P.E.R.C. NO. 82-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERGENFIELD,

Respondent,

-and-

Docket No. CO-81-56-83

EMPLOYEES ASSOCIATION,
BOROUGH OF BERGENFIELD,

Charging Party.

SYNOPSIS

In an unfair practice charge, the Commission concluded that the Borough had not violated the Act by interpreting the salary provision in the parties' collective agreement in reference to raises, to mean that the raises were to be added to the employees' base salaries and then paid in 26 biweekly installments rather than as a lump sum raise as the Association claimed. The contract itself was silent as to the method of payment and the clause only required that the Borough add the amount of the raise to the salaries of the employees. The Association was unable to provide sufficient evidence of Borough misrepresentation as to the meaning of the salary clause and had had an ample opportunity to review said clause prior to the signing of the agreement.

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EMPLOYEES ASSOCIATION,
BOROUGH OF BERGENFIELD,

Charging Party.

Appearances:

For the Respondent, Kenith D. Bloom, Esq.

For the Charging Party, Victor K. Brown, Esq.

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on September 5, 1980, and amended on September 9 and November 13, 1980, by the Employees Association, Borough of Bergenfield (the "Charging Party") alleging that the Borough of Bergenfield (the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge alleged that the Borough failed to negotiate in good faith with respect to a salary provision in the contract, and misrepresented the amount of money which the employees would actually receive, all of which were alleged to be violations of N.J.S.A. 13:13A-5.4(a)(5) and (7) of the Act.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate (continued)

The Charging Party asserted that the salary clause required the payment of the negotiated salary amount at six-month intervals during the life of the agreement. The Borough did not dispute the monetary amounts or the payments in six-month intervals, but argued that the money was to be added as a pay raise to the employees' salaries and paid out through biweekly payments rather than a lump sum or some other distribution.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 8, 1981, and a hearing was held on March 2, 1981, in Newark New Jersey, before Hearing Examiner Arnold H. Zudick, at which time the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs which were received by April 13, 1981.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-47, 7 NJPER ___ (¶______ 1981), on May 26, 1981, a copy of which is attached hereto and made a part hereof. He concluded that the Charging Party had failed to prove by a preponderance of the evidence that the Borough had violated the Act by interpreting the salary provision to mean a raise which was to be added to the base salaries of the employees and then having that raise paid in 26 biweekly installments rather than as a lump sum raise.

1/ (continued) 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."

The salary provision found in the parties' collective negotiations agreement which brought about this current dispute contains the following language:

> The Borough shall increase the base annual salary of all employees by the sum of $575.00 effective the first full pay period of January 1980; by the sum of $575.00 effective the first full pay period of July 1980; by the sume $600.00 effective the first full pay period of January 1981, and by the sum of $600.00 effective the first full pay period of July 1981.

The parties agreed on the amounts that were negotiated but disagreed on how or when the money should be paid. The Charging Party asserted that the total $575.00 amount was to be paid on both January 1 and July 1, 1980 and asserted the same for the $600.00 sums in 1981. The Borough, however, contended that this was not a cash or lump sum agreement, but was a raise in employees' salaries to be paid in the form of wages on a biweekly method.

The contract itself is silent as to the method of payment and the clause mentioned in the preceding paragraph is the only clause concerning salaries. According to that clause, the Hearing Examiner found that the Borough did exactly what the contract required; it increased the base salaries by the negotiated amounts. There is nothing in the clause which required the Borough to pay all of the money on the dates established, but only to add that amount to the salaries of the employees. In particular, this dispute arose when on June 6, 1980, the employees received their retroactive checks for the salary

increase that went into effect on January 1, 1980 pursuant to the collective agreement. The employees allegedly expected to receive a gross amount of $575.00 but instead received approximately $257.00. The Hearing Examiner concluded that in the absence of any contractual clause to the contrary, the Borough did not act improperly by paying the salaries in the way that it did, according to its interpretation of that provision, and that its method of payment is a commonly used and accepted payment method in the labor relations field.

There was testimony by Ralph Belmont, the Charging Party's secretary, that there had not been discussions as to how the employees were to receive these payments other than that they would in fact receive the amount agreed upon. However, Louis Goetting, the Borough Administrator, testified that he had explained to the employees that the raise was not going to be a lump sum increase but a raise in their salary and that each $575.00 raise was broken down over 27 biweekly pay checks. The Hearing Examiner found Mr. Goetting's testimony more credible and the Commission accepts that finding.

