H.E. NO. 2016-5

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

In the Matter of

MERCER COUNTY CORRECTIONS,

Respondent,

-and- Docket No. CO-2014-145

PBA LOCAL 167 & PBA LOCAL 167
SUPERIOR OFFICER'S ASSOCIATION,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that a public employer did not violate the Act by refusing to reduce a negotiated agreement to writing and to sign such agreement and refusing to negotiate in good faith by not implementing an agreement to reduce a disciplinary "reckoning period" (i.e., the period during which a unit employee's chargeable infraction results in the next scheduled and ascending disciplinary penalty and by which an employee may either extricate himself or herself from the disciplinary "schedule" or be reduced on the "steps") from six months to three months.

The Hearing Examiner recommends that the majority representative and public employer did not reach a "meeting of the minds" on reducing the reckoning period, in the absence of a writing. The Hearing Examiner recommends that the Complaint, alleging violations of section 5.4a(5), (6) and (1), be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Genova, Burns, Giantomasi & Webster
(Joseph M. Hannon, of counsel)

For the Charging Parties
Law Offices of David Beckett
(David Beckett, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 9, 2014, PBA Local 167 and PBA Local 167, Superior Officers Association (Local 167, Local 167 (SOA)) filed an unfair practice charge against Mercer County Corrections (County). The charge alleges that on or about August 1, 2013, the parties reached an agreement to reduce certain disciplinary penalties for repeated occurrences of unit(s) employee lateness and by shortening the six-month "reckoning period" [i.e., the period during which a unit employee's chargeable lateness results in the next scheduled (and ascending) disciplinary penalty and by

which a unit employee would ". . . remove himself from discipline for a lateness or be reduced on the steps"] to three months. The charge alleges that on October 1, 2013, the parties again expressed their agreement in an email exchange, despite which County Warden Charles Ellis refused to reduce the agreement to writing and refused to implement the three-month reckoning period. The County's actions allegedly violate section 5.4a(1), (5) and (6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On May 5, 2014, a Complaint and Notice of Hearing issued. On or about May 15, 2014, the County filed an Answer, admitting some allegations and denying others. It denies entering an agreement, refusing to reduce an agreement to writing and violating any provision(s) of the Act. On December 3 and 22, 2014, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs and replies were filed by March 16, 2015.

Upon the record I make the following:

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

FINDINGS OF FACT

1. Local 167 represents "rank and file" corrections officers employed by the County. Local 167 SOA represents all superior corrections officers (sergeants and lieutenants) employed by the County.

2. The County and Local 167 signed a collective negotiations agreement extending from January 1, 2009 through December 31, 2014 (J-1).[2/] Article 6 ("Work Rules") provides: "The [County] may establish reasonable and necessary rules of work and conduct for employees. Such rules shall be equitably applied and enforced." Article 9 ("Grievance Procedure") provides a three-step grievance procedure ending in binding arbitration. Article 10 ("Discipline/Discharge") provides that the County has the right to discipline any employee for just cause; that the employee has the right to appeal discipline; and that discipline exceeding a five day suspension or suspensions of more than fifteen days cumulatively over one calendar year must be appealed to the Civil Service Commission (J-1).

The County and Local 167 SOA signed a collective negotiations agreement also extending from January 1, 2009

2/ "J" represents jointly-submitted exhibits; "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits; and "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s).

through December 31, 2014 (J-2). The agreement sets forth the same provisions identified in Articles 6, 9 and 10 of the agreement signed by the County and Local 167 (J-2). Both agreements are executed on behalf of the County by the County Executive, exclusively (J-1, J-2).

3. Charles Ellis has been Warden of the County Corrections Center since April, 2008 (1T139). On or about August 28, 2009, Warden Ellis authored and/or modified and signed Standards and Operating Procedures Section 136: Lateness (SOP 136) (CP-1; 1T20). The declared "policy" of the County Correction Center in SOP 136 is that each correction officer is expected to report to duty on time, in uniform and prepared to perform his or her duties. "Lateness" results in "inconveniences to other staff" and unnecessary "overtime" liability.

SOP 136 defines "lateness" for unit employees on all three shifts as measured by the County's "official timekeeping system." Unit employees, ". . . who fail to scan in at the start of their assigned shift or who scan in after the start of their assigned shift will be considered late" (CP-1).

