P.E.R.C. NO. 92-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MOUNT HOLLY SEWERAGE AUTHORITY,

Respondent,

-and-

Docket No. CO-H-90-217

CONSTRUCTION AND GENERAL
LABORERS' UNION LOCAL NO. 172
OF SOUTH JERSEY, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission, dismisses a Complaint filed by the Construction and General Laborers' Union Local No. 172 of South Jersey against the Mount Holly Sewerage Authority. The Complaint alleged that the employer violated the New Jersey Employer-Employee Relations Act by deducting past beeper pay from retroactive wage increases.

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CONSTRUCTION AND GENERAL
LABORERS' UNION LOCAL NO. 172
OF SOUTH JERSEY, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Ferg, Barron, Mushinski & Gillespie, attorneys (Stephen J. Mushinski, of counsel)

For the Charging Party, Albert G. Kroll, attorney (Raymond G. Heineman, Jr., of counsel)

DECISION AND ORDER

On February 2, 1990, the Construction and General Laborers' Union Local No. 172 of South Jersey, AFL-CIO filed an unfair practice charge against the Mount Holly Sewerage Authority. The charging party 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) and (5),[1/] by deducting past beeper pay from retroactive wage increases. During successor

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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. (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...."

contract negotiations, the parties agreed that employees who voluntarily carried beepers would no longer be paid. They dispute whether they also agreed that the employer would recoup past beeper payments from those employees when it issued retroactive increases under the successor agreement.

On January 10, 1991, a Complaint and Notice of Hearing issued. On January 25, 1991, the employer filed its Answer denying that it had violated the Act and asserting that beeper pay was fully negotiated and agreed to by the parties.

On April 3, 1991, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by June 7, 1991.

On July 11, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-2, 17 NJPER 366 (¶22171 1991). He found that the parties had negotiated that beeper pay would be deducted retroactively once the new collective negotiations agreement was put into effect.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due July 24, 1991. The charging party was granted an extension of time until August 21, 1991 to file exceptions so that it could evaluate whether to do so. No exceptions were filed and no further request for an extension of time was made.

I have reviewed the record. I incorporate the Hearing Examiner's uncontested findings of fact (H.E. at 3-13). Pursuant to

the authority granted to me by the full Commission in the absence of exceptions, I adopt the recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: September 12, 1991
Trenton, New Jersey

H.E. NO. 92-2

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

In the Matter of

MOUNT HOLLY SEWERAGE AUTHORITY,

Respondent,

-and-

Docket No. CO-H-90-217

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

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Mount Holly Sewerage Authority did not violate the New Jersey Employer-Employee Relations Act by deducting beeper pay from retroactive salary checks. The Hearing Examiner found that the parties had negotiated an arrangement which resulted in the deduction of beeper pay once their new collective agreement was made effective.

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. 92-2

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

In the Matter of

MOUNT HOLLY SEWERAGE AUTHORITY,

Respondent,

-and- Docket No. CO-H-90-217

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

Charging Party.

Appearances:

For the Respondent, Ferg, Barron, Mushinski & Gillespie, Attorneys (Stephen J. Mushinski, of counsel)

For the Charging Party, Albert G. Kroll, Attorney (Raymond G. Heineman, Jr., of Counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on February 2, 1990 by the Construction and General Laborers Union Local No. 172 of South Jersey, AFL-CIO (Union) alleging that the Mount Holly Sewerage Authority (Authority) violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Charging Party alleged that the Authority

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

Footnote Continued on Next Page

unilaterally changed a negotiated term and condition of employment by deducting beeper pay from a retroactive wage increase.

A Complaint and Notice of Hearing (C-1) was issued on January 10, 1991. The Authority filed an Answer (C-2) on January 25, 1991 denying it violated the Act and asserting a negotiations/contractual defense. A hearing was held on April 3, 1991 in Trenton, New Jersey.[2/] The parties filed post-hearing briefs by June 7, 1991.

