanged. All time accumulated after the implementation of the four-four (4/4) and four-three (4/3) schedules shall be based on a 11.25 hour day.

The PBA's proposal essentially asks that suspension days be meted out in "hours" instead of days. Thus, if a patrol officer working an eleven and one-quarter (11.25) hour, 4/4 schedule is suspended for two days, the suspension should be for sixteen hours, not for twenty-two and one-half hours. The length of a disciplinary suspension (whether major or minor) is solely within the control of management. However, what is critical is the fairness and consistency of the suspension. Thus, if a certain infraction consistently received a two-day suspension when a patrol officer worked a 4/2 schedule with 8.5 hour work-days, it would be inconsistent to now assess the same two-day suspension for the same infraction to a patrol officer now working a 11.25 hour work-day. Clearly, the penalty has been increased for the same infraction. The meting out of disciplinary penalties in "days' as opposed to "hours" is further complicated by the different lengths of shifts (11.25 vs. 10) for the 4/4 and 4/3 work schedules.

Accordingly, I conclude that, effective January 1, 2009, disciplinary suspensions shall be meted out in "hours" instead of "days." This will allow the Township to maintain consistency in the meting out of disciplinary penalties without regard to the length of the officer's work-day.

The second part of the PBA's proposal is that suspensions be scheduled to allow an employee to work "Jobs-In-Blue" assignments. "Jobs-In-Blue" assignments are jobs that police officers perform off-duty. The PBA contends that officers are deprived of this opportunity when the suspension is scheduled during two different 4-day work cycles, i.e., an officer suspended for more than ten (10) hours (4/3 schedule) or eleven and one-quarter (11.25) hours (4/4 schedule) may be required to serve the beginning of the suspension on the last day(s) of the 4-day work cycle and then complete the suspension on the first day(s) of

the next 4-day work cycle. The officer is then still suspended during the four (4) days or three (3) days off-duty and is thus precluded from working any "Jobs-In-Blue" assignments while off-duty, before finishing the remaining days of the suspension.

The Township is opposed to any restrictions on the scheduling of disciplinary suspensions. The Township maintains that it has a managerial prerogative to determine when the suspension should be imposed, taking in consideration manpower needs of the municipality and overtime constraints of the other employees required to fill in for the suspended officer.

The PBA has not met its burden on this proposal. All things being equal, the Township should schedule suspensions on consecutive work days within a 4-day work cycle. However, there is no basis to restrict the Township's scheduling of disciplinary suspensions. A police officer under suspension is not entitled to the benefit of a schedule that enhances his off-duty employment opportunities. After all, the police officer has been disciplined and it makes no sense to require an accommodation to an officer serving a disciplinary suspension. At the same time, the Township should be mindful that a practice of suspending officers and not scheduling such suspensions within a 4-day work cycle, without legitimate business reasons, could result in additional monetary remedies if the suspension is found to be without merit.

Accordingly, I find that the PBA has not met its burden and its proposal is hereby denied.

Issue 3
Seniority - Shift Assignment Bidding

PBA Argument

The PBA proposes that the CBA include a provision which provides for seniority bidding for shift assignments pursuant to the Township's past practice and the current practice in other police departments. Article VII, Seniority, in the current CBA provides as follows:

1. Seniority shall be determined in accordance with the date of employment as a police officer in the Department. In the event the employment of more than one Officer occurs on the same date, then the position on the Civil Service list from which the officer was originally appointed will govern the order of seniority.

2. Seniority shall be lost if an employee is discharged or resigned. Seniority shall not be lost by reason of sick leave, military leave which does not exceed four (4) years, or other approved leaves of absence which do not exceed one (1) year.

3. The Township agrees to provide the PBA with its seniority list and to update such list annually.

The PBA proposes to add to Article VII, Seniority, a provision for shift-bidding based upon seniority and other pertinent criteria. In other words, patrol officers would receive their preference in shift assignments bidding based upon his or her seniority and other requirements.

