P.E.R.C. NO. 84-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RARITAN TOWNSHIP MUNICIPAL
UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CO-83-125-75

CONSTRUCTION AND GENERAL
LABORERS' UNION, LOCAL 172
OF SOUTH JERSEY, LIUNA, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the Raritan Township Municipal Utilities Authority violated the New Jersey Employer-Employee Relations Act by neglecting to pay one employee an additional $.28 per hour from December 28, 1981 to January 20, 1982, but dismisses all other portions of the Complaint. In the absence of exceptions, the Chairman adopted the recommendations of a Commission Hearing Examiner.

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Charging Party.

Appearances:
For the Respondent, Bernhard, Durst & Dilts, Esqs. (JoAnne Byrnes, Of Counsel)

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs. (Kenneth I. Nowak, Of Counsel)

DECISION AND ORDER

On November 17 and December 2, 1982, and February 22, 1983, the Construction and General Laborers' Union Local 172 of South Jersey, LIUNA, AFL-CIO, ("Local 172") filed, respectively, an unfair practice charge and amended charges against the Raritan Township Municipal Utilities Authority ("Authority") with the Public Employment Relations Commission. The charge, as amended, alleges that the Authority violated subsections 5.4(a)(1) and (5) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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

34:13A-1 et seq. ("Act"), when it failed to make retroactive wage increases allegedly owed to five unit employees and reduced the number of vacation days.

On March 18, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Authority filed a timely Answer in which it asserted that it paid the proper amount of retroactive wage increases and allowed the proper number of vacation days.

On July 5, 1983, the Authority filed a motion for summary judgment based on its contractual defenses. Pursuant to N.J.A.C, 19:14-4.8, the Chairman referred this motion to Hearing Examiner Arnold H. Zudick.

On July 12 and 14, 1983, the Hearing Examiner conducted a hearing. At the outset, he denied the Authority's motion. The parties then examined witnesses and introduced exhibits. Both parties filed post-hearing briefs.

On December 30, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-33, 10 NJPER ___ (¶_____ 1983) (copy attached). He recommended dismissal of all allegations of the Complaint except that the Authority improperly neglected to pay one employee an additional $.28 per hour from December 28, 1981 to January 20, 1982.

The Hearing Examiner served his report on the parties and advised them that exceptions, if any, were due on or before January 12, 1984. Neither party filed exceptions.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence

of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact are accurate and supported by specific credibility determinations. Based on these findings, I agree with the Hearing Examiner's conclusion that Local 172 did not prove by a preponderance of the evidence that the Authority violated the Act except to the limited extent it neglected to pay one employee -- Gregory LaFerla -- an additional $.28 per hour from December 28, 1981 to January 20, 1982.

ORDER

The Raritan Township Municipal Utilities Authority is ordered to:

A. Pay Gregory LaFerla an additional 28 cents per hour from December 28, 1981 to January 20, 1982, together with 12% interest on that amount from August 4, 1982, the day he should have been fully reimbursed.

B. All other portions of the Complaint besides the allegation concerning LaFerla's entitlement to retroactive salary are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 30, 1984

H. E. No. 84-33

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

In the Matter of

RARITAN TOWNSHIP MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-83-125-75

CONSTRUCTION AND GENERAL LABORERS' UNION, LOCAL 172 OF SOUTH JERSEY, LIUNA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Raritan Township Municipal Utilities Authority did not violate the New Jersey Employer-Employee Relations Act concerning the number of vacation days appearing in the parties' collective agreement. Moreover, the Hearing Examiner found that the Authority did not fail to pay certain employees a contractually provided raise of 64 cents per hour. However, the undersigned did find that the Authority violated §5.4(a)(1) and (5) of the Act by unintentionally failing to pay employee LaFerla a retroactive 28 cents per hour for a specific time period to bring him up to his proper salary range. The Hearing Examiner recommended that LaFerla be reimbursed with interest, but that no posting be required.