Based upon the entire record I make the following:

Findings of Fact

1. The Union and Authority were parties to a collective agreement effective March 1, 1987 through December 31, 1988 (J-2) providing for the following "stand-by time" or "beeper pay":

> Article 15, Section 5 Stand-By Time:
>
> Any employee who is required by the Authority to carry a beeper and be on stand-by shall be compensated three (3) hours per week basic pay in addition to their regular pay or any overtime pay.
>
> Any employee who doesn't respond due to their own negligence, shall receive only one (1) hour's pay.[3/]

1/ Footnote Continued From Previous Page

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

3/ The parties refer to this second paragraph of Article 15 Section 5 of J-2 as the "penalty clause."

There was no written provision for paying employees for the voluntary carrying of beepers. Prior to January 5, 1989 someone in the plant department, maintenance department, and road crew (collection system department) was required to carry a beeper. In the road crew usually there was no particular assignment, someone volunteered to carry the beeper, but if no one volunteered, someone was assigned (T20). Despite the wording of the contract, prior to January 1989 the established practice was to pay employees the three hours pay per week provided for in Article 15, Section 5 of J-2 whether an employee was required to carry the beeper, or volunteered (T77).

2. Negotiations for a new collective agreement began on November 29, 1988. The Union was represented in negotiations by collection systems foreman Joel Hervey, employees Chris Robeau, Bob Young, Jeff Brant, and Union Business Representative Frank Perro (T32, T50). At that meeting the Union presented its contract proposals (J-4) which did not specifically outline its economic and language proposals (T59). The Union listed maternity leave, dental plan, prescription plan and disability plan as proposals, but did not specifically explain what it sought (T60). Article 15, Section 5 of J-4 reads: "Problem with beepers not working." The Union presented that language not as a proposal to change contract language, but merely to bring to the Authority's attention a problem with some beepers (T32, T50-T51).

William Dunn, the Authority's Executive Director, was present at all negotiation sessions. On November 29 the parties discussed both economic (monetary) and language issues, including beeper pay, but they agreed to try to settle language issues prior to the economic issues because many of the Union's economic proposals lacked information (T59-T60).[4/] Dunn responded to the beeper issue saying it would be researched further and he would subsequently respond (T51, T60, T72).[5/] At the second session on January 10, 1989, the Authority made a beeper proposal, indicated it was considering dropping beeper pay altogether, proposed eliminating the requirement to carry beepers except for supervisors, and asked the Union to consider doing the beeper on a voluntary basis with no compensation other than the overtime that might result (T42, T51,

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4/ On direct examination Perro testified that monetary items were not discussed at the first few negotiation sessions, that beeper pay was discussed, but that there was no specific identification of beeper pay as a monetary benefit (T53). On cross-examination, however, Perro testified that on November 29, after J-4 was presented, the parties discussed economic issues and he corrected his earlier testimony by admitting there were Union proposals and discussions with the Authority regarding economic issues (T59). I credit Perro's cross-examination on this point and find that monetary issues, including beeper pay, were discussed in the early negotiation sessions.

5/ Joel Hervey, testified that at the November 29th meeting the Authority (Dunn) suggested it(he) would no longer require anyone to carry the beeper, that it would be on a voluntary basis (T33). Both Perro and Dunn testified that the Authority only said that the beeper issue would be researched further (T51, T60, T72). I credit Perro's and Dunn's testimony and find that Hervey was mistaken as to which meeting the Authority presented its proposal to eliminate most beeper assignments.

T73). The Union at first rejected the proposal (T42), but then agreed to consider it, and the Authority agreed to draft language to be submitted to the Union (T52, T61).

That same day the Union proposed, and the Authority agreed, that all monetary and wage benefits be retroactive to January 1, 1989 (T34, T52-T53, T73-T74). Both Hervey and Perro testified that there were no discussions at that meeting regarding which monetary issues would be retroactive or whether beeper pay was subject to retroactivity (T34, T52-T53). Dunn testified that on January 10 he said beeper pay would probably be a monetary item. He also testified that he assumed beeper pay was subject to retroactivity, but it was not specifically discussed that day (T73-T74). Hervey explained that there was no discussion of any issues to be included or excluded in retroactivity. Although the witnesses differed over whether, on January 10, they discussed beeper pay being a monetary item, I find they agreed they did not specifically identify which items were subject to retroactivity (T64-T65).[6/]

Dunn entered negotiations believing beeper pay was a monetary item (T73). Perro did not consider the Union's beeper language in J-4 to be a monetary proposal because they were not asking for additional money. But he agreed it became a monetary issue when the Authority proposed deleting beeper pay on January 10

6/ It was unnecessary for me to resolve at this point whether the parties discussed beeper pay being a monetary item on January 10.