Enumerated instructions and declarations pertaining to lateness are set forth, followed by "scheduled sanctions" imposed on corrections officers having "unreasonable excuses" for lateness of less than and more than fifteen minutes. For example, SOP 136 prescribes a "step one" discipline of a "written

reprimand" for a corrections officer arriving less than fifteen minutes late for a third time in less than six months. A fourth lateness (of less than fifteen minutes) results in a "step two" discipline of a three-day fine or suspension. Penalties increase through the seventh such lateness, which results in termination. A comparable schedule is set forth for officers reporting more than fifteen minutes late, except that the penalties before termination are greater than those prescribed for "less than" fifteen minute latenesses (CP-1).

SOP 136 also specifies that a ". . . reckoning period of six months [shall apply] from the date of the first lateness. A new reckoning period will begin whenever six months pass and the employee remains infraction free (with no subsequent late charges)" (CP-1).

4. SOP 136 repeats the same penalties for the same lateness infractions set forth in the January, 2009 version of a County "Public Safety Table of Offenses and Penalties" (Table of Offenses). The Table of Offenses charts courses of discipline for various unit employee offenses regarding attendance, performance, personal conduct, and safety and security precautions (CP-2). Specifically, the disciplines for an "unreasonable" excuse for lateness of less than fifteen (A-6) and for latenesses of "more than" fifteen minutes (A-7) match those

set forth in SOP 136 (CP-2; CP-1). The "Table of Offenses" omits any reference(s) to disciplinary "steps."

5. Sometime in early May, 2012, Local 167 President Donald Ryland proposed to the Warden a "new lateness protocol" for the "Table of Offenses" (CP-3; CP-4; 1T28). In the "attendance" category, for example, Ryland proposed reductions in penalties for "unreasonable excuses for lateness" of less than fifteen minutes and for such latenesses of more than 15 minutes. He also proposed increasing the number of infractions necessary for each discipline in both categories, culminating in termination after the tenth infraction within a six month reckoning period (CP-3).

6. On July 17, 2012, Local 167 Counsel wrote to Assistant County Counsel Kristina Chubenko, reiterating the need to revise the "lateness policy" and demanding to meet with County representatives that month regarding Local 167's proposal (CP-4). The letter notes that in February and March, 2012, the parties had agreed to pend hearings, ". . . on disciplinary cases involving lateness charges because a resolution with a new policy could then apply to those lateness charges." Local 167 Counsel wrote:

> It was part of [Local 167's] understanding that the parties would work to draft a policy with disciplinary steps that did not result in charges where major disciplinary suspensions were sought against officers who were, for example, late by a matter of minutes. In fact, we now have pending charges at certain steps (e.g., steps 5, 6, 7

> and 8) where there is less than thirty (30) minutes in the aggregate and the County seeks major discipline and/or removal. [CP-4]

The letter acknowledges that, ". . . the disciplinary table [i.e., Table of Offenses] issues are also pressing but [Local 167] is willing, if that helps in moving this issue forward more quickly, to separate the two and handle the disciplinary policy table revision and lateness policy separately" (CP-4). Counsel wrote that the "lateness policy" should be, ". . . handled first." I infer that the "lateness policy" refers to SOP 136 because the word "policy" appears in SOP 136 and does not appear in the Table of Offenses and because SOP 136 identifies penalties at "steps" one through five and "steps" are omitted from the Table of Offenses.

7. On August 22, 2012, Assistant County Counsel Chubenko wrote a letter to Local 167 Counsel, attaching a proposed "Table of Offenses and Penalties." The letter acknowledges receipt of Local 167's proposal and advises that the attached "counter-proposal" applies to both negotiations units, ". . . as the Table of Offenses must be uniform for all law enforcement at the Corrections Center." She wrote that the County will not amend ". . .any departmental charges which have been or will be issued prior to the resolution of this matter and therefore, no pending charges for which hearings have been requested will be held in abeyance" (CP-5).

The attached “Table of Offenses and Penalties” proposes at “A-6" (“lateness of 15 minutes or less”) a 3-day suspension for a “2nd infraction;” a 5-day suspension for a “3rd infraction;” a 10-day suspension for a “4th infraction;” a 15-day” suspension for a “5th infraction;” a 20-day suspension for a “6th infraction;” and continuing to termination for a “9th infraction.” The proposed scale at “A-7" (lateness of greater than 15 minutes) is a 3-day suspension for a “2nd infraction;” 8-day suspension for a “3rd infraction;” 15-day suspension for a “4th infraction;” 20-day suspension for a “5th infraction;” 25-day suspension for a “6th infraction;” and continuing to termination for a “ninth infraction” (CP-5).