With respect to the vacation issue the Hearing Examiner found, in reliance upon several cases, that there was insufficient basis to alter the clear language of the parties' written agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 84-33

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

In the Matter of

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Appearances:

For the Respondent
Bernhard, Durst & Dilts, Esqs.
(JoAnne Byrnes, Of Counsel)

For the Charging Party
Zazzali, Zazzali & Kroll, Esqs.
(Kenneth I. Nowak, Of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 17, 1982, and amended on December 2, 1982 and February 22, 1983, by Construction and General Laborers' Union, Local 172 of South Jersey, LIUNA, AFL-CIO ("Union") alleging that the Raritan Township Municipal Utilities Authority ("Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Union alleged that the Authority refused to make retroactive wage increases to five unit employees even though it was allegedly required to do so in accord-

ance with the collective agreement, and, that it refused to give all employees six days rather than five days vacation, all of which was alleged to be in violation of subsections 34:13A-5.4(a)(1) and (5) of the Act. 1/

The Union alleged in particular that employees Dwain Floyd, Stephen Gross, Gregory LaFerla, William Sweazy and John Lynch should have received a 64 cent an hour increase retroactive to their date of hire (all but one were hired after December 1, 1981) in accordance with Article 12 of the parties' 1981-1983 collective agreement (Exhibit J-1). 2/ It also alleged that the number of vacation days set forth in Article 7 Section 8 of J-1 (five days

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

2/ Article 12 of J-1 is as follows:

> Each employee covered by this Agreement for the period of 12/1/81 to 11/30/83 shall receive the wages exclusive of overtime, and holiday pay, as set forth below:
>
> Retroactive to December 1, 1981, each employee shall receive a 64 cent increase in their hourly rate of pay.
>
> Prior to the increase, the hourly rate of Gerald Roberts, Assistant Chief Operator, shall be adjusted to $8.00 per hour. In addition, Gerald Roberts will be entitled to the 64 cent increase for 1981.
>
> Effective December 1, 1982, employees shall receive a salary increase of 9% per annum above the revised 1981 salary.
>
> (Minimum and maximum hourly wages for each job classification shall be in accordance with SCHEDULE "A" attached hereto.

and multiples thereof) was a mistake. 3/ It asserted that the contract should have provided for the same amount of vacation days as set forth in Article 4 of the Authority's 1980 Personnel Policy (six days and multiples thereof)(Exhibit CP-1). 4/

The Authority denied committing any violations of the Act and argued that the 64 cent retroactive increase was only intended for employees hired prior to December 1, 1981, but that in any event, the 64 cent increase was included in establishing the salary classifications provided for in Schedule A of J-1. It further argued that the parties never agreed to continue the former policy of six vacation days and multiples thereof, rather, it argued that the parties agreed to five days as provided for in J-1.

3/ Article 7 Section 8(a) of J-1 provides for vacations as follows:

A. An employee will receive vacation with pay in each calendar year according to the following schedule, each vacation day being an eight (8) hour day and each week being a five (5) day, forty (40) hour week:

1. Five (5) vacation days during the first year of employment to be taken after the probationary period. (These days shall be consecutive calendar days when taken as a weeks vacation).

2. Ten (10) vacation days per year during the second year, up to and including six (6) years of service. (Consecutive calendar days as stated above).

3. Fifteen (15) vacation days per year for each year of service beyond six (6) and up to and including twenty (20) years. (Consecutive calendar days as stated above).

4. Twenty (20) vacation days per year after twenty (20) years of service. (Consecutive calendar days as stated above).

4/ Article 4 Section A of the 1980 Personnel Policy established vacations as follows:

A. Vacations

Employees will receive vacations with pay in each calendar year according to the following schedule:

1. One working day for every two months worked during the first year of employment. (These days shall be consecutive working days when taken as a weeks vacation)

2. Twelve working days per year during the second year, up to and including six years of service. (Consecutive working days as stated above)

3. Eighteen working days per year for each year of service beyond six and up to and including twenty years. (Consecutive working days as stated above)

4. Twenty-five working days per year after twenty years of service. (consecutive working days as stated above)

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 18, 1983. The Authority filed a Motion for Summary Judgment on July 5, 1983 which was assigned to the undersigned Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). The Union responded to the Motion on July 12, 1983. Hearings were held in this matter on July 12 and 14, 1983, in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The Motion for Summary Judgment was denied on the record on July 12, 1983 (Transcript "T" 1 pp. 7-20). Both parties filed post-hearing briefs which were received on August 22, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Raritan Township Municipal Utilities Authority is a public employer within the meaning of the Act and is subject to its provisions.

