P.E.R.C. NO. 85-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC VALLEY WATER COMMISSION,

Respondent,

-and-

Docket No. CO-83-218-21

TEAMSTERS LOCAL #97 OF NEW JERSEY,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission and in the absence of exceptions, adopts a Hearing Examiner's conclusions that the Passaic Valley Water Commission violated the New Jersey Employer-Employee Relations Act when it unilaterally inserted certain language into a contract without seeking the approval of Teamsters Local #97 of New Jersey. The Water Commission, however, did not violate the Act when it refused to ratify certain language which Local #97 had accepted.

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TEAMSTERS LOCAL #97 OF NEW JERSEY,

Charging Party.

Appearances:
For the Respondent, Aron & Salsberg, Esqs.
(Richard M. Salsberg, of Counsel, Rodney T. Hara, on the Brief)

For the Charging Party, Goldberger & Finn, Esqs.
(Howard Goldberger, of Counsel)

DECISION AND ORDER

On February 22, 1983, Teamsters Local 97 of New Jersey ("Local 97") filed an unfair practice charge against the Passaic Valley Water Commission ("Water Commission") with the Public Employment Relations Commission. Local 97 alleged that the Water Commission violated subsection 5.4(a)(6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, after reaching agreement during negotiations with Local 97 and signing the signature sheet of the contract, it unilaterally substituted language in the final draft of the contract different from that which the parties had agreed upon.

1/ This subsection prohibits public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

On July 25, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Water Commission then submitted its Answer. It admitted that its negotiations team had reached preliminary agreement with Local 97, but asserted that the proposed contractual language had not been ratified by the full Water Commission. Therefore, it contended that there was no "meeting of the minds" between the parties. It further asserted that the language substituted did not differ materially from the language tentatively agreed upon.

On February 8, 1984, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, presented exhibits and waived oral argument. Both parties were given the opportunity to file post-hearing briefs.

On May 31, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-61, 10 NJPER ___ (¶_____ 1984) (copy attached). He found that the Water Commission had not violated subsection (a)(6) of the Act because it had not ratified the specific language (as opposed to "concepts") which Local 97 had accepted. He further found, however, that the Water Commission did violate subsection (a)(5) of the Act when it unilaterally altered Article 9 of the contract without seeking Local 97's approval. As a proposed remedy, he recommended that the parties negotiate over the specific language to be used to implement their apparent agreement. He declined, however, to require the Water Commission to post a notice of its violation of the Act.

The parties were notified that exceptions, if any, to the Hearing Examiner's report and recommended decision were due by May 31, 1984. Neither party has filed exceptions or requested an extension of time.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to consider the Hearing Examiner's report and recommended decision in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact are accurate. I adopt and incorporate them here. In the absence of exceptions and under all the circumstances of this case, I also adopt and incorporate his recommended conclusions of law and remedy.

ORDER

It is hereby Ordered that the Respondent Passaic Valley Water Commission:

A. Cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from failing and refusing to negotiate in good faith with Teamsters Local #97 of New Jersey concerning terms and conditions of employment of Local 97's unit members, particularly by failing to negotiate the language for the overtime clause, and then unilaterally inserting new language into the parties' collective agreement without first seeking Local 97's ratification of such language;

B. Take the following affirmative action:

1. Immediately engage in good faith negotiations with Local #97 to reach contractual language to implement the parties' agreement on the concepts of an overtime clause; and

2. Notify the Chairman of PERC within twenty (20) days of receipt what steps it has taken to comply herewith.

C. The allegations of the Complaint regarding subsection 5.4(a)(6) violation of the Act are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
August 2, 1984

H. E. No. 84-61

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

In the Matter of

PASSAIC VALLEY WATER COMMISSION,

Respondent,

-and- Docket No. CO-83-218-21

TEAMSTERS LOCAL #97 OF NEW JERSEY,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Passaic Valley Water Commission violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally inserted new language in the parties' collective agreement without first obtaining ratification of that language by Teamsters Local No. 97. Although the Teamsters did not specifically allege such an (a)(5) violation, the facts as fully and fairly litigated contained the evidence of the violation and the Appellate Division has approved of such findings. The Hearing Examiner recommended that the PVWC be required to negotiate over the language in question.

However, the Hearing Examiner also recommended that PERC find that the Passaic Valley Water Commission did not violate subsection 5.4(a)(6) of the Act as alleged by the Teamsters because the facts demonstrated a failure of the meeting of the minds.