8. On August 30, 2012, Counsel for Local 167 wrote a reply to Chubenko, acknowledging that the letter, “. . . follows-up on conversations in which he advised that Local 167 is seeking a meeting with the County Administrator in early September to discuss the disciplinary policies and lateness issues raised in correspondence between this office, the PBA and the County” (CP-6). The letter also acknowledges that the County had “delivered its response” on the matters of “many lateness charges being issued;” officers seeking “major disciplinary sanctions for small amounts of time;” and Local 167's “concern about overuse of the violation of rule, regulation or policy change.” Local 167 Counsel wrote that, “. . . the union [is not] asserting that the

County must reach agreement on a revised Table of Offenses, [but] disciplinary policies and actions are proper topics for such a meeting" (CP-6).

9. On an unspecified date after August 30, 2012, the parties met at the County Corrections Center. On behalf of the County, Assistants County Counsel Chubenko and D'Amico, Administrator Andrew Mair, Assistant Human Resources Director Ollie Young, Warden Ellis and Captain Richard Bearden attended (1T39). On behalf of Local 167 and Local 167 SOA, Presidents Ryland, Lieutenant Robert James, and Local 167 Counsel attended (1T39).

The parties discussed the "lateness" issues they had previously identified (1T39).

10. On or about February 19, 2013, Assistant County Counsel Chubenko sent a letter to Local 167 Counsel, together with the "most recent" proposed and revised "Table of Offenses and Penalties" (CP-7). The attached table sets forth the same offenses and penalties charted in CP-5 (see finding no. 7) and adds progressive penalties for the offense of "violating a rule, regulation, policy, procedure or administrative decision including those involving safety and security" (CP-7; see finding no. 8). This revision of the Table of Offenses refers to a "step" for the first time and concerns "progressive discipline" for violations of "safety and security precautions" (CP-7).

11. On or about March 13, 2013, Local 167 Counsel wrote a reply to Chubenko, in part proposing changes to “A-6" and “A-7" of the “Table of Offenses and Penalties” (unreasonable excuse for lateness of less than fifteen minutes and more than 15 minutes) (CP-8). Counsel proposed that the “step 2" discipline in A-6 be reduced from a two-day suspension to a one-day suspension; “step 3" discipline be reduced from a five-day suspension to a three-day suspension; and “step 4" discipline be reduced from a ten-day suspension to a five-day suspension (CP-8). In boldface print, Counsel wrote:

> The Union’s counter is subject to agreement to changes to the reckoning period in SOP 136 including returning the employee to non-disciplinary status after a six-month infraction-free period and a system that does not call for discipline each time an officer is late. [CP-8]

Counsel reiterated:

> These changes are critical to the union’s agreement to proposed table/schedule and will be discussed with the Warden. If such issues cannot be resolved satisfactorily, then the unions authorized counter will be amended because it is the union’s position that there is no “just cause” for major discipline of an employee who is trying to get to work and is 3 minutes late on more than five occasions in a six-month time period, much less [than the] stronger sanctions of removal proposed by the County. [CP-8]

Counsel noted that the same concerns applied to disciplines charted at “A-7" (unreasonable excuse for lateness of more than fifteen minutes).

12. Sometime in late March, 2013, perhaps on March 26th, Local 167 and Local 167 SOA Presidents Ryland and James met with Warden Ellis and Captain Bearden in the Warden's office (1T47; 1T93-1T94; 1T127-1T128; 1T141-1T142; 2T11).

Ryland testified that their discussion concerned the Table of Offenses and the "reckoning period" (1T94; 1T97). Ryland testified about an agreement on the Table of Offenses:

> And these were, I believe at this meeting, there [was] a minor tweaking in the penalties. But it was like minor tweaking of what the penalties were. But overall there was like an understanding. [1T94]

Ryland conceded on cross-examination that a change in the Table of Offenses and in the reckoning period [i.e., from six months to three months] would require agreement from the Warden (1T99).