2. The Construction and General Laborers' Union, Local 172, is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Authority and the Union reached their first collective agreement, Exhibit J-1, in July 1982. Article 12 of that Agreement provided that "retroactive to December 1, 1981, each employee shall receive a 64 cent increase in their hourly rate of pay." At the bottom of Article 12 it stated "Minimum and maximum hourly wages for each job classification shall be in accordance with Schedule "A."

Although the Authority's witnesses clearly testified that the 64 cent was only to be given to those employees who were employed prior to December 1, 1981, the facts also show that the 64 cents was built in or added to the classifications listed in Schedule A. 5/ Frank Perro, the Union's negotiator who signed the Agreement, admitted that the ranges reflect the 64 cent increase (T 1 p. 84). In addition, both Robert Sobeck, the Authority's Engineer Director who developed the classifications in Schedule A, and Helen LaRue, a member of the Authority who was on its negotiating committee, testified that the 64 cent increase was built into the salary classifications. (T 2 pp. 9, 56, 60, 128, 143). 6/

5/ In comparing the job classifications in Schedule A of J-1 to those classifications in the Authority's personnel policy in Exhibit CP-1, it is apparent that only two titles listed in J-1 are also listed in CP-1. The remaining titles in J-1 are new positions for which no specific classifications were listed in CP-1. However, the evidence does show that the ranges of the two titles included in both documents were increased by at least 64 cents. Moreover Exhibit R-6 shows that the $6.97 per hour maximum salary classification for an Operator Assistant was created specifically by adding 64 cents to those employees who had been in that title prior to December 1, 1981.

6/ Although Leo Spencer, an Authority member and member of its negotiating committee, testified that the 64 cents had nothing to do with the wage scales (T 2 p. 90), the undersigned discounts that testimony and credits Perro, Sobeck, and LaRue that the 64 cents was built into the job classifications listed in Schedule A of J-1.

Further evidence submitted by the Authority, Exhibit R-6, a listing of all employees salaries and retroactive increases, and the amended schedule "A" to Exhibit C-3, the Authority's Motion for Summary Judgment, show, when considered together, that the employees hired before December 1, 1981 did receive at least a 64 cent retroactive increase. Those documents also showed that some of the five employees involved herein received varying retroactive increases.

The evidence with respect to those particular employees show the following:

a) Dwain Floyd - He was employed on March 1, 1982 as an Interceptor Maintenance at $6.30 per hour. However, since Schedule A of J-1 provided a minimum salary of $6.50 for that title, Floyd was paid 20 cents an hour retroactive to his date of hire until April 5, 1982 at which time he received a 50 cent merit increase to $7.00 per hour.

b) Stephen Gross - He was employed on January 28, 1982 as an Operator Trainee at $5.50 per hour. The minimum salary for that title was $6.00 per hour, therefore, on August 4, 1982 he began receiving $6.00 per hour and received 50 cents per hour retroactive to his date of hire.

c) William Sweazy - He was employed on March 1, 1982 as a Painter at $7.00 per hour. Since Schedule A of J-1 set the minimum salary for a Painter at $7.00, Sweazy did not receive any retroactive payments.

d) Gregory LaFerla - He was employed on December 28, 1981 as an Operator Trainee at $5.50 per hour. On January 20, 1982 he received a 28 cents per hour merit increase to $5.78 per hour.