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

H. E. No. 84-61

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

In the Matter of

PASSAIC VALLEY WATER COMMISSION,

Respondent,

-and- Docket No. CO-83-218-21

TEAMSTERS LOCAL #97 OF NEW JERSEY,

Charging Party.

Appearances:

For the Respondent, Aron & Salsberg, Esqs.
(Richard M. Salsberg, of counsel, Rodney T. Hara, Esq. on the brief)

For the Charging Party, Goldberger & Finn, Esqs.
(Howard Goldberger, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("PERC") on February 22, 1983, by Teamsters Local No. 97 of New Jersey ("Charging Party") alleging that the Passaic Valley Water Commission ("Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party has alleged that the Respondent failed to place certain negotiated clauses into a written agreement and to sign such an agreement all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(6) of the Act. 1/

1/ This subsection prohibits public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

The undersigned notes that although the Charging Party did not allege an independent violation of N.J.S.A. 34:13A-5.4 (a)(1), if the Charging Party was successful in proving the (a)(6) violation, then there would be a derivative violation of 5.4(a)(1). That subsection provides that public employers, their representatives or agents are prohibited from "1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

The Charging Party maintained that the parties had negotiated and ratified specific contractual language regarding the payment of overtime to certain unit members when they worked a sixth and/or seventh day. It then argued that the Respondent changed that specific language and attempted to insert the changed language into the parties' collective agreement. The Charging Party sought the placement of the allegedly agreed upon language into the collective agreement. The Respondent denied committing any violation of the Act and asserted that it did not ratify the contractual language in question; that there was no meeting of the minds as to what was agreed upon; and, that the changes made by the Respondent comported to what it believed was the agreement, and that those changes did not substantially or materially differ from the allegedly agreed upon clause.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 25, 1983 and assigned to Hearing Examiner Joan Kane Josephson. The Answer denying any violation was received on August 12, 1983. A hearing was subsequently held in this matter before the undersigned Hearing Examiner on February 8, 1984 in Newark, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. 2/ The Re-

2/ The hearing was originally scheduled with Hearing Examiner Josephson for October 4, 1983 but was rescheduled on September 14, 1983 for November 4, 1983 pursuant to the Charging Party's request. On approximately October 17, 1983 Hearing Examiner Josephson resigned from the Commission, and pursuant to N.J.A.C. 19:14-6.4 the undersigned Hearing Examiner was assigned to complete this matter. Pursuant to the Charging Party's request the undersigned rescheduled the hearing to December 5, 1983 and then to January 5, 1984. The hearing was finally rescheduled to February 8, 1984 pursuant to the Respondent's request.

spondent submitted a post-hearing brief which was received on April 3, 1984.

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

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Passaic Valley Water Commission is a public employer within the meaning of the Act and is subject to its provisions.

2. Teamsters Local No. 97 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Charging Party and Respondent were parties to a collective agreement, Exhibit J-1, covering office, laboratory, clerical, shift, and other employees for 1981-1982. Article 9 Section 5 of that agreement provided that office, laboratory and clerical employees who normally worked Monday through Friday would receive overtime at the rate of time and a half for working Saturday and double time for working Sunday. 3/ Shift employees, however, were covered by Article 9 Section 6 of J-1 which provided that shift employees would work five days in a seven-day period and that they would be entitled to overtime at the rate of time and one-half on a sixth day or double time on a seventh day, but would not be paid over-

3/ Article 9 Section 5 of J-1 provides:

Section 5. - Each employee shall receive one and one-half times his regular rate of pay for work performed on Saturday as such, and twice his regular hourly rate of pay for work performed on Sunday as such, subject to the exceptions hereinbefore provided.

time on Saturday or Sunday unless it was a sixth or seventh workday. 4/

On June 24, 1982, certain laboratory employees filed a grievance alleging a contract violation because they were given compensatory time instead of the appropriate overtime pay for week-end work (Transcript "T" pp. 56-58). That grievance was not formally resolved, but the parties agreed to informally resolve the matter during negotiations for a new collective agreement. Those negotiations began in the Fall of 1982 when the Charging Party presented its contract proposals on September 10, 1982. The Charging Party's proposals (Exhibit R-1) did not contain any proposal regarding overtime or Article 9. Then on September 17, 1982, the Charging Party presented two additional proposals (Exhibit R-2), one of which concerned laboratory employees.