Retired lieutenant Robert James was employed by the County for many years and was Local 167 SOA President from 2012-2014 (2T8). James recalled the meeting in the Warden's office:

> The subject was to talk about the reckoning period in reducing it from six months to three months as closure to the overall disciplinary Table of Offenses. It was part of that discussion that we had with the County . . . that was the unions' interest i[n] having the reckoning period reduced from six months to three months. Our whole thing was leveraged on that reckoning period. [2T11-2T12]

Reducing the reckoning period was important to both unions because many employees were charged with escalating penalties for minor lateness offenses during the six-month period. Six months

was a "very long period of time . . . you could never get out of the Table of Offenses"[3/] (2T12). James testified that in the meeting:

> We agreed that we would reduce the reckoning period from six months to three months. That was part of the overall agreement with the Table of Offenses. [2T12]

On cross-examination, he testified:

> I mean basically we had a meeting. That meeting [we] discussed the reckoning period. We believed we had an agreement in hand. [2T27]

Asked if he left the meeting with a written agreement reducing the reckoning period, James testified: "Well, it was incumbent upon the Warden to have it reduced to writing. We wouldn't make the policy. All we can do is agree upon it" (2T27-2T28). James described the reduction in the reckoning period as "a verbal agreement that was never reduced to writing" (2T28).

I find that James's cross-examination testimony stating his "belief" of an extant agreement reducing the reckoning period undercuts the certainty he espoused on direct examination. I infer that no meeting participant mentioned an interest in or need for a writing memorializing an agreement to reduce the reckoning period from six months to three months. That neither

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3/ For example, an officer at "step 5" in a lateness series could not incur another such infraction for 30 months (in the prevailing six-month reckoning period) in order to reach zero or "step down" to a status preceding eligibility for a written reprimand (1T65).

Local president sought or produced a writing confirming such an agreement on a term and condition of employment of great significance to the Locals suggests more strongly than not, that no agreement was reached on the item in the meeting in the Warden's office.

Captain Bearden testified that in the meeting in the Warden's office, the parties discussed the Table of Offenses and the reckoning period (1T128-1T129). He testified:

> . . . [T]he Table of Offenses was discussed. I believe we came up with an agreement, a basic agreement on what the sanctions would be for the charges. The reckoning period was mentioned by [Local 167] and [Local 167 SOA]. But nothing was ever resolved involving the reckoning period at this meeting. [1T128]

Bearden admitted that either Ryland or James mentioned, ". . . the reckoning period being changed. At that time, the Warden acknowledged his request, but nothing was ever resolved at that point" (1T129).

Warden Charles Ellis testified that in the meeting, the parties discussed the Table of Offenses, other [Local 167] business and finally, the reckoning period (1T142). He testified that, ". . . we mostly agreed on the different sanctions" in the Table of Offenses. He testified that the sanctions agreed-upon, including the lateness penalties, were later memorialized in an email issued on July 23, 2013, by Assistant County Counsel Chubenko to all the principals (1T143; CP-9). Ellis admitted

that the penalties were “extended to give their officers more opportunities to correct their behavior” (1T144).

Ellis testified that Ryland raised the matter of the reckoning period and that,

> I said, ‘you know what? I have to look at that. Because [the State Dept. of Corrections] does something a little bit different. And that’s where I left it at. [1T145]

Neither Ryland nor James specifically denied in their testimonies that the Warden said that he was [effectively] deferring a decision. I credit Ellis’s testimony.

13. On May 13, 2013, Local 167 President Ryland emailed Captain Bearden, acknowledging his receipt of three SOPs, including SOP 136, together with a memorandum asking Local 167 to review the SOPs and respond not later than May 15. Ryland’s email requested an extension of time to review and reply until the close of business, May 20, 2013. Ryland emailed a copy of his reply to Warden Ellis (CP-10; 1T52-1T53). The SOPs from Bearden to which Ryland referred were not introduced together as an exhibit.

14. On May 18, Ryland emailed Warden Ellis Local 167's reply “. . . to SOP 136 as requested by Captain Bearden” (CP-11; 1T55-1T56). Ryland wrote:

> [Local 167] cannot agree with the proposed SOP 136 presented to the PBA in its current form because it completely nullifies the meetings held with the Correction

> Administration, [Local 167, SOA and Local 167] regarding the Table of Offenses. As you may recall, the last time the Unions met with you and Captain Bearden regarding the Table of Discipline, we had a tentative agreement to a revised discipline sanction for lateness of less than 15 minutes (A-6) and lateness of more than 15 minutes (A-7) and same should be clearly reflected in the revised SOP 136. [CP-11]

I infer from Ryland's email that the version of SOP 136 to which he referred is identical to the version marked in evidence (CP-1; see finding no. 3).