(T62-T63). Hervey agreed that beeper pay was a monetary issue and was negotiated as part of the monetary package (T43-T44, T48). Thus, I find that after the January 10 negotiations session both parties defined beeper pay as a monetary item.

3. The third and fourth negotiation sessions occurred on February 28, and April 4, 1989, respectively. Beeper pay was not directly discussed at either session (T34, T53). The Authority did, however, present its wage proposal to the Union on April 4 which included beeper pay as a monetary proposal (T34, T53-T54). There was no discussion defining retroactivity at either session (T34, T54).

The fifth session occurred on June 4 or 7, 1989. The parties discussed beeper pay and reached agreement on that issue and presumably the whole contract. The parties agreed that those persons required to carry the beepers, only the supervisors/department heads, would be compensated the three hours' pay pursuant to the contract, and that anyone else carrying a beeper would do so voluntarily (T35, T42-T43, T54-T55, T74). The Authority agreed to draft a memorandum of understanding on all resolved issues (T55).[7/]

7/ On cross-examination Hervey first testified that the parties reached agreement on beeper pay on or about June 7th, then he testified that as of that date he believed the beeper issue was still open (T42-T43). Both Perro and Dunn testified that an agreement on beeper pay was reached at that time (T54-T55, T74). I credit Perro's and Dunn's testimony.

By letter of June 21, 1989 (J-5) the Authority's attorney sent Perro a copy of the prepared memorandum of agreement. The memorandum contained the following beeper pay language:

> Article 15, Section 5 - Beeper reference shall be deleted, calls shall be made through the volunteer list with salary adjustments.

After reviewing J-5 Perro and Hervey agreed that the beeper language (and other items) needed clarification, and a meeting was scheduled between them and Dunn (T36, T56). Perro told Dunn that the beeper language in J-5 was not the language the parties had agreed upon. He said the parties had reached an agreement to use the contract language, but that only those employees required to carry beepers would be reimbursed at the three hours base rate (T56-T57).[8/] Dunn agreed that the language in J-5 inaccurately reflected the parties' agreement on beeper pay (T82). The parties then reached the agreement to keep the first paragraph, but delete the last

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8/ Hervey testified that on June 28 the Union again tried to have the full contract language on beepers restored and have everyone paid for carrying beepers, but the Authority rejected it (T36, T47). He then said that department heads would be required to carry beepers "from that point forward, or from whatever point the contract was settled" (T36), and that remaining beeper carriers would be on a voluntary basis with no compensation except the overtime (T36). While Hervey's testimony supports the finding that department heads would be required to carry beepers and all other employees would only carry them on a voluntary basis without compensation, there is no reliable evidence that the parties agreed that the new beeper agreement would only be effective from June 28 forward or from whatever point the contract was settled, as opposed to being subject to retroactivity. Thus, I do not credit Hervey's testimony to prove that beeper pay was not subject to retroactivity.

paragraph (penalty clause), of Article 15, Section 5 of J-2, and to only pay the three hours base pay to the department head employees required to carry beepers (T36, T57, T66, T82-T83). Those department heads included Joseph Gaskill, Robert Maybury, Larry Shemelia, and Brian Sperling (T79). The first paragraph of Article 15, Section 5 of J-2 is essentially the same as Article 15, Section 5 of J-1, the parties' 1989-1990 collective agreement.9/ The Union ratified J-1 in October and the Authority ratified it in November 1989 (T37).

4. Although J-2 expired on December 31, 1988, the parties, during most of 1989, continued to apply the status quo established practice and terms and conditions of employment that existed under J-2 while they were negotiating a new agreement. Thus, prior to the signing of J-1 in November 1989, employees who were required to carry the beepers, and those who voluntarily carried beepers, were paid the additional three hours salary provided for by the established practice and in Article 15, Section 5 of J-2 (T68-T70, T78). Perro believed, however, that even after J-1 was signed, employees would be entitled to keep the beeper pay for beeper carrying prior to November 16, 1989 as if under the terms and practice of the prior agreement (T58, T68-T69). Perro

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9/ The actual language of Article 15, Section 5 of J-1 provides:

> Any employee who is required by the Authority to carry a beeper and be on stand-by shall be compensated through an adjustment in their salary. The adjustment being three (3) hours base pay per week.

acknowledged that after J-1 was signed employees would not be paid for voluntarily carrying a beeper (T69).

