

P.E.R.C. NO. 87-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NORTH CALDWELL,

Respondent,

-and-

Docket No. CO-86-315-3

WEST ESSEX PBA LOCAL NO. 81,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds, in agreement with the Hearing Examiner and in the absence of exceptions, that the Township of North Caldwell violated the New Jersey Employer-Employee Relations Act when it unilaterally added an additional salary step for probationary officers and refused to sign a contract which did not contain this additional step.

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Charging Party.

Appearances:

For the Respondent, John S. Kosko, Township Administrator

For the Charging Party, Shanahan & Schussel, Esqs.
(Alan Schussel, of counsel)

DECISION AND ORDER

On May 9, 1986, the West Essex Policeman's Benevolent Association, Local No. 81 ("PBA") filed an unfair practice charge against the Township of North Caldwell ("Township"). The charge alleges the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(5) and (6),^{1/} when it unilaterally added an extra salary step for probationary police officers contrary to the parties'

^{1/} These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

agreement reached during negotiations and refused to execute an agreement which did not contain the extra salary step.

On July 3, 1986, a Complaint and Notice of Hearing issued. On July 17, 1986, the Township filed its Answer. It admitted negotiating an agreement with the PBA, but denied: (1) that it included salary increases for probationary officers; (2) that they were in the PBA's negotiations unit or that (3) the PBA and the Township reached a "meeting of the minds" on a salary increase for probationary officers. As affirmative defenses, it contended the Complaint was barred by the doctrines of waiver, estoppel and laches.

The parties waived a hearing and stipulated the record.

On November 10, 1986, Hearing Examiner Mark A. Rosenbaum issued his report and recommended decision. H.E. No. 87-32, 12 NJPER ____ (¶ _____ 1986) (copy attached). He found that the Township violated subsections 5.4(a)(5) and (6) of the Act when it unilaterally added an additional salary step for probationary officers and refused to sign a contract which did not contain this additional step.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on November 24, 1986. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-4) are accurate. I adopt and incorporate them here. Under all the circumstances of this case, and acting

pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his conclusions of law and recommended remedy.

ORDER

The Township of North Caldwell is ordered to:

1. Cease and desist from:

A. Refusing to negotiate in good faith with the West Essex PBA Local No. 81 by unilaterally adding an extra salary step for probationary police officers.

B. Refusing to reduce a negotiated agreement to writing.

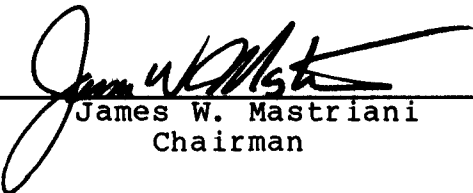
2. Take the following affirmative action:

A. Execute the agreement between the parties for 1985 (Exhibit J-1) after deleting the additional step for probationary patrolmen of less than six months. The salary guide will read, in relevant part, "Probationary patrolman - \$18,700."

B. Make whole Patrolman Clark for any monies he should have received, together with interest of 12% per annum, pursuant to a base salary of \$18,700 for all the time worked in 1985.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Dated: Trenton, New Jersey
December 23, 1986

H.E. NO. 87-32

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

In the Matter of

TOWNSHIP OF NORTH CALDWELL,

Respondent,

-and-

Docket No. CO-86-315-3

WEST ESSEX PBA LOCAL NO. 81,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner recommends that the Commission find that the Township of North Caldwell violated subsections 5.4(a)(5) and (6) of the Act when it unilaterally added an additional probationary patrolman step to the collective agreement between the Township and the West Essex PBA Local No. 81. The action occurred after the parties had reached agreement for calendar year 1985, but prior to the final execution of the agreement. The Hearing Examiner recommends that the individual probationary patrolman who was affected by the unilateral action be made whole for monies he should have received in 1985, together with interest of 12% per annum.

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. 87-32

STATE OF NEW JERSEY
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Charging Party.

Appearances:

For the Respondent

John S. Kosko, Township Administrator

For the Charging Party

Shanahan & Schussel, Esqs.