Ryland next wrote of Local 167's understanding of the discipline progression for both offenses, "unreasonable excuse for lateness of less than fifteen (15) minutes" and "unreasonable excuse for lateness of more than fifteen (15) minutes." He wrote enumerated ascending numbers of latenesses for both offenses, (e.g., "third lateness, fourth lateness," etc.) concomitantly noting the ascending "steps," one through nine (CP-11).

Ryland also wrote:

> The Unions also negotiated a tentative agreement to revise the current reckoning period from six (6) months to three (3) months from the date of the first lateness. [Local 167] proposes the revised SOP to reflect; any employee who has progressed in the discipline steps will regress in the discipline steps if the employee remains infraction-free (with no subsequent charges) beginning with the date of the last infraction and same should be reflected in the revised SOP. [CP-11]

Ryland testified in rebuttal that his May 18 email, ". . . reflects the discussion that we [Ellis, Ryland, James] had" (1T168).

15. On July 23, 2013, Assistant County Counsel Chubenko emailed a note to Local 167 Counsel, Local 167 President Ryland, Local 167 SOA President James and Warden Ellis, together with a complete, updated version of the "Table of Offenses and Penalties" (CP-9). The note provides:

> Attached please find a copy of the revised Table of Offenses as requested. Please be advised that this is still being reviewed by Warden Ellis. Please be further advised that this Table of Offenses will only be put in effect if both [Local 167 and Local 167 SOA] mutually agree to all the revisions. [CP-9]

The attached five-page chart includes the same penalties for the same number of offenses at "A-6" and "A-7" that were set forth in the County's August 22, 2012 "counter-proposal" to Local 167 Counsel (CP-9; CP-5; see finding no. 7).

16. On July 24, Chubenko emailed a revised Table of Offenses to all of the principals, clarifying that an "A-1" charge means "no call, no show" and that "A-2" means "late call-off." Chubenko wrote that if her revision was acceptable, ". . . the intent is to have this table go into effect August 1, 2013" (CP-12).

On July 26, Chubenko emailed another revision of "A-2" to the principals, again requesting to be informed of their

approval. She repeated the intention to implement the "[T]able" on August 1, 2013 (CP-12).

17. On July 31, shortly after 1 p.m., Local 167 President Ryland emailed Chubenko, (with copies to Ellis, Bearden, James, Local 167 Counsel and others), regarding the "revised Table of Offenses" (CP-12; 1T61). The email provides:

> Please allow this to confirm the acceptance of the revised Table of Offenses. I was granted authorization by Lt. Robert James, President SOA, to forward this acceptance on his behalf acknowledging acceptance by both unions. It is understood that SOP 136 lateness will be amended to reflect a 3 month reckoning period effective August 1, 2013.
>
> The PBA is grateful to all parties for their time and effort with this matter. Thank you.

Ryland testified that the last sentence of the first paragraph was part of Local 167's agreement to the Table of Offenses (1T64). Asked on direct examination if he would have agreed to the revised Table without changing the reckoning period, Ryland testified:

> No. It was definitely an ongoing negotiation for a number of years. The reckoning period was definitely a sticking point with the overall table, the disciplinary table process. [1T66]

18. Ryland represented unit employees in disciplinary hearing "lateness" cases after August 1, 2013. He complained to Assistant Human Resources Director Ollie Young that some of those cases existed only because the reckoning period was not reduced

to three months (1T73). Ryland admitted that the August 1, 2013 version of the Table of Offenses (generated on July 23, 2013 in CP-9) provided lesser penalties and more "steps" for the same lateness infractions than the January 8, 2009 version of the Table of Offenses (R-1; CP-2; 1T104-1T105). For example, Ryland admitted that a discipline imposed under the Table of Offenses set forth in CP-9 and R-1 on a unit employee for lateness infractions in a May 27, 2014 "hearing officer report" was less than the discipline that would have been imposed under the January 8, 2009 version of the Table of Offenses (1T107-1T109; CP-14; R-1; CP-9; CP-2).

