

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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In the Matter of the Arbitration

between

MIDDLETOWN TOWNSHIP,

-Employer-

and

PBA LOCAL 124,

-Union-

Docket No. AR-2010-303
(Grv: 09-26-09 Rush Holt Public
Meeting Overtime)

***OPINION
AND
AWARD***

Issued: March 5, 2011

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ARBITRATOR:

Joseph Licata, Esq.

HEARING INFORMATION

Dates: June 14, 2010 and December 16, 2010

Time: 10:00 a.m.

Location: Middletown Township Hall
Middletown, New Jersey

APPEARANCES

FOR THE EMPLOYER

Matthew Giacobbe, Esq.

Cleary Giacobbe Alfieri Jacobs LLC

FOR THE UNION

Kevin McGovern, Esq.

Mets, Schiro & McGovern, LLP

NATURE OF DISPUTE

Middletown Township (“Township”) and PBA Local 124 (“PBA”) are parties to a Collective Bargaining Agreement, which was in effect from January 1, 2004 through December 31, 2007 (“Agreement”, Exhibit J1). The PBA represents all Township police officers below the rank of sergeant. On or about September 24, 2009, the PBA filed a grievance alleging that the Township violated Article V, Section E of the parties’ Collective Bargaining Agreement and past practices by failing to strictly follow “traditional principles of seniority” with respect to the allocation of overtime assignments on August 26, 2009. Using the same grievance form, on September 25, 2009, Robert Oches, Chief of Police, denied the grievance. (Exhibits J2, Grievance Form, and J3, attached response from Chief Oches). The matter remained unresolved.

On or about October 26, 2009, the PBA filed a demand for arbitration with the New Jersey Public Employment Relations Commission. On January 12, 2010, Richard Gwin, then Director of Conciliation & Arbitration, notified the undersigned Arbitrator of his designation to hear and decide the parties’ dispute. On June 14, 2010, I met with the parties for an arbitration hearing at Middletown Township Hall. The hearing continued on December 16, 2010. Both parties had a full and fair opportunity to develop the record evidence and argue in support of their respective positions.

The PBA elicited testimony from Police Sergeant, Frederick Deickmann, Police Corporal, William Kennelly, and Police Corporal, Keith MacDonald. The Township elicited testimony from Deputy Chief, Frederick Henry and from Chief Oches. The following exhibits were admitted in evidence:

Exhibit No./ Page No.	Date/Description of Document
JOINT EXHIBITS	
J1	1/1/04 – 12/31/07 Collective Bargaining Agreement.
J2	9/24/09 PBA Grievance filed by Bernie Chenoweth, PBA President, including September 25, 2009 denial of grievance by Chief Oches.
J3	9/25/09 attachment to denial of grievance.
PBA EXHIBITS	
U1	8/16/05 Special Order #2005-01 “Overtime Call-Out Procedure” with attached seniority list.
U2	Completed sign-up sheet for Overtime Traffic/Security Post at the Red Bank and Rumson fireworks display of July 3, 2009.
U3	Middletown Cultural Arts Center Detail August 26, 2009 (4:00 p.m. - 10:00 p.m.).
U4	Color-coded Police Department seniority list by badge number.
U5	August 26, 2009 Police Department Daily Duty Roster (delineating Squads One through Six).
U6	8/26/09 Middletown Township Police Department Vehicle Assignments sheet.
U7	Completed sign-up sheet for Overtime Traffic/Security Post at the Red Bank and Rumson fireworks display of July 3, 2010.
TOWNSHIP EXHIBITS	
E1	2/19/09 Special Order #2009-01 with attached Seniority List dated 2/18/09 re: Overtime Procedure.
E2 (p. 1)	9/25/09 e-mail communication from Deputy Chief Henry to Chief Oches re: Rush Holt overtime assignments.
E2 (p. 2)	Middletown Township Police Department overtime call-out list by rank, seniority and promotion date (including Deputy Chief Henry’s handwritten notations).

Exhibit No./ Page No.	Date/Description of Document
TOWNSHIP EXHIBITS (Cont'd)	
E2 (p. 3)	8/24/09 Police Personnel Roster by Squad including supervisor/non-supervisor ratios per Squad.
E2 (p. 4)	8/25/09 (4:33 p.m.) e-mail communication from Deputy Chief Henry to Chief Oches re: overtime for 8/26/09.
E2 (p. 5)	8/25/09 (2:03 a.m.) e-mail communication from Lieutenant John McGuire responding to 8/24/09 (5:13 p.m.) e-mail communication from Deputy Chief Henry re: officers available for Rush Holt overtime assignments at Township Arts Center.
E2 (p. 6)	Undated communication from Fire Police Captain, Anthony Domalewski to Deputy Chief Henry re: "Names of Fire Police".
E2 (p. 7)	8/27/09 (1:03 p.m.) e-mail communication from Craig Schwarz to Deputy Chief Henry re: Auxiliary Police Officers in attendance at the Rush Holt Public Meeting.
E2 (p. 8)	Architectural layout of Middletown Cultural Arts Center with handwritten notations (depicting geographical areas of police officer deployments).
E2 (pp. 9-10)	Handwritten notations concerning assignment of police officers to Rush Holt Public Meeting.

The parties elected to close the record by way of submitting post-hearing briefs. By correspondence dated January 14, 2011, Kevin P. McGovern, Esq., submitted a brief on behalf of the PBA. By correspondence dated January 17, 2011, Matthew Giacobbe, Esq., submitted a brief on behalf of the Township. The Arbitrator facilitated an exchange of briefs. Neither party requested permission to submit a reply brief and the record closed. At all material times, both parties were expertly represented by skilled labor counsel.