The PBA submits that it was previously the past practice of the Township to include seniority as a factor during the shift bidding process, and that it was included as a factor for several years. (Wallace Cert. ¶3) It was only included, however, assuming the qualifications of the officers' bidding for the same shifts were equal. (Wallace Cert. ¶4) According to PBA President, Harold Wallace, this was a Township policy that was not formally memorialized in a contract but was a past practice of the Township. (Wallace Cert. ¶5) The PBA further

submits that the reestablishment of this provision is extremely important for officer morale and would not impair the ability of the Chief to run the day to day operations of the department. (Wallace Cert. ¶6)

The PBA cites several contracts which include provisions providing for seniority based shift assignments:

The 1999-2006 CBA between the City of East Orange and East Orange FOP Lodge 11, (Article XIX, Hours of Work, Scheduling and Overtime, Section 13), provides as follows:

> (a) By December 1st of each year, shift assignments for employees working in the Patrol and other Uniformed Divisions shall be made, where all ranks and qualifications are equal, pursuant to a seniority bid system. (For purposes of this Section, "qualifications" shall also include an officer's ability to properly function within the "Community Policing Program" philosophy established by the City.) Each of the affected employees shall list their shift choices in order of preference. Assignments shall be made based upon seniority and shall commence on January 1st and shall remain in effect until the procedure is repeated in the subsequent year. (E-32 at 23-24).

The 2004-2007 CBA between Millburn Township and PBA Local 34, Article VI, Changes of Tour of Duty and Shift Structure, provides as follows:

> 4. The work schedule for the patrol division shall be a four/four schedule. Officers shall bid for shifts by seniority but the Chief has the right to change shift selections in the interest of the department . . . (E-31 at 9).

The 2005-2007 CBA between Mendham Township and PBA Local 139, Article XXIV, Work Schedule, provides as follows:

> D. Shift selection shall be made on or about January 1 of each year on a seniority basis. However, only one (1) sergeant may select any given shift, which shall also be on a seniority basis. (E-33 at 24).

The 2005-2009 CBA between the Township of Little Falls and PBA Local 346, Article XI, Work Shifts, "Shift Bidding by Seniority," provides as follows:

D. Shift Bidding by Seniority All full time Employees shall have the right to bid for shifts based upon their seniority within their rank. Each September the shift bidding shall take place for the new work schedule to take effect on January of the following year. The Chief of Police shall have the right to place officers within the schedule based upon any specialized skills that may be needed for the effective operation of a shift. (E-34 at 11).

The PBA asserts that it is well established that shift bidding clauses based on seniority are mandatorily negotiable provided all qualifications are equal and that managerial prerogatives are not otherwise compromised. See, Jersey City v. Jersey City Police Superior Officers Association, 32 NJPER 115 (2006); Newark, City of v. Newark Firefighters Union, 30 NJPER 152 (2004). See, also Roselle Park v. PBA Local 27, Roselle Park Police Supervisors Group, 31 NJPER 157 (2005). In Passaic v. Passaic PBA Local 14, 30 NJPER 2 (2004) the Commission held:

> Police Officers seek to negotiate over the right to choose shift assignments based upon their seniority since those assignments dictate their work hours and affect their off-duty lives. Thus, we have stated that public employers and majority representatives may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. (Id.)

According to the PBA, the Township has no reasons such as training, skills or supervision of any particular assignment that warrants deviation from seniority assignment bidding. This clause would also eliminate any perception that assignments were based on favoritism and instead is a neutral system that is fair and equitable to both the Township and the PBA.

The PBA requests that seniority assignment bidding be reestablished in the current CBA.