The minimum salary for that title was $6.00 per hour and LaFerla was finally brought up to that level on August 4, 1982. He then received 22 cents per hour retroactive from his date of hire to August 4, 1982. However, there was no showing that he received an additional 28 cents per hour retroactive to cover the period from December 28, 1981 until January 20, 1982.

e) John Lynch - The evidence concerning Lynch is somewhat contradictory. The amended schedule "A" to C-3 indicates that he was hired on January 1, 1982 apparently as an Interceptor Maintenance at $6.55 per hour and was promoted to an Interceptor Maintenance Foreman on August 4, 1982 at $7.55 per hour. However, Exhibit R-6 shows that Lynch was hired on January 7, 1976, that his salary in December 1981 was $6.55 per hour and, that he received two retroactive raises, 64 cents per hour retroactive from December 1, 1981 to April 15, 1982 at which time he was promoted to foreman and received $7.55 per hour, and 45 cents per hour retroactive from April 15, 1982 to August 1982 at which time he began receiving $8.00 per hour. Since Robert Sobeck testified that Lynch was employed prior to December 1, 1981, the undersigned believes that R-6 contains the more accurate information regarding Lynch's salary history. (T 2 p. 20)

4. The evidence regarding the vacation issue shows the following sequence of events. In late August and early September 1981 the parties exchanged contract proposals. The Union in its contract proposals, Exhibit R-2, sought a substantial increase in the number of vacation days previously established in CP-1. The Union sought two weeks vacation for the first year and an additional

week every fifth year. 7/ Gerald Dodge, an employee and one of the Union's negotiators, testified that one week vacation in R-2 was equivalent to six days. T 1 pp. 106-108. No additional vacation proposals were included in Exhibit R-3, the Union's other list of proposals.

The Authority's first official vacation proposal to the Union was set forth in Exhibit CP-2, dated August 20, 1981, and

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7/ The Union's vacation proposal in Exhibit R-2 was Article 8 as follows:

Vacations

All permanent employees, covered by this Agreement, shall be entitled to vacation leave based upon their years of continuous service as Authority employees. Periods of time on leave of absence without pay, except for military leave, shall be deducted from the employee's total continuous service for purposes of determining the earned service credit for vacation leave. Vacations with pay shall be granted to employees as follows:

A. After one (1) year of continuous service, the maximum of two (2) weeks vacation, but at the option of the employee, one (1) week of such vacation may be taken after six (6) months of continuous service.

After five (5) years of continuous service three (3) weeks vacation.

After ten (10) years of continuous service four (4) weeks vacation.

After twenty (20) years of continuous service five (5) weeks vacation.

B. Each employee granted a vacation will be paid therefore, at his basic hourly wage rate for his regular classification in effect at the time such employee takes said vacation. An employee eligible for one weeks vacation shall receive forty (40) hours pay, an employee eligible for two weeks vacation shall receive eighty (80) hours pay and an employee eligible for three weeks vacation shall receive one hundred and twenty (120) hours pay, an employee eligible for four (4) weeks vacation shall receive one hundred and sixty (160) hours pay, and an employee eligible for five (5) weeks vacation shall receive two hundred (200) hours pay at the employees classified rate as aforesaid.

proposed five days and multiples thereof. 8/

Following the exchange of proposals the parties held their first two negotiation sessions on September 21 and October 1, 1981. Thereafter, on October 7, 1981, the Authority submitted its last set of proposals to the Union, Exhibit CP-3, which contained the same vacation proposal as set forth in CP-2. Subsequently, the parties completed their negotiations at sessions on October 8, October 22, and November 5, 1981. Since no complete agreement had been reached by that time the Union filed a Notice of Impasse with the Commission on November 16, 1981, Docket No. I-82-121 (Exhibit R-1), and listed several items as remaining in dispute including "vacation." 9/

8/ Exhibit CP-2 was actually the Authority's third draft of its contract proposals. The record reveals that in drafts one and two the Authority was proposing six vacation days similar to CP-1. However, the undisputed testimony was that the Authority never presented the first two drafts to the Union, and that the first proposal the Union received was CP-2. (T 2 p. 109).

