

P.E.R.C. 86-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY BOARD OF CHOSEN
FREEHOLDERS & OCEAN COUNTY
SHERIFF,

Respondents,

-and-

Docket No. CO-84-328-13

OCEAN COUNTY SHERIFF'S
DEPARTMENT, P.B.A. LOCAL 258,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge that the Ocean County Sheriff's Department, P.B.A. Local 258 filed against the Ocean County Board of Chosen Freeholders and Ocean County Sheriff. The charge alleged the County and Sheriff violated the New Jersey Employer-Employee Relations Act when, following the expiration of the parties' contract, the County did not pay salary increments allegedly required by Article IV of the predecessor contract. The Commission finds that the County did not violate the Act because the parties never reached a "meeting of the minds" on a system requiring the automatic payments of increments as an existing term or condition of employment. The Commission further holds that the parties have an obligation to continue to negotiate in good faith on the automatic increment system issue.

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Charging Party.

Appearances:

For the Respondent Ocean County Board of Chosen
Freeholders, Berry, Kagan, Privetera & Sahradnik, Esqs.
(John C. Sahradnik, Esq.)

For the Respondent Ocean County Sheriff, Citta, Holzapfel &
Citta, Esqs. (James W. Holzapfel, of Counsel)

For the Charging Party,
Oxford, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

DECISION AND ORDER

On May 31, 1984, the Ocean County Sheriff's Department,
P.B.A. Local No. 258 ("PBA") filed an unfair practice charge against
the Ocean County Board of Chosen Freeholders ("County") and the
Ocean County Sheriff ("Sheriff"). The charge alleges that the
County and the Sheriff violated the New Jersey Employer-Employee
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections

5.4(a)(1),(3) and (5),^{1/} when, following the March 31, 1984 expiration of the PBA-County collective negotiations agreement and during successor contract negotiations, the County did not pay salary increments allegedly required by Article IV of the predecessor contract.^{2/}

Simultaneous with filing its charge, the PBA sought an interim order requiring the County or Sheriff to pay salary increments pending completion of the unfair practice proceedings. On June 15, 1984, after a hearing, Commission designee Edmund G. Gerber denied interim relief. I.R. No. 84-14, 10 NJPER 398 (¶15184 1984). He found the PBA had not demonstrated a substantial likelihood of proving that the predecessor contract required automatic salary increments.

On August 7, 1984, a Complaint and Notice of Hearing issued. The hearing was set for six days later.

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; and (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."

2/ The charge does not specify what the Sheriff allegedly did wrong.

On August 13, 1984, the County moved to continue the hearing so that, consistent with N.J.A.C. 19:14-3.1, it would have ten days from service to answer the Complaint. This motion was granted.

On August 17, 1984, the Sheriff filed his Answer. He asserted that the Complaint against him should be dismissed because the County was the public employer for the duration of the predecessor contract and until April 19, 1984 when N.J.S.A. 40A:9-11.9 was amended to charge the Sheriff with fixing compensation of employees in his department.

On August 20, 1984, the County filed its Answer. It denied that the predecessor contract mandated that it pay salary increments following the contract's expiration. As a separate defense, it asserted that res judicata and collateral estoppel barred this litigation since a fact-finder's report and a binding arbitration award allegedly established that the prior contract did not provide automatic salary increments.

On August 27, 1984, the County moved for summary judgment. The Chairman, pursuant to delegated authority, stayed the hearing.

On September 20, 1984, viewing the evidence in the light most favorable to the PBA, we denied this motion. P.E.R.C. No. 86-38, 10 NJPER 574 (¶15268 1984). While finding that the fact-finder's report and the arbitrator's award diminished any argument that seniority determined salary guide placement under Article IV of the parties' contract, we stated that we were not

convinced, at least at that juncture, that Article IV necessarily precluded automatic annual increments.

On October 22, 23 and 24, and November 8 and 19, 1984, Hearing Examiner Judith E. Mollinger conducted a hearing. The parties entered stipulations, examined witnesses, introduced exhibits and made motions. They argued orally and filed post-hearing briefs.

On September 6, 1985 the County moved to dismiss the Complaint as moot given an August, 1985 interest arbitration award establishing compensation, for 1984-1985. The PBA opposed this motion.