Dunn agreed to the status quo arrangement prior to the effective date of J-1, and to no reduction in the beeper pay during that time period, only until the total contract was agreed upon because the Union asked that all monetary issues be retroactive (T78). He believed that beeper pay was a monetary issue subject to retroactivity, and that beeper money paid to employees for voluntarily carrying beepers after January 1, 1989 would be deducted from retroactive increases owed to those employees once J-1 was signed. Perro did not tell Dunn that he (Perro) felt that beeper pay should not be subject to retroactivity, nor did Dunn give Perro any reason to believe that the Authority would not consider beeper pay subject to retroactivity (T64).[10/]

In the fall of 1989 Hervey began hearing rumors that beeper pay would be included in the retroactive calculations. He met with Plant Superintendent, Dave Baril, who informed him that beeper pay would be included in the calculations retroactive to January 1, 1989. Hervey did not agree with that result but could not resolve it with Baril (T38-T39, T48-T49).

10/ On cross-examination Perro was asked whether he had "any reason to believe that the Authority would not consider beeper pay to have been included in the retroactive items?" and he responded: "At no time did Mr. Dunn lead me to believe that." (T64). That answer was not responsive to the question. It is a negative pregnant from which I infer the answer would have been "no."

J-1 provided for certain salary increases. After it was signed the Authority prepared and served on employees "backpay determinations" (J-3 A-L) covering the period January 5, 1989 to November 15, 1989. Those determinations showed increases for straight time, overtime hours, and shift work, from which beeper pay was deducted from all but the department head/supervisory employees who were required to carry beepers but had not been paid for it. J-3 A-L reflected the retroactive increase in salaries and other payments that were adjusted up or down depending upon whether the employee should or should not have been paid for carrying the beeper (T79-T80).[11/]

5. After the employees received their copy of J-3 Hervey informed Perro of the beeper pay deductions and he scheduled a meeting with Dunn. Perro told Dunn that beeper pay should not have been deducted because "the Authority required them to carry the beeper." (T58). Dunn would not change his position.

After January 1, 1989, Dunn did not require employees, other than department heads, to carry a beeper, and believed those who did, had volunteered to carry one and were not to be paid for that function (T77, T85-T87). He was unaware of any order to

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11/ J-3 I, J, K, and L show that supervisors Gaskill, Maybury, Shemelia and Sperling had beeper pay added to their retroactive payments. J-3 A, B, C, D, E, F, G show that employees Brant, Chambers, Danser, Hervey, Heyward, Olszewski, Pearson, and Rodgers had beeper pay deducted from their retroactive payments. But the J-3 documents do not show when those beeper hours were worked, i.e., before or after June, 1989.

employees to carry it (T91), but he, personally, never told employees that they were not required to carry a beeper (T94). But in, or after, June 1989 supervisors told employees they were not required to carry one (T94-T95). Dunn knew that employees carrying the beepers from January to June 1989 assumed they were being paid for it, but he knew they also knew that all monetary issues were retroactive to January 1, 1989 (T95).

6. Hervey attended a supervisors meeting in November 1989. Several foremen raised a concern that since beeper carrying was voluntary, they had no idea who was carrying a beeper at any particular time. Superintendent Baril told them he would prepare a schedule of which employees were carrying beepers (T39). Hervey became a collection system (road crew) supervisor in June 1990. He does not assign employees to carry beepers. He asks for volunteers and has never had a problem finding someone (T40).[12/]

Exhibit CP-1 is the monthly 1990 Road Crew Work Schedules. At the bottom of those schedules it lists beeper coverage with the weeks in question and a name or initials of the employee who carried the beeper. In the latter part of 1990 Shemelia filled in the

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12/ Hervey actually testified: "I no longer make a schedule for -- in other words, I no longer assign a person to carry the beeper in the collection system." (T40). The evidence, however, does not show how long he did make a beeper schedule for the road crew, nor does it show whether it was voluntary or required. Since there is prior testimony that Baril made a schedule because beepers were carried on a voluntary basis (T39), I do not find Hervey's testimony that he "no longer assign[s] a person" to mean that beeper carrying was required rather than voluntary.

information on CP-1 (T40). CP-1 does not indicate whether the names appearing in the beeper section were voluntary or required beeper carriers.

