P.E.R.C. NO. 88-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-86-230-93

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act when it refused to negotiate the severable economic consequences, including a stress and shift differential, resulting from its decision to change the existing work schedule of police officers represented by the Fraternal Order of Police, Newark Lodge No. 12.

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Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel

For the Charging Party, Markowitz & Richman, Esqs. (Steven C. Richman, of counsel; Joel G. Scharff, on the brief)

DECISION AND ORDER

On February 26, 1986, the Fraternal Order of Police, Newark Lodge No. 12 ("FOP") filed an unfair practice charge against the City of Newark. The charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it refused to

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

negotiate the severable economic consequences, including a stress and shift differential, resulting from its decision to change the existing work schedule.

On February 5, 1987, a Complaint and Notice of Hearing issued.

On March 18, 1987, the City filed its Answer. It denied the Complaint's allegations. As affirmative defenses, it contends that the FOP waived its right to negotiate and the matter is moot because the parties negotiated a contract for 1987-88.

On March 20, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties entered into stipulations, examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On August 17, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-10, 13 NJPER ___ (¶_____ 1987). Relying on City of Newark, P.E.R.C. No. 87-71, 12 NJPER 20 (¶17007 1985) ("Newark I"), he concluded that the FOP's demand was mandatorily negotiable. He then rejected the City's reliance on the contract's "zipper clause" as a defense to the Complaint. He found that clause was not a defense because the FOP did not "consciously intend...to waive its right to negotiate over work schedule changes" and that the "replacement" article affirmatively contemplated that such changes were to be negotiated. He also rejected the City's mootness defense because there was no evidence that the negotiations for the 1987-88 contract were intended to resolve the negotiations issues raised as a result of the 1985 shift change.

On September 15, 1985, after receiving an extension of time, the City filed exceptions. It again contends that the FOP waived its right to negotiate by agreeing to Article 34 ("zipper clause") in the 1985-86 contract. On October 7, 1987, the FOP responded, urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are accurate. We adopt and incorporate them here. We also agree with the Hearing Examiner's analysis and conclusions of law. We have already held that the FOP's request was mandatorily negotiable. Newark I. The only issue is whether the FOP waived that right. Essentially for the reasons stated by the Hearing Examiner, we hold, under these facts, that it did not. We note, in particular, one crucial fact: the demand to negotiate the severable consequences was prompted by the City's non-negotiable decision to change the existing tours of duty even though that change was contrary to the parties' express agreement. We held that change to be lawful in Newark I. Given this, the FOP had the right to negotiate under the plain terms of Article 32.

ORDER

The City of Newark is ordered to:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the FOP over the severable consequences of its decision to change police tour and rotation schedules.

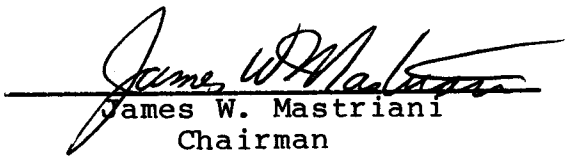
B. Take the following affirmative action:

1. Negotiate in good faith with the FOP over the severable issues of its decision to change police tour and rotation schedules as related to economic terms and conditions of employment (including, but not limited to, the stress/shift differential) for the relevant time periods in 1985 and 1986.

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

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
October 22, 1987
ISSUED: October 23, 1987

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the FOP over the severable consequences of its decision to change police tour and rotation schedules.

WE WILL negotiate in good faith with the FOP over the severable issues of its decision to change police tour and rotation schedules as related to economic terms and conditions of employment (including, but not limited to, the stress/shift differential) for the relevant time periods in 1985 and 1986.

Docket No. CO-86-230-93 CITY OF NEWARK
(Public Employer)

Dated _____ By _____
(Title)

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

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

H.E. NO. 88-10

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-86-230-93

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City of Newark violated §§5,4(a)(5) and derivatively 5.4(a)(1) of the New Jersey Employer-Employee Relations Act by refusing to negotiate with the Fraternal Order of Police over the impact of the City's lawful managerial decision to change the police tour (shift) and rotation schedule. The City had refused such negotiations in reliance upon a zipper or fully bargained clause in the parties' agreement, but the Hearing Examiner concluded that the clause did not operate as a waiver of the FOP's right to negotiate over the impact of the City's decision.

