P.E.R.C. NO. 97-124

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN,

Respondent,

-and- Docket No. CO-H-96-246

BERGEN COUNTY POLICE
PBA LOCAL 49,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the County of Bergen. The Complaint was based on an unfair practice charge filed by the Bergen County Police, PBA Local 49. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when, during successor contract negotiations, it unilaterally changed terms and conditions of employment by refusing to pay an automatic salary adjustment. The charge also alleges that the employer declined to negotiate during the fall and early winter of 1995-96. The Commission finds that this case involves adjustments to overall salary levels -- adjustments that are conceptually different from increments. The Commission declines to consider a salary increase unrelated to attainment of an additional year of service as part of the status quo. The Commission expresses no comments on the merits of any contractual claim and need not, in this decision, respond to the employer's additional argument that salary indexing is not mandatorily negotiable. In the absence of exceptions, the Commission dismisses the remaining allegations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN,

Respondent,

-and- Docket No. CO-H-96-246

BERGEN COUNTY POLICE
PBA LOCAL 49,

Charging Party.

Appearances:

For the Respondent, Edwin C. Eastwood, Jr., attorney

For the Charging Party, Loccke & Correia, P.A., attorneys (Richard D. Loccke, of counsel; Joseph Licata, on the briefs)

DECISION AND ORDER

On February 27, 1996, Bergen County Police PBA Local 49 filed an unfair practice charge against the County of Bergen. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), (5) and (7),[1/]

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

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when, during successor contract negotiations, it unilaterally changed terms and conditions of employment by refusing to pay an automatic salary adjustment. The charge further alleges that the employer declined to negotiate during the fall and early winter of 1995-96. The PBA seeks an order directing payment of the pay adjustments and counsel fees.

On March 22, 1996, the PBA's application for interim relief was denied. I.R. No. 96-19, 22 NJPER 147 (¶27077 1996). The Commission designee found that the relevant language in the parties' contract did not survive the expiration of the contract; that this situation was different from an incremental structure; and that prior advance payments after contract expiration were purely voluntary. On June 21, we denied the PBA's motion for reconsideration, finding no extraordinary circumstances warranting review at that juncture. P.E.R.C. No. 96-79, 22 NJPER 236 (¶27121 1996).

On April 10, 1996, a Complaint and Notice of Hearing issued. On April 19, the County filed an Answer denying that it violated the Act.

1/ Footnote Continued From Previous Page

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

On July 23, 1996, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits, and filed post-hearing briefs.

On November 6, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-8, 23 NJPER 20 (¶28017 1996). He rejected the PBA's arguments that: salary adjustments were like increments and survived the expiration of the contract; payment of adjustments after contract expiration was a past practice; not paying adjustments changed the status quo; and the parties' intent, rather than contract language, was controlling.

On November 19, 1996, the PBA filed exceptions. It asserts that the Hearing Examiner: improperly credited his literal reading of the contract over the testimony of the witnesses who negotiated the salary advance/index provisions; erred by finding that the parties negotiated over the index raises and salary advance amounts for each succeeding contract and they were limited to the years covered by these agreements; and erroneously failed to recognize the clear analogy between step increments and the salary advance as part of a salary index system meant to survive the expiration of the contract. Finally, the PBA argues that there is no basis for the Hearing Examiner's finding that a perpetual system of salary increases is contrary to the Act since the employer has the ability to negotiate or arbitrate the system away.

On November 25, 1996, the employer filed an answering brief. It argues that salary advancements were used by the parties

in the past when salary increases were anticipated until the amount of the raise had been determined, but that never before had the employer determined that no salary increases would be offered. The employer asserts that the PBA is trying to achieve by way of this charge, salary increases that will not be forthcoming at the negotiations table.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-14) except to the extent they discredit the witnesses' accounts of their intent in negotiating automatic salary advances. We add that Article II of the parties' 1994-95 agreement, entitled Term of Contract, provides, in part, that "All provisions shall remain in full force and effect until a new contract is executed."

Beginning in 1978, the parties negotiated a salary index system pegging unit salaries for each year covered by a contract to the salaries of 42 Bergen County municipalities with salary advances to be paid in anticipation of the indexed final salaries. PBA representatives and the former County administrator who first negotiated the index system testified that the index system was intended to be automatic and that advance payments were intended to be made every January whether there was a contract in place or not. No successor contract has been settled before the expiration of the predecessor contract and each January, advance payments have been made. Because the County did not project any salary increases for the PBA unit for 1996, it paid, but then "withdrew," advance payments in January 1996. This charge ensued.