19. On October 1, 2013, Ryland emailed Ellis, Bearden, Chubenko, Local 167 Counsel and others a "forwarded correspondence regarding the Table of Offenses and the accepted amended policy changes," consisting of his July 31, 2013 email to the same principals (advising of both unions' acceptance of the revised Table of Offenses and that it is "understood" that the reckoning period will be reduced from six months to three months; see finding no. 17) (CP-12).

20. Later on October 1, Ellis replied in an email to Ryland, Bearden, Chubenko and James regarding "revised Table of Offenses." The email provides: "Yes, this is what we discussed but I am not sure we address this in the table of offenses. I believed that [Chubenko] said to address this issue in our SOPs"

(CP-12). Ellis admitted on cross-examination that he spoke with Chubenko on or before October 1 and that his discussion with her prompted him to include in his email to Ryland and others her recommendation about the SOPs (1T160).

Ellis testified that his October 1 reply meant that, ". . . if I was going to change the issue about the six-month reckoning period, that would have been changed in the SOPs, not in the Table of Offenses" (1T149). He testified that he neither agreed to change the reckoning period, nor changed it (1T149). He did not recall what prompted him to ". . . go into the system, find the email and then just respond to [Ryland]" (1T148). I credit Ellis's testimony regarding his intended meaning of his October 1, 2013 reply to Ryland, specifically that ". . . but I am not sure we address this in the Table of Offenses" means that (reducing) the reckoning period is not a matter set forth in the Table of Offenses.

On cross-examination, Ellis admitted that he never told or communicated to Ryland that his May 18, 2013 and July 31, 2013 emails confirming a changed reckoning period (to three months) were wrong (1T153; 1T154; see finding nos. 14 and 17). Similarly, he admitted that his October 1, 2013 reply to Ryland does not express disagreement with a three-month reckoning period (1T154-1T155).

21. On October 23, 2013, Ryland emailed Ellis, with copies to Bearden, Chubenko and the Local 167 SOA president regarding, "SOP 136: Lateness" (CP-16; 1T80). The email provides:

> I was inquiring about the SOP changes as discussed when the unions met with you and Captain Bearden and Lt. Chmura.[4/] I was made aware that the reckoning period will not be changed to reflect the agreed 3 month reckoning period but will remain at 6 months. Respectfully, I am requesting to have all parties meet again to discuss this matter prior to finalizing this matter. I am forwarding some prior emails regarding this matter however the agreement arose from a meeting held with unions. [CP-16]

Ryland attached his "prior" May 18, 2013 email to Ellis and others (CP-16; see finding no. 14).

22. On December 26, 2013, Ryland emailed Warden Ellis, advising that both Local 167 and Local 167 SOA, ". . . remain firm that all parties agreed to a 3 month reckoning period and same was to be effective upon acceptance of the Table of Offenses" (CP-17). Ryland also wrote that both majority representatives will file an unfair practice charge, ". . . regarding this matter should the position of the Correction Center administration remain the same."

4/ Only Ellis testified of a possible meeting after March 26, 2013 (see finding no. 12) that a Lieutenant Chmura attended. He testified: "There may have been a meeting that we had with Lieutenant Chmura. So I think in that meeting we may have had a discussion" (1T145-1T146). In the absence of other testimony on this record, I make no finding regarding any "discussion" that may have happened in the averred meeting beyond Ryland's and Ellis's written descriptions.

Later that day, Ellis emailed Ryland, with copies to Local 167 SOA, Bearden and Chmura, acknowledging their "discussion" of the reckoning period and cautioning that, ". . . if you look closely at the final document that [Chubenko] sent to all of us [CP-9] it said nothing about reckoning periods. Because the reckoning period is in our SOPs so noted by [Chubenko] when I mention it to her" (CP-17). His email continues:

> The order SOPs changes that we discuss and agreed on were to be changed by Lt. Chmura. I also spoke with him and you, stating that you should reach out to him and question h[im] about the proposal changes and I also call[ed] him and he said he would get his notes and get it done . . . For the record changing the SOP for a few would not be a benefit for the many that do come to work and would only help those that we just help[ed] by making changes to the Table of Offenses and at this point I am not will[ing] to make any more concession[s]. I will wait for your filing. [CP-17]

