P.E.R.C. NO. 99-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HOPATCONG,

Respondent,

-and- Docket No. CO-H-97-268

POLICEMAN'S BENEVOLENT ASSOCIATION, LOCAL 149,

Charging Party.

BOROUGH OF HOPATCONG,

Charging Party,

-and- Docket No. CE-H-97-13

POLICEMAN'S BENEVOLENT ASSOCIATION, LOCAL 149,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a consolidated complaint which was based on unfair practices filed by the Borough of Hopatcong and Policeman's Benevolent Association, Local 149. The PBA's charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act when, during successor contract negotiations, it unilaterally changed the divisor used for computing biweekly compensation. The Borough's charge alleges that the PBA violated the Act by refusing to sign a successor agreement. The Commission finds that the PBA's charge involves a contractual dispute that must be resolved through the negotiated grievance procedure. With respect to the Borough's charge, the Commission finds that the parties had not agreed on specific contract language and thus the PBA did not violate the Act by refusing to sign a final agreement.

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

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POLICEMAN'S BENEVOLENT ASSOCIATION, LOCAL 149,

Respondent.

Appearances:

For the Borough, David A. Wallace, attorney

For the PBA, Loccke & Correia P.A., attorneys (Joseph Licata, of counsel)

DECISION

On February 14, 1997, Policeman's Benevolent Association Local 149 and the Borough of Hopatcong filed unfair practice charges against each other. The PBA's charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4),

(5) and (7),[1/] when, during successor contract negotiations, it unilaterally changed the divisor used for computing biweekly compensation. The Borough's charge alleges that the employee organization violated the Act, specifically 5.4b(4),[2/] by refusing to sign a successor agreement.

On June 11, 1997, the charges were consolidated and a Complaint and Notice of Hearing issued. At the hearing, the Borough's March 31, 1997 statement of position was accepted as its Answer. The Borough asserted that the PBA's charge should be dismissed because it alleges a mere breach of contract. The PBA never filed an Answer to the Borough's charge.

On October 30, 1997 and February 24, 1998, Hearing Examiner Stuart Reichman conducted a hearing. The parties

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ This provision prohibits employee organizations, their representatives or agents from: "(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 8, 1998, the Hearing Examiner recommended dismissing the Consolidated Complaint. H.E. No. 99-1, 24 NJPER 403 (¶29184 1998). He found that the PBA's charge involves a dispute over the contractual salary rate that does not rise to the level of an unfair practice. He further found that employer had not proved that there was a meeting of the minds on wording issues in a draft agreement and that therefore the PBA had not violated the Act by refusing to sign that agreement.

On July 17, 1998, the PBA filed exceptions. It asserts that the Hearing Examiner erred by recommending dismissal of its charge rather than deferral to arbitration.

On August 4, 1998, the Borough filed exceptions and a response to the PBA's exceptions.[3/] The Borough asserts that the PBA repudiated the memorandum of agreement rather than attempt to develop accurate contract language to memorialize that agreement. The Borough further urges that if we dismiss its charge, we should order negotiations on the remaining issue rather than permit the PBA to pursue interest arbitration. As for the PBA's charge, the Borough asserts that the PBA elected to file a charge rather than pursue grievance arbitration and that deferral to arbitration is unavailable and inappropriate.

3/ We deny the Borough's request for oral argument. The issues have been fully briefed.

On August 10, 1998, the PBA filed a response to the Borough's exceptions. It urges adoption of the portion of the report recommending dismissal of the Borough's charge. As to its charge, the PBA asserts that we must not abdicate our statutory responsibility over unfair practice charges. If the employer is unwilling to waive procedural defenses to arbitrability, then the PBA argues that we should remand the matter for a decision on the merits.

We have reviewed the record. Neither party has specified any exceptions to the Hearing Examiner's findings of fact (H.E. at 5-6; 8-10). See N.J.A.C. 19:14-7.3(b). We adopt and incorporate them with these additions. Under the Borough's prior payroll procedure, approximately once in ten years, there would be a 27th pay period. The PBA grieved the payroll change alleging a violation of the contractual annual salary provision. The PBA did not pursue the grievance to binding arbitration.