As early as 1975, we held that an employer is normally precluded from altering the status quo while engaged in collective negotiations, and that such an alteration constitutes an unlawful refusal to negotiate. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). We noted that in such cases we are not enforcing or imposing an expired contractual obligation. Rather, we are simply requiring the maintenance of terms and conditions of employment during successor contract negotiations. See also Galloway Tp. Bd. of Ed., P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 352 (App. Div. 1977), rev'd 78 N.J. 25 (1978).[2/]

The central question is whether payment of salary advances constituted an element of the status quo whose continuance could not be disrupted by unilateral action. Our compensation cases have focused on the payment of increments. This case does not involve increments -- they have been paid. Instead it involves adjustments to overall salary levels -- adjustments that are conceptually different from increments.

In Galloway, we found that payment of increments was part of the status quo because the salary schedule in effect specified a particular salary step for each year of a teacher's service. It could not be disputed that a teacher would have an additional year

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2/ The Hearing Examiner's reliance on the holding of the Supreme Court decision is misplaced. The Court held that N.J.S.A. 18A:29-4.1, not the status quo doctrine, required the payment of increments to teachers after the expiration of a one year contract.

of service, even though a successor agreement had not been reached. A unilateral determination not to pay any increments was a negation of that additional year of service and was thus an alteration of the status quo.

Here, increments for years of service have been paid. What the employer has refused to pay is a salary adjustment in anticipation of a negotiated general increase in salary. If the parties have contractually agreed that such payments should be made after the expiration of the contract, then any payments would be a function of that agreement. We decline, however, to consider a salary increase unrelated to attainment of an additional year of service as part of the status quo. We express no comments on the merits of any contractual claim and need not, in this decision, respond to the employer's additional argument that salary indexing is not mandatorily negotiable.

In the absence of exceptions, we dismiss the remaining allegations.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997

H.E. NO. 97-8

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

In the Matter of

COUNTY OF BERGEN,

Respondent,

-and- Docket No. CO-H-96-246

BERGEN COUNTY POLICE
PBA LOCAL 49,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the County of Bergen did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by refusing to pay a salary adjustment in January 1996. The Hearing Examiner found that the County had complied with the parties last collective agreement which expired on December 31, 1995, and that no new collective agreement had been reached requiring a salary adjustment in 1996.

The Hearing Examiner rejected the PBA's arguments that salary adjustments were like increments and survived the expiration of the contract; that payment of adjustments post contract expiration was a past practice; that not paying adjustments changed the status quo; and, that the parties intent, rather than contract language, was controlling.

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. If no exceptions are filed, the recommended decision shall 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.

H.E. NO. 97-8

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

In the Matter of

COUNTY OF BERGEN,

Respondent,

-and- Docket No. CO-H-96-246

BERGEN COUNTY POLICE
PBA LOCAL 49,

Charging Party.

Appearances:

For the Respondent, Eastwood & Scandariato
(Peter A. Scandariato, of counsel)

For the Charging Party, Loccke & Correia, attorneys
(Richard D. Loccke, of counsel)
(Joseph Licata, on the brief)

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION

On February 27, 1996, Bergen County Police PBA, Local 49 filed an unfair practice charge with the New Jersey Public Employment Relations Commission, alleging that the County of Bergen violated subsections 5.4(a)(1), (2), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] The PBA alleged the County violated the Act when, during

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or

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negotiations for a new collective agreement, it unilaterally changed established terms and conditions of employment by refusing to provide a salary "adjustment" in January 1996.

The PBA further alleged the County declined to negotiate with it during the fall and early winter of 1995-96. The PBA claims that the County intentionally delayed the commencement of negotiations as a way to avoid paying a salary adjustment in January 1996. The PBA seeks an order directing payment of January pay adjustments, and counsel fees.

Procedural Background

The unfair practice charge was accompanied by an order to show cause for interim relief. The order was executed and made returnable for March 15, 1996.

The County opposed the application for interim relief. It admitted paying an annual salary adjustment in past Januarys because it anticipated salary increases in those calendar years. But argued

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1/ Footnote Continued From Previous Page

interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

that no wage increase was anticipated in 1996, and that the PBA was using this litigation in an attempt to gain a salary increase that has not been obtained through collective negotiations.