On September 18, 1985 the Hearing Examiner issued her report and recommended decision. H.E. No. 86-13, 11 NJPER 651 (¶16229 1985) (copy attached). She recommended dismissal of the allegations pertaining to subsection 5.4(a)(3), but found that the County and Sheriff, as joint employers, violated subsections 5.4(a)(1) and (5) when they failed to pay salary increments following the predecessor contract's expiration.^{3/}

On October 2, 1985 the Sheriff filed exceptions. It asserts that the Hearing Examiner erred in finding that prior to April 19, 1984, the Sheriff was a joint employer required to abide by the predecessor contract.

^{3/} She also denied the County's motion to dismiss the Complaint as moot.

On October 2, 1985 the County filed exceptions. It asserts that: (1) the PBA failed to prove by a preponderance of the evidence that Article IV of the predecessor contract guaranteed an incremental salary guide providing for annual increases on the contract anniversary date; (2) there is insufficient credible evidence to establish automatic annual increments; (3) res judicata and collateral estoppel apply; and (4) the interest arbitration award moots this case.

On October 17, the PBA responded. It asserts that: (1) the Sheriff, not having participated in the hearings, cannot file exceptions; (2) the Hearing Examiner correctly found the Sheriff was an employer; (3) the record supports finding an automatic incremental salary guide; (4) res judicata and collateral estoppel do not apply; and (5) the interest arbitration award is irrelevant.

On February 19, 1986, we heard oral argument. Each Commissioner received a transcript of that argument.

Findings of Fact

We have reviewed the record. We find these facts.^{4/}

^{4/} The Hearing Examiner's findings of fact are mostly accurate, but we add several facts and correct others. Further, the Hearing Examiner intermingled some conclusions of law with findings of fact. For example, finding no. 48 states that the County and Sheriff were joint employers on April 1, 1984; this finding interprets case law and statutes and is a legal conclusion, not a fact. Similarly, finding no. 50 states that

The PBA is the majority representative of the County's sheriffs officers and correction officers, excluding superior officers. The County and the PBA entered a collective negotiations agreement effective April 1, 1982 through March 31, 1984 (J-1).

Article IV is entitled Salaries. It provides, in part:

All personnel covered by this Agreement shall be placed upon their negotiated and agreed step for the April 1, 1982 and April 1, 1983 contract. See attached Appendix A.

<u>Step 1</u>	<u>4/1/82</u>	<u>Step 2</u>	<u>4/1/83</u>
1	\$10,000.00	1	\$10,000.00
2	11,600.00	2	11,600.00
3	14,900.00	3	14,900.00
4	16,200.00	4	16,200.00
5	18,000.00	5	18,000.00
6	19,300.00	6	19,300.00
7	20,900.00	7	20,900.00
8	22,900.00	8	22,900.00
		9	24,700.00

The appendix specifies the name of every unit employee and the salary each employee will receive for each of two years: the first commencing April 1, 1982 at a certain step and the second commencing April 1, 1983 at the next higher step. The issue is whether this provision required either the Sheriff or the County to pay automatic increments following the contract's expiration in order to preserve the status quo during successor contract negotiations. We will

4/ Footnote Continued From Previous Page

the County and the PBA negotiated a salary guide providing annual step increases on the contract anniversary date; this finding weighs evidence and is a legal conclusion, not a fact. We review those conclusions in our legal analysis.

summarize the parties' positions concerning what happened during negotiations and then trace the events which led to Article IV.

The PBA asserts that, in light of existing salary inequities, its number one priority in negotiating the 1982-84 contract was an incremental salary guide. It pressed this demand and gave up good-boy pay to get it. When members of its negotiating team questioned whether the memorandum of agreement guaranteed increments upon the contract's expiration, the County's negotiator assured them it did and the PBA ratified the memorandum with that understanding. Although the final contract language in Article IV substituted "negotiated and agreed-upon steps" for "salary guide," the PBA maintains this change merely insured that Article IV would not cover court attendants and criminal identification officers.