4. In December 1982 the parties reached a tentative agreement on several issues including Article 9 and the payment of overtime to laboratory (and other) employees. That tentative agreement, including the tentative agreement on Article 9, was reduced to writing (Exhibit CP-1) by the Respondent's Personnel Director and chief negotiator, John Galletta, and was sent to Pat Nardolilli, the Charging Party's business representative, on Decem-

4/ Article 9 Section 6 of J-1 provides:

> Section 6. - Shift employees working a seven day, 16 hour or 24 hour operation, shall be scheduled to work five days consisting of eight hours per day within a seven day period, excepting that a shift employee may be scheduled to work a sixth day once per month. Such shift employees shall not be paid overtime rate provided for Saturday and Sunday work as such, but shall be paid one and one-half times their regular rate of wages for any work performed on the sixth day, and twice the regular rate of wages for the seventh day worked in any seven-day period, except that any employee shall not receive such scheduled overtime pay unless he shall have worked his full scheduled work week as herein defined.

ber 14, 1982. 5/ Nardolilli on December 20, 1982, then presented CP-1 to his membership for ratification, but they rejected the wording of Article 9 and sought further clarification of overtime for laboratory, office and clerical employees for working on Saturday and/or Sunday. In fact, the Charging Party had three specific problems with CP-1. The Charging Party sought greater pay in item #2 which concerned payment for working on holidays; it sought to separate laboratory and shift workers in item #10 which involved Article 9 Section 6 and the instant dispute; and it sought to improve item #11 which concerned sick time. (T p. 171).

5. As a result of the Charging Party's refusal to ratify CP-1, Nardolilli met with Galletta, and Respondent's Chairman, Anthony Pasquarila, on the morning of December 23, 1982. At that time the Respondent agreed to the Charging Party's demand regarding holiday pay in item #2 of CP-1, and it agreed to separate item #10, Article 9 Section 6 of CP-1, but there was no agreement to change anything in item #11 of CP-1. (T pp. 84, 174). With regard to Article 9, the instant dispute, the Respondent clearly agreed that laboratory employees (and office and clerical employees) would be

5/ Article 9 Section 6 of CP-1 provides:

> Section 6. - Shift employees working a seven day, 16 hour or 24 hour operation, shall be scheduled to work five days consisting of eight hours per day within a seven day period excepting that a shift employee or a laboratory employee may be scheduled to work a sixth and/or seventh day as required. Such shift and/or laboratory employee shall be paid overtime rate provided for the sixth and/or seventh day work at one and one-half times their regular rate of wages for any work performed on the sixth day, and twice the regular rate of wages for the seventh day worked in any seven-day period, except that any employee shall not receive such scheduled overtime pay unless he shall have worked his full scheduled work week. Any employee calling in sick during a scheduled sixth and/or seventh day week will be considered the employees day off and will not be charged or paid for a sick day. He will be paid for the days worked at the applicable rate of pay.

paid on the same overtime basis as shift employees, that is, time and one-half for a sixth day and double time on a seventh day provided the employee worked his/her regular five consecutive workdays. (T pp. 163-165, 183).

As a result of that agreement Galletta drafted exhibit CP-2A (Article 9 §1 for laboratory, clerical and office employees), and Exhibit CP-2B (Article 9 §6 for shift employees) to separate Article 9 Section 6 of CP-1, and he gave copies to Nardolilli. (T pp. 175, 197-198). 6/ Galletta testified that he separated Article 9

6/ Galetta actually drafted CP-2A and 2B prior to the morning meeting of December 23, 1982. (T pp. 197-199).

Exhibit CP-2A (Art. 9 §6) provides:

Shift employees working a seven day, 16 hour or 24 hour operation, shall be scheduled to work five days consisting of eight hours per day within a seven day period, exceptiong that a shift employee may be scheduled to work a sixth day once per month. Such shift employees shall not be paid overtime rate provided for Saturday and Sunday work as such, but shall be paid one and half times their regular rate of wages for any work performed on the sixth day, and twice the regular rate of wages for the seventh day worked in any seven day period, except that any employee shall not receive such scheduled overtime pay unless he shall have worked his full scheduled work week. Any employee calling in sick during a scheduled sixth day week will be considered the employees day off and will not be charged or paid for a sick day. He will be paid for the days worked at the applicable rate of pay.