Township Argument

The Township maintains that the current seniority assignment bidding provision is consistent with prior practices, applicable case law and comparable jurisdictions and should not be altered. The Township contends that it has a managerial prerogative to assign and regulate shift schedules. The Legislature has vested municipal authorities with the discretion to determine the powers, duties, functions, and efficient operation of police departments. Jersey City v. Jersey City POBA, 154 N.J. 555, 572 (1998); Jersey City, City of v. Jersey City Police Superior Officers Ass'n, 32 NJPER 115 (2006). It follows that municipalities are able to organize, staff and schedule for the purpose of improving a police department's effectiveness and performance. Id. Public employers and majority representatives may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (P. 25197 1994)¶; City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (P. 20211 1989), aff'd NJPER Supp.2d 245 (P. 204 App. Div. 1990)¶¶; contrast Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (P. 25196 1994)¶ (clauses that base shift assignment solely on seniority are not mandatorily negotiable).

The Township maintains that public employers have a managerial prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs and an arbitrator cannot second-guess those determinations. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (P. 30190 1999), recon. den. P.E.R.C. No. 2000-72, 26 NJPER 172 (P. 31069 2000), aff'd 27 NJPER 357 (P. 32128 App. Div. 2001). Moreover, there is case law allowing a cause of action for the failure to follow seniority in

shift assignments. City of Hoboken, 15 NJPER 253 (1989); City of Brigantine, 15 NJPER 520 (1989). This further evidences the practice of using seniority as the basis to assign shifts.

According to the Township, while police departments may unilaterally make or change assignments when a chief determines that qualifications are not equal or that certain assignments must be made to achieve operational, supervisory, or other governmental policy objectives, the common practice is to base shift bidding on seniority. Rutherford, Borough of v. PBA, Rutherford Local 300, 33 NJPER 98 (2007). In Rutherford, the chief asserted a specific need to have a mix of officer qualifications, expertise, and experience on each shift thus using other criteria rather than just seniority. Id. Here, in the Township of Irvington, there has not been a need to use "additional criteria" and thus shift bidding by seniority is proper. The scheduling of shifts is a managerial prerogative. An arbitrator cannot second-guess the overall approach. Id.

The Township disputes the PBA's reliance on other CBAs to support the argument that officers should receive their shift preference based on seniority and "other pertinent criteria." For instance, the 2006-2009 CBA between the City of East Orange and FOP Lodge 11 provides in pertinent part that "shift assignments for employees working in the Patrol and other Uniformed Divisions shall be made, where all ranks and qualifications are equal, pursuant to a seniority bid system." (E-30). According to the Township, all of the municipalities the PBA cited in its brief state that "officers shall bid for shifts by seniority," "Shift selection shall be made . . . on a seniority basis," "All full time Employees shall have the right to bid for shifts based upon their seniority within their rank" and "the right to choose shift assignment based upon their seniority since this assignment dictates their work hours and affects their off-duty lives."

The Township submits that its current practice of designating shifts or assignments is consistent with Shift Bidding by Seniority provisions employed by comparable municipalities. Thus, assignment of shifts based on "other requirements" such as attendance and disciplinary records in addition to seniority is improper and should not be awarded.

Discussion

I shall first address the Township's argument that shift bidding is not a mandatory subject of negotiations. PERC has consistently ruled that negotiations are not required where negotiations over work schedule changes would interfere with management's policy on staffing levels, employee supervision or training. Borough of Atlantic Highlands and Atlantic Highland PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Irvington PBA Local 29 v. Township of Irvington, 170 N.J. Super. 539 (App. Div. 1979). Further, the Commission has determined that public employer's have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982)

However, the Commission has found that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., City of Asbury Park, P.E.R.C. No 90-11, 15 NJPER 509 (¶20221 1989), aff'd NJPER Supp. 2d 245 (¶204 App. Div. 1990).