The County asserts that it too was concerned about salary inequities and was seeking a way to reduce salary differences between employees with the same years of experience. It also had a goal, understood by everyone, of keeping any contract within a settlement pattern of 8% increases in 1982 and 1983. While not irrevocably opposed to increments as a method of attaining these two objectives, it was opposed to both granting increments and negotiating percentage raises in addition, if that would cause the total economic package to exceed its settlement pattern. While its negotiator did not agree to an automatic increment system, he did agree with the PBA's negotiator to help sell the memorandum of agreement to the PBA membership by giving it the appearance of a

salary guide and by answering questions concerning whether it was in fact a salary guide; he hedged his responses, however, by prefacing them with "if" whenever he referred to a salary guide. After leaving that meeting, he became concerned that the officers were under an impression that they were going to receive windfall increments upon the contract's expiration. He and the PBA's chief negotiator agreed in the hallway to eliminate any such impression by substituting "negotiated and agreed upon steps" for "salary guide". The PBA's negotiator then prepared a contract making that change and the County signed it.

Before 1982 there was no single collective negotiations agreement; instead there was a collection of side-bar agreements. There was no salary guide, and there were clear inequities concerning who earned how much. Sheriff officers were paid different salaries and received different salary increases independent of when they were hired (Tr. V, 110-11). Before 1982, there were at least 16 different salary levels (J-2; Tr. I, 98; Tr. II, 77).

Negotiations for a collective negotiations agreement commenced sometime in January or February 1982. There were numerous meetings before the signing of the final contract on January 13, 1983 (H.E. finding #13, 14 and 41).

The PBA was initially represented by four employees and other employees joined negotiations later (H.E. finding #11). Following one or two sessions, the PBA retained Ron Villano as its

chief negotiator. Villano had extensive labor relations experience. (H.E. finding #14).

The County retained John Miraglia as its chief negotiator. Miraglia also had extensive labor relations experience. (H.E. finding #12). Miraglia had often negotiated with Villano (Tr. V, 44). Inez Killian, an administrative assistant, and A. Paul King, Director of Labor Relations, also attended some negotiations sessions. James Kennedy did not. (Tr. I, 87) One witness testified he thought Kennedy attended negotiations, but no one else mentioned him and Kenneth Burdge was still County administrator (Tr. V, 127).

At the first negotiations session, before Villano was hired, the PBA presented its contract proposals and economic priorities: a salary guide with increments, increased longevity payments, increased stipends and health benefits. This economic package equalled a 62% increase. Miraglia rejected it as too expensive (H.E. finding #13).

In early March, 1982, the PBA, represented by Villano, presented a revised proposal, including this salary provision:

ARTICLE IV

SALARIES AND SHIFT DIFFERENTIAL

A. Effective April 1, 1982, base salary for all employees covered by this Agreement shall be \$11,000.00 (Eleven Thousand).
The Maximum base salary for all employees covered by this Agreement shall be \$24,500 (Twenty-four thousand five hundred).
Salaries shall be determined by the following chart:

Starting date to 1 year	\$11,000.00
Step 2-----	13,700.00
Step 3-----	16,400.00
Step 4-----	19,100.00
Step 5-----	21,800.00
Step 6-----	24,500.00

All steps to reflect years of experience as a Sheriff's Officer.

B. Effective April 1, 1983, the minimum base salary for all employees covered by this Agreement shall be \$12,000.00 [sic] (Twelve Thousand One Hundred). The maximum base salary for all employees covered by this Agreement shall be \$26,950 (Twenty-six Thousand Nine Hundred and Fifty).

Salaries shall be determined by the following chart:

Step 1-----	\$12,100.00
Step 2-----	15,070.00
Step 3-----	18,040.00
Step 4-----	21,010.00
Step 5-----	23,980.00
Step 6-----	26,950.00

Miraglia rejected this proposal; he stated that granting increments on employment anniversary dates would be too expensive (Tr. IV, 70; Tr. V, 41).

Miraglia, saying he was not opposed to guides and the PBA could go work one out, did not reject outright the concept of a salary guide at that time (H.E. finding #16). He told the PBA's negotiator, while discussing salary inequities, that it was only fair employees know what their salary was going to be from one year to the next (Tr. V, 111-12). He was worried that unless these inequities were corrected, the creation of a new jail and expansion of the workforce would result in chaos (Tr. V, 111). He explained this concern about "screwed-up" salaries to the PBA's negotiator (Tr. IV, 71). The County thought the salary inequities could best

be addressed by bringing the salaries of employees closer together and reducing the number of different salaries (Tr. V, 51-54, 100). The PBA thought a salary guide could best resolve these inequities (Tr. V, 111).