We begin with the PBA's charge. On December 13, 1996, the Borough announced that beginning January 1, 1997, the payroll would be based on the actual number of work days rather than the previous method of dividing the annual salary by 260. The change reduced biweekly earnings, the hourly overtime rate, and longevity pay, which is based on a percentage of biweeky pay. Under the prior method, there were, in essence, 26.1 pay periods per year. Thus, while employees would usually receive their annual salary in 26 payments each year, there would be a 27th pay period every ten years, resulting in an overpayment.

The PBA filed a grievance alleging a violation of Article XIII, Appendix A of the parties' agreement. That appendix specifies annual salaries for each unit position. The PBA did not pursue the grievance to binding arbitration and instead filed its unfair practice charge. The charge essentially alleges that the employer reduced employee compensation below the level set by the collective negotiations agreement. Although the PBA argues that the employer has repudiated the agreement, the factual allegations do not amount to a repudiation. The employer claims that its payment method more accurately reflects the parties' agreement on salaries. The PBA disagrees. This type of contractual dispute must be resolved through the negotiated grievance procedure. Passaic Community College, P.E.R.C. No. 93-54, 19 NJPER 59 (¶24027 1992). Deferral is inappropriate at this point, in part because the Borough will not waive procedural defenses. Brookdale Comm. College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). Accordingly, we dismiss the PBA's charge.

We next consider the Borough's charge. The parties entered into a memorandum of agreement. The economic terms of the successor contract are resolved. One language item remains in dispute. Although the parties have agreed to that issue in principle, they have not agreed on specific language. Thus, the PBA has not violated the Act by refusing to sign a final agreement. The Borough has not alleged that the PBA has refused to negotiate in good faith and we will not reach that issue.

Similarly, because we are dismissing the Borough's charge, we have no basis to order how the remaining dispute over that language issue should be resolved.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: September 24, 1998
Trenton, New Jersey
ISSUED: September 25, 1998

H.E. NO. 99-1

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

In the Matter of

BOROUGH OF HOPATCONG,
Respondent,

-and- Docket No. CO-H-97-268

PBA LOCAL 149,
Charging Party.

BOROUGH OF HOPATCONG,
Charging Party,

-and- Docket No. CE-H-97-13

PBA LOCAL 149,
Respondent.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Borough of Hopatcong did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when it changed the manner in which it calculated police officers' salaries. The employer changed the method of salary calculation from dividing an employee's annual salary by 26 pays to dividing the salary by the number of days in the year.

The Hearing Examiner also found that PBA Local No. 149 did not violate the Act by refusing to sign the successor collective agreement. The Hearing Examiner found that there was no meeting of the minds on specific contract language.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-1

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

In the Matter of

BOROUGH OF HOPATCONG,
Respondent,

-and- Docket No. CO-H-97-268

PBA LOCAL 149,
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Respondent.

Appearances:

For the Borough,
David A. Wallace, attorney

For the PBA,
Loccke & Correia, attorneys
(Joseph Licata, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On February 14, 1997, the Policeman's Benevolent Association, Local 149 (Hopatcong Unit), ("Local 149") filed an unfair practice charge (C-4)[1/] with the New Jersey Public

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1/ Exhibits received in evidence marked as "C" refer to commission exhibits, those marked "CP" refer to the Charging Party's exhibits, and those marked as "R" refer to Respondent's exhibits. The transcript citation 1T1 refers to the transcript developed on October 30, 1997, at page 1, and 2T refers to the transcript developed on July 10, 1997.

Employment Relations Commission alleging the Borough of Hopatcong ("Borough") engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4a (1), (2), (3), (4), (5) & (7)[2/] when the Borough by memorandum dated December 13, 1996, unilaterally modified the compensation system for police officers. The new compensation plan uses a different divisor for computing compensation. As a result, police officers are receiving less money on a biweekly basis than they had in the past.