On March 22, 1996, the Commission Designee issued a decision denying interim relief. County of Bergen, I.R. No. 96-19, 22 NJPER 147 (¶27077 1996). He found that the relevant language in the parties contract did not survive the expiration of the contract; that this situation was different than an incremental structure; and that prior advance payments after contract expiration were purely voluntary.

By letter of April 3, 1996, the PBA filed a motion for reconsideration of the interim relief decision.

On June 21, 1996, the Commission denied the PBA's motion for reconsideration. County of Bergen, P.E.R.C. No. 96-79, 22 NJPER 236 (¶27121 1996).

A Complaint and Notice of Hearing was issued on the charge on April 10, 1996 (C-1). The County filed an Answer to the Complaint (C-2) on April 19, 1996, denying it violated the Act.

A hearing was held on July 23, 1996.[2/] Both parties filed post-hearing briefs by September 30, 1996. The PBA filed a reply brief by October 28, 1996.

Based upon the entire record, I make the following:

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

FINDINGS OF FACT

1. The County and PBA have been parties to collective agreements for over twenty years. Beginning in 1976, for their 1976-1977 collective agreement (J-1), the parties created an "index system" to determine the salaries for unit members. The index system was established beginning with the parties negotiating a percentage that they applied to the maximum patrolmens salary obtained after review of 42 specific Bergen County municipalities. That municipal salary was the foundation of the index system. The base salary for the County patrolman was then determined by applying the negotiated percentage to the municipal salary. For the life of J-1, the parties had agreed upon the 55th percentile.

Under the index system, the salary for Bergen County police employees increased two ways. It increased each time the municipal salary used as a base for the index system increased, even if the percentile remained the same, and it increased when the percentile increased, even if the municipal salary remained the same. Of course, both methods of increase could have occurred at the same time.

In J-1, Article 8, Section 1, the parties agreed that for 1976, the salary schedule for all Bergen County police officers would be placed at the 55th percentile of the municipalities listed in Appendix "B". In Article 8, Section 4, the parties agreed that for 1977, the County police base salary would not be less than the 55th percentile of the maximum patrolmen's pay from the list of

municipalities. The parties realized, however, that many of those municipalities would not have their final salary figures available on time for the parties to calculate the municipal salary to which the negotiated percentile would be applied. Therefore, the parties negotiated a dollar amount that the employees would receive by the first of the calendar year in lieu of their specific increase, because the specific increase could not be calculated until the municipal salaries were determined. This "January increase" has been called an "advance", an "adjustment," a "payment", up front money, or the "float" (T38-T39; T56; T66-T69, J-2, J-3, J-7, J-12). This salary advance was not the employees' actual raise amount. It was a negotiated fixed amount of money for the employees given in anticipation of their raise as an offset to the actual raise amount. It cushioned the wait anticipated for all of the municipalities to settle their contracts (T32; T56; T66). Once the municipal salaries were available, the County percentile was applied, and the actual raise for that year was determined. Any difference between the amount of the advance and the amount of the actual raise, up or down, would then be resolved (T79).

In J-1, Article 8, Section 5, the parties negotiated that a $500 "pay rate adjustment" be paid on January 1, 1977. That Section provides:

> Recognizing that some of the municipalities listed in Appendix "B" may finalize their 1977 pay rates after January 1, 1977, the parties to this contract agree that there shall be a Five Hundred Dollar pay raise across the board on January 1, 1977, for all employees covered by

> this Agreement. Final pay rate adjustments as provided in the clause shall be made not later than September 1, 1977.

The parties most recent agreement, J-12, covering 1994-95, provided for a $2,250 salary advance in Article 8, Section 7. It was the County's refusal to pay that amount in January 1996 that led to the filing of the charge.