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.

H.E. NO. 88-10

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

In the Matter of

CITY OF NEWARK,

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Appearances:

For the Respondent, Glenn A. Grant, Esq.
Corporation Counsel

For the Charging Party, Markowitz & Richman, Esqs.
(Stephen C. Richman, of Counsel and
Joel G. Scharff, on the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on February 26, 1986 by the Fraternal Order of Police, Newark Lodge No. 12 (FOP) alleging that the City of Newark (City) violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The FOP alleged that the

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

City refused to negotiate over the impact of a tour (shift) change on the economic terms and conditions of employment of unit personnel including, but not limited to, the stress/shift differential clause.

A Complaint and Notice of Hearing was issued on February 5, 1987. The City filed an Answer on March 18, 1987 denying the allegations in the Charge and asserting affirmative defenses. The City argued that it was not required to negotiate in this instance because of the existence of a "fully bargained" clause in the parties' collective agreement. The City further argued that the FOP did not demand negotiations on any item other than the shift differential, and that a new agreement was reached subsequent to the tour change, rendering other issues moot.

A hearing was held in this matter on March 20, 1987.[2/] Both parties submitted post-hearing briefs on July 7, 1987.

Upon the entire record I make the following:

1/ Footnote Continued From Previous Page

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

2/ The Transcript will be referred to as "T."

Findings of Fact

1. Related Factual/Legal Background - On June 18, 1985 the City officially informed the FOP that effective September 2, 1985 it would implement a new work and shift (tour) schedule for police officers (J-2A). The old schedule included three shifts (tours) with a 4-on, 2-off rotation; the new schedule included five shifts with varying on-off rotations. The parties' 1985-86 collective agreement (J-1) provided for a 4-2 rotation (Art. 5, Sec. 1(b)).

On June 25, 1985 the FOP filed a grievance alleging that the shift and rotation change violated the collective agreement. On that day the FOP also requested a meeting to discuss the grievance (J-2B). The City denied the grievance and the FOP filed for arbitration on July 9, 1985. On August 7, 1985 the City filed a scope petition with the Commission (Docket No. SN-86-9) seeking to restrain the above arbitration. On November 19, 1985 the Commission issued a decision granting the restraint. City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985)(Newark I).

The Commission held that although the decision to implement the new shift and rotation schedules was a managerial prerogative in this instance and therefore not arbitrable, severable issues such as overtime payments and shift differentials could subsequently be negotiated and arbitrated. After finding that the FOP could not arbitrate the work schedule change, however, the Commission concluded the decision by saying:

> [T]his decision does not affect any other severable issues, such as overtime payments and shift differentials. Article 5 Section 9 provides a $250.00 annual shift differential for officers who are assigned

> to rotating shifts or who are permanently assigned to shifts which do not begin between 5:45 a.m. and 12 noon. When these differentials were negotiated, an officer would complete a tour of all three shifts within 18 days. Now that an officer will rotate through five different shifts in an 8-month cycle, the assumptions underlying the agreement upon a $250.00 annual shift differential are no longer in force and a demand for negotiation and arbitration on these severable issues could be made by the FOP. See City of Elizabeth and Elizabeth Fire Officers, 198 N.J.Super. 382 (App. Div. 1985); Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984). 12 NJPER at 22.

On December 5, 1985, the FOP filed a motion for reconsideration of the decision in Newark I. Through its motion the FOP was, in part, seeking a clarification of the Commission's decision regarding severable issues for negotiation. The FOP sought to have the Commission clarify when negotiations and arbitration on the severable issues should occur--before or after contract expiration, the form of the arbitration, and the scope of the arbitrators' authority.