The parties had just executed a memorandum of understanding for a new contract when Local 149 representatives became aware of the new compensation plan. They went to the employer seeking to block the implementation of the new compensation system unless and until this new system had been negotiated. The Borough refused to stay the implementation of the new payroll calculation system and implemented it on January 1,

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

1997. It was alleged that through this conduct the employer unilaterally modified a mandatory subject of negotiations, base wage computation, and has wrongfully refused to negotiate over this topic. It was further alleged that the timing of this act tended to coerce employees and discouraged the exercise of protected rights.

On February 14, 1997, the Borough of Hopatcong filed an unfair practice charge (C-3) against Local 149 alleging that it engaged in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4b(4)[3/] in that the parties had reached a tentative successor agreement to the contract which expired on December 31, 1996. On December 24, 1996, Local 149 notified the Borough that the Local 149 membership had ratified the agreement. On December 30, 1996, the Borough approved the agreement. Nevertheless, on February 4, 1997, Local 149 advised the Borough that it refused to sign the ratified agreement. It is specifically alleged that at no time did Local 149 advise any Borough representative that any language contained in the Borough draft inaccurately set forth the terms of the settlement ratified by Local 149 membership and approved by the Borough's Mayor and Council.

On March 31, 1997, the Borough filed a statement of position asserting that Local 149's charge failed to meet the

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3/ This provision prohibits employee organizations, their representatives or agents from: "(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Commission's complaint issuance standard, for the charge alleges a mere breach of contract claim. It further alleges that Local 149's charge is factually inaccurate.

On June 11, 1997, the Director of Unfair Practices issued complaints and a notice of hearing (C-1) as well as an order consolidating these two unfair practice charges. Hearings were conducted on October 30, 1997 and February 24, 1998. At the hearing, the Borough's statement of position was accepted as its answer (C-5) to Local 149's charge (CO-H-97-268). Both parties were given the opportunity to examine and cross-examine witnesses, present evidence and argue orally. Both parties submitted briefs and reply briefs which were received by May 20, 1998.4/

4/ At the first day of hearing the parties agreed not to proceed with the Borough's charge, CE-H-97-13. The parties were engaged in settlement discussions and it was hoped that this charge would settle. Evidence was taken on CE-H-97-13 during the February 24, 1998 hearing. In its post-hearing brief, the Borough points out that Local 149 never filed an answer to CE-H-97-13 and, therefore, pursuant to N.J.A.C. 19:14-3.1, all allegations in the Borough's charge, as incorporated in the complaint, must be deemed to be admitted as true and shall be so found by the Commission. However, N.J.A.C. 19:14-3.1 may not be invoked after a hearing. Borough of Tenafly, P.E.R.C. NO. 98-129, 24 NJPER 230 (¶29101 1998) holds "If a charging party permits a respondent to go through the time and expense of defending against an unfair practice charge, there is good cause for denying the invocation of a rule that would have obviated much if not all of the testimony and evidence." Id. at 9.

FINDINGS OF FACT

CO-H-97-268

1. It is not disputed that on December 17, 1996, Local 149 and the Borough reached a verbal tentative agreement, subject to ratification, for a new contract effective January 1, 1997 through December 31, 1998. Both Local 149 and the Borough voted on and approved the tentative agreement. However, Local 149 has never signed the draft contract which was prepared by the Borough.

2. On December 13, 1996, Borough Administrator Frank Bastone distributed a memorandum with each employees' paycheck. The memorandum (CP-2) states:

> Beginning January 1, 1997, the Borough payroll will be based on the actual number of days in the year rather than the old method of dividing salary by 26 pays. The new method will be your salary divided by the number of working days in the year times 10 days per pay period.

3. Prior to the memorandum, salaries were computed by dividing an employee's annual salary by 26 (the number of bi-weekly pay periods in most years). This change in the method of salary computation was never discussed in the ongoing negotiations nor was Local 149 given notice of this change (1T28). The change in the method of computation was unilaterally implemented by the Borough on January 1, 1997.