At these meetings, Miraglia, without specifying an economic proposal, told the PBA negotiators that the County had "a certain pot of money," to be divided consistent with his direction. He suggested the PBA work out a plan for distributing this money (H.E. finding #18). Miraglia did not put a percentage value on the pot, but Villano and other members of the PBA team understood the value of this pot -- 8% for each of two years -- based on the County's pattern of settlements (Tr. I, 138-39; Tr. II, 11, 60; Tr. IV, 108). The County Freeholders had limited Miraglia's authority to this pattern of settlements (Tr. V, 80-82).

In early March 1982, Miraglia and Villano agreed to collect and codify the many sidebar agreements. This arduous process consumed most negotiations before September 1982 (Tr. I, 128-29; Tr. II, 31-33; Tr. IV, 67-68; Tr. V, 88). The County made no economic offer, but the parties continued to discuss salary inequities between officers with the same seniority (Tr. II, 77, 79-80; Tr. IV, 71).

In June 1982, a mediator, Julius Malkin, was appointed. He conducted three mediation sessions, but no agreement was reached. Miraglia still considered the PBA's economic proposals, although lowered, to be out of reach (H.E. finding 23).

In August, 1982, the Director of Arbitration appointed a staff member to conduct interest arbitration proceedings pursuant to the mutual agreement of the parties. The PBA modified its economic package to leave only four issues open -- a five-step salary guide, health benefits, longevity and increased stipends (H.E. finding #24). Additional changes brought the PBA's salary requests down from 15% to 9% plus increment and lowered the stipend increases (Tr. V, 93). The County rejected this proposal as too expensive.

The parties then submitted final offers to the arbitrator (H.E. finding #25). The PBA's final offer was, for 1982, a five step salary guide (cost to follow) plus certain stipends, and for 1983, "salary 9% plus increment, 9% applied to guides" plus certain stipends, uniform and maintenance allowances, medical and dental benefits, longevity increments and a COLA (CP-5). The County's final offer was, for 1982, an "8% increase -- total cost - salary will create a guide" and, for 1983 "8% including increment (CP-5).^{5/}

^{5/} H.E. finding #24 implied that Miraglia dissembled and contradicted himself about the economic positions he took in negotiations and interest arbitration. The record reveals, however, that his testimony was consistent: he did not make an economic proposal (other than referring to the pot of money) at the negotiations table, but he did give the County's economic position at the interest arbitration proceedings. Villano similarly testified that the County had not made any salary offers before September 9 (Tr. IV, 70, 100). Villano conceded that the County never formally offered to guarantee increments (Tr. IV, 102).

The interest arbitration proceedings ended when the arbitrator left the Commission's employ (H.E. finding #26). Miraglia told Villano the County wanted to settle the contract, but the PBA "would have to take things off the table." Villano then secured the consent of PBA officers to do so (H.E. finding #27).

The parties met on September 9, 1982 in the County's administration building. The full PBA team was present; Miraglia represented the County (H.E. finding #27). Miraglia again advised Villano that he had "X" amount of dollars; he would bend, but the PBA would have to bend some to get a guide (Tr. IV, 107). The PBA withdrew its demands for a dental plan and increased longevity in 1982 in exchange for a 1983 reopener on both issues. The only remaining economic item for negotiations was the PBA's proposed five-step incremental salary guide based on years of experience as reflected by the employment anniversary date (H.E. finding #27).^{6/}

Miraglia laughed at this proposal and never accepted it (Tr. IV, 89-90). He rejected placing officers on a salary guide in accordance with their seniority (Tr. II, 102); he rejected paying automatic increments on employee anniversary dates (Tr. I, 181); he rejected a guide with only five steps (Tr. V, 69); and he rejected the entire package as being way too expensive (Tr. IV, 89-90).

^{6/} Villano was confused about this proposal. He initially claimed that placement would have been based on the contract's date (Tr. IV, 77-78), but after much questioning conceded it would have been based on the employment anniversary date (Tr. IV, 84).