By letter of December 11, 1985 (J-2C), FOP President Thomas Possumato formally requested of Brenda Veltri, City Personnel Director, that the City negotiate over the impact of the tour change on economic issues including the stress/shift differential. Possumato characterized the Commission's decision in Newark I as ordering the parties to negotiate over that matter.[3/] By letter

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3/ The pertinent language in J-2C is as follows:

> As part of the decision, the [Commission] ordered that the parties negotiate the impact of the tour change as it impacts on economic terms and conditions of employment, including, but not limited to the stress/shift differential.

Footnote Continued on Next Page

of December 17, 1985 (J-2D), Veltri responded to J-2C and refused to negotiate based upon the language in the fully bargained clause (Article 34) in J-1.[4/]

On February 20, 1986, the Commission issued a decision denying the motion for reconsideration. City of Newark, P.E.R.C. No. 86-96, 12 NJPER 203 (¶17079 1986)(Newark II). The Commission explained that in a scope matter its jurisdiction is limited and it addresses issues in the abstract. Thus, the Commission held:

> [O]ur decision held that the severable issues were mandatorily negotiable in the abstract. The question of contractual arbitrability is for an arbitrator or a court to resolve. The question of whether the City has refused to negotiate is subject to our jurisdiction over unfair practices. 12 NJPER at 203.

The instant Charge was filed on February 26, 1986 in an apparent reaction to the Commission's language in Newark II.

3/ Footnote Continued From Previous Page

> The purpose of this communication is to formally request the City's participation in negotiations on this subject. The Lodge is available to immediately commence such negotiations. Would you kindly advise us of your position as soon as possible.

4/ The pertinent language in J-2D is as follows:

> I was surprised at this request in light of the fact that the City of Newark and the Fraternal Order of Police participated in a meeting at the Public Employee Relations Commission (PERC) on December 6, 1985. At this meeting it was agreed that all matters concerning the recent PERC decision would be held in abeyance, pending the Commission's decision on the F.O.P. motion for reconsideration.
>
> Once again the City disagrees with the F.O.P.'s interpretation of the contract. Pursuant to Article 34, the City refuses to negotiate this matter.

2. Stipulations of Fact - The parties stipulated to the following facts:

a. The public employer of the employees who are the subject of the instant proceeding is the City of Newark (hereinafter "City"). The City is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, NJSA 34:13A-1 et seq. (hereinafter "Act") and is subject to its provisions.

b. The Fraternal Order of Police, Newark Lodge No. 12 is an employee representative within the meaning of the Act, and is subject to its provisions.

c. The City and Newark Lodge No. 12 have been parties to a series of collective bargaining agreements. The current collective bargaining agreement is effective January 1, 1985 through December 31, 1986. [J-1] is a copy of the collective bargaining agreement.

Negotiations of the successor agreement commenced on or about March 25, 1986, and concluded on April 9, 1986 with the signing of the new agreement [which is the April 9th document C-2B].

d. The aforesaid collective bargaining agreement recognizes Newark Lodge No. 12 as the exclusive and sole representative for collective bargaining purposes for all police officers of the Newark Police Department.

e. In June, 1985, a dispute arose between the parties pertaining to the City's desire to implement a new work schedule and shift schedule.

f. On or about June 18, 1985, the City's Police Director, Charles Knox wrote to Thomas Possumato, Newark Lodge No. 12 President giving notice that the proposed change in work schedule and work shift was to be implemented in September, 1985. [See J-2A]

g. On or about June 25, 1985, Newark Lodge No. 12 filed a grievance alleging that the change violated six separate provisions of the agreement, including Article 5. The City denied the grievance. On or about July 9, 1985, the FOP demanded arbitration. Subsequent thereto, the City filed a scope of negotiations petition with the Public Employment Relations Commission [Commission], which was docketed as Docket No. SN-86-9.

h. On or about November 19, 1985, the Commission issued its decision and Order in the above-captioned scope of negotiations proceeding. [Newark I] The Order provided as follows: "The request of the City of Newark for a restraint of binding arbitration is granted."

i. On or about December 11, 1985, Possumato wrote to Brenda Veltri, Personnel Director of the City requesting the commencement of negotiations on the impact of the tour change upon the economic terms and conditions of employment, including, but not limited to the stress/shift differential....[See J-2C]