The salary adjustment provided in J-1 was not an increment. J-1, Article 8, Section 7, and Appendix "A", specifically provided for increments for County patrolmen. J-1, Section 7 provides:

> There shall be three (3) annual wage step increments to top pay for patrolmen. The effective date for the entitlement to said annual wage step increases shall be the anniversary date of the individual employee's initial date of hiring. The pay rate for each annual wage step for the year 1977 shall be computed by subtracting three (3) Two Thousand Dollar ($2,000.00) increments, representing the three annual wage steps, from the 1977 Bergen County Police Patrolman's maximum pay rate as provided for in this clause.
>
> Appendix "A" includes the increment salary schedule which provides in pertinent part:
>
> | Patrolman | |
> |---|---|
> | During first year | $ 9,300 |
> | During second year | 11,300 |
> | During third year | 13,300 |
> | After three years (maximum) | $15,300 |

J-1 expired on December 31, 1977. No language was included therein providing for a salary adjustment in January 1978.

2. Exhibit J-2, the parties' 1978-79 collective agreement expired on December 31, 1979. Article 8, Sections 2 and 3 of J-2, set the base salary for County police officers at the 60th percentile of the maximum patrolmens salary from the list of municipalities. That percentile increase (from J-1) was not automatic. It was an increase achieved through collective negotiations (T20; T32; T43).

Article 8, Section 6 of J-2, and Appendix "A", provided for increments for patrolmen, and Section 7 provided for a $550 "pay raise payment" to be given January 1, 1978 and January 1, 1979. The increase in the salary adjustment money from J-1 to J-2 was negotiated by the parties (T38; T43-T44). J-2 did not provide for a salary adjustment for January 1980.

Exhibit J-3, the parties 1980-1982 collective agreement, expired on December 31, 1982. Article 8 reflected that the 60th percentile was retained for 1980, but the percentile was increased to 65% for 1981 and 1982. Increments were included for patrolmen, and a $550 "pay raise advance payment" was provided for each year of the agreement.[3/]

Exhibit J-5, the parties 1983-1984 collective agreement, expired on December 31, 1984. Article 8 reflected the index percentile was increased to 70% for 1983, and increased to 75% for

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3/ J-3 was signed in April 1981. It was preceeded by an interest arbitration award (J-4) issued on November 10, 1980 in which the PBA's economic package was accepted.

1984. Patrolmen were still provided an increment, and the "pay raise advance payment" was increased to $1,000 for each year of the agreement.

Exhibit J-7 was the parties' 1985-1987 collective agreement expiring December 31, 1987. It raised the index percentile for each year of the agreement to 80% for 1985, 85% for 1986, and 90% for 1987. Patrolmen continued to receive increments. The January salary advance remained at $1,000 for 1985, but was increased to $1,250 for 1986, and increased to $1,500 for 1987.[4/]

Exhibit J-9 was the parties' 1988-1990 collective agreement expiring December 31, 1990. It raised the index percentile to 93% for 1988, and to 95% for 1989 and 1990. Patrolmen continued to receive increments. The January salary advance was increased for each year of the agreement. It was $1,750 for 1988, $2,000 for 1989, and $2,250 for 1990.[5/]

Exhibit J-11 was the parties' 1991-1993 collective agreement expiring December 31, 1993. It kept the index percentile at 95% for each year of the agreement, continued increments for patrolmen, and kept the salary advance at $2,250 for each year of the agreement.[6/]

4/ J-7 included the salary terms the parties had agreed upon in J-6, a 1985 memorandum of understanding.

5/ J-9 was preceeded by an interest arbitration award (J-8) covering the period in question.

6/ J-11 was preceeded by an interest arbitration award (J-10) covering the period in question in which the PBA's economic package was accepted.

Exhibit J-12, effective for 1994 and 1995, expiring December 31, 1995, was the parties' most recent collective agreement. In Article 8, it kept the index percentile at 95% and the salary advance at $2,250 for both years of the agreement, and continued to provide annual increments for eligible police officers. Article 8, Section 6 of J-12 sets forth the three step annual increment schedule for County police officers as follows:

> The initial base annual salary for Police Officers hired during the term of this Agreement shall be Seventeen Thousand ($17,000) Dollars.
>
> There shall be three (3) equal annual salary step increments to maximum base annual salary (top step) for Police Officers. The effective date for the entitlement to such annual salary step increment shall be the anniversary date of the individual employee's initial date of hiring. The pay rate for each annual salary step for those Police Officers below the maximum for their grade during the years 1994 and 1995 shall be computed by subtracting the starting salary from the maximum base annual salary for Police Officers in each of the said years and dividing the difference by three (3). The base annual salary of Police Officers having completed one (1) year of service shall be plus one-third (1/3) such difference and the base annual salary of Police Officers having completed two (2) years of service shall be the starting salary plus two-thirds (2/3) such difference. After three (3) years of service, a Police Officer shall receive the maximum base annual salary for his grade.