In City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391, 393-394 (¶25197 1994) the Commission found:

> "Police officers seek to negotiate over the right to choose shift assignments based on their seniority since those assignments dictate their work hours and affect their off-duty lives. **Thus, we have stated that public employers and majority representatives may agree that seniority can be a factor in shift assignment where all qualifications are equal and managerial prerogatives are not otherwise compromised.** However, the need to fulfill the employer's law enforcement mission means that other factors besides seniority must be allowed to come into play when management has special policy needs. Thus, contract proposals that base shift assignments solely on seniority are not mandatorily negotiable. And contract proposals requiring seniority bidding must preserve management's right to deviate from a seniority system when necessary, to accomplish a government policy goal -- for example, seniority bidding cannot compromise management's power to assign employee's with special qualifications to special tasks, determine that employees with certain abilities perform better on certain shifts, train employees, strengthen supervision, determine staffing levels, or respond to emergencies." (Emphasis added by arbitrator).

It is clear that the Commission has decided that seniority may be a factor in shift assignment where all qualifications are equal and managerial prerogatives are not otherwise compromised.

A review of the parties' arguments shows that the Township and the PBA have a different view of how shift bidding by seniority should be accomplished. The Township contends that its current practice is consistent with other comparable municipalities. The Township maintains that if a shift bidding procedure is awarded, such procedure should not be based on attendance and disciplinary records. The Township notes that other jurisdictions with contractual shift bidding procedures provide for managerial discretion.

The PBA proposes to add to Article VII, Seniority, a provision for shift-bidding based upon seniority and other pertinent criteria. In other words, patrol officers would receive their preference in shift assignments bidding based upon his or her seniority and other requirements.

I conclude that the PBA has met its burden of showing that a new provision regarding shift bidding should be added to Article VII, Seniority. The PBA has submitted numerous provisions from other CBAs showing that police officers in other jurisdictions have contractual provisions in which seniority is a factor in determining shift assignments. The Township has acknowledged that these provisions exist in other CBAs but it argues that any such provision must preserve its managerial prerogatives and that such seniority must be limited to assignments where all qualifications are equal. The Township's arguments are consistent with PERC case law.

Thus, I conclude that effective January 1, 2010, the CBA shall be amended to provide that shift assignments shall be determined by seniority where all qualifications are equal. I have made this effective in 2010 for several reasons. First, shift assignments for 2009 have probably been completed. Second, a review of the CBA does not indicate if the parties have a "bidding" procedure for vacations but vacation schedules are normally completed in the latter part of the calendar year. Subjecting the parties to a bidding for shift assignments in 2009 can only be disruptive at this late date. Finally, I shall remand the task of finalizing the language on determining shift assignments by seniority to the parties. A number of CBAs are in the record in other jurisdictions. They are all different and have been crafted to meet the needs of the separate jurisdictions. The Township and the PBA, in drafting the language, shall be guided by the requirements of the PERC case law that shift assignments shall be determined by seniority where all qualifications are equal. It is incumbent on the parties to draft contract language that fits their needs and satisfies the PERC requirements. In the event the parties cannot reach agreement by March 1, 2009, I shall decide the matter.

Issue 4
Employee Rights, Minor Discipline

PBA Argument

The PBA maintains that the CBA must include a provision on minor disciplinary procedures consistent with applicable law and the grievance arbitration award issued by Arbitrator John Sands. The PBA proposes that Article II, Employee Rights, include a new paragraph with the following language or incorporate the terms of the *Sands* award:

> Minor disciplinary action shall be issued and governed by the procedures as established in the arbitration award of Arbitrator John Sands, In the Matter of Officer Larry Reynolds, PERC Docket No. AR-2005-608.