Exhibit CP-2B (Art. 9 §1) provides:

The normal workweek for office, laboratory and clerical employees shall be seven hours per day, five days per week, Monday through Friday, with the exception of employees in these categories who are required to work an eight hour day or on Saturday and/or Sunday because of special job requirements.

Laboratory employees may be scheduled to work a sixth and/or seventh day as required. Such laboratory employees shall be paid overtime rate provided for the sixth and/or seventh day of week at one and one-half times their regular rate of wages for any work performed on the sixth day, and twice the regular rate of wages for the seventh day worked in any seven day period except that any employee shall not receive such scheduled overtime pay unless he shall have worked his full scheduled work week. Any employee calling in sick during a scheduled sixth and/or seventh day week will be considered the employees day off and will not be charged or paid for a sick day. He will be paid for the days worked at the applicable rate of pay.

Section 6 of CP-1 because it "didn't change anything" except that laboratory employees could be required to work a sixth or seventh day as required (CP-2B), whereas shift employees could only be required to work a sixth day once a month (CP-2A). (T p. 174).

In the afternoon of December 23 a meeting was held before all Respondent Commission members, and Galletta, and Harold Goldman, Respondent's assistant counsel, and Nardolilli, and Leonard Melissant, a Charging Party negotiator, were also present. The evidence shows that during that afternoon meeting the parties met together at times, and separately at times (T p. 95), and that when they were together they were at different tables. (T p. 91).

Nardolilli testified that at that meeting Pasquarila and Galletta recommended that the Respondent adopt CP-2A and 2B. He further testified that the Respondent Commission members then caucused with Goldman, and that they returned, he believed, with an understanding to accept CP-2A and 2B if he (Nardolilli) took those items back for ratification. Nardolilli concluded that if he did that there would be no problem with the language. (T pp. 36-37, 91). The facts show that Nardolilli informed the Respondent that he had the authority to bind the union, and that ratification was therefore unnecessary, but he eventually did seek and obtain Charging Party's ratification of CP-2A and 2B. (T p. 37).

Although Nardolilli thought that the Respondent's request to him that CP-2A and 2B be ratified indicated its acceptance of those items (T pp. 91-92), he admitted that he could not be certain the Respondent ratified those items, or that those items were even before the Commission members when they voted. (T pp. 87-90). He only testified that he thought they voted to accept something regarding those items.

Similarly, although Melissant thought the Respondent ratified CP-2A and 2B, he admitted that he did not know whether what the Respondent actually ratified was CP-2A and 2B. (T p. 105).

Goldman, however, testified that the Respondent Commission members did not have CP-2A and 2B before them on December 23, and that he had recommended that no action be taken on the contract at that time and that the Respondent did not ratify anything on December 23. (T pp. 114, 115, 117). Goldman admitted that the Respondent asked Nardolilli to take CP-2A and 2B back to his membership, but he indicated the reason was because the Charging Party had ratified the agreement on December 20 with the understanding that items 2, 10, and 11 of CP-1 be changed, and he indicated that since the Respondent was not willing to accept one of those proposed changes (item 11), the Charging Party would have to go back to the membership for their ratification of only the two items (items 2 and 10) before the Respondent would take any formal action regarding a final agreement. (T pp. 114-115). His concern was that the Charging Party had not ratified that which would be acceptable to the Respondent, and he recommended that the Respondent not act until that ratification by the Charging Party was achieved. Goldman concluded that the only language ratified by the Respondent occurred subsequent to December 23, and was contained in Exhibit J-2. (T p. 124).

6. The evidence shows that neither Galletta, nor the Respondent's negotiating team, had the authority to bind the Respondent, and that the parties' practice was to draft the actual contract language after both parties had ratified the concepts of

an agreement. Galletta testified that although he drafted the language in Article 9 in CP-1, and the language in CP-2A and 2B, that language was not first cleared with the Respondent as a whole, and that the Respondent could not be bound by his drafting those documents and that it could reject such language. (T pp. 169, 176, 188-189). In fact, Galletta testified that the parties' normal practice after negotiations was first, for the Charging Party to ratify what the parties negotiated, and then for the Respondent to ratify what he told them was negotiated. Galetta continued that then he would get together with Goldman and draft the language in accordance with what was negotiated. (T pp. 180-181). He concluded that said practice was followed in the instant matter.