There was insufficient evidence of any alleged misrepresentation on the part of the Borough as to what the salary clause actually meant or that the Charging Party did not have an opportunity to review that clause of the agreement with the aid of its attorney prior to the signing. Additionally, the Charging Party did not allege which sections of the Commission's rules and regulations had been violated to support its claim that the Borough

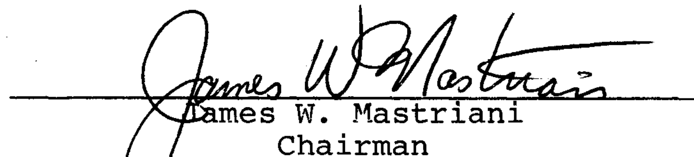
had violated Subsection (a)(7) of the Act and the Hearing Examiner recommended dismissal of that allegation as well.

Neither party has filed exceptions to the report of the Hearing Examiner. We have reviewed the entire record in this matter and hereby adopt the findings of fact and conclusions of law made in H.E. No. 81-47. We find that the Borough's actions did not violate N.J.S.A. 34:13A-5.4(a)(5) and (7) by its conduct herein with respect to its payment procedure. We adopt his recommendation that the Complaint be dismissed in its entirety.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commisisoners Hartnett, Hipp, Newbaker, Parcells and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: July 21, 1981
Trenton, New Jersey
ISSUED: July 22, 1981

82-1

H. E. No. 81-47

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

In the Matter of

BOROUGH OF BERGENFIELD,

Respondent,

-and-

Docket No. CO-81-56-83

EMPLOYEES ASSOCIATION,
BOROUGH OF BERGENFIELD,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Borough did not violate the New Jersey Employer-Employee Relations Act. The Charging Party failed to prove by a preponderance of the evidence that the Borough acted illegally by paying the employees their negotiated salary increase in biweekly salary payments rather than in a lump sum distribution. The Hearing Examiner found that the parties had not negotiated any contractual clause with respect to method of payment, and the Borough precisely complied with the salary provisions of the agreement.

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.

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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EMPLOYEES ASSOCIATION,
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Charging Party.

Appearances:

For the Respondent
Kenith D. Bloom, Esq.

For the Charging Party
Victor K. Brown, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on September 5, 1980, and amended on September 9 and November 13, 1980, by the Employees Association, Borough of Bergenfield (the "Charging Party") alleging that the Borough of Bergenfield (the "Borough") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge alleges that the Borough failed to negotiate in good faith with respect to a salary provision in the contract, and misrepresented the amount of money which the employees would actually receive, all of which were alleged to be violations

of N.J.S.A. 34:13A-5.4(a)(5) and (7) of the Act. [1/]

The Charging Party asserted that the salary clause required the payment of the negotiated salary amount at six-month intervals during the life of the agreement. The Borough does not dispute the monetary amounts or the payments in six-month intervals, but argues that the money was to be added as a pay raise to the employees' salaries and paid out through biweekly payments rather than a lump sum or some other distribution.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 8, 1981, and a hearing was held on March 2, 1981, in Newark, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs which were received by April 13, 1981.

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 briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

1/ These Subsections prohibit public employers, their representatives or agents from:

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

"(7) Violating any of the rules and regulations by the Commission."

Findings of Fact

1. The Borough of Bergenfield is a public employer within the meaning of the Act and is subject to its provisions.

2. The Employees Association, Borough of Bergenfield is a public employee representative within the meaning of the Act and is subject to its provisions.

3. The pertinent collective negotiations agreement between the parties is effective during the term January 1, 1980 through December 31, 1981 (see Exhibit J-1).

4. On January 24, 1980, the parties signed the collective negotiations agreement (J-1), and Article XV(1) contained the following salary provision:

> The Borough shall increase the base annual salary of all employees by the sum of $575.00 effective the first full pay period of January 1980; by the sum of $575.00 effective the first full pay period of July 1980; by the sum of $600.00 effective the first full pay period of January 1981, and by the sum of $600.00 effective the first full pay period of July 1981. Exhibit J-1, p. 26.

5. John McCormack, the Charging Party's former president and negotiator, admitted receiving a copy of the collective negotiations agreement prior to the time it was signed. He testified that Louis Goetting, the Borough Administrator, suggested he bring the document to his attorney, and in fact Mr. Brown (the Charging Party's attorney) did review the document and made certain changes therein which were agreed to prior to the actual signing of the document. 2/

2/ Transcript ("T") pp. 31-32.