Arbitrator Sands' award, appended hereto as Exhibit E-25, provides in pertinent part as follows:

> Finally, I find that the Township's unilateral change of its disciplinary procedure to eliminate the Preliminary Notice of Discipline and Final Notice of Discipline forms that it had used did violate Article IV.1 of the parties' contract. That section requires negotiation with the PBA prior to establishment of "[a]ny new rules or modifications of present rules affecting working conditions or terms of employment . . . "(Joint Exhibit 1, p. 8) "Preliminary" notice of charges enables a bargaining unit member and his union representatives to address problems and request a hearing on disputed issues of fact prior to imposition of discipline. Here the new procedure and form eliminate the opportunity for such important interaction with a real and substantive impact on terms and conditions of employment. The Department failed to notify and negotiate with the PBA prior to modifying the existing rule, and that violated Article IV.1's clear mandate. I shall therefore direct the employer to restore the status quo ante and not to change the existing rule without first having negotiated with PBA as required by the contract. (E-25 at 10). (Emphasis added by PBA)

The PBA submits that Arbitrator Sands clearly affirmed the established law that the public employer must provide due process of law when it is imposing minor discipline (i.e., a suspension of five days or less). FOP Lodge 1 v. Camden Police Department, 368 N.J. Super. 56, 64 (Law Div. 2003); N.J.S.A. 40A:14-147.

FOP Lodge 1 sets forth in detail what due process must be afforded to municipal police officers prior to the imposition of minor disciplinary action. The Court stated therein that at a minimum a public employer must provide the following due process:

1. The employee must be provided written notice of the charges against him/her;
2. The evidence supporting the charges must be disclosed to the employee;
3. The employee is to be afforded the opportunity to respond in writing to the charges;
4. If, after reviewing the written charges and the employee's response, it is determined that there are no material facts at issue, then the matter may be resolved by relying on only the written submissions;
5. If, after reviewing the written charges and the employee's response, it is determined that there are material facts at issue, then the employee is entitled to
   a. Representation at the employee's expense,
   b. The opportunity to cross-examine any and all witness who may be called against him/her and
   c. The opportunity to present any and all evidence on his/her own behalf.

Failure to provide notice and an opportunity to be heard would result in a violation of the employee's due process rights. Id. Accordingly, no suspension may be imposed or sustained absent due process being afforded to the police officer. Id.

According to the PBA, the relevant statute, N.J.S.A. 40A:14-147 requires that an officer be provided a hearing between 10 and 30 days of the date when charges are served. The court's decision in *FOP Lodge 1* has been interpreted to mean that the Due Process Clause of the United States Constitution requires that, at a minimum, an officer must be provided an opportunity to respond in writing to the charges. Id. at 64. That response must be reviewed by a neutral hearing officer to render a determination of whether there are material facts in dispute. Irvington historically has not allowed for this. In the past, the Township has decided prior to serving the charges, whether there are issues that could

require a hearing, without first putting the officer on notice of what the charges are and what the factual support for those charges might be.

Further, it has been well established that disciplinary procedures are mandatorily negotiable. See Newark Bd. of Ed., 6 NJPER 53 (1980) (notice of discipline is mandatorily negotiable); New Jersey Transit Corporation, 31 NJPER 122 (2005)(grant of interim relief to cease an employer's referral of minor disciplinary proceedings to a three-member tribunal rather than a single hearing officer). As the Township has ceased its practice of not providing for a hearing in the wake of Arbitrator Sands' award, there is no reason why the disciplinary procedure should not be included in the current CBA to formally establish the procedure.

The proposed contractual provision also comports with statutory requirements and due process. The Legislature has specifically mandated a procedure for suspending municipal police officers:

> [N]o permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct or disobedience of rules and regulations . . . nor shall such member or officer be suspended removed, fined or reduced in rank from or in office, employment, or position therein, **except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer.** Said complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, **with notice of a designated hearing thereon by the proper authorities, which shall not be less than 10 nor more than 30 days from date of service of the complaint.** (Emphasis added by PBA).
>
> * * *
>
> **A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.**
> [N.J.S.A. 40A:14-147 (emphasis added by PBA).]

According to the PBA, this statute speaks in the imperative and leaves nothing to the discretion of the officials responsible for the operation of the police department. There must be a hearing performed based upon written charges, prior to the imposition of a disciplinary suspension on a municipal police officer. (Id.)