Finally, this Opinion and Award is issued in accordance with the parties' Collective Bargaining Agreement, and any and all applicable laws pertaining to public sector arbitration in the State of New Jersey.

THE ISSUES

At the June 14, 2010 arbitration hearing, the parties agreed upon the following issues in dispute: "Did the Employer violate the CBA by failing to assign overtime by seniority on August 26, 2009? If so, what shall be the remedy?"

THE POSITIONS OF THE PARTIES

The Position of the PBA

With respect to assigning overtime to the August 26, 2009 Rush Holt Public Meeting, the PBA asserts that the Township violated Article V, Section E of the Collective Bargaining Agreement by following the procedures of Special Order #2005-01, pertaining to Patrol Bureau Overtime, instead of strictly adhering to "traditional principles of seniority" on a department-wide basis. As the PBA observes, Article V, Section E, provides that overtime will be assigned by "traditional principles of seniority, unless specialized services are needed." Instead of posting a voluntary overtime sign-up sheet and making corresponding overtime assignments in descending order of seniority, pursuant to the Master Seniority List (Article V, Section D), Deputy Chief Henry improperly, it is alleged, followed the procedures applicable for filling overtime assignments within the Patrol Bureau, i.e., Special Order #2005-01 or #2009-01.¹

¹ The parties have referred to both Special Orders in this matter. For ease of reference, my use of the terminology "Special Order #2005-01" should be construed to also mean Special Order #2009-01, which supplanted #2005-01 in

The PBA introduced Exhibits U2 and U7 pertaining to the Red Bank/Rumson fireworks' displays of 2009 and 2010, respectively. The PBA asserts that, identical to the Rush Holt Public Meeting, the police functions at the Red Bank/Rumson fireworks involved providing security and crowd control. The 2009 posting stated: "The selection of officers would be made utilizing simple seniority criteria only from the officers who have signed the sheet". The 2010 posting stated that "assignments would be made in both classifications by seniority". According to the PBA, the fireworks' and Rush Holt Public Meeting overtime details share in common the assignment of police personnel to provide security, crowd control and related traffic duties. As such, the PBA maintains that Deputy Chief Henry should have posted a voluntary overtime sign-up sheet in advance of the August 26, 2009 Rush Holt Public Meeting and correspondingly awarded overtime assignments in descending order of seniority, pursuant to the Master Seniority List.

Additionally, the PBA submits that the "specialized services" exception of Article V, Section E did not apply to the Public Meeting overtime detail. On cross-examination, Deputy Chief Henry recalled an example of "specialized services" involving the deployment of Middletown Police Officers (as part of an enhanced local, state, and federal protection protocol) for then-candidate Barack Obama during a 2008 campaign stop in Monmouth County. The PBA notes that several of the police officers assigned to the protection of then Senator Obama were detectives -- the very same officers who were

February of 2009. Insofar as the outcome of this proceeding is concerned, I find no significant distinction between the two Patrol Bureau overtime procedures.

excluded from overtime eligibility regarding the Rush Holt Public Meeting. In fact, according to the PBA, Deputy Chief Henry conceded that detectives were qualified to fill the overtime detail. For all these reasons, the PBA reasons that the “specialized services exception” of Article V, Section E did not justify the Township’s use of the Patrol Bureau roster only when assigning overtime to the August 26, 2009 Rush Holt Public Meeting.

The PBA further challenges the Chief’s “preference” for reliance on the Patrol Bureau to fill the overtime detail. The PBA observes that Article V, Section E and Special Order #2005-01 do not sanction favoring patrol officers over non-patrol officers based on a “preference”. To the contrary, based on the negotiated language, the Township must adhere to “traditional principles of seniority” where, as here, “specialized services” were not called for. The PBA rejects the notion that limiting the eligible class of police officers to the Patrol Bureau was justified because such officers were better qualified to perform security and crowd control duties than detectives. The PBA replies that the Chief’s reasoning is flawed for two reasons. First, members of the Detective Bureau are typically experienced patrolmen. Second, in Middletown Township, detective is an assignment, not a promotion. Contrary to the Chief’s assertion, more senior detectives have as much, or more, experience dealing with the public as many less senior members of the Patrol Bureau.

Additionally, the PBA argues that even the Department’s records for the day describe the overtime assignment as a “special assignment” as distinguished from a “patrol assignment”. (Exhibits U6 and E2, page 4). The PBA reasons: “The August 26, 2009 assignment form is compelling evidence that the Employer understood the Rush

Holt event to be something other than a patrol assignment at the time that assignment was made.” Thus, the PBA submits that the Township violated Article V, Section E of the Agreement and past practice by limiting eligibility for the August 26, 2009 Rush Holt Public Meeting overtime assignments to police officers assigned to the Patrol Bureau.

Lastly, the PBA addresses the subject matter of remedial relief. The PBA relies on Exhibit U3, which is a list of officers who had been either asked or not asked to work overtime. The PBA points out that Patrolman Soltysik, who wears Badge No. 315, was the least senior officer assigned to an overtime post at the August 26, 2009 Rush Holt Public Meeting. Using Patrolman Soltysik as a benchmark, the PBA seeks an order from the Arbitrator directing the Township to compensate thirty-one (31) bypassed officers – each having greater seniority than Soltysik -- in the amount of three (3) hours of overtime pay. According to the PBA, the 3-hour compensation piece is based on “pro rata share of the full overtime assignment”, i.e., ninety (90) hours divided by thirty-one (31) officers, including members of the Superior Officers Association. However, if the Arbitrator decides to limit a monetary remedy to members of the PBA bargaining unit, then the PBA seeks relief for fourteen (14) affected officers, each of whom should receive approximately 6.5 hours of overtime (90 hours divided by fourteen (14) officers).