6. The instant dispute arose on June 6, 1980. 3/ On that day the employees received their retroactive checks for the salary increase that went into effect on January 1, 1980, pursuant to Article XV(1) of the collective agreement. The employees allegedly expected to receive a gross amount of $575.00, instead they received a check for approximately $257.00. 4/ Several employees questioned Goetting on the size of the checks and Goetting explained how the money was being paid.

7. Mr. McCormack acknowledged that after receiving the retroactive checks Mr. Goetting did attempt to explain how the money was paid. 5/ McCormack admitted that his earnings were increased by $575 (from January to June 1980) but that he did not actually collect that sum of money. 6/ McCormack also stated that although he negotiated the contract he could not recall certain increases that were negotiated, 7/ and he admitted that he could not remember whether he ever discussed Mr. Goetting's explanation of the checks with his own attorney. 8/ Finally, McCormack acknowledged that the salary increase was based on a dollar amount rather

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3/ The Borough moved to dismiss the charge by arguing that the same was untimely filed pursuant to N.J.S.A. 34:13A-5.4(c). The undersigned dismissed that motion (T. p. 130), and found that the charge was filed within six months from when the Charging Party first had notice of the alleged violation.

4/ T. p. 25. Other testimony indicated that the amount was approximately $287 per man. T. pp. 21-22.

5/ McCormack also testified that prior to signing the agreement he did not sit down with Goetting to work out the figures that each man was going to get. T. p. 43.

6/ T. p. 39.

7/ T. p. 35.

8/ T. p. 41.

than a percentage increase. [9/]

8. Ralph Belmont, the Charging Party's secretary, testified that Mr. Goetting wanted to do away with a percentage raise, and that only the Charging Party analyzed the amount of money that was negotiated as a percentage raise. [10/] Belmont indicated that the amount of the raise was $1150 for 1980 and $1200 for 1981. [11/] When Belmont was asked on direct examination:

> "Was there ever any breakdown given to you, a written breakdown as to how the payments were to be received?"

He responded:

> No sir, there was never any official elaboration on it or papers given to us, each individual to either elaborate on or to be taken back to our co-workers to be voted upon on how that money was to be broken down. We were flatly told and were led to believe that we would be getting the money that we had agreed upon." T. p. 64.

Belmont testified that he signed the agreement on behalf of the Charging Party, that he had personal knowledge of the changes that were made in the agreement, and that he knew that there were eleven or twelve items that were corrected and included in the agreement. [12/]

On cross-examination Belmont admitted that his salary at the end of 1979 was $15,262 and that at the end of 1980 his salary was $16,412, which on paper was an increase of $1150. [13/] However, Belmont stated that the total amount he actually received in 1980

9/ T. p. 45.

10/ T. pp. 59, 64.

11/ T. p. 63.

12/ T. pp. 69-70.

13/ T. pp. 82-83. Belmont also admitted that his 1982 contract would be negotiated on the basis that he received $1150 for 1980 and $1200 for 1981 which would be a total of $2350 added to the salary he earned at the end of 1979. T. pp. 80-82.

was approximately $860. [14/]

9. Louis Goetting, the Borough Administrator, testified that the Borough had agreed to a salary increase of $575 on January 1 and July 1, 1980, and $600 on January 1 and July 1, 1981. [15/] However, Goetting was careful to explain that the raise was not going to be a lump sum increase, but would only be a cash increase or raise in their salary. [16/] Goetting explained that in order for the employees to realize their full raise they must work a full period, i.e. 26 biweekly installments. [17/] Goetting testified that on June 6, 1980, he explained to the employees that each $575 raise was broken down over 26 biweekly pay checks and that each employee's check would be increased by $22.11, [18/] and that the retroactive checks in June 1980 included approximately eleven retroactive payments of $22.11 for each employee. [19/]

Goetting further stated that he attempted to explain the raises to the Charging Party during the course of negotiations, and that he thought it was clear that he was talking in terms of an increase in salary and not a cash bonus. [20/] Goetting acknowledged that although the employees have received the precise salary increase (i.e., $1150 for 1980), the money was actually broken down to a 30-month payout. [21/] He also admitted that he did not prepare

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14/ T. pp. 83-84; 86, 89.

15/ T. pp. 100-101.

16/ T. pp. 102, 104.

17/ T. p. 106.

18/ T. p. 110.

19/ Id.

20/ T. pp. 107-108.

21/ T. p. 111.

a document for negotiations to explain the payment of the negotiated increase. [22/]

When asked if he discussed a 24 or 30-month payout during negotiations Goetting responded:

> "No, from the tone of the negotiations it appeared to me that it was understood that when someone got a raise in July what that meant." T. p. 119.

