H.E. NO. 90-36

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

In the Matter of

Monmouth County Sheriff and
Board of Chosen Freeholders,

Respondent,

-and-

Docket No. CO-H-89-281

Monmouth County Process Servers Association,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that Monmouth County violated subsections 5.4 (a)(1) and (5) when it unilaterally ceased monthly automobile allowance payments to process servers.

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

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Monmouth County Process Servers Association,

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Appearances:

For the Respondent, Robert J. Hrebek, Esq.

For the Charging Party, Mark J. Blunda, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 27, 1989, the Monmouth County Process Servers Association ("Association") filed an unfair practice charge with the New Jersey Public Employment Relations Commission ("Commission") against the Monmouth County Sheriff and Board of Chosen Freeholders ("County") alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S A. 34:13A-5.1 et. seq. ("Act"), specifically

subsections (a)(1), (3), (5) and (7).[1/] The charge alleges that the County violated the Act when it unilaterally ceased monthly automobile allowance payments to unit employees.

A Complaint and Notice of Hearing issued on July 26, 1989. On August 22, 1989, the County filed an Answer denying it violated the Act. The County asserted that the allowance payments were terminated because the employees were assigned county cars and therefore no longer used their personal vehicles to serve process. The County further alleged that the charge was filed more than six months after the allowance termination was announced.

On September 13, 1989, I conducted a hearing during which the parties examined and cross-examined witnesses, presented evidence and argued orally. Upon completion of the hearing, both parties waived oral argument and filed post-hearing briefs by November 22, 1989.

Upon review of the entire record, I make the following:

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; (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (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; and (7) violating any of the rules and regulations established by the commission."

FINDINGS OF FACT

1. The County is a public employer within the meaning of the Act and the Association is a public employee representative within the meaning of the Act (T8).[2/]

2. The County and the Association are parties to a collective bargaining agreement which was in effect January 1, 1986 through December 31, 1987 (J-1). As of the hearing, no successor agreement had been reached (T29).[3/]

3. Article III of the agreement states:

> A. Effective January 1, 1986, the automobile allowance shall be increased to $325.00 per month per employee.
> B. Effective January 1, 1987, the automobile allowance shall be increased to $350.00 per month per employee.
> C. The Employer shall automatically pay the automobile allowance on the first of each month.

An automobile allowance provision has been in existence for approximately the last twenty (20) years (T17).

4. Process servers used their personal cars to perform county duties. In early 1987, the sheriff told the process servers that county cars would be assigned and that use of personal vehicles would no longer be required (T32, 33, 38). Process server Andrew Busko protested and told the sheriff that he was breaking the contract. No grievance was filed (T47).

2/ Transcript citation T8 refers to the transcript of September 13, 1989 at page 8.

3/ Mediation was unsuccessful and fact finding was requested (T29-30).

5. On October 20, 1987, the sheriff held a meeting with the process servers regarding car assignments (T28, 48)(R-3). Also present at this meeting were the undersheriff, three sheriff's officers,[4/] and three support personnel from the sheriff's office including Freda McLauglan, administrative assistant secretary to the sheriff (T48).[5/]

The sheriff reiterated that cars would be assigned to all county employees who served process and that use of personal vehicles for this purpose would cease (T44). The sheriff stated that this action was being taken in response to problems expressed by the process servers involving car maintenance and higher insurance rates (T43-44). The sheriff affirmed the County's desire to assign cars to both process servers and sheriff's officers to avoid discrimination between units (T44).[6/] The sheriff indicated that acquisition of the cars would be proposed in the 1988 budget and that, if approved, cars would be received in approximately nine months (T44-45).

4/ In Monmouth County, the title of process server has been eliminated. When employees currently serving in that title leave or retire, they will be replaced by sheriff's officers. In October 1987, there were three sheriff's officers who functioned as process servers (T42).

5/ Busko recalled a different attendance list at the October meeting. He testified that the sheriff, two unnamed counsels, Johnny Jones, another member of the Association and himself were at the meeting. While the conflict is irrelevant, I credit McLauglan. Her recollection of the October meeting was sharper and more specific than Busko's.

6/ Sheriff's officers are in a bargaining unit represented by the PBA (T50).

The October 20 meeting was not a negotiations session (T51). The Association did not agree to stop allowance payments (T26). The Association told the sheriff of its intention to file an unfair practice charge regarding the unilateral change. The sheriff asked Busko to refrain from filing the charge until he spoke with the freeholders about the proposed contract and the car allowance dispute. The sheriff believed that the process servers' money demands would not be a problem and that he would have an answer for Busko in a few days. Based on the sheriff's representations, Busko did not file a charge at that time (T28).

6. On October 28, 1987, an arbitrator issued a Decision and Award interpreting the contract's auto allowance provision (CP-1). In pertinent part the issue submitted for determination was:

> Was the agreement violated by 1) failing to make auto allowance payments on the first day of each month; and 2) pro rating the monthly auto allowance based upon attendance in the preceding month. If so, what shall the remedy be?