The Position of the Township

The Township asserts that Deputy Chief Henry and Chief Oches properly relied on Special Order #2005-01 when it assigned ten (10) overtime posts to the August 26, 2009 Rush Holt Public Meeting at the Middletown Cultural Arts Center. The Township notes that the PBA and its membership were intimately involved in the creation of both Special

Orders #2005-01 and #2009-01. The parties specifically agreed that the following 5-step procedure would apply to filling overtime slots from within the Patrol Bureau: overtime will first be offered to officers on the shift going off duty; second to patrol officers coming on duty; third, to patrol officers within the Patrol Bureau by seniority; fourth, to patrol officers in the Traffic Bureau by seniority; and fifth, to all patrolmen/corporal's in the entire Police Department by seniority. A similar procedure is set forth for supervisors based on rank preferences, where applicable.

The Township reasons that exigent circumstances justified Deputy Chief Henry's adherence to Special Order #2005-01. Prior to August 24, 2009, Chief Oches and Deputy Chief Henry were obviously aware that Congressman Rush Holt was planning to hold a public meeting on August 26, 2009. Indeed, at that time, no overtime detail was planned to augment members of the auxiliary police and volunteer fire departments. Then, on August 24, 2009, just two days before the Public Meeting, the Middletown Police Department became aware that congressional candidate, Michael Halfacre, intended to appear at the event with numerous protestors at 4:00 p.m. on August 26, 2009. Halfacre and the protestors intended to rally against what was then proposed healthcare legislation supported by President Obama and Congressman Holt.

It is contended that, in light of the dramatically changed circumstances implicated by Halfacre's intended appearance, Chief Oches and Deputy Chief Henry had to expeditiously prepare for a much larger crowd than what was originally anticipated. In contrast to the planning of overtime for the prior fireworks' displays in 2009 and 2010, the Township insists that there was insufficient time to follow a department-wide posting

procedure with respect to the ten (10) overtime positions needed to provide added security at the Rush Holt Public Meeting. Instead, the Township claims that it properly invoked the aforementioned overtime protocol of Special Order #2005-01.

Using a combination of in-person and telephonic communications, Deputy Chief Henry more quickly solicited fifty-four (54) of the sixty-nine (69) eligible police officers before filling the ten (10) overtime posts needed. According to the Township, “the required amount of officers necessary for the last minute event could have not possibly signed up on the voluntary list in the amount of time between notification of the protest and the actual event.” For this reason, the Township asks the Arbitrator to uphold the Deputy Chief’s reliance on the overtime procedures set forth by Special Order #2005-01.

The Township additionally argues that Chief Oches and Deputy Chief Henry had the managerial discretion under the Agreement and existing law to determine which officers were best suited to perform security and crowd control functions at the Rush Holt Public Meeting. In this instance, the Township argues that the Chief and Deputy Chief reasonably determined that patrolmen were best suited for the Rush Holt Public Meeting overtime detail. The Township viewed the duties of the overtime detail as a natural extension of the patrol function.

Lastly, in the alternative only, the Township asserts that the PBA is asking the Arbitrator to unjustifiably provide remedial relief to thirty-one (31) police officers who were allegedly available, but not asked, to work overtime at the Rush Holt Public Meeting. The Township submits that all police officers working the Rush Holt Public Meeting overtime assignment were appropriately compensated. As such, according to

the Township, no additional payment is contractually or legally justifiable. Indeed, it is contended that the Arbitrator cannot award extra compensation to the PBA and/or the SOA bargaining units without exceeding his authority under Article XXII, Section C, which states, “the Arbitrator is bound by applicable federal and state law and has no authority to add to, modify, detract from or alter in any way the provisions of this Agreement or any amended or supplement thereto”. Accordingly, even if the Arbitrator were to reach the subject of remedial relief, the Township submits that extra overtime compensation may not be awarded.

For all these reasons, the Township asks the Arbitrator to deny the grievance.

FACTS

A. The Structure of the Middletown Township Police Department.

At all material times, the Township employed approximately one hundred seven (107) police officers (ninety-six (96) active and eleven (11) non-active due to either injury or police academy training). Broken down by rank, patrolmen and corporals total eighty-one (81) police officers. Approximately sixty-five (65) of the eighty-one (81) officers are assigned to the Patrol Bureau. Ten (10) patrolmen and/or corporals are assigned to the Detective Bureau, five (5) to the Traffic Bureau, and two (2) to the Service Division (Community Relations). The foregoing patrolmen and corporals are represented for purposes of collective negotiations and related labor matters by Middletown Township PBA Local 124. (Exhibit J1, Collective Bargaining Agreement, Article I, “Recognition”, Section A). The President of the PBA was/is Bernie Chenoweth, who is assigned to the Patrol Bureau (Squad Three).

A separate Middletown Superior Officers Association represents the Township's thirteen (13) police sergeants and nine (9) police lieutenants. Approximately sixteen (16) of the twenty-two (22) SOA members are assigned to the Patrol Bureau, whereas two (2) are assigned to the Traffic Bureau, another two (2) to the Detective Bureau, and another two (2) to the Service Division. At all material times, the President of the SOA was/is Lieutenant Robert Weber, who is assigned to the Traffic Bureau.

Lastly, the top level of the police table of organization consists of Deputy Police Chiefs, Joseph Braun, Eugene Hannafey, and Frederick Henry. Robert Oches is the Chief of the Middletown Township Police Department.²

B. Established Principles of Police Department Overtime Distribution.

Assuming that a need for special overtime exists, the Township and PBA have contractually agreed under Article V, Section E that, "Traditional principles of seniority shall apply when officers are needed to work overtime, unless specialized services are needed".³ In order to facilitate overtime in seniority order, the parties also negotiated Article V, Section D, which provides for the maintenance of a "Master Seniority List" in the Police Department which must be distributed to the PBA in October of each year. Several Exhibits introduced by the parties reflect the establishment of a department-wide overtime/seniority list predicated upon a Badge Number system. An inverse relationship exists between badge number and seniority, that is, the lower the badge number, the

² It is noted that in Middletown Township, detective is an assignment, and not a rank.