In the past, the Township unilaterally decided whether there were disputed facts. It would then serve a Minor Disciplinary Action Form along with a Final Notice of Disciplinary Action form (31B), which summarily imposed the penalty the Township deems to be proper. No opportunity to refute the factual allegations was provided by the Township. An officer was unable to submit material in writing setting forth what factual issues might have existed and could not request a hearing on those facts. That procedure was in direct contravention of N.J.S.A. 40A:14-147 and FOP Lodge 1, supra. Since the issuance of Arbitrator Sands' award, the Township has ceased this practice of not providing a hearing for minor discipline.

Accordingly, the PBA maintains that the minor disciplinary procedures must be included in the current CBA. The PBA requests that Article II be amended to include either a reference to the procedures set forth in Arbitrator Sands' award or those set forth in *FOP Lodge 1*.

Township Argument

The Township maintains that it has already established that it will execute minor disciplinary procedures in accordance with applicable state law. The Township, in its brief, agrees with the PBA that the applicable case on the issue of minor disciplinary proceedings is FOP Lodge No. 1 v. City of Camden, 368 N.J. Super. 56 (Law Div. 2003) wherein the

court established that N.J.S.A. 48:14-147 ("Police Statute") applies to minor disciplinary matters involving police officers in civil service municipalities. Specifically, the court defined the essential components of a minor disciplinary hearing. Those requirements are set forth below:

> (1) the officer must be served with a notice of the disciplinary charges in writing; (2) he or she is entitled to disclosure of all evidence supporting the charges; (3) the officer must also be given an opportunity to respond in writing to the charges to provide any information that could raise an issue of material fact; (4) if a review of the evidence supporting the charges and the officer's response indicates that there are no material facts in dispute then the designated hearing officer may resolve the matter on the basis of the written record; (5) in addition, if there is a material fact in dispute the officer is entitled to representation, cross-examination of any witnesses who may be called to testify against him and to present any witnesses on his behalf. City of Camden, 368 N.J. Super. at 64.

While other arbitration awards are not binding on the municipalities, the Township of Irvington does intend to incorporate the required disciplinary procedures for minor disciplinary proceedings involving police officers and afford the following due process to the officers in accordance with State law:

1. The officer must be served with a notice of the disciplinary charges in writing;

2. He or she is entitled to disclosure of all evidence supporting the charges. The disclosure of evidence can be accomplished by summarizing the evidence in specifications that are attached to the notice of the disciplinary charges;

3. The officer must also be given an opportunity to respond in writing to the charges to provide any information that could raise an issue of material fact. I would recommend that the officers be given ten (10) business days to respond in writing to the charges. In addition, a hearing officer should be designated by the Township to review the officers' responses, if any, to the charges;

4. If a review of the evidence supporting the charges and the officer's response indicates that there are no material facts in dispute than the designated hearing officer may resolve the matter on the basis of the written record. In other words, if the officer fails to respond in time or his or her response does not raise a factual issue, then there

is no need to conduct a hearing. The hearing officer should make the determination as to whether there are material facts in dispute and issue a written response indicating whether a hearing will be held;

5. If there is a material fact in dispute the officer is entitled to representation, cross-examination of any witnesses who may be called to testify against him and to present any witnesses on his behalf.

6. All minor discipline should be recorded in hours so that it should not exceed forty (40) hours, which has been deemed by the Courts as the threshold of major discipline. The Township will issue a minor disciplinary form for all future actions involving discipline of forty (40) hours or less.

The Township submits that the PBA's argument is moot since it has proposed disciplinary procedures for minor disciplinary proceedings involving police officers.