The relevant portions of the vacation proposal in CP-2 are contained in Article 7 Section 8(A) as follows:

A. An employee will receive vacation with pay in each calendar year according to the following schedule, each vacation day being an eight (8) hour day and each week being a five (5) day, forty (40) hour week:

1. Five (5) vacation days during the first year of employment. (These days shall be consecutive calendar days when taken as a weeks vacation).
2. Ten (10) vacation days per year during the second year, up to and including six (6) years of service. (Consecutive calendar days as stated above).
3. Fifteen (15) vacation days per year for each year of service beyond six (6) and up to and including twenty (20) years. (Consecutive calendar days as stated above).
4. Twenty (20) vacation days per year after twenty (20) years of service. (Consecutive calendar days as stated above).

9/ Perro testified that although "vacations" was listed as an item in dispute in R-1, that said issue was limited to how many vacation days an employee must take in order to be eligible to receive his pay prior to taking that vacation. T 1 p. 68.

Thereafter, the parties engaged in mediation and reached a Memorandum of Understanding (Exhibit CP-4) on February 26, 1982. That Memorandum was silent both as to the overall number of vacation days, and as to how many vacation days an employee had to take in order to receive his pay prior to the vacation. Subsequently, on March 1, 1982, the Union, in accordance with item 18 of CP-4, submitted a list of classifications for the new contract.

On April 6, 1982, Perro received a draft of J-1 to review, and he made several changes in that document and returned it to the Authority's attorney on or about June 28, 1982 with the changes he had made. T 1 pp. 74-76. Perro admitted that although he reviewed that document he did not make any changes in the vacation section which listed five days and multiples thereof as the vacation policy. Subsequently, in early July 1982 the Authority returned the corrected draft of J-1 to Perro for any final changes, and by letter dated July 8, 1982 (Exhibit R-5), Perro returned the draft of J-1 to the Authority's attorney and that letter included the following statement:

> ...enclosed you will find a copy of the R.T.M.U.A. Agreement with all the necessary changes made.
>
> Please contact me after the Authority has executed same.

Once again, Perro admitted that although he had reviewed the draft, he did not suggest any changes in the vacation portion of the contract. T 1 pp. 76-77. In fact, Perro testified that he must have seen that the draft of J-1 contained five days vacation but he

> ...overlooked it when [he] was reviewing it because there were...other items that were pertinent that

[he] wanted to concentrate on. T 1 p. 39. 10/

Having received R-5 from Perro, both parties signed J-1 in July 1982.

5. In support of the Union's position that the parties had agreed to six rather than five vacation days, Perro testified that the Authority's negotiators had agreed to six days at the fourth negotiation session (T 1 p. 56), and Gerald Dodge testified that LaRue said the Authority would accept six days. (T 1 pp. 119-120). However, Perro admitted that his notes of the negotiation sessions which he referred to throughout his testimony did not reflect any agreement on the number of vacation days. (T 1 pp. 59-65). Similarly, although Dodge stated that an agreement had been reached for six vacation days, he could not recall when vacations were discussed during negotiations (T 1 pp. 113-116), and he could not recall whether CP-2 and CP-3 were ever used during negotiations. (T 1 pp. 111-112). 11/ The undersigned credits Spencer and LaRue when they testified that the Authority never agreed to six vacation days. (T 2 pp. 73, 81, 126).

Finally, both Dodge, and shop steward William Sweazy testified that despite the Authority's contention that only five vacation

10/ The undisputed evidence shows that the drafts of J-1 were typed by the Authority's attorney's office, but that certain changes were typed by Perro's office. T 1 pp. 38, 77.

11/ The undersigned does not credit either Perro or Dodge regarding their recollection of the number of vacation days. Dodge's testimony was marked by his constant inability to remember several aspects of the negotiations, and Perro's testimony was not supported by his own notes of the negotiations. Although his notes may not have been a complete record of the negotiations, it is unlikely that he would have simply forgotten to include notes on an agreement over the number of vacation days.