Over the years, through negotiations, the parties had reduced the list of municipalities from 42 in J-1, to 30 in J-12.

Article 8 of J-12 provides in pertinent part:

> 1. The base annual salaries for the year 1994 for all Employees covered by this Agreement are

set forth in Schedule A. This salary schedule reflects the parties' efforts to have placed the salaries for all Bergen County Police Officers at a representative position based upon the maximum Police Officer's salary (top step) being at the ninety-fifth (95%) percentile of those Bergen County law enforcement agencies listed in Appendix B.

2. Each year the annual salaries for all employees covered by this Agreement shall be computed based upon the current year maximum base annual salary (top step) for Patrolmen or Prosecutor's Senior Investigators in Bergen County law enforcement agencies listed in Appendix B. The maximum Bergen County Police Officers' base annual salary (top step) for each year shall be at the ninety-fifth (95%) percentile of the maximum base annual salaries for Patrolmen or Prosecutor's Senior Investigators in the respective agencies listed in Appendix B. Not less than ninety-five (95%) percent of those agencies shall have a maximum base annual salary for Patrolmen for said year which is below the maximum base annual salary of the Bergen County Police Officer. All computations shall be from the top of the list.

7. Recognizing that some of the agencies listed in Appendix B may finalize their annual pay rates after January 1 of each of either of the said years, the parties to his contract agree that there shall be an advance payment across-the-board annually payable as soon as practicable after January 1 of each year for all Employees covered by this Agreement. Final pay rate adjustments as provided herein shall be made not later than September 1 of each year, respectively, for each of the years covered under this Agreement. The annual advance payment due on January 1 of each year, or as soon thereafter as it can be paid, shall be Two Thousand Two Hundred Fifty ($2,250.00) Dollars.

J-12 expired on December 31, 1995. There was no language in Article 8, Section 7 of that agreement providing for a salary advance, automatic or otherwise, in January 1996, or thereafter

(T58-T59). In fact, every time the phrase "each year" was used, and the phrase "for each of the years covered under this Agreement", was used in Section 7 of Article 8, it was referring to each year of J-12, 1994 and 1995. I, therefore, find that the salary advance payments provided for in J-12 were limited to 1994 and 1995. There was no language in Article 8 that advance payments be made in 1996 during negotiations for a new agreement.

3. Several witnesses testified that the index system, generally, and the January salary advance in particular, were intended to be automatic, and would automatically continue into the future (T19, T27, T65, T67). But if that was their intent, it was not what they agreed upon. PBA witness, Frank Prelich, first testified that the salary advance was automatic, but then conceded that both the index percentile and the salary advance had to be negotiated (T38, T43-T44). PBA President, Richard O'Grady, also testified initially that J-12 provided for an automatic salary advance (T57), but later conceded on cross-examination there was no language in J-12 about an automatic wage increase (T58-T59). I credit Prelich's and O'Grady's latter testimonies because they are consistent with the wording of J-12, and the predecessor agreements. Stephen Cuccio, the former Bergen County Administrator who originally negotiated the index system on behalf of the County, testified that he anticipated that the index system would take care of negotiating raises forever (T74). He even intended that advance payments be made every January whether there was a contract in place

or not (T68). But Cuccio's intent is not controlling, contract language controls. I find that these parties negotiated over the index raises and salary advance amounts for each succeeding collective agreement, and they were limited to the years covered by those agreements.

Consequently, I do not credit Prelich's, O'Grady's or Cuccio's testimony that salary advances were automatic. I find that the index system as a means to determine a raise, and index percentiles and salary advances provided for in J-1, J-2, J-3, J-5, J-7, J-9, J-11 and J-12 did not increase automatically; they were established through collective negotiations, and they applied only for the specific years covered by those agreements (T20, T32, T38, T43-T44). The parties did not contractually agree to the payment of salary advances in January following the expiration of collective agreements in any December. Rather, each succeeding agreement provided for a salary advance in January of each year of a "new" agreement.