4. The change has reduced the gross biweekly earnings as well as the overtime rate and longevity entitlement of all unit members (1T121-1T122; CP-3, CP-4). Sergeant Michael Siciliano testified that his bi-weekly gross earnings were $2,007.46 under the old method of computation and $1,999.80 under the new method. His overtime rate was $37.64 under the old method and $37.50 under the

new method. In addition, longevity pay is based on a percentage of one's bi-weekly paycheck. Accordingly, Siciliano's longevity pay has been reduced an unspecified amount.

ANALYSIS

Without question, the net take home pay of police officers in the unit represented by Local 149 has been reduced and compensation is a mandatorily negotiable term and condition of employment. An employer may not unilaterally alter rules governing working conditions whether or not established by contract. Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). However, an employer has the right to enforce the parties contract in accordance with its terms even if employees' benefits are reduced as a consequence. State of New Jersey (Department of Education), P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988). If there is a dispute as to the interpretation of a contract, such a dispute is for the parties' grievance procedure. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The question here is whether the changes in salary benefits is contractual in nature or did the level of salary benefits arise out of the parties conduct, separate from the contract. (There is no allegation that the terms of the contract were repudiated.)

In Passaic Community College. P.E.R.C. No. 93-54, 19 NJPER 59 (¶2407 1992) where, as here, a contract provided for annual

salaries paid on a bi-weekly basis, the employer unilaterally went from using a divisor of 260 to compute a rate of pay to using a divisor which matched the number of work days in the calendar year, e.g. 261 or 262. The Commission held that the underlying dispute was whether the employer changed the agreed upon contractual salary rate when it changed the divisor and such a dispute must be resolved through the parties grievance procedure, citing State of New Jersey (Dept. of Human Services). The same result must be reached here. I will recommend the Commission dismiss CO-H-97-268.

Local 149 argues that its charge is distinguishable from Passaic Community College since in Passaic the underlying Director of Unfair Practice decision was based upon a factual determination that there was not an underpayment of salaries. However, the Commission decision does not rely on any such facts. Rather, it holds that the dispute concerned the interpretation of the parties' collective agreement.5/

5/ The PBA alleges that the Borough violated 5.4a(3) by this conduct, but it did not introduce evidence of employer hostility to prove a violation of this provision. It relies on the timing of events, urging that the Commission infer hostility. Such an inference is not warranted since the employer may have a contractual right to change the divisor without negotiations.

CE-H-97-13

Finding of Facts

A. A tentative agreement for a new contract was entered into by the parties on December 17, 1996. The agreement included specific salary increases. Also, changes were to be made to several contract provisions, specifically, Article VI, Para. D section 4; Article XI, Para. I; Article XIV; Article XVI, Para. C step 2 and Article XXIV. However, as with the balance of the tentative agreement, the proposed language changes were never reduced to writing.

B. Borough Administrator Bastone was a negotiator for the Borough. He testified that Local 149 negotiators understood just what the language changes were (2T146). The agreement was subject to mutual ratification but, according to Bastone, there was no understanding that the agreement was subject to attorney review (2T142-2T143). Both sides ratified the agreement and Bastone prepared a draft of the language changes (R-6). These included changes as to sick leave verification, vacation leave carry over, a clothing or equipment allowance, and changes in the grievance procedure. Bastone presented this draft to Local 149 on or shortly after January 7, 1997. He then prepared a new agreement incorporating the new language (R-5) which was submitted to Local 149 in late January (2T107). The PBA never signed the agreement.

C. When the Borough filed its charge on February 13, 1997, Local 149 never stated that it refused to sign the agreement because of the language changes. Rather, on February 4, 1998, Local 149 representatives stated that they refused to sign the contract

because the Borough unilaterally altered its method of computing salary (2T128). Local 149 did not express an objection to any language changes until October, 1997, when Local 149's attorney objected to changes in the clothing-equipment allowance article (2T132-2T133). The Borough agreed to those suggested language changes (2T109). Then in November of 1997, Local 149 informed Bastone that it objected to the language changes in the grievance procedure (2T134, CP-10).6/

D. Michael Siciliano was a member of Local 149's negotiating team. He was present at the December 17, 1996 negotiations session when the tentative agreement was reached. Bastone did not present specific language changes during the December 17, 1996 negotiations session.7/ It was agreed that Bastone would give Local 149 something in writing to take back to its members at a later date. Siciliano took notes about the tentative agreement. His notes indicate the economic agreement but state "Wording issues still haven't been agreed upon" (CP-13).