ANALYSIS

The primary and pivotal question raised in this case is whether the County and Locals 167 and 167 (SOA) reached an agreement to reduce the disciplinary "reckoning period" for corrections officers from six months to three months. In order to determine if an agreement was achieved, I must try to discover the intent of the parties. Interpretative devices include primarily, expressions in writing, such as a memorandum of agreement. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979). In the absence of a writing, I must

determine if the parties reached a "meeting of the minds." Borough of Fairlawn, H.E. No. 91-33, 17 NJPER 201 (¶22085 1991), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991); North Caldwell Bd. of Ed., P.E.R.C. No. 90-92, 16 NJPER 261 (¶21110 1990). In Fairlawn, the hearing examiner described various ways that a "meeting of the minds" case may arise. The hearing examiner wrote:

> [T]he parties may have agreed on specific language but disagree on what it means or how it applies; the parties admit they agreed on some language but disagree on the actual language; or the parties negotiated over a particular topic, have no written agreement and left the negotiations with different positions on whether an agreement was reached on that topic. [Id. at 205; citations omitted]

See also, Washington Tp., H.E. No. 97-25, 23 NJPER 266 (¶28128 1997).

Local 167 and 167 (SOA) contend that, ". . . the terms [of the Table of Offenses and SOP 136] are related and so once the County accepted the unions' terms requiring a change in the reckoning period by implementing the new Table [of Offenses], there was a meeting of the minds and it [i.e., the County] was bound" (post-hearing brief at 19). The Locals also assert that on October 1, 2013 [two months after the new Table of Offenses was implemented], the parties "confirmed" their "meeting of the minds" when the Warden wrote in an email exchange with Local 167

President Ryland that, ". . . the change in the reckoning period has to be implemented by changing the SOP [136]" (brief at 19).

I disagree. SOP 136 and the Table of Offenses are "related" in that they both prescribe disciplinary penalties for an ascending number of unit employee lateness infractions. For example, the earliest version (January, 2009) of the Table of Offenses and SOP 136 specify the same penalties for the same (number of) lateness infractions. In May, 2013, Ryland complained to Ellis that SOP 136 was unacceptable to Local 167 in part because it exceeded the "revised discipline sanction" the parties had discussed in March, 2013 and earlier (dating to August, 2012 when Assistant County Counsel Chubenko proposed less onerous disciplinary penalties for lateness infractions in the Table of Offenses and an increase in the number of infractions preceding termination) (see finding nos. 14 and 7, respectively).

SOP 136 and the Table of Offenses also differ substantively, as pointedly delineated by Local 167 Counsel in his letters to Chubenko on July 17 and August 30, 2012 and March 13, 2013 (see finding nos. 6, 8 and 11). In the last of those, Local 167 Counsel conditioned Local 167's proposed changes to the Table of Offenses on ". . . changes to the reckoning period in SOP 136, including returning the employee to non-disciplinary status after a six-month infraction-free period." He reiterated the need for that change, warning that without it, Local 167 will contest the

"just cause" for an increasing number of "major disciplines," based upon the example of a unit employee's lateness of 3 minutes on 5 occasions within a six-month period.

On behalf of the County, Chubenko never referenced SOP 136 (including the reckoning period) in her communications to Local 167 representatives or Counsel. On August 22, 2012, February 19, 2013, July 23, 24 and 26, 2013, she wrote consistently and exclusively of changes to and implementation of the Table of Offenses (see finding nos. 7, 10, 15, and 16). Two of these communications are not even responsive to Local 167 Counsel's demand to change SOP 136 (see finding nos. 6 and 7; 8 and 10).

Local 167's case for an agreement or a "meeting of the minds" on a shortening of the reckoning period derives from a purported "offer" set forth in Chubenko's July 23, 2013 email to Local 167 Counsel, Ellis and others, attaching a "revised" Table of Offenses; a "counter-offer" in Ryland's July 31, 2013 email to Chubenko, Ellis and others agreeing to the proposed Table of Offenses, ". . . provided [that] the County would change SOP 136 to reflect the agreed-upon three-month reckoning period;" and the County's "acceptance" by ". . . the promulgation and issuance of the new Table [of Offenses] on August 1, 2013 and by its silent assent which it reasonably had to know would be seen as agreement" (brief at 20).

I disagree that the County "accepted" a reduced reckoning period by either asserted "action." It's true that by the terms of Chubenko's July 24 and 26, 2013 emails the County intended to implement the revised Table of Offenses on August 1, 2013. Omitted from those emails and from all communications Chubenko authored is any reference to SOP 136 or the reckoning period.