Similarly, Goldman indicated that the Respondent's normal ratification procedure was to ratify concepts of an agreement, and to then submit it to the law department to draft the actual language and incorporate it into the agreement. The agreement would then be presented to the Respondent Commission members for execution. (T pp. 118-119).

7. After the meetings on December 23, Nardolilli submitted CP-2A and 2B to his membership on December 28, 1982 and they ratified those items as well as everything else that was negotiated. (T p. 38). Subsequently, on December 30, 1982, Nardolilli met with Galletta, Goldman, and Respondent Commission members to sign the new agreement. 7/ Goldman indicated that although the Respondent

7/ Nardolilli testified that the meeting at which he signed the agreement occurred on January 6, 1983. (T p. 39). However, Goldman and Galletta testified that said meeting occurred on December 30, 1982 (T pp. 117, 176, 203), and the signature page of the agreement (J-2) is dated December 30, 1982. The undersigned credits Goldman and Galletta on that issue.

ratified all of the negotiated items on December 30, no precise contractual language was ratified at that time (T. pp. 118-119). Galletta then testified that the only documents the parties, including Nardolilli, had before them when they signed the agreement was the cover page and signature page of J-2, and he stated that Nardolilli was not given CP-2A and 2B at that time. (T pp. 176, 179). However, Galletta later admitted that other than the signature page of J-2, he did not know what other documents Nardolilli was given on December 30. (T p. 203).

Nardolilli testified that he was given CP-2A and 2B at the time he signed the agreement (T pp. 39-40), but he admitted that the agreement was not put together at that time (T p. 40), and he further indicated that he was told he would receive a copy of the agreement once it was prepared. (T p. 41).

8. Thereafter, on January 26, 1983, Leonard Melissant filed a grievance (attached to the Charge in C-1) over the language in Article 9 alleging that he was not paid overtime in accordance with the agreement. The grievance was denied at the first step, and by letter dated February 16, 1983, Nardolilli moved the grievance to a higher level.

In the interim, on February 4, 1983, Nardolilli received his copy of J-2 (the 1983-84 agreement), and on February 5 he discovered the word change between what was CP-2A and 2B and what was Article 9 Sections 1 and 6 in J-2. 8/

8/ Section 1 of Article 9 in J-2 dealing with overtime for laboratory, office and clerical employees is as follows:

Section 1. - The payroll period shall extend from Sunday, 12:01 a.m. to Saturday, 12:00 midnight. The regular work week for office, laboratory and clerical employees shall be seven hours per day, five days per week Monday through Friday, with the exception of employees in those categories who are required to work an eight hour day or on Saturday and/or Sunday because of special job requirements.

(continued)

Thereafter on March 24, 1983 Nardolilli met with the Respondent concerning the language in Article 9, and he said that the Respondent asked to renegotiate that language, but (Nardolilli) declined. (T p. 48). That language issue was never resolved.

9. Finally, the record shows that Goldman drafted the language in J-2 after December 30, 1982. He admitted that the differences between CP-2A and 2B and Article 9 Sections 1 and 6 of J-2 are attributable to him, and that any language differences were made by him in an attempt to clarify the parties' agreement. (T pp. 121-122, 142-144, 150-152).

Analysis

Having reviewed all of the pertinent contractual language as well as the testimony, the undersigned finds that although the

8/ (continued)

> Laboratory employees may be scheduled additionally to work a sixth and/or seventh day as required. For any work so performed the employee shall be paid overtime as follows: one and one-half times the regular rate for work performed on the sixth day if he shall have actually worked the preceding five days in that payroll period and two times the regular rate for work performed on the seventh day if he shall have actually worked in the preceding six days in that payroll period.
>
> Section 6 of Article 9 in J-2 dealing with shift employees is as follows:
>
> Section 6. - Shift employees working a seven day, 16 hour or 24 hour operation, shall be scheduled to work five days consisting of eight hours per day within a payroll period, excepting that a shift employee may be scheduled to work a sixth day once per month.
>
> Such shift employees shall not be paid overtime rate provided for Saturday and Sunday work as such, but shall be paid overtime as follows: one and one-half times their regular rate for work actually performed on the sixth day, and two times the regular rate for work actually performed on the seventh day. A shift employee shall not receive overtime pay unless he shall have actually worked each day of his scheduled work week.