days had been agreed upon they did actually receive six vacation days or multiples thereof during 1982. (T 1 pp. 101, 130). In fact, Sweazy indicated that he was told that he would receive six vacation days when he was hired on March 1, 1982. (T 1 p. 126). The Authority did not deny that some employees received six vacation days during 1982. Engineer Director Robert Sobeck explained that the reason Sweazy was told he'd receive six days, and one reason why some employees received six vacation days or multiples thereof at least until July 1982, was because when Sweazy was hired in March 1982, and at all times prior to July 1982, no agreement had been reached with the Union, and the Authority was still following the vacation procedure set forth in CP-1. (T 2 p. 5). Sobeck then added that the reason the six vacation days was given to some employees after July 1982 was because of an error by his secretary. Sobeck had told his secretary to follow the vacation policy in CP-1 for employees not in the bargaining unit, but she mistakenly followed that procedure for all employees until Sobeck corrected the problem (T 2 pp. 5-7).

Analysis

This case primarily involves the interpretation of the parties' collective agreement and both parties made the same mistake, they attempted to change the clear wording of the agreement and to assert a change or a meaning unexpressed in the writing. However, having reviewed the entire matter herein the undersigned finds that but for one apparently unintentional, but nevertheless minor violation, the Authority did not violate the Act regarding four of the five employees involved herein, nor did it commit any violation

regarding the number of vacation days.

The law regarding the interpretation of contractual agreements such as in the instant matter has been well settled by the Commission and the courts. In In re Twp. of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983), a case very similar to the instant matter, the parties had negotiated and signed their first collective agreement which did not include a longevity clause. The union therein argued that the parties had agreed to continue the former longevity policy, but the Township argued that the union withdrew its request for longevity. The Township prepared the draft of the agreement without a longevity clause and gave it to the union's negotiator for review. The union's negotiator reviewed the draft and made changes therein, but said nothing about the lack of a longevity clause. The Commission, noting the union's failure to prove an agreement over longevity, and noting that the union had reviewed the agreement but did not include longevity, therein, held that no violation was committed.

Similarly, in In re Boro of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981); and In re Delaware Valley Reg. Bd/Ed,, P.E.R.C. No. 81-77, 7 NJPER 34 (¶2014 1980), the Commission held that the clear terms of a collective agreement could not be contradicted by outside evidence. In Bergenfield, supra, the charging party presented witnesses who testified to a contract interpretation unexpressed by the agreement. The Commission found that the charging party's attempt to contradict the clear agreement could not be relied upon. In Delaware Valley, supra, the Commission held that evidence of prior practice could not be considered to

contradict or alter the clear terms of a written agreement.

Support for those Commission decisions comes from our own Supreme Court in several early decisions. Beginning in Casriel v. King, 2 N.J. 45 (1949), the New Jersey Supreme Court held that although evidence of surrounding circumstances is admissible to aid in the construction of an agreement, it is admissible only as an aid to interpreting the agreement, "but not for the purpose of giving effect to an intent at variance with any meaning...to the words." at p. 50. The Court in that case held:

> Such evidene is adducible only for the purpose of interpreting the writing - not for the purpose of modifying or enlarging...its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. 2 N.J. at p. 51.

Thereafter in Washington Construction Co. Inc. v. Spinella, 8 N.J. 212, 217 (1951), the Court held:

> ...the court will not make a different or a better contract than the parties themselves have seen fit to enter into.

Finally, in Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953), the Court discussed contract interpretation and the parol evidence rule at length and citing from Corbin on Contracts held:

> The "parol evidence rule" purports to exclude testimony "only when it is offered for the purpose 'varing or contradicting' the terms of an 'integrated' contact..." 12 N.J. at p. 302. 12/

12/ See also Owens v. Press Publishing Co., 20 N.J. 537 (1956).
The Federal sector law on the parol evidence rule in the Third Circuit was recently restated in Local 461, Dist. III, IUERMW v. The Singer Co., 540 F.Supp. 442, 110 LRRM 2407 (D C NJ 1982) where the court held:

> ...that the introduction of parol or extrinsic evidence to aid in the interpretation of a contract is prohibited unless the contract is ambiguous. See Lewis v. Seanor Coal Co., 382 F.2d 437, 66 LRRM 2007 (3rd Cir. 1967). at 110 LRRM at p. 2410.