In finding that the County was obligated to automatically pay the automobile allowance without pro ration, for each month on the first day of that month, the arbitrator stated:

> The contract makes no reference to the use of vouchers. Indeed, the contract does not provide a benefit which is directly or proportionately related to a quantitative utilization of the automobile. The contract provides a sum certain to be paid monthly. This amount is not expressed as a mileage allowance as it might have been if it were intended to be a direct quantitative reimbursement. Despite the fact that vouchers have been used to administer the benefit, there is no evidence that it was intended to represent an amount directly related to a specific quantity

> of automobile use. It is a fixed figure negotiated by the parties to provide a sum certain as a monthly allowance to unit members. The express language of the contract cannot logically lead to an other interpretation.

7. By letter dated November 17, 1987, Mark Blunda, attorney for the Association, notified the County of the Association's desire to begin negotiations for a successor agreement to the 1986-87 contract (CP-2)

8. Sometime in December 1987 or January 1988, the Association served the County with its initial written proposals for the 1988-89 contract. The auto allowance provision was not mentioned (T22, CP-3).

9. On October 1, 1988, the County assigned vehicles to process servers Burnett, Jones, Reddick, Plummer, Kelly and Grunan. Their last $350 monthly auto allowance check was received on September 1, 1988 (T24, 30, 47).

10. By letter dated November 7, 1988, assistant county counsel Robert Hrebek forwarded the County's first written contract proposal to Association counsel Blunda. Number 3 of that proposal stated: "deletion of Article III [auto allowance] at such time as the sheriff provides automobiles for use" (T27, CP-4).

11. On December 1, 1988, Blunda responded with the Association's counter-proposal (R-1). In pertinent part it stated:

> Finally, I bring to your attention the fact that commencing in September of this year the employer committed an unfair practice by unilaterally changing terms and conditions of employment without negotiations. Specifically, the employer has stopped paying the bargaining unit member the

> $350.00 per month auto allowance required under the contract. There has been no agreement between the parties to substitute county cars for this auto allowance and, consequently, the Association could obtain a restraining Order from the Public Employment Relations Commission. However, in hopes of quickly reaching agreement on the entire contract, the Association is withholding any action on an unfair practice charge at the present time. Please be advised, however, that should the statute of limitations approach before we have a settlement, the Association may revise its position.

On the same date the Association filed a Notice of Impasse with the Commission. "Auto allowance" was identified as one of the economic issues in dispute (CP-5).

12. On January 1, 1989, the County assigned a vehicle to process server Busko. His last $350 monthly auto allowance check was received on December 1, 1988 (T23). Busko did not ask for the car. Rather, he requested the sheriff delay assigning him a vehicle because had purchased a new car and would have trouble making car payments without the $350 car allowance (T24, 26, 35).

Sheriff's officers Carbo and Biddle also received vehicles and stopped receiving monthly auto allowance checks (T53).[7/] By the hearing date, one process server (Ertle) and two sheriff's officers (Morgan and Ryan) had not been assigned county vehicles and were still receiving monthly auto allowance checks (T25, 53).

7/ Sheriff's officers who served process were receiving $350 per month auto allowance even though such a provision was not in the PBA contract (T25, 51).

ANALYSIS

N.J.S.A. 34:13A-5.4(c) provides:

> [N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

The County argues the charge is untimely because it was filed more than 6 months after it announced cars would be assigned to process servers. The announcement was made in early 1987, the first cars were assigned on October 1, 1988 and the charge was filed on March 27, 1989. The 6-month statute of limitations may run from the date a unilateral change is announced or from the date it is implemented. Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶ 10253 1979), Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-89, 4 NJPER 188 (¶ 4094 1978). Here, the implementation or actual assignment of cars occurred within 6 months of the filing. I find that this charge is timely.

The County next contends that the assignment of cars to its process servers is a non-negotiable managerial prerogative and therefore the Association had the burden to initiate negotiations over severable "impact" issues such as compensation, notice and procedure. While I agree that the assignment of cars to employees is a managerial prerogative, the impact of the assignment is negotiable. Morris Cty. Park Cmn., P.E.R.C. No. 83-31, 8 NJPER 561

(¶ 13259 1982), aff'd App. Div. A-795-82T2 (1/12/84), certif. den. 97 N.J. 672 (1984).

The record shows that neither party initiated negotiations over the impact of the car assignments. In Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶ 15265 1984), the Commission held that where an employer's action is a managerial prerogative and that action does not repudiate the parties' contract or alter existing terms and conditions of employment, the union has the burden of demanding negotiations on the severable aspects of the managerial decision. The decision to assign cars was a managerial prerogative. Since cars were not assigned in the past, the assignment neither repudiated the contract nor altered existing terms and conditions of employment. Accordingly, the Association had, and failed to carry, that burden.

The Association's failure to initiate negotiations over the impact of the car assignments does not dispose of all the issues raised in the charge. In addition to assigning cars, the County also terminated the $350 monthly auto allowance. These two actions (assignment of cars and termination of allowance) must be viewed independently. The monthly allowance is a separate, long-standing term and condition of employment. It is the subject of a clear contract provision and has been paid for nearly 20 years. While an unfair practice cannot be found against the County for failing to negotiate over the impact of the car assignment, an unfair practice can be found against the County for failing to negotiate with the Association before terminating the $350 auto allowance.