parties did reach a basic agreement on the concepts of overtime pay for the affected employees, i.e. time and one-half for working a sixth day and double time for working a seventh day if the employee worked a regular five-day workweek, they did not reach agreement on the actual language to implement their basic agreement. In order to find that the parties reached agreement on CP-2A and 2B, the Charging Party had the burden of proof to show that the Respondent specifically ratified those clauses. See In re Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982); In re Passaic Valley Water Commission, P.E.R.C. No. 80-134, 6 NJPER 220 (¶11112 1980); In re Lower Township Bd.Ed., P.E.R.C. No. 78-32, 4 NJPER 24 (¶4013 1977). The Charging Party simply failed to meet that burden by a preponderance of the evidence. Instead, the facts show that there was no meeting of the minds as to what was actually ratified. The Charging Party clearly ratified CP-2A and 2B on December 28, 1982, but the Respondent ratified nothing on December 23, 1982, and only ratified the concepts of an agreement on December 30, 1982. The Charging Party thought that the specific language in CP-2A and 2B was ratified by the Respondent, but the Respondent thought that the language for the overtime clause had yet to be drafted in final. Thus, no meeting of the minds was ever achieved. 9/

The focus of the dispute is what occurred on December 23, and December 30, 1982. With regard to the December 23rd meeting,

9/ The Commission has issued several decisions where complaints have been dismissed because of a failure of the meeting of the minds. For example, see In re Union County Educational Services Comm., P.E.R.C. No. 84-46, 10 NJPER 31 (¶15018 1983); In re Jersey City Bd.Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); In re Mt. Olive Twp. Bd.Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983); In re Camden Fire Dept., supra; In re Tinton Falls Bd.Ed., P.E.R.C. No. 79-19, 4 NJPER 475 (¶4214 1978); and, In re Mt. Olive Twp. Bd.Ed., P.E.R.C. No. 78-25, 3 NJPER 382 (1977).

the undersigned credits Goldman's explanation regarding the Respondent's request that Nardolilli take CP-2A and 2B (and the acceptance of item 2 but rejection of item 11 of CP-1) back to the membership for ratification prior to any formal action by the Respondent Commission. Goldman's concern was that the Respondent wanted to be certain that the membership approved the results of the negotiations and changes over items 2, 10, and 11 of CP-1 before it formally considered the same.

Goldman's testimony that the Respondent did not ratify anything on December 23, and that Respondent Commission members did not have CP-2A and 2B before them on that day is also credited. Both Nardolilli and Melissant admitted that they could not be certain that the Respondent ratified CP-2A and 2B. They could only testify that the Respondent voted on something on December 23, but even the weight of that testimony is diminished because Nardolilli had difficulty throughout his testimony recalling the events surrounding CP-2A and 2B. 10/ Moreover, the undersigned believes that if there was a vote, the Respondent may simply have voted to send CP-2A and 2B, and items 2 and 11 of CP-1, back to the Charging Party for ratification. If such a vote did occur it would have been consistent with Goldman's testimony that the Respondent wanted the Charging Party to ratify those items before it considered them. In any case, the Charging Party simply did not present sufficient credible evidence that the Respondent ratified CP-2A and 2B on

10/ The undersigned specifically discounts Nardolilli's testimony where he concluded that if the Charging Party ratified CP-2A and 2B the Respondent would have no problem with the language. There was no independent evidence that the Respondent or any of its representatives made such a statement. It is certainly possible that the Respondent indicated that it would have no problem with the concepts (rather than the language) contained within CP-2A and 2B if they were ratified. But apparently there was a failure of the meeting of the minds as to what the Respondent would do if CP-2A and 2B was ratified.

December 23, nor was there sufficient basis to question the credibility of Goldman's testimony.

Finally, the undersigned credits Galletta's testimony that he could not and did not bind the Respondent to the language in CP-2A and 2B since he did not have such authority. Negotiating teams frequently lack the authority to bind the public employer. See In re Camden Fire Dept., supra; and In re Borough of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981), where the public employer's negotiators also lacked the authority to bind the employers in their respective negotiations.