(Alan Schussel, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On May 9, 1986, the West Essex Policemen's Benevolent Association Local No. 81 ("PBA" or "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Township of North Caldwell ("Township" or "Respondent") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the PBA alleged that the Township unilaterally inserted an extra probationary step into the parties'

collective agreement in violation of subsections 5.4(a)(5) and (6) of the Act.^{1/}

On July 3, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 14, 1986, the Township filed its Answer denying that it committed any unfair practices, denying that the PBA had attempted to negotiate over the extra probationary step and asserting certain affirmative defenses. The parties agreed to stipulate facts and relevant exhibits, and to establish a briefing schedule. The last of the parties' submissions was received on November 5, 1986.

FINDINGS OF FACT

1. The Township of North Caldwell is a public employer within the meaning of Act and is subject to its provisions.

2. The West Essex PBA Local No. 81 is an employee organization within the meaning of the Act and is subject to its provisions. The PBA has represented probationary patrolmen and patrolmen since at least 1977 for purposes of collective negotiations. While the contracts from that period forward (Exhibits J-1, 2, 3, 4, 5 and 6) have not expressly included

^{1/} These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

probationary patrolmen within the recognition clause, salary guides and other contractual provisions in those contracts are conclusive on the issue. See Finding of Fact No. 6, infra.

3. During 1985 the parties engaged in collective negotiations for a successor agreement to an expired collective agreement covering the calendar year 1984.

4. In November 1985, the parties reached an agreement for calendar year 1985. Subsequently the Township prepared the written agreement.

5. The written agreement was implemented by salary ordinance of the Township in late November 1985. At that time retroactive checks for increases in 1985 were issued to PBA members. The parties agree that all aspects of the agreement were implemented and are not in dispute, with the exception of the probationary employee issue. "The parties agree that there was no discussion specifically including or excluding probationary officers' wages prior to the drafting of the 1985 agreement by the municipality." (Exhibit CP-1).

6. Prior contracts between the parties (Exhibits J-2, 3, 4, 5 and 6) as well as prior Township salary ordinances enacted by the Township (Exhibits J-8, 9, 10, 11, 12, 13 and 14) indicate a single step for probationary patrolmen with the exception of the years 1980 and 81. In the agreement covering 1980 and 1981, which replicated an interest arbitration award, probationary patrolmen were red circled at the 1979 rate, received an increase at the end

of the six-month probationary period, and then received another increase upon completion of six months after the probationary period. Moreover, in the uniform and equipment sections of the agreements new officers were routinely referenced and received extra monies with which to purchase uniforms. "New officers" clearly can include probationary officers since reference is made to completion of tenure at the police academy.

7. Since 1977, officers have been employed as probationary patrolmen by the Township. With the exception of the probationary patrolman who was, in 1985, directly affected by the dispute in this matter, the remaining probationary patrolmen were paid in accordance with prevailing rates established in the contracts and salary ordinances in place at the times of their hirings. The affected officer, Patrolman Clark, was employed by the Township as a probationary patrolman on September 9, 1985 (R-1).

ANALYSIS

The sole issue in this matter is whether a unilateral change by the employer in the schedule of wage rates in the collective agreement between the parties constitutes a violation of subsections (a)(5) and (6) of the Act. It is undisputed that the additional step added by the Township after the completion of negotiations was never discussed by the parties.

Normally, any issue not discussed by parties in collective negotiations would be deemed to be waived and simply not part of their agreement. Thus, under the stipulated facts, it appears that,

since no discussions took place concerning an additional tier for the probationary patrolmen, the Township did not negotiate in good faith when it unilaterally inserted this term in the conformed agreement.

Notwithstanding the above analysis, the Township offers several arguments as to why it did not commit an unfair practice. First, the Township argues that the PBA never attempted to negotiate the matter of an extra probationary step in the contract. Thus, in view of the silence on this issue, the Township argues that there could be no meeting of the minds and thus no agreement on this issue. I reject this argument. A comparison of the 1984 and 1985 salary guides reveals an agreement to provide a 7% across the board increase (with figures rounded up to the nearest \$25.00) to all classes of patrolmen, including probationary patrolmen. It is stipulated that no discussion took place concerning probationary patrolmen. Thus, it is apparent that, when the Township compiled the conformed agreement for 1985, it applied the 7% to the "probationary patrolman" position in the 1984 agreement to reach the figure of \$18,700. The PBA does not dispute that portion of the salary guide; indeed, it is consistent with the historic practice of the parties in non-arbitrated contracts. However, the Township labeled that figure (\$18,700) as "six months to 12 months service" and then created an additional step for probationary patrolmen with "up to six months service." Thus, it clear that while the parties never discussed the implementation of a two-tier system for

probationary patrolmen, the Township unilaterally implemented same. In a day and age where two-tier provisions are common and often hotly contested subjects of collective negotiations, an employer is certainly not entitled to implement one unilaterally in the absence of negotiating over same. To do so and then upon objection claim that there was no meeting of the minds turns the negotiations obligation upside down.