The parties at their meeting on an unfair labor practice charge held on December 6, 1985, agreed not to discuss the question of what the Commission found to be negotiable and/or when it was negotiable until after the motion for reconsideration was held. This was suggested by [the Commission staff agent] since he felt that the Commission might clarify its decision and this would eliminate the need to pursue another charge.

j. On or about December 17, 1985, Veltri responded to Possumato and advised him of the City's refusal to negotiate pursuant to his request. [J-2D]

k. On or about February 27, 1986, Newark Lodge No. 12 filed an unfair practice charge docketed as Docket No. CO-86-230 contending that the City's refusal to negotiate the impact of the change of tours on the economic terms and conditions of employment, including, but not limited to the stress/shift differential was a violation of the Act.

l. After an informal exploratory conference between the parties on March 21, 1986, the parties agreed to waive the decision of the hearing officer and submit this matter directly to the Commission upon the foregoing stipulation of facts.5/

5/ Pursuant to Commission Rules parties are entitled to waive a hearing examiner's recommended report and decision. N.J.A.C. 19:14-6.7. The stipulation offered to waive my decision, however, was not reached in a meeting before me since I was not involved in the case until after February 5, 1987. When the parties offered this stipulation at hearing on March 20, 1987, I reserved the right to issue a decision if I felt there might be credibility issues that required determination.

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3. Article 5, Section 9 of J-1 provides for the following stress/shift differential:

> Effective January 1, 1985, Police Officers shall receive a Stress/Shift Differential Pay Allowance of $250.00 per year, payable quarterly or a prorata share of the said sum provided:
>
> (a) they are permanently assigned to work on a rotating shift basis; or
>
> (b) they are permanently assigned to work on steady shifts, the starting time of which does not begin between the hours of 5:45 a.m. to 12:00 noon.
>
> Effective January 1, 1986, the aforesaid Stress/Shift Differential Pay Allowance of Police Officers shall be increased to $350.00 per year payable quarterly or a prorata share of said sum.
>
> Those Police Officers who are temporarily assigned to work a shift as stated above in (a) or (b) shall receive a prorata share of the monthly allowance, based on the length of time they serve in said capacity.

For 1987 and 1988 there is an increase of $150 in the stress/shift differential. (C-2B)

Exhibit J-1 also contains a savings clause (Article 32) and a fully bargained clause (Article 34) which are relevant here:

> Article 32 - Section 1
>
> In the event that any provision of this Agreement shall at any time be declared invalid by Legislative Act or any court of competent jurisdiction, or through government

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5/ Footnote Continued From Previous Page

> Having already undertaken a thorough review of the facts and the law in determining whether there were any significant credibility issues, and aware of my ability to issue a decision in a timely fashion, I decided it would be more efficient for me to issue a decision and allow the Commission to make its de novo review.

regulations or decrees, such decision shall not invalidate the entire Agreement, it being the express intent of the parties hereto that all other provisions not declared invalid shall remain in full force and effect.

Section 2

In the event of such finding, the City and the Lodge will agree to meet within thirty (30) days to negotiate a replacement Article or Section.

Article 34 - Section 1

This Agreement represents and incorporates the complete and final understanding and settlement by the parties. During the term of this Agreement, neither party will be required to negotiate with respect to any matter whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Section 2

This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing only executed by both parties.

4. There were only two witnesses at the hearing, FOP President Thomas Possumato and City Labor Relations and Compensation Officer Jacob Weiss, who negotiated J-1 and C-2B on the City's behalf.