With regard to the December 30th meeting, the undersigned credits Galletta's and Goldman's testimony that the parties' procedure for drafting an agreement, although unconventional, was for the concepts of the agreement to be ratified and language drafted thereafter. The Charging Party presented no evidence to the contrary. Consequently, the undersigned credits their testimony that the Respondent only ratified the concepts of an agreement by signing J-2 on December 30, and did not ratify the specific language in CP-2A and 2B. 11/ In fact, both parties admit that there was no real physical contract before them at the signing on December 30, just the front page and signature page of an agreement. It cannot be established, therefore, that the Respondent was specifically, or even knowingly, agreeing to the language in CP-2A and 2B by signing J-2. That is where a failure of the meeting of the minds occurred.

11/ The ratification by the Respondent on December 30 of only the concepts of an agreement is further established by the fact that the Respondent does not dispute the Charging Party's assertion that the parties reached an agreement to pay overtime at time and one-half for a sixth day, and double time for a seventh day if an employee worked his/her regular full work week. The Respondent only disputes the language used to implement that agreement.

Nardolilli thought by signing J-2 he was agreeing to the insertion in that document of the language in CP-2A and 2B. However, the Respondent in signing J-2 was only agreeing to the concepts set forth in CP-2A and 2B and fully expected to then prepare the language for the agreement all of which was consistent with the parties' past practice.

Furthermore, although Nardolilli testified that he was given CP-2A and 2B along with the front page and signature page of J-2 on December 30, that testimony is discounted. As previously indicated, Nardolilli's recollection of the events on December 23 and December 30 did not appear to be as clear as Galletta's and Goldman's. For example, Nardolilli testified that the contract signing occurred on January 6, 1983, yet the signature page of J-2 with Nardolilli's signature is dated December 30, 1982, and both Galletta and Goldman testified it was December 30. In addition, the facts show that Nardolilli received copies of CP-2A and 2B on December 23, 1982, and he may have had those copies with him on December 30, but it is unlikely that the Respondent would have given him those two clauses at the signing of J-2 and no other clauses of the agreement.

Consequently, no meeting of the minds was reached regarding the overtime language and the 5.4(a)(6) allegation of the Complaint must therefore be dismissed. The parties must continue to negotiate over the language to be used to implement their apparent agreement on the concepts of an overtime clause. 12/

12/ This is actually the second time that the parties' somewhat loose negotiations process resulted in a failure of the meeting of the minds. See In re Passaic Valley Water Commission, supra.

A dismissal of the 5.4(a)(6) allegation, however, does not mean that certain of the Respondent's actions did not violate the Act. PERC, as affirmed by the Appellate Division, has held that it may decide an issue, although not specifically pleaded, if the issue has been "fairly and fully tried." See In re Commercial Twp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (¶13253 1982), affirmed Appellate Division Docket No. A-1642-82T2 (12/8/83).

The undersigned believes that the facts as adduced and fairly and fully tried by both parties shows that the Respondent violated §5.4(a)(5) of the Act by unilaterally inserting language in Article 9 Sections 1 and 6 of J-2 which was not previously ratified by the Charging Party. 13/ The facts surrounding that occurrence were fairly and fully litigated. First, contrary to the Respondent's argument, the language in Article 9 Sections 1 and 6 of J-2 is clearly different from the language in CP-2A and 2B. For example, the last two sentences of CP-2A and 2B which deal with calling in sick on a sixth day of work, were not even included in Article 9 Section 1 or 6. In addition, the first sentence of Article 9 Section 1 of J-2 was a designation of a payroll period which was not contained in any form in CP-2B. Moreover, there were several word or phrase differences between the respective clauses.

13/ N.J.S.A. 34:13A-5.4(a)(5) provides:

> Public employers, their representatives or agents are prohibited 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."
>
> The Commission on other occasions has, while dismissing alleged 5.4(a)(6) violations, found that public employers have violated 5.4(a)(5) of the Act. See, In re Borough of Wood-Ridge, supra, and In re Lower Twp. Bd.Ed, supra.

The premise behind the (a)(5) finding is that the Respondent in drafting J-2 did not follow the very procedure it insisted the Charging Party follow in seeking acceptance of the language in CP-2A and 2B. That procedure was to require the Charging Party to ratify the language prior to official acceptance by the Respondent. The evidence of the violation is contained within the very evidence presented by the Respondent in arguing that it did not violate §5.4(a)(6) of the Act.