³ By special overtime assignments, I refer to overtime necessitated by a special event or need for added police presence. I am not referring to the situation whereby an individual police officer is required to work beyond his or her shift in order to complete, for example, an accident or arrest report.

greater the seniority. (See, e.g., attachments to Exhibits E1, Special Order #2009-01, E2, overtime call out list by rank, seniority and promotion date, and U4, PBA work product listing of Middletown Township Active Badge Numbers in decreasing order of seniority).

In practice, either the tour commander and/or higher-level police supervisor facilitates special overtime assignments based on a seniority selection from those police officers who affix their names to a voluntary overtime posting. According to the testimony of Sergeant Frederick Deickmann, under this system, all department members are eligible for the overtime assignment, subject only to the maximum permitted sixteen (16) hours of work in any twenty-four (24) hour period. Both parties acknowledge that a good example of special event overtime, facilitated by traditional principles of seniority, can be gleaned from the Red Bank/Rumson fireworks details.

Specifically, the PBA introduced Exhibit U2, a posting, entitled, "July 3rd Overtime Traffic Post 1700-2400 Hours". The document was authored by Deputy Chief Hannafey. It informs the reader that two separate fireworks displays are scheduled for July 3, 2009, one to be held in Red Bank and, the second, in Rumson, New Jersey; that several "Regular Police Officers" are needed to cover various traffic and security posts; that officers who are interested in working the detail should sign up using both their names and badge numbers in the area provided; that the selection of officers will be made utilizing simple "SENIORITY" criteria "ONLY" from the "officers" who have signed this sheet; that the detail requires a Class "A" Uniform, raingear, reflective vest and flashlight W/1; and that the overtime detail is posted and will be assigned and finalized

on Wednesday, June 24, 2009, as mutually agreed upon by both the SOA and PBA Presidents.

I observe that in response to the 2009 Posting, approximately eighteen (18) police officers affixed their names to the sheet and, thereafter, it appears that Deputy Chief Hannafey assigned a relative seniority-ranking number to each officer whose name appears on the list. The PBA also introduced Exhibit U7, which is a similar document as Exhibit U2, except that it concerns the July 3, 2010 Red Bank and Rumson fireworks. The major difference between the two postings is that the 2010 posting also solicits police supervisors, in addition to regular police officers, to work the special event overtime detail. On this latter point, the 2010 Posting states: "The number of supervisors and officers required will be determined during event planning. Assignments will be made in both classifications by seniority. Only officers who sign prior to June 25th at 0800 hrs will be eligible for the detail".

It is noted that the 2009 and 2010 Postings remained up for at least ten (10) days before final assignments were made in descending order of seniority and, where applicable, by rank. In contrast to the above-mentioned special event overtime assignments, sometimes an overtime detail calls for "specialized services". In such cases, the Chief of Police, or his designee, is implicitly permitted to bypass the Master Seniority List referred to within Article V, Section D, and to instead assign officers to overtime based upon their unique skills, qualifications, or other distinguishing occupational trait.

Both Sergeant Frederick Deickmann and Deputy Chief Frederick Henry testified that "specialized services" overtime was assigned in 2008 in connection with a campaign

stop by then Senator Barack Obama. At that time, local and state police were working in conjunction with the United States Secret Service in order to provide security and crowd control protections at the campaign stop. A specific need for SWAT members and members of the detective and traffic bureaus presented itself. In accordance with the “specialized services” exception of Article V, Section E, officers possessing the requested details were directly assigned to the overtime detail without a posting or strict adherence to seniority principles. A second example of the Department’s application of the “special services” exemption was offered by Corporal William Kennelly. With respect to the July 3, 2009 and 2010 fireworks events, police marine patrol was requested. Corporal Kennelly, a marine patrol member, was assigned to boat patrol during the fireworks displays.

Another exception to the allocation of overtime based strictly on principles of department-wide seniority arises when the need for overtime arises from within the Patrol Bureau. In order to efficiently allocate such overtime assignments, the Chief of Police, in consultation with the PBA and SOA Presidents, promulgated Special Order #2005-01 on August 16, 2005 (Exhibit U1) and Special Order #2009-01 on February 19, 2009 (Exhibit E1). When overtime is necessary in the Patrol Bureau, in lieu of a posting, the Department relies upon in-person and/or telephone communications using the following procedures, in descending order of priority, until the overtime need is satisfied:

- (1) to officers on the shift going off duty;
- (2) to patrol officers coming on duty;
- (3) to patrol officers within the Patrol Bureau by seniority;

(4) to patrol officers in the Traffic Bureau by seniority; and

(5) to all patrolman/corporal's in the entire Police Department by seniority.

A similar procedure is set forth for supervisors based on rank preference, where applicable.

It is observed that the first three measures of Special Order #2005-01 require the soliciting of police officers whom regularly perform the duties of uniformed patrol. The fourth measure allows the hiring of members of the Traffic Bureau, if reliance on the first three steps does not fully satisfy the demand for overtime. When all else fails, the fifth measure opens up overtime eligibility to all members of the Middletown Township Police Department by seniority, as if traditional principles of seniority were being followed pursuant to Article V, Section E of the Agreement.

In summary, the parties have mutually acknowledged and adhered to filling overtime assignments within the Police Department, based on "traditional principles of seniority" by way of using a Master Seniority List, "unless specialized services are needed," or the need for the overtime arises from within the within the Patrol Bureau, in which case, the Chief of Police or his designee may implement the procedures set forth in Special Order #2005-01.