The Township also argues that the title of probationary patrolman is not covered by the 1985 collective agreement between the parties because the only probationary patrolman (Clark) was paid pursuant to a "supplemental safe neighborhood program" grant. However, there is nothing to indicate that the recognition clause reached between the parties provided for the exclusion of patrol officers based upon the funding for individual positions. Moreover, while the source of funding is a factor, it is not determinative of unit composition; rather, such determinations are normally made on the basis of community of interest considerations (see Twp. of Mine Hill, D.R. No. 79-4, 4 NJPER 294 ¶4148 1978), request for rev. den. P.E.R.C. No. 74-8, 4 NJPER 416 (¶4186 1978). Further, it is clear that the parties have long negotiated over the probationary patrolman title (see Finding of Fact Nos. 2 and 7); if there were to be some change in the unit composition in view of such history, the Township had a responsibility to seek such a distinction during negotiations.

Finally, the Township argues as affirmative defenses that the Charging Party has either waived its right to object to the

additional step on the salary guide or is estopped or barred by the doctrine of laches from making the claim that the Township failed to negotiate in good faith in this matter. The affirmative defenses are based upon the timing of the PBA's protest of the agreement which the Township manager "prepared and tendered to the PBA on November 20, 1985...." (A-2, p. 2). This argument is also without merit. The Act provides at section 5.4(c) that parties have six months within which to bring unfair practice charges to the Commission. The Charge that was filed on May 9, 1986, within six months of when the Charging Party knew or should have known that this additional probationary patrol officer step was being added unilaterally to its agreement.

Further, when the Township unilaterally added the extra probationary patrolman step to the written contract for 1985, it failed to reduce the memorandum of agreement reached by the parties to writing. This conduct violates the Township's obligation under section 5.4(a)(6).

CONCLUSIONS OF LAW

Based on the above, I recommend that the Commission find that the Township of North Caldwell violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally added a step to the collective agreement negotiated by the parties. I recommend further that the Commission find that Township also violated subsection (a)(6), since it made this change after the parties had reached an agreement but prior to the execution of said agreement.

RECOMMENDED ORDER

I recommend that the Commission ORDER

1. That the Township of North Caldwell cease from:

A. Failing to negotiate in good faith with the West Essex PBA Local No. 81 by unilaterally altering the terms of a collective agreement reached between the parties, specifically by creating a two-tier probationary patrolmen step in the contract.

B. Failing to discharge its responsibility under the Act to reduce a negotiated agreement to writing by changing the negotiated agreement when it reduced it to writing.

2. That the Township take the following affirmative action:

A. Execute the agreement between the parties for 1985 (Exhibit J-1) after deleting the additional step for probationary patrolmen of less than six months. The salary guide will read, in relevant part, "Probationary patrolman - \$18,700."

B. Make whole Patrolman Clark for any monies he should have received, together with interest of 12% per annum, pursuant to a base salary of \$18,700 for all the time worked in 1985.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Mark A. Rosenbaum
Hearing Examiner

Dated: November 10, 1986
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease from failing to negotiate in good faith with the West Essex PBA Local No. 81 by unilaterally altering the terms of a collective agreement reached between the parties, specifically by creating a two-tier probationary patrolmen step in the contract.

WE WILL cease from failing to discharge our responsibility under the Act to reduce a negotiated agreement to writing by changing the negotiated agreement when we reduced it to writing.

WE WILL execute the agreement we reached with West Exxex PBA Local No. 81 after deleting the additional step for probationary patrolmen of less than six months. The salary guide will read, in relevant part, "Probationary Patrolmen--\$18,700.

WE WILL make Patrolman Clark whole for any monies he should have received, together with interest of 12%, in 1985.

Docket No. CO-86-315-3

TOWNSHIP OF NORTH CALDWELL
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.