Discussion

It is apparent that the parties are in agreement that the requirements of *FOP Lodge No. 1* are applicable in disciplinary matters and that the essential components shall be incorporated and made part of the disciplinary procedures in the CBA. This is effectively a Stipulation by the parties and I direct that the CBA be amended to include the essential components required by *FOP Lodge No 1.* The following are the essential components as discussed in *FOP Lodge No 1*:

> (1) an accused officer is entitled to written notice of the charges; must be served with a notice of the disciplinary charges in writing; (2) he or she is entitled to disclosure of all evidence supporting the charges; (3) he or she is to be afforded an opportunity to respond in writing to the charges; (4) if a review of the evidence supporting the charges and the officer's written response discloses that there is no material fact in dispute, the hearing officer may resolve the case on the basis of the written record; but (5) if there is a material fact in dispute, the officer is entitled to representation, to cross-examine any witnesses who may be called to testify against him or her and to present any witnesses on his or her behalf. City of Camden, 368 N.J. Super. at 64.

I shall retain jurisdiction in the event the parties fail to agree on the final language to be included in the CBA. This shall be effective January1, 2009.

Issue 5
Swift Swapping

PBA Argument

The PBA submits that the "Shift Swapping" provision in the CBA needs to be clarified. The PBA proposes that Article XXI, Miscellaneous, Paragraph 10, be amended to include the following language at the end of the paragraph:

> "In the event that two officers mutually agree to exchange shift assignments upon timely notification to the Shift Commander, such request shall be granted. No request will be unreasonably denied."

According to the PBA, the above language does not alter the current provision, nor does it infringe upon the managerial prerogatives of the Township in any way. Instead, the proposed language clarifies that shift swapping requests will not be unreasonably denied. This proposal is also consistent with PERC caselaw. See, e.g., In the Matter of Borough of North Plainfield, and IAFF Local 2958, 23 NJPER 38 (1996)("Employees have an intimate and direct interest in the procedures for implementing a duty tour exchange policy and in not having a requirement that could make it more difficult for a firefighter to pair up with a colleague who is willing to exchange shifts") (Emphasis added); Teaneck Tp., 10 NJPER 644 (1984) (Proposals allowing temporary shift exchanges with the chief's approval are mandatorily negotiable) While the Chief retains the right to approve the shift swapping, his reasons for denying shift swapping requests should be based on qualifications or particular skills needed for various shifts. See City of Jersey City, 24 NJPER 116 (1998) ("The police chief must retain a prerogative to deny shift exchanges when necessary to maintain "beat integrity" and achieve the goals of the NTF program.") Such a provision avoids potential abuse and the appearance of favoritism.

Thus, for all the above reasons, the PBA requests that the shift swapping provision be included in the current CBA.

Township Argument

The Township asserts that shift swaps must be subject to approval by the Department since it is a managerial prerogative and is therefore not a mandatory subject of negotiations. The Township cited a number of cases in support of its position:

1. A proposal to change police work schedules is not mandatorily negotiable if under the proposal the employer will not have adequate coverage. Borough of Prospect Park, 18 NJPER 301 (1992).

2. Proposals allowing temporary shift exchanges with notice but without approval are not mandatorily negotiable. See Rochelle Park Tp., 13 NJPER 818 (P. 18315 1987); Teaneck Tp., 10 NJPER 644 (P. 15310 1984); Town of Kearny, 8 NJPER 435 (P. 13203 1982); Saddlebrook Tp., 4 NJPER 192 (P. 4097 1978).

3. "The employer . . . has a reserved right to veto an exchange if specially qualified employees are needed to do special tasks." Mercer, County of v. PBA, Local 167, Mercer County Correctional Officers, 32 NJPER 44 (2006).

The Township contends that the PBA's proposal that once two officers mutually agree to exchange shift assignments that "such request shall be granted" is contrary to police employment policy. The Township maintains that it has a right to approve or deny any shift changes based on managerial prerogative and administration of the police force. Further, even if an officer has voluntarily agreed to exchange a shift, he or she might not be qualified for the position. The Township asks that the PBA's proposed language be denied.