Possumato testified that the change from three to five tours affected employees' sleep patterns, vacation schedules, and the number of days worked on a night shift (T30-T31, T37-T38). By sending J-2C to Veltri, Possumato sought to reopen negotiations for J-1 to negotiate a new stress differential for the remainder of J-1 based upon working five tours (T19). The FOP was only seeking negotiations for the period of time that the City had changed from a three to a five-tour schedule (T20-T21). The City apparently

changed back to a three-tour schedule sometime in 1986 (T37), and the FOP's demand to negotiate in J-2C was not intended to relate to the 1987-88 contract or proposals (T21). Possumato testified that the 1987-88 contract, C-2B, was reached based upon a three-tour schedule (T17-T18). He explained that the FOP's negotiations for 1987-88 had nothing to do with the instant proceeding (T41), and he indicated that by negotiating for 1987-88 the FOP was not waiving its right to negotiate over an increase in the stress/shift differential that might be allowed as a result of this proceeding (T18).

5. Weiss testified that negotiations for 1987-88 began in March 1986 (T52). The FOP submitted a proposal for 1987-88 (CP-3) which sought an increase of $125 for the stress/shift differential in each year of the contract. The parties, however, ultimately agreed to an increase of $150 per year (C-2B). Weiss explained that it was the City's position during those negotiations that the increase in the stress/shift differential for 1987-88 was compensation for change, and that the dollar amount (for 1987-88) would be for the then existing tours (that is the five tours that existed during the time of the negotiations leading to C-2B), and for any other tour schedule that may be implemented in the future (T53). The FOP, however, did not agree (T54). It maintained that the increase for 1987-88 did not relate to five shifts, only three shifts (T54). Weiss testified that both he and Possumato knew of each other's position, but that neither man agreed with the other's position (T54, T56).

Weiss agreed that the FOP's proposal in CP-3 was based on three tours, but the City wanted to reach an agreement based upon the then existing (March to April 1986) tour schedule (T58). Weiss testified that the City did not offer to negotiate any change in the stress/shift differential for 1986, but was willing to negotiate over the differential effective January 1, 1987 based upon the then existing (1986) schedule (T59).

Weiss interpreted the language in Art. 5, Sec. 9 of J-1 to apply to specific people who were permanently assigned. He explained that it was not intended to apply to every employee who was on a rotating shift (T49-T50).

Analysis

The Commission and Appellate Division have held that although public employers may make certain work schedule changes pursuant to their managerial prerogatives, issues such as compensation, which are severable from the managerial decision, are mandatorily negotiable. City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (1985).

In its concluding paragraph in Newark I, the Commission only explained that in view of the instant shift change, the amount of the annual shift differential was a severable issue (from the decision to change the shift) because with the change in the shift, the assumptions underlying the agreed upon dollar amount in Art. 5, Sec. 9 were no longer in place. Thus, the Commission concluded that a demand for negotiations on the severable issues "could be made by

the FOP." The Commission in Newark I, however, did not consider whether the zipper clause (Art. 34) operated as a waiver of the FOP's right to negotiate that severable issue, nor did it actually find that the City was required to negotiate that issue. It only suggested that the FOP could demand negotiations on the severable issue, and in Newark II it specifically held that a refusal to negotiate allegation must be resolved through its unfair practice jurisdiction.

Thus, the primary issue here is whether Art. 34, the zipper clause, operates as a waiver of the FOP's otherwise right to negotiate over severable issues of the City's managerial decision to change the tour schedule. In its post-hearing brief the City framed two additional issues:

1. Whether the unfair labor charges as filed by the FOP includes a grievance of the 1987-88 contract provision relating to shift differential pay.

2. Whether the FOP in the 1987-88 Labor Agreement could indirectly attack the City's exercising of its managerial prerogative by refusing to negotiate the increased shift differential pay based upon the five tour schedule.

With respect to the primary issue, if a zipper clause is to operate as a waiver of a particular negotiable right, it must be clear from the wording of the clause that it covers that particular negotiable right. The Commission will look to a variety of factors in determining the waiver issue. In State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977), and Deptford Bd.Ed, P.E.R.C. No. 81-78, 7 NJPER (¶12015 1980), the Commission adopted National Labor

Relations Board (NLRB) modifications of the clear and unequivocal waiver test which is applied to zipper clauses. The Commission in Deptford adopted the Hearing Examiner's citation of the following NLRB ruling:

> ...The NLRB has stated that in determining the existence of a waiver of statutory rights prescribing bargaining responsibilities the NLRB will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized, as an "integration" (to determine the applicability of the parol evidence rule). Although certain members of the NLRB have interpreted the consideration of the above-mentioned factors as a clear rejection of the "clear and unequivocal" rule, it is clear to the undersigned that the NLRB has merely clarified the "clear and unequivocal" standard to reflect the...concern that its waiver rule was being applied in too mechanical a fashion, without regard for the bargaining postures, proposals and agreements of the parties. (Citations omitted) Deptford Bd.Ed., H.E. No. 81-13, 6 NJPER 538, 539 (¶11273 1980).

Zipper clauses have been given waiver effect in situations where a union attempted to enforce some prior practice which was not included in the collective agreement, and where a union attempted to negotiate over some change made by the employer that was otherwise permitted within the terms of the collective agreement or did not alter the terms of the collective agreement. GTE Automatic Electric, 261 NLRB No. 196, 110 LRRM 1193 (1982); Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984); Bound Brook Bd.Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Township of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983).

For example, in GTE Automatic, the employer unilaterally implemented a savings and investment plan. The union sought negotiations over the plan but the employer refused. The NLRB gave effect to the zipper clause and found no violation. It noted that the plan did not constitute a unilateral change in the employee's existing terms and conditions of employment. In Bound Brook, the employer extended the workday by ten minutes but the Commission gave effect to the zipper clause because the new workday did not exceed the workday provided for in the collective agreement.

In situations where a change is not specifically authorized by or covered by a collective agreement, however, a zipper clause may not be given a waiver effect unless the clause clearly and unequivocally covers the matter in question. In Rockwell International Corp., 260 NLRB No. 153, 109 LRRM 1366 (1982), the NLRB found that a zipper clause did not operate as a waiver of the union's right to negotiate on a particular subject. The employer unilaterally increased cafeteria prices at the cafeteria used by employees. The union sought negotiations over those prices, but the employer refused, relying on a zipper clause. The parties had not previously negotiated over that subject. The zipper clause was broadly worded but did contain a reservation clause for the union to request negotiations over significant changes in long-established working conditions. The NLRB concluded that even if the zipper clause did not operate as a reservation by the union of its right to demand negotiations, it similarly did not amount to an express waiver of its right to negotiate. The NLRB held:

> ...It is well established that such a waiver will not lightly be inferred in the absence of clear and unequivocal language. Such language is not present in this case. Thus, where, as here, an employer relies on a purported waiver to establish its freedom unilaterally to change terms and conditions of employment not contained in the contract, the matter at issue must have been fully discussed and consciously explored during negotiations and the Union must have consciously yielded or clearly and unmistakably waived its interest in the matter. Regardless of whether the Union had knowledge before July 1979 of its right to demand bargaining on this subject, as the Union contends it did not, the subject of cafeteria and vending food prices was never discussed during the 1978 contract negotiations. We therefore find that the Union did not consciously yield its statutory right and that the language in article XVII did not amount to an effective waiver of the Union's right to request bargaining on changes in the in-plant food prices. (Footnotes omitted) 109 LRRM at 1367.

In reviewing the instant facts in comparison to the above cases and in reviewing the test adopted in Deptford, I find that Art. 34 of J-1 did not operate as a waiver of the FOP's right to negotiate over the severable issue of the amount of the stress/shift differential for 1985 and 1986. Work schedules significantly impact on employee work hours and both work schedules and work hours are important terms and conditions of employment. While employers in police and fire cases may occasionally need to exercise their managerial authority to unilaterally change work schedules to further a governmental interest, police work schedules are not per se managerial prerogatives. Twp. of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd App. Div. Dkt. No. A-2408-85T6, __ N.J. Super. ___ (2/11/87); Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985). The Commission must apply a balancing

test to determine the negotiability of changes to police work schedules. Bd.Ed Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed.Assn., 81 N.J. 582 (1980); Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); IFPTE, Local 195 v. State, 88 N.J. 393 (1982). In Newark I, the Commission merely struck the balance in the City's favor, thus finding that the instant change was neither arbitrable nor negotiable.