Nothing in Ryland's July 31, 2013 emailed "proposal" specifically informs the County, Chubenko or the Warden that the County's implementation of the revised Table of Offenses (the next day) shall simultaneously be an acceptance of a revised reckoning period. I find it unreasonable to posit an "acceptance" in the mere implementation of the revised Table of Offenses, considering that Chubenko neither wrote nor referenced the reckoning period in her communications to Local 167 Counsel or representatives; and that contextually, she first notified Local 167 of the anticipated implementation date about one week earlier (i.e., July 24) and Ryland emailed the new offer (i.e., one that added a change in the reckoning period) to her and the Warden less than twelve hours before that date. Time was never "of the essence" in the parties' discussions or negotiations. One cannot be reasonably certain that the County's implementation was an acknowledgment, let alone an acceptance, of Ryland's averred "counter-offer."

I note that Chubenko's strict adherence to the Table of Offenses in her communications with Local 167 is compliant with Local 167 Counsel's earlier-expressed willingness to ". . . separate the two" [i.e. the reckoning period and Table of Offenses] (see finding no. 6) but inconsistent with his later demand that the Local's "counter [proposal to disciplines in the Table of Offenses] is subject to agreement to changes in the reckoning period in SOP 136 . . ." (see finding no. 11). The County never expressly elected either course, though its responses to proposals or offers were uniformly consistent with "separating the two."

Corbin defined an "acceptance" as a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer and thereby creates the set of legal relations called a contract. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations, 26 Yale L.J. 169, 199 (1917). If Ryland's July 31 email is an offer (a "counter-offer," as Local 167 avers), what sort of acceptance did it invite? If it provided an invitation at all, it would have been the self-described County act of "amending" SOP 136, ". . . to reflect a 3 month reckoning period effective August 1, 2013." The County never obliged or "accepted" by "amending" SOP 136.

Local 167 and Local 167 (SOA) contend that "acceptance" is demonstrated by the County's "silent assent," i.e., it never

"disputed" that SOP 136 had to include a three-month reckoning period and never "provided any indication of any issue with such terms" (brief at 20-21). The Locals rely on several New Jersey contract law cases, principally, Weichert Co. Realtors v. Ryan, 128 N.J. 427 (1992). The Court there wrote: ". . . silence does not ordinarily manifest assent, but the relationships between the parties or other circumstances may justify the offeror's expecting a reply, and therefore, assuming that silence indicates assent to the proposal." Id. at 436. Case examples followed, including ones showing a history of silent acceptances among the parties; an offeree's direction to the offeror to perform; and actions of the offeree inducing the offeror's detrimental reliance [citations omitted]. The Court in Weichert Co. concluded:

> [W]here an offeree gives no indication that he or she objects to any of the offer's essential terms, and passively accepts the benefits of an offeror's performance, the offeree has impliedly manifested his or her unconditional assent to the terms of the offer. [Id., 128 N.J. 436-437]

I disagree that the County "silently assented" to a shortened reckoning period. The circumstances of this case bear no similarities to any case examples set forth in Weichert Co. Only by finding that the County is the beneficiary of the revised Table of Offenses can it be said that it "passively accepts the benefits of the offeror's performance." Although one can

construe such a benefit to the County (reduced litigation costs, improved morale, etc.) it is at best, indirect and ignores that the intended beneficiaries are the employees of both units who will incur lesser disciplinary penalties than previously for the same infractions.

Finally, I disagree that the Warden's October 1, 2013 emailed reply to Ryland ". . . further confirmed [the County] knew there was an agreement and that the delay was not a concern" (brief at 21). I have found that the Warden's reply merely reaffirmed that the reckoning period is not set forth in the Table of Offenses and that Assistant County Counsel Chubenko advised him to "address" any change to the reckoning period by modifying SOP 136.

Under all the circumstances of this case, I find that Local 167 and Local 167 (SOA) have not proved by a preponderance of evidence that they and the County achieved a "meeting of the minds" on an agreement to reduce the disciplinary reckoning period from six months to three months. Specifically, the Locals have not demonstrated that the County, by any affirmative act, agreed to reduce the reckoning period. Accordingly, the County did not violate the Act by refusing to reduce that alleged agreement to writing.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

/s/Jonathan Roth

Jonathan Roth
Hearing Examiner

DATED: August 31, 2015
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by September 10, 2015.