Having reviewed those cases it is clear that where, as here, a contract is clear and unambiguous on its face, outside evidence cannot be relied upon to change or vary the terms of the agreement.

The Retroactive Pay Issue

Although the Union did not clearly enunciate its position, it appears that it is asserting that the five affected employees should have received 64 cents per hour retroactive to their date of hire in addition to their minimum salary set forth in Schedule A of J-1. The contract on its face, however, does not grant such an increase.

The undersigned first notes that despite the Authority's assertion that the 64 cent retroactive raise was only intended for employees hired before December 1, 1981, there is no such limiting language in Article 12 of J-1. In fact, the language in that Article is quite clear, "...each employee shall receive a 64 cent increase...." However, that language cannot be read alone. The last sentence of Article 12 makes it clear that Schedule A contains the minimum and maximum salary for the hourly wages in each job classification, and the evidence further shows by way of interpretation of that language which is consistent with the use of parol evidence in Casriel, supra, and Atlantic Northern Airlines, supra, that the 64 cents was included in each job classification. Consequently, once employees who were hired after December 1, 1981 were retroactively brought up to their proper job classification they were then automatically receiving their 64 cent increase. 13/ Since there was nothing in Article 12 or

13/ Perhaps the confusing element regarding this issue is that employees hired prior to December 1, 1981 literally received a 64 cent retroactive increase as per contract thereby placing them in their respective job classifications. That does not mean that they received two 64 cent per hour increases. It means that the salary ranges were created, at least in part, by adding 64 cents to those employees and then structuring the classifications around those amounts. Nevertheless, the employees hired after December 1, 1981 still received their 64 cent increase since it was built into the job classifications.

Schedule A of J-1 which suggested that employees hired after December 1, 1981 should receive 64 cents above the minimum salary for their job classification, then, in accordance with the above-cited cases, there was no basis to permit the Union's position to justify a change or modification of the agreement.

Since the Authority retroactively paid employees Floyd, Gross, Sweazy, and Lynch, at least their minimum salaries as lited in Schedule A which included a 64 cent increase, no violation of the Act was committed concerning their salaries. However, the Authority did violate the Act when it failed to pay LaFerla, even if unintentionally, an additional 28 cents per hour from December 28, 1981 to January 20, 1982 to bring him up to the proper classification. 14/ LaFerla is entitled to be paid that amount for those hours for that time period, and is also entitled to 12% interest on that payment to be computed from August 4, 1982, the day he

14/ This decision is not based upon a finding that since the Authority may have given merit raises to some of the affected employees that it was thereby excused from giving the 64 cent raise. The Authority seems to argue that In re Middlesex County (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980) stands for the proposition that if an employee receives a merit increase larger than the contractual increase provides that the employer is excused from providing the contractual increase. The decision in Mackaronis, supra, is limited to its own facts. The Commission merely found that based upon the contract and prior policy in that case, and since all employees were treated the same way therein, that the County did not act improperly in not providing the contractual increase.

The facts in this case are different. The 64 cents was already included in the salary ranges. However, whether the Authority called some or all of the retroactive increase for the affected employees a merit increase or a contractual increase is immaterial. What matters is that except for LaFerla, the employees received at least their minimum contractual salary from their date of hire which included the 64 cent increase.

should have been brought up to classification. 15/

The Vacation Days Issue

In order to have established a violation on this issue the Union had the burden of proving that an agreement had been reached for six vacation days. However, the Union failed to prove by a preponderance of the evidence that such an agreement was reached. That is not to suggest that the Authority proved that five vacation days had actually been agreed upon during one of the negotiation sessions. The evidence is not conclusive on that point. However, the evidence clearly shows that, as in Twp. of Vernon, supra, the Union's negotiator and business representative herein, Frank Perro, reviewed the draft of the collective agreement and was aware of the vacation language which listed five vacation days, and he even made other changes in the draft. Yet Perro never attempted to change the vacation clause, and admitted it was his own oversight. Just as in Twp. of Vernon, any mistake that was made in this case is attributable to the Union, not the Authority. When Perro returned the draft of J-1 to the Authority with changes for the second time, he wrote in R-5 that it included "all the necessary changes." Once J-1 was signed both parties were bound by the agreement. As the Court held in Washington Construction Co., supra, the court will not make a different or better contract than the parties themselves entered into. Moreover, as the Court indicated in Casriel and Atlantic Northern Airlines, parol evidence cannot be used to contradict the clear meaning of the writing or