The parties stipulated that road crew schedules for 1989 could not be found, but that schedules existed for some of the latter months of 1989 which used the same "format" for beeper scheduling as contained in CP-1. The 1989 schedules were prepared by the road crew themselves and kept at the plant (T25-T26). They did not prove that employees were required to carry beepers.[13/]

7. Patrick Rodgers, a road crew employee, was paid for carrying a beeper between January 1 and November 15, 1989. On November 15 he received J-3H, his retroactive pay increase, from which beeper pay ($766.00) had been deducted (T21-T22; J-3H). Rodgers volunteered to carry the beeper which was the basic practice in the road crew (T20, T28). He carried the beeper according to the

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13/ Since the format for the 1989 schedules were the same as CP-1, there was no showing that names for beeper carriers on the 1989 schedules were required to carry beepers. In fact, since Hervey's prior testimony indicates that in late 1989 beeper carrying was voluntary (T39), I infer that, absent supervisors, the names on the 1989 schedules, which only existed in latter 1989 (T25), had volunteered to carry beepers. Road crew employee Patrick Rodgers indicated that around June 28, 1989 employee initials were placed on the beeper section of the work schedules (T21). Even assuming that is true and shows that schedules similar to CP-1 existed back to June or July 1989, it does not show that those were required assignments. In fact, it was clear by June 28 that non-supervisory employees were not required to carry beepers and would not receive extra compensation for voluntarily carrying them (T95).

posted schedule (T28). He was specifically required to carry the beeper one time when his supervisor was on vacation T28).[14/]

By November, Rodgers knew that he was not required to carry the beeper, and knew that if he volunteered he would not be compensated for it. Thus, he refused to carry the beeper for some time. Dave Baril apparently told Rodgers that employees that did not carry the beeper when assigned would be looked upon unfavorably (T22-T23).[15/]

Analysis

This case concerns a dispute over how beeper pay should have been handled between January 1, 1989 and November 15, 1989. Were the employees to be paid as if under the prior practice, or not paid as pursuant to the new practice? No dispute exists about how

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14/ On direct examination Rodgers testified that between January 1 and November 15, 1989 he was not aware that he was not required to carry the beeper (T22). He said he was not told that until after November (T23). But earlier on direct examination he testified that Road Crew employees were basically voluntary carriers (T20). On cross-examination he again testified that he generally volunteered to carry the beeper, because he knew it had to be covered, and he was only directed to carry it when Shemelia was on vacation (T28, T30). When asked if he was ever required to carry the beeper other than for Shemelia, he responded with a negative pregnant, "As far as being scheduled to? Yes." (T28). I infer from that response, and from his earlier testimony, that he regularly volunteered to carry it, and that other than the one Shemelia substitution, he was not specifically required to carry it. Rodgers may not have known that he was not required to carry it, but he apparently volunteered to do it (T30).

15/ There was no evidence that Baril, Dunn, or anyone else from the Authority took action against, or made any other statements to Rodgers or any other employee for not carrying a beeper.

beeper pay was handled prior to January 1, 1989. The parties' collective agreement at that time, J-2, provided that any employee who was required to carry a beeper would be compensated three hours per week. Based upon the wording of that clause employees who voluntarily carried beepers were not contractually entitled to extra compensation. But the established practice at that time was to pay all beeper carriers three hours pay per week.

There is also no dispute over the contract and practice the parties negotiated to be effective on January 1, 1989 as J-1. Article 15, Section 5 of J-1, like the same article in J-2, provided that any employee required by the Authority to carry the beeper would be compensated. That article, however, did not include a penalty clause. As with J-2, there was nothing in J-1 about paying employees for voluntarily carrying the beepers. During the 1989 negotiations process, however, the parties negotiated an end to the prior unwritten established practice. For 1989-90 the parties agreed that only employees specifically required to carry beepers, normally only supervisors/department heads, would be compensated pursuant to Article 15, Section 5. Employees who voluntarily carried the beeper would not be compensated. J-1 became effective by the middle of November and there is no dispute as to the intent or meaning of the parties regarding beeper pay from that moment on.