That the Association failed to initiate negotiations over the abstract issue of compensation does not give the County the right to terminate a separate, specific negotiated benefit. The existing $350 allowance and the hypothetical financial impact of the car assignment are two different matters. See, Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (¶ 16024 1984), aff'g H.E. No. 84-50, 10 NJPER 216 (¶ 15111 1984). Accordingly, I find the County violated the Act when it failed to negotiate with the Association before eliminating the $350 monthly auto allowance.[8/]

By terminating the allowance, the County also repudiated the parties' contract. Tp. of Piscataway, P.E.R.C. No. 87-47, 12 NJPER 833 (¶ 17320 1986). The contract clearly states that each employee shall receive a $350 automobile allowance. I agree with the arbitrator that the entitlement is not specifically related to use of the process server's personal car. Accordingly, the County's termination of this negotiated benefit is a repudiation of the agreement.

An employer may not alter terms and conditions of employment during collective negotiations with the majority representative. Piscataway Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), petit. for rehrg. den. App. Div. Dkt. No. A-8-75 1975, certif. den. 70 N.J. 150 (1976). The parties' contract expired on

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8/ This issue was placed on the table by the County in negotiations for a successor agreement, but that was not until well after the allowance was eliminated.

December 31, 1987. Negotiations for a successor began in November 1987 and did not reach impasse until December 1, 1988. When the County unilaterally changed the existing terms and conditions of employment in October 1988, it violated its duty to negotiate.

The Association presented no evidence to support its allegation that any employees were discriminated against because of protected activity or that the County violated any rules and regulations established by the Commission. Bridgewater Tp. v. Bridgewater Pub. Wks. Assn., 95 N.J. 235 (1984). Accordingly, the Association's (a)(3) and (7) charges are dismissed.

Remedy

In Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn. of Ed. Sec., 78 N.J. 1 (1978), the Supreme Court held that "the Commission has the authority to order that a party found to have violated the Act make the affected employees whole for their actual losses sustained by reason of the commission of an unfair practice." The Court cautioned, however, that "the authority should be exercised with due regard for the employer's status as a governmental entity serving the public and funded by the taxpayers." Applying these principles, I find that making the affected employees whole requires the County to pay each employee $350 per month for the entire period this amount was improperly denied. Such a remedy does not measure

either the employees' actual loss sustained or the employer's governmental status. The employees' $350 monthly loss was mitigated by use of the county car and the economic benefit of not having to use their personal cars for business. Allowing employees to have both the $350 and the use of the a county car would be a windfall and an irresponsible waste of government funds. Accordingly, I find that the most appropriate remedy is for the County to pay each affected employee $350 per month for the period of loss minus the value of the use of the county car. The parties shall agree on a neutral third person to determine the value of the use of the county car.

Based on the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

Monmouth County violated subsections 5.4 (a)(1) and (5) when it 1) failed to negotiate with the Association prior to terminating the employees' $350 monthly automobile allowance, 2) repudiated the parties' contract by terminating the employees' $350 monthly automobile allowance, and 3) unilaterally terminated the employees' $350 monthly automobile allowance during negotiations with the Association for a successor agreement.

Monmouth County did not violate subsections 5.4 (a)(3) and (7).

RECOMMENDED ORDER

I recommend that the Commission ORDER Monmouth County to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act.

2. Refusing to negotiate in good faith with the Monmouth County Process Servers Association concerning terms and conditions of employment of bargaining members, specifically the automobile allowance.

B. Take the following affirmative action:

1. Pay each affected employee[9/] $350 per month for the period of loss minus the value of the use of the county car. The period of loss is from when the employee no longer received his monthly auto allowance check until the present. The value of the county car shall be determined by a neutral third person agreed upon by the parties.

2. Negotiate in good faith with the Monmouth County Process Servers Association regarding any changes in the employees' monthly automobile allowance.

9/ This remedy applies only to affected employees in the Monmouth County Process Servers Association bargaining unit.

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 with this order.

I further recommend that the Commission DISMISS the charge's (a)(3) and (7) allegations.

Susan A. Weinberg
Hearing Examiner

Dated: January 25, 1990
Trenton, New Jersey

R E C O M M E N D E D

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 and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act.

WE WILL cease and desist from refusing to negotiate in good faith with the Monmouth County Process Servers Association concerning terms and conditions of employment of bargaining members, specifically the automobile allowance.

WE WILL forthwith pay each affected employee $350 per month for the period of loss minus the value of the use of the county car. The period of loss is from when the employee no longer received his monthly auto allowance check until the present. The value of the county car shall be determined by a neutral third person agreed upon by the parties.

WE WILL forthwith negotiate in good faith with the Monmouth County Process Servers Association regarding any changes in the employees' monthly automobile allowance.

Docket No. CO-H-89-281 Monmouth County
(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.