The facts show that the Respondent insisted that the Charging Party ratify CP-2A and 2B. Once Nardolilli reported back that the Charging Party had ratified CP-2A and 2B the parties met to sign an agreement. Although the undersigned has found no (a)(6) violation by the Respondent because it never actually ratified CP-2A and 2B, the Respondent clearly knew that the Charging Party had ratfied those documents, and the subsequent unilateral language change of those specific clauses and the subsequent placement of those changes in J-2 without first getting the Charging Party's ratification of the changes was a violation. To be consistent with its own procedure, the Respondent should have sought the Charging Party's ratification of the language drafted by Goldman prior to its insertion in the agreement. Goldman clearly admitted to unilaterally drafting Article 9 Sections 1 and 6 and changing the wording of CP-2A and 2B. Although he did it under the belief that he was making the language more clear, and although there may have been some communication breakdown between himself and Galletta, any communication breakdown cannot be attributed to the Charging Party, and Goldman certainly knew that the only language ratified by the Charging

Party was CP-2A and 2B. The Respondent, therefore, had an obligation to make certain that the language changes were acceptable to the Charging Party.

The Respondent's argument that there is no material difference between the language in the respective clauses is without merit. Depending upon the interpretation of the parties, there may be significant differences between Article 9 Sections 1 and 6, and CP-2A and 2B. The language changes involve either the deletion or insertion of whole sentences or phrases. The language dealing with the payroll period, for example, may be a limiting factor unfavorable to employees. 14/

In finding an (a)(5) violation the undersigned is not suggesting that the Respondent intentionally violated the Act, nor that Goldman's mere drafting of different language for overtime was a violation. The Respondent had every right to draft other language as a counter offer to CP-2A and 2B. However it was subsequent to the drafting of that language that the problem arose. The Respondent never really presented the new language as a "counter-offer" to the Charging Party. Rather, it placed the new language in J-2, knowing it was different from CP-2A and 2B, thereby essentially ratifying that language before ever showing it to the Charging Party or seeking the Charging Party's approval.

14/ Of course, if the Respondent really believed that there was no material difference between CP-2A and 2B and Article 9 Sections 1 and 6 of J-2, then it would have no problem agreeing to CP-2A and 2B. It is apparent, however, that the Respondent does have a problem with CP-2A and 2B and apparently believes that said language is unclear in certain ways and could possibly be interpreted to the Respondent's disadvantage, and/or that a controversy could subsequently develop as to the interpretation of certain aspects of those clauses. Consequently, the Respondent drafted Article 9 Sections 1 and 6 to reflect its interpretation of CP-2A and 2B which may not be the Charging Party's interpretation of those same clauses. It cannot be said, therefore, that CP-2A and 2B and Article 9 Sections 1 and 6 are essentially the same.

Since the Respondent has maintained that it never ratifies anything prior to the Charging Party's ratification, the Respondent should have followed its negotiating procedure and sought the Charging Party's ratification of the language changes in the overtime clauses prior to inserting them in J-2. Instead, it unilaterally drafted the overtime language, then adopted the language by placing it in J-2 as if it had been agreed upon by the Charging Party. Had the Respondent sought the Charging Party's ratification of Article 9 Sections 1 and 6, this charge may never have arisen.

The Remedy

Despite the finding of the above (a)(5) violation, the undersigned does not believe that a posting is either necessary or required in this case because the result in this case would be the same with or without an (a)(5) vioaltion. That is, the parties must negotiate over the language to be used to implement their apparent agreement.

Conclusions of Law

1. The Passaic Valley Water Commission violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively 5.4(a)(1), by failing to negotiate over the language for the overtime clause, and then unilaterally inserting new language in the parties' collective agreement that had not been ratified by Teamsters Local No. 97.

2. The Passaic Valley Water Commission did not violate N.J.S.A. 34:13A-5.4(a)(6) and that portion of the Complaint should be dismissed.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from failing and refusing to negotiate in good faith with the Charging Party concerning terms and conditions of employment of Charging Party's unit members, particularly by failing to negotiate the language for the overtime clause, and then unilaterally inserting new language into the parties' collective agreement without first seeking the Charging Party's ratification of such language.

B. That the Respondent take the following affirmative action.

1. Immediately engage in good faith negotiations with the Charging Party to reach contractual language to implement the parties' agreement on the concepts of an overtime clause.

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

C. That the Complaint be dismissed regarding the alleged 5.4(a)(6) violation of the Act.

Arnold H. Zudick
Hearing Examiner

DATED: May 31, 1984
Trenton, New Jersey