C. The Department's Overtime Determinations Regarding the August 26, 2009 Rush Holt Public Meeting.

It appears that prior to August 24, 2009, Chief Oches knew about the then scheduled, August 26, 2009 Public Meeting at the Middletown Cultural Arts Center. Congressman Rush Holt initiated the event and was apparently the sole or keynote

speaker. Among other items, Congressman Holt planned on discussing then proposed healthcare legislation (which is now in effect as the Healthcare and Education Reconciliation Act). According to Chief Oches, no special overtime security details were contemplated until it became known on August 24, 2009 that Michael Halfacre, a political rival of Congressman Holt, intended to appear at the Public Meeting with other citizens in opposition to the proposed healthcare legislation.

In an effort to guard against potential security problems, Chief Oches had requested that Mr. Halfacre and other protesters not show up before the anticipated 6:00 p.m. start of the Public Meeting. Faced with an entirely different dynamic, Chief Oches and Deputy Chief Frederick Henry determined to assign ten (10) members of the Patrol Bureau, on an overtime basis, to provide security and crowd-control functions beyond that provided by members of the auxiliary police and fire department. In light of the short notice received concerning Mr. Halfacre's plans, according to Chief Oches, Deputy Chief Henry and Lieutenant Robert Weber, SOA President, decided to forego an overtime posting in favor of the procedures set forth by Special Order #2005-01. Deputy Chief Henry testified that he truly doubted that there was sufficient time to fill the ten (10) slots by way of an Article V, Section D posting.

The documentary evidence shows that Deputy Chief Henry's first efforts to fill the overtime detail commenced sometime in the earlier part of the afternoon on August 24, 2009. By way of a 5:13 p.m. e-mail communication on the same day, Deputy Chief Henry advised Lieutenant John McGuire that he had secured three to four police officers from the day shift (pursuant to Special Order #2005-01, i.e., the shift going off duty) and

inquired whether Lieutenant McGuire could identify any officer on his shift who would be interested in filling an overtime slot. (Exhibit E2, page 5). Lieutenant McGuire is a tour commander on the midnight shift, i.e., 12:00 a.m. to 8:00 a.m. Deputy Chief Henry informed Lieutenant McGuire that the overtime detail would commence at approximately 4:00 p.m. and last until approximately 9:00 or 10:00 p.m.

By e-mail communication dated August 25, 2009, at 2:03 a.m., Lieutenant McGuire advised Deputy Chief Henry that Patrolmen Keenan (Badge # 248) and Bedit (Badge # 279), in addition to himself, were interested in filling the overtime position. After receiving Lieutenant McGuire's input, Deputy Chief Henry proceeded to make telephone calls following the Patrol Bureau Seniority List. However, he could not fully satisfy the intended ten (10) overtime assignments. Ultimately, Deputy Chief Henry satisfied the overtime detail after working his way through the Traffic Bureau in descending order of seniority. In total, Deputy Chief Henry called or spoke with fifty-four (54) different police officers in order to satisfy the ten (10) officer overtime requirement.

Deputy Chief Henry testified that, even if he had more ample time to facilitate a posting using the Master Seniority List, he would have, nonetheless, followed the procedures of Special Order #2005-01. Deputy Chief Henry reasoned that he preferred a uniformed presence to provide security and crowd control functions and that Patrol Bureau members most frequently performed such duties. Chief Oches expressed a similar preference. However, both Deputy Chief Henry and Chief Oches acknowledged that detectives can wear police uniforms and that they were basically qualified to provide

security and crowd control functions -- as they did at the July 3, 2009 and/or 2010 Red Bank/Rumson fireworks' displays.

At 4:33 p.m. on August 25, 2009 (approximately twenty-four (24) hours before the overtime detail was to commence), Deputy Chief Henry notified Chief Oches by e-mail communication that ten regular police officers and two on-duty traffic officers would be present at the Rush Holt Public Meeting. (Exhibit E2, page 4). The PBA introduced Exhibit U6, a document entitled, "Middletown Township Police Department Vehicle Assignments" for August 26, 2009. The document was jointly prepared by Lieutenant Hanson and Sergeant Bolkland. Under the designation, "Special Assignments", the document reflects the assignment of the following officer/badge numbers to the Middletown Arts Center Public Meeting.

<u>Name of Police Officer</u>	<u>Badge Number</u>
McNair	269
Chesek	219
Fuerst	238
Soltysik	315
Benedit	279
Keenan	248
Kennelly	235
Roth	277
Sofeld	314

A tenth officer, Patrolman Simon, appears on a work product document prepared by the PBA, entitled, "Arts Center Detail August 26, 2009 (6 hours 4:00 p.m. - 10:00 p.m.)" (Exhibit U3). Deputy Chief Henry and Chief Oches testified that they were also present at the Rush Holt Public Meeting and that they had previously determined that no other supervisory police personnel were needed.

Finally, the PBA introduced Exhibit U4, "Middletown Township Active Badges". The document sets forth a listing of all uniformed members of the Middletown Township Police Department by descending order of seniority according to badge number. It is color-coded. In blue highlight, the names of all ten (10) patrolmen who worked overtime and their respective badge numbers are highlighted. A yellow highlight through an officer's name indicates that he or she was regularly assigned to the 4:00 p.m. to midnight shift and was not eligible for overtime. A beige highlight through an officer's name indicates either a refusal to work overtime or that the officer was out on paid leave or in training. A green highlight through the officer's name depicts police officers who were assigned outside of the Patrol Bureau, such as a Detective Bureau or Community Relations. They were not asked to work overtime. Excluding supervisors, the PBA work product shows that fourteen (14) police officers were not asked to work overtime, despite having greater seniority than Patrolman John Soltysik (Badge # 315). Soltysik was the tenth and last officer assigned to the Rush Holt Public Meeting overtime detail. Including supervisors, thirty-one (31) police officers were not asked to work the overtime detail, despite having greater seniority than Patrolman Soltysik. (Exhibit U4).