During the period the parties were negotiating for a new agreement, January 1 through November 15, 1989, they agreed that the

status quo with respect to beeper payment that existed prior to January 1, 1989 would continue. Thus, during that time period employees who were both required to, and volunteered to, carry the beepers were reimbursed pursuant to the prior practice and Article 15, Section 5 of J-2. But the Union had agreed by June of 1989 that the Authority was not required to compensate voluntary beeper carriers during 1989-90, and also knew that all monetary items were retroactive to January 1, 1989.

In its post-hearing brief the Union argued that the Authority agreed during the negotiations process to make contractual wage increases retroactive to January 1, 1989.[16/] That sentence is only partially accurate and, thus, is misleading as written. The parties actually agreed during negotiations that wage and monetary benefits would be subject to retroactivity. No monetary items were restricted from retroactivity, and the parties agreed that beeper pay was a monetary item.

My decision rests on the resolution of two issues. First, was beeper pay subject to retroactivity and, second, were the employees required to carry beepers? Having found that both Perro and Hervey agreed that beeper pay was a monetary item, that neither it, nor any other monetary item was excluded from retroactivity, and that all wage and monetary items were subject to retroactivity, I

16/ In its post-hearing brief the Union actually put the date of January 1, 1990. The operative time period in this case was January 1, 1989, and I assume that the 1990 date was a typographical error.

find that the parties reached an agreement that beeper pay was a monetary item subject to retroactivity.

During the negotiations process the parties obviously assumed that all wage increases would be subject to retroactivity which is the norm in collective negotiations. The Union may not have thought or realized that beeper pay, if made retroactive, would have a negative impact on the employees, but they did not restrict monetary items or retroactivity to items other than beeper pay. Dunn agreed to the payment of beeper pay during the status quo period because he understood that beeper pay was a monetary benefit, was subject to retroactivity, and would, therefore, be deducted at a later time. Dunn's belief that beeper pay was monetary and subject to retroactivity was an accurate and reasonable conclusion based upon what the parties agreed to during the negotiations process.

In its post-hearing brief the Union argued that neither Perro nor Hervey identified beeper pay as an item that would be subject to retroactivity. The burden here, however, was on the Union to establish that beeper pay was not subject to retroactivity as opposed to the burden being placed on the Authority to prove that it was. The Union failed to make that proof.

Although the Union may not have intended to make beeper pay subject to retroactivity, or merely made a mistake in asking that all wage increases and monetary benefits be subject to retroactivity, neither situation makes the Authority's action

violative of the Act since it merely implemented the parties' agreement. I am not necessarily finding that this case is one of mutual mistake or a failure of a meeting of the minds, but even if it is, the complaint would still be dismissed. See North Caldwell Bd. of Ed., P.E.R.C. No. 90-92, 16 NJPER 261 (¶21110 1990); Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988); and Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

In North Caldwell the Commission found there was no meeting of the minds and dismissed the Complaint when the parties completed negotiations with two different views of what had transpired and no written agreement to support either party's view. Here, although there was no written provision on the retroactivity agreement, the parties did not end negotiations with two different views of what transpired regarding beeper pay and retroactivity. The evidence shows they agreed that all wage and monetary benefits would be retroactive, that beeper pay become a monetary benefit, and that neither beeper pay, nor any other monetary benefit was excluded from retroactivity.

To the extent the Union intended to exclude beeper pay from retroactivity, and simply forgot or misunderstood the affect of what it had agreed to, its unexpressed intent or misunderstanding is insufficient to establish that the Authority implemented a result other than what the parties actually agreed upon. Jersey City Bd. of Ed. The Union may simply have made a mistake, but the

Commission, by adopting the following pertinent language in Hillside Bd. of Ed. at 14, rejected mistake as a basis to remake a bargain.

> Contracts are not reformed for mistakes; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of mistake. They will, however, rewrite a writing which does not express the bargain. J. Calamari and J. Perillo, Contracts, 2d ed., §9-31 at 312 (1978) cited in Steelworkers v. Johnston Industries, ___ F. Supp. ___, 120 LRRM 2695 (E.D. Mich. 1984).