Discussion

The current language of the CBA provides the following regarding the swapping of shifts:

> 11. An Officer who is denied a day off for his or her lack of sufficient compensatory time or for the Department's lack of coverage may submit to the Chief a request by way of a T-Fro Report for permission to swap work days with another of the same rank in the same division and within the same biweekly pay period. Such request shall be signed by both Officers involved in the requested swap and must be submitted ten (10) calendar days prior to the earliest effective date of the swap requested. If approved, the swap shall be started and completed within fourteen (14) calendar days.

The PBA essentially seeks to have the above language modified to provide that shift swaps can be made at all times. The current language conditions such requests to circumstances where an Officer is denied a day off for his or her lack of sufficient compensatory time or for the Department's lack of coverage. The Township is opposed to any changes in the current "shift swap" language in the CBA.

For the following reasons, I conclude that the PBA has not met its burden on this proposal. First, the record includes no other CBAs that provide for shift swapping as proposed by the PBA. As discussed above, comparability is a factor in weighing the merits of a proposal. The record includes no such comparability evidence. Second, even if the record included such comparability evidence, I am persuaded that there is no legitimate basis to award the PBA proposal. The record includes no evidence of the need for such language. The language in the CBA is designed to accommodate an officer who is denied a day off under specific circumstances — lack of sufficient compensatory time or because the Department lacks coverage. The PBA has offered no evidence of any hardships that have been caused by the lack of more liberal shift swapping procedures.

Accordingly, I find that the PBA has not met its burden and its proposal is hereby denied.

Accordingly, after carefully considering the relevant statutory criteria in relation to the evidence in the record, I respectfully issue the following award:

AWARD

1. **Police Related Shootings:**

The PBA proposal regarding "Police-Related Shootings" shall be denied.

2. **Disciplinary Suspensions:**

Effective January 1, 2009, disciplinary suspensions shall be meted out in "hours" instead of "days."

The PBA proposal that disciplinary suspensions must be scheduled on consecutive work day(s) within a 4-day work cycle(s) shall be denied.

3. **Seniority - Shift Assignment Bidding:**

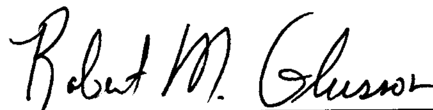
Effective January 1, 2010, the CBA shall be amended to provide that shift assignments shall be determined by seniority where all qualifications are equal. I shall remand the task of finalizing the language on determining shift assignments by seniority to the parties. The Township and the PBA, in drafting the language, shall be guided by the requirements of the PERC case law that shift assignments shall be determined by seniority where all qualifications are equal. It is incumbent on the parties to draft contract language that fits their needs and satisfies the PERC requirements. In the event the parties cannot reach agreement by March 1, 2009, I shall decide the matter.

4. **Employee Rights, Minor Discipline:**

Effective January 1, 2009, the CBA be amended to include the disciplinary procedures required by *FOP Lodge No 1.* I shall retain jurisdiction in the event the parties fail to agree on the final language.

5. **Shift Swaps:**

The PBA proposal regarding "Shift Swaps" shall be denied.

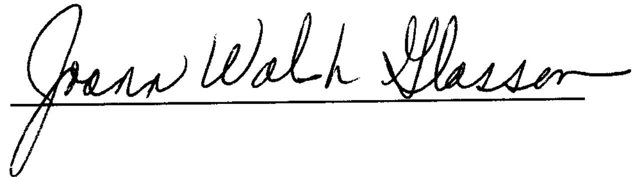


ROBERT M. GLASSON
ARBITRATOR

Dated: November 29, 2008
Pennington, NJ

STATE OF NEW JERSEY) ss.:
COUNTY OF MERCER)

On this 29th day of November 2008, before me personally came and appeared ROBERT M. GLASSON, to me known and known by me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



JOANN WALSH GLASSON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/11/2011