Although the County, from 1978 through the end of J-12 (1995), paid salary advances each January without interruption until January 1996 (T17, T38-T39, T42), it was not "automatically" required to make those payments in the Januarys following the expiration of each collective agreement when no new agreement had yet been implemented. Rather, I find the County became required to pay salary advances pursuant to the language in the above collective agreements, once they were implemented, because they were made

retroactive to the Januarys following the expiration of the previous collective agreement.

4. Negotiations for a successor to J-12 began in 1995. Prior to 1996, the County had always offered the PBA a wage increase during negotiations. But in negotiations for a successor to J-12 the County has not proposed a raise (T54, T60).[7/] There were approximately 25 collective negotiations agreements covering County employees that expired on December 31, 1995, including the PBA's, but the County has not offered a wage increase to any of those unions, and did not project any salary raises for the PBA for 1996 (T80-T82; R-1).

The PBA submitted salary proposals (CP-1) for a new collective agreement. CP-1 did not contain any proposal addressing salaries, raises, or advances. On cross examination, O'Grady was asked if in their proposals the PBA was asking for a raise. He responded, "No" (T54). He conceded that wages were not mentioned in CP-1, and said that wages had not been discussed (T54-T55). I credit his testimony.

5. By memorandum of January 19, 1996 (CP-2), the County's Director of Personnel notified the County Police Chief that Personnel would not pay any step increases for expired labor agreements. Nevertheless, the County, subsequently, paid the step

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7/ The PBA, in its reply brief, argued that the County made no wage proposal at all. That argument is not inconsistent with PBA President O'Grady's testimony that the County had not proposed a raise (T54). I credit that part of his testimony.

increases - increments - for eligible employees in the PBA's negotiations unit (T82, T95-T96, R-1).

In the first pay period in January 1996, the County made a salary advance payment to employees included in the PBA's unit, but "withdrew" it at the second pay period (T51).

By memorandum of January 25, 1996 (CP-3), the County's Director of Personnel notified the County Executive's assistant, that as a result of a January 24th administrative forum, he was instructing the County's payroll officer to discontinue making advance payments of a $2,250 salary adjustment. The record, however, does not show how much was given, or if any of what was given was actually taken back. What is clear is that even assuming some salary advance money was paid during the first pay period of 1996, the County has discontinued making such payments.

6. There were no facts presented regarding the commencement of negotiations or whether they were delayed.

ANALYSIS

The issue raised in the charge is narrow. Did the County violate the Act by refusing to pay a salary advance in 1996? I find it did not.

Salary advances were all or part of the negotiated raise provided for employees in the parties collective agreement. They were not increments, and they did not come into existence as a past

practice. They were provided by contract. The last contract that provided for a raise and a salary advance, J-12, expired in 1995. The County did not repudiate J-12, it paid the raises and salary advances requied by that agreement. Since no collective agreement has been negotiated for 1996, and no raise or salary advance has been negotiated for 1996, no advance is yet owed for 1996. The PBA's assumption that not proposing a change to the language in J-12, Article 8 would guarantee the employees a salary advance of $2,250 in 1996, was a mistake. The County was not obligated to pay an advance in 1996 unless subsequently required by a new collective agreement.

In its post-hearing brief, the PBA made several arguments to support its contention that the County violated the Act. It primarily analogized salary advances to increments, arguing that they survived the expiration of the contract; that advance payments have been the past practice; and, that failure to pay them has changed the status quo. The PBA rolled these arguments into one in its brief saying:

> ...if a benefit was intended to survive the expiration of a contract, as evidenced by the contract language and/or past practice, an employer commits an unfair practice per se if it unilaterally changes the status quo pending successor labor negotiations.
> [Post-hearing brief at 11].

The PBA further argued that the parties had intended salary advances to survive the collective agreements; that the County repudiated Article 8, Section 7 of J-12; that the County's partial

advance payment for 1996 was indicative of an obligation to pay; and, that the County had not made an offer for a zero percent increase. But the PBA's arguments are all rooted in what it contends the parties intended, as opposed to what the contract says.

The PBA's arguments are not persuasive. They seek a result that would circumvent the clear terms of the parties agreement. The PBA cannot achieve through this unfair practice charge what it has not yet achieved through the negotiations process--a salary raise for 1996 and thereafter.

The term "increment" in a labor relations context, refers to the forward movement from one step (or level) to the next on a multi-step salary guide or salary schedule. The receipt of an increment - i.e. a step increase - can be subject to an employer's discretion, or can occur automatically, based upon the satisfactory completion of another year of service.