15/ Administrative agencies may award interest in accordance with R.4:42-11 of the New Jersey Court Rules. See Michael Law v. Parsippany Twp. Bd/Ed, App. Div. Docket No. A-280-82T2 (October 25, 1983), and In re Bergen Pines County Hosp., P.E.R.C. No. 82-117, 8 NJPER 360 (¶13165 1982).

to create something wholly unexpressed in the writing. The agreement clearly calls for five vacation days and that cannot be contradicted by the Union's testimony.

In addition, the undersigned finds that although Gerald Dodge testified that one week vacation in R-2 was equivalent to six days, the evidence does not support that contention. First, the traditional work week and thereby the traditional vacation week is five days, and there is nothing in Article 8(A) of R-2 to suggest otherwise. Second, Article 8(B) of R-2 defines a week as 40 hours, and both J-1 (at Article 7), and CP-1 (Article 2E) define a work week as 40 hours. Consequently, even the Union's proposal doesn't call for six vacation days.

Finally, although the evidence shows that certain employees received six vacation days during 1982, that alone is not enough to prove that the parties agreed to six vacation days in J-1. The undersigned credits Sobeck's explanation that the Authority was following the vacation policy in CP-1 until J-1 was ratified, and that subsequently, his secretary misunderstood his directive to give six vacation days to only unrepresented employees.

Accordingly, based upon the above analysis, the undersigned makes the following:

Conclusions of Law

1. The Raritan Township Municipal Utilities Authority violated §5.4(a)(1) and (5) of the Act when it failed to pay employee Gregory LaFerla an additional 28 cents per hour from December 28,

1981 to January 20, 1982. 16/

2. The Authority did not violate §5.4(a)(1) and (5) of the Act regarding the salaries for employees Floyd, Gross, Sweazy, and Lynch, nor did it violate the Act regarding the number of vacation days set forth in J-1. Consequently, the Complaint should be dismissed regarding those issues.

Recommended Order

The Hearing Examiner recommends that the Commission find:

A. That the Authority violated §5.4(a)(1) and (5) of the Act by failing to pay Gregory LaFerla an additional 28 cents per hour from December 28, 1981 to January 20, 1982, and that 12% interest should be added thereto from August 4, 1982, the day he should have been fully reimbursed. However, no posting is required. 17/

16/ The undersigned notes that of the five employees involved herein only LaFerla received part of his retroactive increase as a merit increase. But the undersigned does not believe that LaFerla is entitled to be brought up to classification plus the merit increase. He was entitled only to be paid the minimum for his job classification (which included the 64 cent raise) from his date of hire and he is therefore entitled to an additional 28 cents per hour for the time period indicated to accomplish that result. For example, if LaFerla had received this additional 28 cents on August 4, 1982 when he was otherwise brought up to classification, he would have earned $6.00 per hour which was the minimum salary for an operator trainee and it would have been consistent with the contract.

17/ Although LaFerla is entitled to his retroactive 28 cents per hour for the time indicated plus interest, there is no need for a posting in this matter. The undersigned believes that the Authority's failure to pay LaFerla the additional 28 cents was nothing more than an unintentional, inadvertent, though unlawful, mistake. The Authority properly reimbursed the other employees, and there was no showing that it failed to pay the additional money to LaFerla in particular for any unlawful reasons. A posting might give the impression that the Authority's action regarding the retroactive increase was unlawful in general, and the undersigned is not finding that to be the case.

B. That the Commission dismiss the Complaint with respect to employees Floyd, Gross, Sweazy and Lynch, and with respect to the number of vacation days set forth in the parties' agreement.

Arnold H. Zudick
Hearing Examiner

Dated: December 30, 1983
Trenton, New Jersey