But the facts here show a long history of a three-tour work schedule and a 4-2 rotation. In fact, the 4-2 rotation was included in Art. 5, Sec. 1(b) of J-1. Consequently, the instant work schedule or tour change, though implemented lawfully even though it was done on a unilateral basis, still significantly changed and impacted on the employees' terms and conditions of employment.

The stress/shift differential clause (Art. 5, Sec. 9) was negotiated based entirely upon the knowledge that there were three shifts with 4-2 rotations. When that was unilaterally changed the very foundation for the stress/shift differential clause was destroyed. An examination of Art. 34 shows no express waiver of the FOP's right to negotiate over the impact of lawful managerial changes in terms and conditions of employment.

This case is similar to Rockwell but distinguishable from GTE Automatic and Bound Brook. Here, as in Rockwell, the zipper clause did not inherently show, nor was there independent evidence, that the FOP had consciously yielded, or clearly and unmistakably waived its right to negotiate over severable negotiable issues

resulting from the City's unilateral implementation of a managerial prerogative which changed a significant term and condition of employment.

In GTE Automatic there were no changes in existing terms and conditions of employment, and in Bound Brook the changes in terms and conditions were still in compliance with the collective agreement.

Here, however, the changes in the work schedule did not comply with the collective agreement, and the FOP did not consciously yield its right to negotiate over the severable negotiable "impact" issues of the change.

In passing the Act the Legislature intended to foster harmonious labor relations through good faith negotiations. That intent would not be achieved if public employers could unilaterally, though lawfully, change existing terms and conditions of employment, and then avoid negotiations over the severable consequences of the change based upon broad language in a zipper clause. Only if a clause clearly and unmistakably covers the particular issue can it operate as a waiver. See Electrical Workers Local 1466 v. NLRB, 122 LRRM 2948 (D.C. Circuit 1986).

Here the zipper clause did not meet the clear and unequivocal test set forth in Deptford. In applying that test to the instant facts I find that by reading Art. 5, Sec. 1(b), Art. 5, Sec. 9, Art. 32 and Art. 34 in pari materia, it becomes clear that the FOP could not have consciously intended to waive its right to

negotiate over work schedule changes or the resulting impact. Art. 5, Sec. 1(b) provides for a 4-2 rotation and Art. 5, Sec. 9 provides for a stress/shift differential based upon a 4-2 rotation and the three-tour shift which had preexisted for many years. Article 32 provides that where a governmental entity invalidates a particular provision of the agreement the parties will meet to negotiate a replacement section. In Newark I the Commission invalidated the language in Art. 5, Sec. 1(b) by holding that the City had the right to unilaterally change the shifts and eliminate or substantially change the 4-2 rotation schedule. Since the stress/shift differential clause was based on the preexisting three-tour schedule, the Commission's decision in Newark I approving a unilateral implementation of a five-tour schedule similarly invalidated the foundation for Art. 5, Sec. 9.

Article 32, Sec. 2 provided for negotiations over a replacement section. But since the Commission in Newark I found that the City had the right to implement the tour and rotation changes, it was no longer possible for the FOP to negotiate (or arbitrate) over the implementation of those changes. That only left the FOP the opportunity to negotiate over the severable issues or impact resulting from the managerial change, and I believe that such negotiations are still within the intent of Art. 32, Sec. 2 because that section provided for broader negotiations, whereas, negotiations over severable issues of the change is an included right contained within the broader language of the section.

Article 34, standing alone, is too broad to give it the effect of waiving the FOP's right to negotiate over severable issues of a managerial decision. In fact, if it were given that effect here it would negate the FOP's included right pursuant to Art. 32, Sec. 2 to negotiate over the severable issues resulting from the invalidation of Art. 5, Sec. 1(b) and the invalidation of the very foundation of Art. 5, Sec. 9. Thus, the FOP is entitled to negotiate over the amount of the shift differential from the time the City implemented a five-tour schedule through the remainder of the terms of J-1, or until the time the City returned to a three-tour schedule.