In Galloway Township Bd. Ed. v. Galloway Township Ed. Ass'n., 78 N.J. 25 (1978), the New Jersey Supreme Court held that the withholding of an automatic increment after a contract expired was an unlawful unilateral change in the status quo, and violated subsection 5.4(a)(5) of the Act. In the Commission's decision leading to the Supreme Court's Galloway decision, Galloway Tp. Bd. Ed., P.E.R.C. No. 76-32, 2 NJPER 183 (1976), the Commission found that a negotiated salary schedule remained in effect even after the expiration of the agreement, and until a new agreement was reached,

and that an existing salary schedule with its length of service steps was part of the status quo.[8/]

The Commission in State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981) explained the rationale for that holding when it said:

> It must be emphasized that it is not the contracts per se which are being extended. Rather, it is the terms and conditions of employment which were in effect at the time that the contracts expired which are being maintained. Those terms included a salary structure which provided for the payment of increments upon the passage of additional periods of service measured by assigned anniversary dates. The employees involved herein have successfully completed that additional period of service. Their proper placement on the salary guide which remains in effect requires that they move up one step and receive the appropriate salary increment. 7 NJPER at 536.

Despite the PBA's arguments, salary advances are not increments; they are neither treated like nor paid like increments. Increments are the negotiated salary steps contained within negotiated salary schedules. The parties here had a three step increment schedule for police officers. That schedule did not limit the step amounts to specific contractual years. By agreeing to such a schedule in J-12 (and its predecessors) the parties had, thus, negotiated the salary for each step of the schedule which would

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8/ While Galloway continues to be the leading case requiring the payment of increments post contract expiration, the law has been clarified regarding teachers and other certificated personnel. See Neptune Tp. Bd. Ed. v. Neptune Tp. Ed. Ass'n, 144 N.J. 16 (1996).

apply to an employee whenever he/she would reach that step. It is because each step of such salary schedules are already negotiated, and because movement from one step to another is automatic - i.e. based only upon the satisfactory completion of another year of service--that the salary schedule (increment) survives the expiration of a collective agreement. Galloway.

Here, the parties negotiated an increment schedule for police officers into their agreements, and eligible officers were paid those increments in 1996. That meant, for example, that a police officer who was on step one or two in 1995 of the J-12 salary schedule automatically moved to the next step of that schedule in 1996 (and 1997 if applicable) even though J-12 expired on December 31, 1995.

But the increment explanation does not apply to salary advances. Salary advances were raises negotiated for specific contractual years, they were limited to those specific years, thus, they did not survive the expiration of the agreement(s) in which they were contained. Advances were not based upon a salary schedule; they were based upon raises negotiated in the parties agreement(s), and they were simply an offset to the amount of the raise employees would receive in a specific year as provided by their negotiated agreement. Salary advances were due in January of each new contract year whether or not an employee had completed another year of service. Prior to 1996, the actual amount of an employee's raise was determined by the negotiated index system.

Once J-12 expired, however, the County had complied with raises required by contract and could not be required to pay any other increase (except increments) until a new agreement was reached. Thus, if the parties do not continue the index system into the predecessor agreement to J-12, or negotiate some other raise for 1996, there will be no basis for a salary advance.

The PBA is really arguing here that the index system itself (not increments) survives the expiration of the collective agreement. It apparently believes that employees are entitled to a raise in 1996 based upon any increase in the municipal salary that was the base for the index system. But that position is flawed. If followed, it would mean that the parties, because of J-12, or even J-1, negotiated a salary raise for 1996 and thereafter. They did not. They negotiated a raise through 1995. To conclude otherwise relegates the parties to a perpetual agreement on raises which is contrary to both the terms of the last agreement and the parties rights under the Act.

If no raise is negotiated for 1996, or until one is, the County must retain the status quo. The status quo for 1996, with respect to wages, will be to pay employees the same salaries they received in 1995. The exception, of course, are those employees entitled to an increment who were already moved to the next step of the salary schedule.