The bargain here, although unwritten, was clear: monetary items were retroactive and beeper pay was a monetary item. The Union cannot remake the bargain at this point.[17/]

17/ Since Article 15, Section 5 of J-1 only provides beeper pay to employees required to carry beepers, and since beeper pay was a monetary item retroactive to January 1, 1989, the Authority was not contractually obligated to pay voluntary beeper carriers for that function during 1989, and the prior unwritten established practice cannot supersede the clear terms of the written 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).

In considering whether a public employer must negotiate before acting inconsistent with a past practice rather than relying on its collective agreement, 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). Thus, 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 acting pursuant to the collective agreement. See N.J. Sports & Exposition Auth.

Second, the Union did not show by a preponderance of the evidence that the non-supervisory employees were required to carry beepers during the period January 1, 1989 through November 15, 1989. Although Rodgers testified that he did not know that he was not required to carry a beeper during that time period, he also testified that he and the other road crew employees generally volunteered to carry the beeper, and that he was only required to carry the beeper in one instance when he substituted for supervisor Shemelia. No other employees were offered to prove that they were required to carry beepers. Rodgers' testimony is insufficient to prove that either he or any other non-supervisory employee was required to carry beepers as opposed to voluntarily assuming that responsibility. Similarly, the work schedules in CP-1 did not establish that the employees were required to carry beepers during the period from June 1989 through November 15, 1989. The schedules for 1989 were not actually produced at hearing, but even if they were the same format as CP-1, nothing on CP-1 indicates that the employees whose names or initials appear next to weeks for beeper carrying were required to carry it as opposed to having volunteered for that function. In fact, nothing on CP-1 shows whether employees were required to carry beepers certain weeks and volunteered on other weeks. Dunn did not require employees to carry beepers and was not aware that anyone else had issued such an order, thus, the burden was the Union's to prove that such an order or requirement had been issued. The evidence did not support such a finding.

Although Dunn did not notify employees during the negotiations process that they were not required to carry beepers, that does not prove that they were required to carry them. Dunn made the Authority's position known to the Union's negotiations team which included several unit members. He was not required to notify the employees directly. An attempt by Dunn to directly contact the employees about the Authority's beeper pay position during the negotiations process could have been a violation of the Act. See Matawan-Aberdeen Reg. School Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984).

In its post-hearing brief the Union cited three cases to support its position that the Authority violated the Act. Newark City Housing Authority, P.E.R.C. No. 90-116, 16 NJPER 390 (¶21160 1990); Stanhope Borough Bd. of Ed., H.E. No. 90-22, 15 NJPER 682 (¶20277 1989);[18/] and Borough of Somerville, P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984).

In Newark City Housing the employer violated the Act by failing to negotiate prior to implementing an on-call beeper program for more than one employee. That case is distinguishable because here the parties did negotiate over the beeper pay arrangement and

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18/ In its post-hearing brief the Union cited Stanhope but gave the cite as 15 NJPER 257. The case cited at 257 was Passaic Co. Bd. of Ed., P.E.R.C. No. 89-98 which was a decision directing the issuance of a complaint in a charge alleging a unilateral change in a past practice. That case is not relevant to the case here.

agreed to apply it retroactively. In Stanhope a Commission hearing examiner recommended that the Board violated the Act by unilaterally deviating from a negotiable past practice. But here the Authority did not unilaterally deviate from a past practice. The parties negotiated an end to the past practice, the beeper payment for voluntary carriers, and agreed to make it retroactive to January 1989. In Somerville the employer violated the Act by unilaterally denying retroactive salary checks to people who were no longer employees just prior to the adoption of a new contract.[19/] That case is distinguishable because here the Authority issued the retroactive checks and only deducted the beeper pay for voluntary beeper carriers as the parties had agreed.

Accordingly, based upon the above facts and analysis I issue the following:

Recommendation

I recommend the Complaint be dismissed.[20/]

Arnold H. Zudick
Hearing Examiner

Dated: July 11, 1991
Trenton, New Jersey

19/ That case was limited to its facts and may not always stand for the proposition that employees who separate from service prior to the adoption of a new agreement are entitled to retroactive salary increases.

20/ Since the Union did not allege an independent 5.4(a)(1) violation of the Act I will not consider whether Baril's "unfavorable" remark to Rodgers violated the Act. See Ocean County College, P.E.R.C. No. 81-122, 8 NJPER 372 (¶13170 1982).