With regard to the second and third issues framed by the City, I find that the instant Charge does not contain any allegation of an unfair practice regarding the negotiations leading to the 1987-88 contract (C-2B). The Charge was filed on February 26, 1986 and covers the sequence of events that occurred in late 1985 concerning the FOP's demand in J-2C to negotiate the impact of the tour change. The Charge was not amended to include any incidents occurring after February 26, 1986, particularly incidents regarding the negotiations for 1987-88. The stipulations did not cover the 1987-88 negotiations, and issues regarding these negotiations may not have been fully and fairly litigated. See Commercial Twp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

Thus, the issue here is limited to whether the City violated the Act in December 1985 by refusing to negotiate the severable negotiable issues resulting from the City's decision to change the tour and rotation schedule. I found that it did, and since the City would not negotiate with respect to that issue for 1985 and 1986, the contractual period provided in J-1, the remedy is to negotiate over the severable issues (primarily the amount of the stress/shift differential) for that period of time.

The City's negotiator testified that during negotiations for 1987-88 -- in March and April 1986 -- it was the City's position that any increase in the amount of the stress/shift differential was compensation for change and for the then existing tour schedule (five tours) and any future tour schedules that might be implemented. The City made it clear, however, that it would not engage in negotiations to change the amount of the stress/shift differential for 1986 because of the existence of the zipper clause in J-1. Furthermore, the City did not specifically argue that it fulfilled any obligation it may have had to negotiate over the amount of the stress/shift differential for 1986, through the conduct of its negotiations for 1987-88. Nevertheless, to the extent that the City believes that its 1987-88 negotiations may have fulfilled its 1986 negotiations responsibility, I reject that belief as lacking merit.

First, the City's negotiator specifically admitted that the City did not offer to negotiate any change in the amount of the

stress/shift differential for 1986. The responsibility for negotiating over that issue affixed in December 1985 at the time of the FOP's demand to negotiate. The City rejected the demand to negotiate in December 1985 and thereby violated the Act at that time. The negotiations that occurred in March and April 1986 were after the fact, and were not on their face intended to cover 1986 -- the time period that the 1985 demand to negotiate intended to cover. Second, the City's negotiator admitted that the FOP negotiator did not agree that the 1987-88 negotiations were intended to cover five tours, and based upon the facts before me there was no meeting of the minds on that issue.6/

Thus, I conclude that the City did not establish that it has already satisfied its obligation to negotiate over the impact of the tour change for 1985-86.

Accordingly, based upon the entire record I make the following:

Conclusion of Law

The City violated §5.4(a)(5) and derivatively §5.4(a)(1) of the Act by refusing to negotiate with the FOP over the severable

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6/ I am not here finding that the parties' 1987-88 agreement is somehow deficient or that in the final analysis there was no meeting of the minds regarding the intent of the 1987-88 increase in the amount of the stress/shift differential. I am only finding that based upon the facts presented the City did not prove that the 1987-88 negotiations fulfilled its obligation to negotiate over the impact of its tour and rotation change for 1985-86.

issues incident to the decision to change the police tour and rotation schedule.

Recommended Order

I recommend that the Commission ORDER:

A. That the City cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the FOP over the severable issues of its decision to change police tour and rotation schedules.

B. That the City take the following affirmative action:

1. Negotiate in good faith with the FOP over the severable issues of its decision to change police tour and rotation schedules as related to economic terms and conditions of employment (including, but not limited to, the stress/shift differential) for the relevant time periods in 1985 and 1986.

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

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

Arnold H. Zudick
Hearing Examiner

Dated: August 17, 1987
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our police employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate with the FOP in good faith over the impact of our decision to change police tour and rotation schedules in 1985 and 1986.

WE WILL negotiate in good faith with the FOP over the impact of our decision to change police tour and rotation schedules on economic terms and conditions of employment for the relevant time periods in 1985 and 1986.

Docket No. CO-86-230-93 CITY OF NEWARK
(Public Employer)

Dated _____ By _____
(Title)

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

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