6/ The Borough introduced a letter into evidence from Local 149's attorney, dated August 25, 1997. It seeks to use the letter to prove there was no dispute between the parties which would warrant Local 149's refusal to sign the agreement. However, it is apparent that this letter was written pursuant to settlement discussions between the parties. Accordingly, I will not consider it as evidence for this purpose.

7/ Bastone testified that Local 149 negotiators understood what the contract language changes were. Siciliano said that Bastone did not present specific language changes. I credit Siciliano's testimony. Bastone didn't give Local 149 express language until January 7, 1997.

Thus, the parties had not reached agreement on non-economic language. In the past, Local 149 presented economic issues to its members and then went back to negotiate non-economic issues. Historically, the parties have always been able to work out language issues after the money issues were resolved. (2T150-2T153).

E. Siciliano told Bastone at the December 17, 1996 negotiations, the wording issues could get worked out. Siciliano also stated that everything was going to be reviewed by Local 149's attorney (2T162-2T164). Local 149 has had its attorney review the proposed contract language as long as Siciliano has been a union member (2T163).[8/]

F. Siciliano was aware that the Borough wanted the Local 149 contract to conform with the other Borough labor agreements, but at the time of the ratification vote Local 149 did not have the specific wording of those agreements (2T176). Local 149 never brought Bastone's language proposal, R-6, to its membership for a vote. When the issue of the change in the divisor to calculate salary arose "things just fell apart... as far as where... the non-economic issues stood. They were almost a moot point at that point" (2T161). When Siciliano told the Borough that Local 149 refused to the sign the contract, the reason given was the computation of payroll issue.

8/ I credit Siciliano's unrebutted testimony on this point.

ANALYSIS

The Borough argues that the parties reached a tentative agreement which both parties ratified. Despite this ratification, Local 149 has refused to execute the draft agreement because of the payroll computation dispute. The Borough contends that this refusal to execute a negotiated and ratified agreement constitutes an unfair practice citing Office of the Bergen County Prosecutor, P.E.R.C. No. 83-90, 9 NJPER 75 (¶14040 1982) where the Commission found an unfair practice when an employee organization refused to sign a ratified collective negotiations agreement because it did not contain certain provisions which it desired.

Local 149 argues that it cannot be forced to sign the collective negotiations agreement prepared by the Borough since the agreement contains specific language changes to which it never agreed.

For an agreement to be reached there must be a "meeting of the minds." Where the parties dispute a claim by one or the other that an agreement has been reached, PERC will examine the totality of the circumstances to determine whether a "meeting of the minds is evident." Ocean County Board of Freeholders, P.E.R.C. No. 86-107, 12 NJPER 341 (¶17139 1986). One party can not be forced to sign an agreement at the insistence of the other where the parties failed to agree to contract language. Rutgers University, P.E.R.C. No. 95-32, 20 NJPER 431 (¶25221 1994), Borough of Fairlawn, P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991).

I find the Borough failed to prove by a preponderance of the evidence there was a meeting of the minds on the wording issues contained in the draft agreement. Accordingly, I recommend that the Borough's charge, CE-97-13 be dismissed.

CONCLUSIONS OF LAW

1. The Borough of Hopatcong did not violate N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) and (7) when it modified the manner in which it calculated police salaries.

2. PBA Local 149 did not violate N.J.S.A. 34:13A-5.4b(4) when it notified the Borough that it refused to sign the successor collective agreement.

RECOMMENDED ORDER

It is recommended that the Commission **ORDER** that both unfair practice complaints, CO-H-97-268 and CE-97-13, be dismissed.

Stuart Reichman
Hearing Examiner

Dated: July 8, 1998
Trenton, New Jersey