However, Goetting did testify that during negotiations he did say that the employees were not going to get $575 cash because there would only be a salary increase. [23/] He also testified that it was not until June 1980 that he became aware of the Charging Party's position with respect to the $575 increase. [24/] Finally, Goetting stated that during negotiations there was no question in his mind that the Charging Party understood the terms of the contract. [25/]

The Issues

A. Did the Borough violate the Act with respect to the establishment of a salary provision in the collective agreement, and the payment of salaries pursuant to the agreement?

1) Did the parties agree to the wording of Article XV(1) of their collective agreement?

2) Did the Borough unlawfully misrepresent the amount of money that each employee would receive pursuant to Article XV(1)?

22/ T. pp. 116, 118.

23/ T. p. 120.

24/ T. pp. 121, 127-128. The record shows that in early June 1980, but prior to June 6, 1980, McCormack appeared at Goetting's home and asked for his check of $575. Goetting testified that he told McCormack that although he had been given a raise of $575, that he could not possibly have earned the full $575 by that time. T. p. 114-115. McCormack testified that Goetting told him he was in for a big surprise. T. pp. 24, 114.

25/ T. p. 129.

Discussion and Analysis

Article XV(1)

In the original charge and the first amended charge filed herein, the Charging Party asserted that the words "base annual salary" were never used in negotiations, and that the Borough improperly inserted that phrase in the agreement after negotiations. In the second amendment to the charge the Charging Party stated that the employees had not been advised that the negotiated salary would be an increase to base annual salary.

Even assuming that the words "base annual salary" were not precisely used in negotiations, that does not automatically establish that the Borough violated the Act by including that phrase in the final draft. The Charging Party is still required to prove a violation based upon all the facts of the case. In this matter the parties had agreed that the Borough would prepare the collective agreement for signature. Mr. Goetting testified that he believed the Charging Party understood that this was not a lump sum raise, but was a raise which would be added to the base salaries of the employees. His subsequent drafting of Article XV(1) reflected his understanding of what had been agreed upon.

The Charging Party presented witnesses who testified primarily on the method of payment issue, and they failed to provide any meaningful testimony with regard to the drafting of Article XV(1). Mr. McCormack testified concerning the sum of money that had been negotiated, but his overall testimony demonstrated that he was uncertain as to other elements of the agreement, and this raised

doubts as to the overall value of his testimony. Mr. Belmont indicated only that he was surprised to learn that he would not receive the money as he expected.

Goetting's testimony on this issue, however, was more credible and was delivered in a more certain manner than the other witnesses', and the language he used in drafting Article XV(1) was consistent with his position as to what had been negotiated.

The most important factor with respect to this first issue, however, is that the Charging Party admits that prior to signing the agreement it reviewed that document with its attorney. Belmont admitted that the Charging Party made approximately twelve changes in the agreement which were subsequently initialed by the parties. A review of Exhibit J-1 shows that Article XV itself was amended in subsection (4), and it is therefore unreasonable to conclude that the Charging Party did not have the opportunity to review subsection (1) of that article and raise any objection to the wording of that article prior to signing the agreement.

The Charging Party's assertion that the employees were not aware of the actual meaning of the contract is not a defense to their signing the document, and certainly does not establish that the Borough acted unlawfully in drafting Article XV(1). Consequently, the Charging Party did not prove, by a preponderance of the evidence, that the Borough violated the Act in drafting the agreement.

<u>The Alleged Misrepresentation</u>

The heart of this case concerns the method of payment.

The parties agree on the amounts that were negotiated, but disagree on how or when the money should be paid. The Charging Party asserts that $575.00 was to be paid on January 1 and July 1, 1980, and $600.00 paid on January 1 and July 1, 1981, presumably in a lump sum, but certainly effective on the above dates. The Borough contends that this was not a cash or lump sum agreement, but that the money was to be added to the employees salary and paid in the form of wages on a biweekly method.

The collective agreement is silent on the method of payment, nor is there any proof of an established past practice concerning method of payment. Article XV(1) is the only clause concerning salaries and it only required the Borough to "increase" the employee's base salary by $575 effective January 1 and July 1, 1980, and by $600 effective January 1 and July 1, 1981. The record shows (see Exhibit J-2A) that the Borough did exactly what the contract required, it "increased" the base salaries by the negotiated amounts. Article XV(1) did not require the Borough to pay all of the money on or about the above dates, but only to add that money to the employee's salary. The record shows that the Borough complied with the agreement.