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

A. The Township hereby recognizes the Township of Middletown PBA Local 124, as the exclusive collective negotiations agent for all sworn officers in the Police Department of the Township below the rank of Sergeant.

B. The title of policeman shall be defined to include the plural as well as the singular and to include males and females in the use of the words employee, policeman or officer shall be intended to include all persons of the bargaining unit.

ARTICLE V - SENIORITY

D. A master seniority list based on the above definitions shall be maintained and a copy supplied annually to the Association in October of each calendar year. The list shall indicate the official seniority standard of all members of the Police Department.

E. Traditional principles of seniority shall apply when officers are needed to work overtime, unless specialized services are needed.

ARTICLE XI - OVERTIME

The employer agrees that overtime consisting of time-and-one-half (1 ½) will be paid to all employees for hours worked in excess of the normal work day of (8) hours and for any normal work week in a seven day period or more than forty (40) hours.

Employees shall not be paid overtime for hours of work in excess of the normal day unless such overtime is authorized by the Chief of Police or the officer in charge of the shift.

ARTICLE XXII - ARBITRATION

A. If a grievance is not settled under Article XXI, such grievance shall, at the request of either the Association or the employer, be referred for binding arbitration to the State Board of Mediation and/or P.E.R.C. for the selection of an arbitrator according to its rules.

C. The arbitrator shall be bound by the provision of this agreement and restricted to the application of the facts presented to him involving the grievance. The arbitrator shall also be bound by applicable Federal and State law in cases. He shall have no authority to add to, modify, detract from, or alter in any way the provisions of this agreement or any amendment or supplement thereto.

D. The cost of the services to the arbitrator shall be borne equally between the Association and the employer. Any other expenses incurred, including, but not limited to the presentation of witnesses, shall be paid by the party incurring same.

ARTICLE XXIX - MANAGEMENT RIGHTS CLAUSE

A. The employer hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and Constitution of the State of New Jersey and of the United States, except as otherwise provided by the terms of this Agreement, and the laws and constitutions of New Jersey and the United States, including but not limited to the following rights:

A1. The executive management and administrative control Of the Township properties, facilities, and activities of its employees, using personnel methods and means of the most appropriate and efficient manner possible as may from time to time be determined by the Township.

A2. To make rules of procedure and conduct, to use approved methods and equipment; to determine work schedules and shifts, as well as duties; to decide the number of employees needed for any particular time; and to be insole charge of the quality and quantity of the work required.

RELEVANT WORK RULE

SPECIAL ORDER 2009-01

TO: ALL POLICE PERSONNEL

FROM: ROBERT OCHES
CHIEF OF POLICE

REF: OVERTIME PROCEDURE

DATE: February 19, 2009

This Special Order shall rescind and replace Special Order 2005-01 issued on August 16, 2005.

In accordance with both the Middletown Township Superior Officers Association (Article V, Seniority, paragraph D, page 8) and the Policemen's Benevolent Association (Article V, Seniority, paragraph D, page 9) contracts, Police Administration is required to promulgate a seniority list for the entire Police Department. The attached list represents the official seniority standing for each member of this agency. This seniority list shall remain in effect until a revision becomes necessary based upon any future promotions, retirements, transfers, suspensions or the hiring of new police officers.

The seniority list is to be utilized when hiring officers for overtime assignments.

The Middletown Township Policemen's Benevolent Association Local 124 working agreement in Article V - Seniority, paragraph E, page 9, states, "Traditional Principles of seniority shall apply when officers are needed to work overtime, unless specialized services are needed."

Therefore when overtime is necessary in the Patrol Bureau, it will **first** be offered to officers on the shift going off duty. **Second**, overtime will be offered to the patrol

officers coming on duty. **Third**, overtime will be offered to patrol officers within the Patrol Bureau by seniority. **Fourth**, overtime will be offered to patrol officers in the Traffic Bureau by seniority. **Fifth**, overtime will be offered to all Patrolman/Corporal's in the entire Police Department by seniority (example; Community Relations, Detectives and Service Bureau, etc...).

DISCUSSION AND OPINION

Initially, I find that the Arbitrator's jurisdiction appears to be limited to the PBA bargaining unit. Both the grievance (Exhibit J2) and the demand for arbitration were pursued by PBA Local 124, on behalf of affected patrolmen and corporals. The record before me contains no similar filings by the SOA. Also, Chief Oches credibly testified that the SOA President, in conjunction with Deputy Chief Henry, determined not to post the overtime detail, allegedly due to the short notice received by them concerning the intent of Michael Halfacre and protesters to appear at the August 26, 2009 Rush Holt Public Meeting. Thus, based on the above factors, it does not appear that the interests of SOA members are properly before me in this proceeding.

In the alternative, I find that the Township/Chief Oches reasonably exercised his management rights by determining that no SOA member was needed to supervise the police function at the August 26, 2009 Rush Holt Public Meeting. A determination concerning how many police officers are needed to work overtime is properly reserved to management. Likewise, I find that a determination of supervisory/subordinate ratios typically involves the exercise of a management right, especially in the public sector. Lastly, no claim was advanced before me that Chief Oches and Deputy Chief Henry (who are not SOA bargaining unit members) improperly usurped overtime posts from SOA

members. For all these reasons, I will initially deny the grievance insofar as it seeks relief for any member of the SOA.