In its post-hearing brief the County, relying on In re IFPTE, Local 195 v. State, 88 N.J. 393, 403 (1982), argued that the

index system itself is non-negotiable because it significantly interferes with management prerogatives. It claimed that the salary indexing idea was "imprudent public policy." That assessment may be true, but the County shares the responsibility for agreeing to that system for the last twenty years. In its reply brief, the PBA vigorously argued that the index system is a negotiated term and condition of employment. But, I will not resolve the negotiability of the index system in this decision. If the PBA seeks to continue such a system into a new agreement the County can file a scope of negotiations petition seeking resolution of the negotiations issue.

I find, however, that the index system, unlike increments, did not survive the expiration of J-12. There was nothing automatic about payments under the index system. The index system was specifically negotiated from contract to contract, as the means to calculate the amount of a raise, and salary advances were negotiated for each specific year of the contracts. When those contracts expired, so did the index system as a means to determine whether there was to be a raise, and so did the salary advance requirements. The PBA's testimony (parol evidence) that the index system was intended to be automatic, and that salary advances were intended to continue after contract expiration, was different from the clear terms of the contract(s). Parol evidence is inadmissable to alter or contradict or give different meaning to clear terms of a written agreement. Casriel v. King, 2 N.J. 45 (1949); Atlantic No. Airlines Inc. v. Schwimmer, 12 N.J. 293 (1953); Raritan Twp. M.U.A.,

P.E.R.C. No. 84-94, 10 NJPER 147 (¶15072 1984); Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981); Delaware Valley Reg. Bd. Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (¶2014 1980); Morris County, D.U.P. No. 94-27, 20 NJPER 118 (¶25063 1994).

The PBA's argument that the County's actions violated the Act because it differed from, or changed, past practice is also unpersuasive. A past practice is a term and condition of employment not appearing in the parties' collective agreement, but arising as implied from their mutual conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J.Super. 440 (App. Div. 1981). Normally, where a collective agreement is silent or ambiguous on an issue, past practice controls. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). But mere silence on an issue does not give a past practice binding effect where the particular past practice is contrary to - or gives an effect different from - the express provisions of a collective agreement. N.J.Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710, 711 (¶18264 1987); Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). Where the mutual intent of the parties can be determined from a simple reading of the parties' agreement, a contrary past practice cannot be relied upon. New Brunswick Bd. of Ed., 4 NJPER 84 (¶4040 1978), mo. for recon. den., 4 NJPER 156 (¶4073 1978).

Here, salary advances were not controlled by past practice because J-12, and the previous agreements, clearly provided for

them. Therefore, any practice the PBA relied upon which was contrary to the agreements is insufficient to create a binding legal obligation.

The PBA apparantly believes that salary advances paid after a contract expires but before a new contract is reached is a past practice. The argument lacks merit. Those time periods between the expiration of one agreement and the implementation of a new agreement have no legal significance in this case. First, once each agreement expired the County was not obligated to pay salary advances until a new agreement was reached. Its decision to make those advances during the interim was purely voluntary, and obviously in anticipation of negotiating a subsequent raise. Second, since each new agreement was implemented retroactive to the expiration of the prior agreement, no intervening, and inconsistent, prior practice could prevail. Thus, in hindsight, salary advances were always required to be paid by contract, not prior practice, and the County met its contractual obligations by paying the advances through 1995.

The law is well settled that an employer has met its negotiations obligation when it acts pursuant to its collective agreement. Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980).

Even where an employer deviates from a practice that has existed for ten years, it does not waive its contractual rights, and it does not violate the Act, by subsequently changing the practice to be consistent with its collective agreement. See N.J. Sports & Exposition Auth. Such is the result here. The County paid advances in prior years when the contract had expired although not required to do so, but chose not to pay them in 1996 when no new agreement was in place.

The PBA also argued that the County repudiated Article 8, Section 7 of J-12 by not paying advances in 1996. But that argument has no merit. J-12 required salary advances in 1994 and 1995, but not in 1996.

The PBA's argument that the County's partial advance payment in January 1996 was indicative of an obligation to make advance payments after J-12 expired also lacked merit. The County's action was no less voluntary because it made a partial payment.

Finally, the PBA's allegation that the County failed to negotiate with it during the fall and early winter of 1995-96, and delayed the commencement of negotiations to avoid paying a salary advance, was wholly unsupported by the record.

Accordingly, based upon the above findings and analysis, I make the following:

Conclusion of Law

The County did not violate the Act by refusing to pay salary advances in 1996.

Recommendation

I recommend the complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: November 6, 1996
Trenton, New Jersey