Despite the fact that the parties never negotiated a method of payment, each party assumed that it was understood how the money would be distributed. However, in the absence of any contractual clause to the contrary, the Borough did not act improperly by paying the salaries the way it had anticipated, and the undersigned can take administrative notice of the fact that its method of payment

is a commonly used and accepted payment method in the labor relations field.

The Charging Party's assertion that the Borough knew that the employees misunderstood the contract is not supported by the evidence. Mr. Goetting testified that he explained during negotiations that the employees would not get a cash or lump sum amount, and he thought the employees understood what it meant to have an increase in salary.

The Charging Party's assertion that the Borough had an obligation to advise the employees of its interpretation of Article XV(1), and that its failure to do so was a violation of the Act, is without merit. The Act puts an equal burden on both parties in negotiations to negotiate in good faith, it does not put a greater burden on the employer. The instant facts show that neither the Charging Party nor the Borough sought to negotiate or calculate the figures that each man would actually receive. Goetting testified that he thought the employees understood what he meant. The fact that the employees misunderstood the plain meaning of the contract cannot be attributed to any unlawful act of the employer, and the Borough had no additional burden to make certain that the employees understood its interpretation of Article XV(1).

The Commission in a recent case, In re Delaware Valley Reg. Bd/Ed, P.E.R.C. No. 81-77, 7 NJPER 34 (¶12014, 1980), considered an issue similar to the instant matter. In that case an association was found to have violated the Act by failing to prepare a salary guide in compliance with the negotiated agreement.

The association had relied upon prior practice to justify its actions, but the Commission in adopting the Hearing Examiner's recommendations held, that evidence of prior practice could not be considered to contradict or alter the clear terms of a written agreement. The Hearing Examiner concluded that since the association's evidence concerned a contract interpretation unexpressed by the agreement, and which effectively altered the terms of the agreement, it could not be considered. 26/

A similar result is required in the instant matter. The Charging Party entered into an agreement with the Borough which clearly required the Borough to increase the base annual salaries of the employees and the Borough complied with that agreement. The Charging Party made allegations of misrepresentation which it could not prove, and the testimony of its witnesses goes to a contract interpretation which is unexpressed by the agreement and alters the clear terms of the agreement and therefore cannot be relied upon to contradict or add to the agreement. 27/ The Charging Party's

26/ In re Delaware Valley Reg. Bd/Ed, supra, H. E. No. 81-14, 6 NJPER 540, 541 (¶11274, 1980). The Hearing Examiner also stated that:

> "As a general principle, evidence of circumstances outside of, or extrinsic to, the language of a contract is admissible for the purpose of interpreting the writing but not for the purpose of changing it. 'So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.'" Atlantic Northern Airlines, Inc. v. Schwinne, 12 N.J. 293 (1953) 6 NJPER at 541.

27/ "When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, either parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 3 Corbin §573.

assertion that the cited contract law does not apply because the employees did not intend to accept the money they received is without merit. The instant agreement is clear on its face, and the Charging Party reviewed that agreement before signing the document. Its attempt to introduce evidence of a contrary agreement is simply an attempt to alter or contradict the clear terms of the instant agreement and therefore cannot be relied upon. Finally, in view of the fact that the Charging Party's witnesses admitted that the Borough did not negotiate percentage figures, the Charging Party's discussion of such figures is inappropriate.

Accordingly, the undersigned will recommend dismissal of the Subsection a(5) allegation for lack of sufficient evidence of any violation, and will recommend dismissal of the Subsection a(7) allegation because the Charging Party did not even allege which sections of the Commission's rules and regulations had been violated.

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

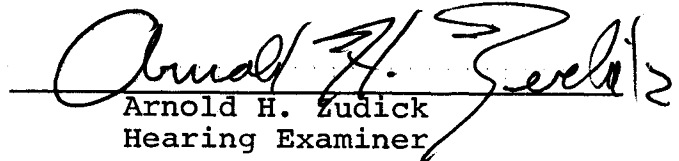
Conclusions of Law

1. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(5) by including the phrase "base annual salary" in Article XV(1) of the parties' collective agreement, or by paying the negotiated salary to the employees through a biweekly salary distribution.

2. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(7) because the Charging Party did not allege any sections of the Commission's rules and regulations that have been violated.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Arnold H. Zudick
Hearing Examiner

DATED: May 26, 1981
Trenton, New Jersey