I will next turn my attention next to the grievance as it concerns the respective rights and obligations of the Township and PBA bargaining unit members in this dispute. In City of Long Branch, 8 NJPER (¶13211 1982), the Commission held that the determination concerning whether or not overtime is needed is a non-negotiable exercise of managerial prerogatives under law. According to the Commission, an overtime determination is inextricably linked to manning level determinations and its obligation to deliver governmental services efficiently. However, the procedures or criteria used to allocate overtime is a mandatory subject of negotiations. In terms of contract enforcement, arbitral doctrine similarly recognizes the right of management to assign overtime, as part of its rights to direct the workforce and schedule work. See, Elkouri & Elkouri, How Arbitration Works, Fifth Edition, pages 740-741. Except as restricted by a negotiated agreement, the allocation of overtime is an exclusive right of management (Id., page 743). Having said this, however, I take notice that it is commonplace for seniority to play a significant, if not predominant, role in the allocation of both voluntary and mandatory overtime assignments among qualified personnel.

In the present case, the parties' negotiated a balancing of rights regarding the subject of overtime assignments. Article XXIX, "Management Rights Clause", Section A, reflects the general notion that management retains certain inherent rights, except as otherwise provided in the Agreement. Section A2 of the same Article reserves to management the rights to determine work schedules and shifts, the number of employees,

and the quality and quantity of the work required. Article V, Section D obligates the Township/Department to maintain a Master Seniority List and to provide an updated copy of same to the PBA in October of each year. Most directly applicable to the outcome of this grievance dispute, Article V, Section E, provides: "Traditional principles of seniority shall apply when officers are needed to work overtime, unless specialized services are needed".

Based on Article V, Sections D and E, I find that traditional principles of voluntary overtime require adherence to the department-wide Master Seniority List. The prior experience of the parties supports this finding. Both PBA witnesses and Exhibits U2 and U7 reflect the assignment of overtime at the Red Bank/Rumson fireworks displays held on July 3, 2009 and 2010. Township police officers were needed to provide security and crowd control functions. To meet the demand in 2009, pursuant to Article V, Sections D and E, the Department posted a sign-up sheet at least ten (10) days in advance of the fireworks. The posting explained, among other things, "[t]he selection of officers would be made utilizing simple seniority criteria only from the officers who have signed the sheet". The 2010 posting states "assignments will be made in both classifications by seniority", i.e., supervisors by seniority and non-supervisory by seniority. Based on seniority selection, some detectives were among the officers assigned to the overtime details. These detectives wore patrol uniforms. Neither party contended that a contemporaneous concern over the ability of detectives to perform uniformed security and crowd control functions suffered in connection with the 2009 and/or 2010 fireworks' overtime details.

Conversely, by clear implication, the Township/Department is contractually permitted to deviate or depart from the Master Seniority List when the overtime detail in question requires the performance of specialized services. It is true that the parties did not contractually define what they meant by the “specialized services” exception to the general rule of overtime allocation based on traditional principles of seniority. However, I observe that both parties acknowledged that a 2008 detail involving local, state, and federal efforts to provide security to then Senator Barack Obama, during a campaign stop in Monmouth County, fell within the exception. Specifically, because the services of SWAT and undercover detective personnel were requested, the Chief bypassed the Master Seniority List and instead made overtime assignments based on the special skills demanded. Another “special services” example was provided by PBA witness Kennelly, who testified that he received a special marine patrol overtime assignment in connection with the July 3, 2009 and 2010 fireworks displays.

Consistent with the parties’ understanding of the terminology, “specialized services”, as used in Article V, Section E, I add that the New Jersey Public Employment Relations Commission has considered a demand for “special skills” official to justify bypassing the allocation of overtime by strict seniority in cases including demands for K-9 officers, bomb squad members, air patrol members, police divers, sharpshooters, hostage negotiators, narcotics officers, and homeland security. See, e.g., Township of Wayne, 24 NJPER 141 (¶29071 1998); New Jersey Department of

Corrections, 18 NJPER (¶23196 1992); Township of Teaneck, 14 NJPER (¶19228 1988); Borough of Maywood, 10 NJPER (¶15044 1984); and City of Long Branch, *supra*.

Against this backdrop, for the reasons which follow, I am satisfied that the PBA has demonstrated that the Township should have adhered to the Master Seniority List and observed “traditional principles of seniority” under Article V, Sections D and E of the Agreement, respectively, and not Special Order #2005-01, when allocating overtime assignments to the August 26, 2009 Rush Holt Public Meeting. The parties have in the past followed a posting procedure to solicit bargaining unit members interested in a voluntary overtime assignment. Once the deadline for signing up expires, the Township/Department observes traditional principles of seniority by allocating the available overtime slots to interested officers in descending order of seniority. This procedure was followed with respect to the Red Bank/Rumson July 3, 2009 and 2010 fireworks overtime details. Although I acknowledge that the late notice received by the Township concerning Michael Halfacre’s plans to appear at the Public Meeting made a posting impractical, I also observe that a posting was not the only means available to ensure that overtime assignments were made based on traditional principles of seniority. Indeed, it seems to me that Deputy Chief Henry could have just as easily spoke to officers in person and/or made phone calls following the Master Seniority List, instead of engaging in the same form of communications using Special Order #2005-01 on August 24 and 25, 2009. Therefore, I disagree that the short notice provided to the Township concerning the need for an overtime presence on August 26, 2009, standing alone, justified a departure from Article V, Sections D and E of the Agreement.

Next, I remain unconvinced that the nature of the police function performed at the Rush Holt Public Meeting reasonably necessitated a switch from filling overtime posts, via the Master Seniority List, to filling overtime posts by way of Special Order #2005-01. In this case, I observe that if the Rush Holt overtime detail involved the uniformed motor patrol of the streets surrounding the Middletown Cultural Arts Center, then the Township's reliance on Special Order #2005-01 would be more solidified based on an argument that the overtime arose from within the Patrol Bureau. In contrast, the fact that the overtime detail in question involved merely providing uniformed security and crowd control within the Center, in my view, provides little reason to distinguish the August 26, 2009 overtime detail from the overtime details assigned to the July 3, 2009 and 2010 Red Bank/Rumson fireworks. As both parties acknowledge, the Township then assigned both uniformed patrolmen and detectives (in uniform) to perform security and crowd control police functions on an overtime basis, pursuant to Article V, Sections D and E of the Agreement.

Indeed, both Chief Oches and Deputy Chief Henry concede that detectives are qualified to perform crowd control and security functions and wear police uniforms, where appropriate or necessary. I also take notice that assignments to the detective position are often awarded to experienced patrolmen. Further, in Middletown Township, detectives maintain the rank of patrolman while assigned to the Detective Bureau. Thus, for all these reasons, I cannot accept the notion that

detectives were qualified to perform security and crowd control functions on July 3, 2009 and 2010, but not on August 26, 2009.

Based on the foregoing, I conclude that the Township improperly deviated from use of the Master Seniority List, following “traditional principles of seniority”, within the meanings of Article V, Sections D and E of the Agreement with respect to filling ten (10) overtime slots on August 26, 2009.

Lastly, I will address the issue of remedial relief. In my opinion, an appropriate make-whole remedy should include a directive that the Township cease and desist from the actions leading to this dispute. As to monetary relief for the fourteen (14) PBA members who had greater seniority than Patrolman Soltysik, I acknowledge that such a remedy could be awarded, if appropriate in a particular case. See, State, Dep't of Corr. v. Int'l Fed'n of Prof'l and Technical Eng'rs, Local 195, 169 N.J. 505 (2001); and, Office & Professional Employees Intern. Union Local 32, AFL-CIO v. Camden County Municipal Utilities Authority, 362 N.J. Super. 432 (App. Div. 2003). However, for the reasons which follow, I am persuaded that such a remedy is not appropriate in this case.

In pertinent part, I am influenced by the fact that the parties' have negotiated, or at least agreed, following discussion, as to the means used to facilitate both department-wide and Patrol Bureau overtime assignments. For example, the postings concerning the July 3, 2009 and 2010 fireworks' overtime details express that both the posting and ultimate assignments were agreed upon by the Department and the PBA and SOA Presidents (Exhibits U2 and U7). Similarly, Special Order #2005-01 (and #2009-01) was

agreed upon by both the PBA and SOA Presidents, provided that the overtime arises from within the Patrol Bureau. (Exhibits U1 and E1). Conversely, the parties apparently have not faced, prior to this dispute, a situation whereby the posting procedure would not be a practical means of honoring traditional principles of seniority. Here, for example, the demand for an Article V, Section E overtime detail presented itself on short notice and it is at least understandable that Deputy Chief Henry believed that he did not have enough time to meet the demand by observing the department-wide posting practice. Although the same concern did not justify a departure from observing traditional principles of seniority in the process, it does, in my opinion, provide a mitigating circumstance, especially in the absence of an agreed upon contingency procedure.

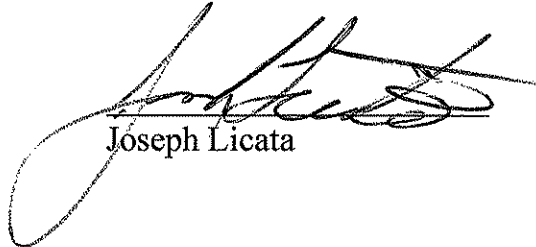
Ultimately, it may be that the parties will be satisfied with the Arbitrator's thought process that telephonic and/or other verbal communications, following the Master Seniority List, could be followed in such instances, or the parties may agree upon an alternative procedure which they deem more desirable. Whatever the outcome, in light of the parties' demonstrated past course of dealing, in addition to a cease and desist directive, I will order the parties to meet within thirty (30) days from the date of this Award to discuss and agree upon the procedural aspects of facilitating overtime assignments, by use of the Master Seniority List, based on traditional principles of seniority, when it is impractical to adhere to the established department-wide posting procedure. Of course, if the Township were to ignore the within cease and desist order or otherwise violated Article V, Sections D and/or E in the future, a make-whole, monetary

remedy would seem to me to be much more in order. The PBA's grievance is adjusted accordingly.

AWARD

For the reasons more thoroughly set forth herein, the grievance filed by Middletown Township PBA Local 124 against Middletown Township is denied with respect to any police officer holding the rank of sergeant or above. The grievance is sustained to the extent that the Township relied on Special Order #2005-01 or 2009-01, instead of using the Master Seniority List and following "Traditional Principles of Seniority" under Article V, Sections D and E of the parties' Collective Bargaining Agreement, respectively, when assigning police officers to fill ten (10) overtime positions to provide security and crowd control at the August 26, 2009 Rush Holt Public Meeting. The Township is directed to cease and desist from committing such violations in the future with due recognition that a monetary, make-whole remedy could be properly implemented as a remedy in any such future case. Additionally, the parties are directed to meet within thirty (30) days of the date hereof to agree upon the procedural aspects of facilitating overtime assignments by way of the Master Seniority List, following traditional principles of seniority, when it is impractical to fill an overtime demand arising under Article V, Section E by way of a department-wide posting. This matter is adjusted accordingly.

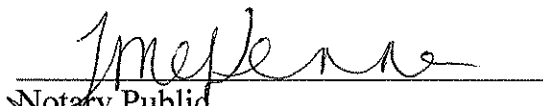
Respectfully submitted,


Joseph Licata

Dated: March 5, 2011

State of New Jersey)
):SS
County of Bergen)

On the 5th day of March, 2011, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.


Notary Public
TRACY MCKENNA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 26, 2014