Miraglia and Villano met alone. Villano reported his discussions with Miraglia to the PBA team and formulated new positions (H.E. finding #28). Miraglia and Villano, with the help of PBA officer Kelly, then worked out a recommended memorandum of agreement with this provision:

1. The following salary guide shall be implemented as of April 1, 1982 and April 1, 1983.

Step 1	10,000	10,000
2	11,600	11,600
3	14,900	14,900
4	16,200	16,200
5	18,000	18,000
6	19,300	19,300
7	20,900	20,900
8	22,900	22,900
9		24,700

Schedule of payment to individuals as attached.
(J-2)

The attached six-page schedule had two parts: (1) a three page list of every unit employee's name, current salary and service date, and (2) a three-page scattergram showing how many persons were at each salary level and how much each level cost. Officer Kelly prepared the list and scattergram. Miraglia added salary figures for 1982 and 1983 besides each employee's service date on the list: salary amounts for 1982 were assigned based on the first step above the employee's current salary while salary amounts for 1983 reflected the next step above the employee's 1982 step. The number of steps and the amount on each step remained the same for both years with the exception of a new last step representing an 8% increase. No salaries were assigned for court attendants and

criminal identification officers who were to be transferred over to the corrections department (H.E. finding #35).^{7/}

The eight step guide evolved through negotiations between Miraglia and Villano. They determined more than five steps were needed to reconcile all the disparities in salaries. They agreed to freeze the base step at \$10,000 because the County anticipated hiring 20-30 officers for a jail then being built (Tr. IV, 28, 113; Tr. V, 111). Miraglia created the ninth step so that employees at the maximum step for 1982 could get a salary increase; the 8% increase in the step nine salary over the step eight salary was based on the County's settlement pattern (Tr. I, 103; Tr. V, 129). Miraglia rejected adding an 8% increase to each of the first eight steps for 1983 because that would have resulted in astronomical raises (Tr. V, 129, 130). He further testified that he would have preferred just raising each employee's 1982 salary by 8%, but that Villano rejected this approach because he needed the appearance of a salary guide to sell to the PBA membership (Tr. V, 130).

Miraglia also suggested and Villano agreed that the PBA should give up annual "good-boy" pay of \$300 per employee to obtain a settlement. Villano testified, and the Hearing Examiner found, that the PBA gave up "good boy" pay to obtain a guide (H.E. finding

^{7/} This transfer resulted from N.J.S.A. 40A:9-117.6, effective September 14, 1982. That statute provided that County Sheriffs shall appoint to the position of Sheriff's officer those persons who had been working as court attendants or criminal identification officers.

#36). Miraglia testified, consistent with the County's position, that the PBA needed to release the money to work out salary inequities (Tr. V, 53-54).^{8/} The County paid the employees 1/2 of the \$300 for 1982.

Miraglia reviewed the proposed memorandum with Killian and County Administrator Burdge. They agreed the County could live with the agreement for two years and the County had achieved its purpose of addressing salary inequities (Tr. V, 69).

Villano returned to the conference room and explained the agreement to the PBA team (H.E. finding #38). Having difficulty persuading his team to approve the agreement, Villano asked Miraglia to meet with the team, review the memorandum and answer any questions. Miraglia agreed (H.E. finding #39).

Officers McDowell and Exel asked Villano and Miraglia if officers would move on the salary guide after the contract expired.

^{8/} The Hearing Examiner also discounted Miraglia's testimony that he told Villano that they would have to settle this contract like they settled salary inequities among superior officers, who did not get increments (Tr. V, 100). Miraglia testified that his aim in negotiations was to reduce the inequities and randomness of salaries; he thus sought to bring the salaries of employees closer together which, in turn, might permit future negotiations over guides and increments (Tr. V, 100). He had the same concerns with superior officers. He thought he had settled the inequities concerning the superior officers during the summer, but he was not sure since a problem concerning sergeants and another problem involving captains might have remained (Tr. V, 101). In any event, it is not inconsistent to register the same concerns about non-supervisors as supervisors simply because a final agreement may not have been signed.

Exel testified that Miraglia said he would go to the top unless "we bargain it out." McDowell had the same understanding, but was not sure whether it was Villano or Miraglia who answered the question; if Villano answered it, Miraglia made no counterstatement (H.E. finding #39). PBA witnesses also testified that Miraglia told them that all personnel would move up one step on the contract's anniversary date unless an employee's increment was withheld to discipline him (Tr. II, 19). Miraglia testified that he answered the question by saying "if this was a salary guide, you would move, if there was no other agreement ever negotiated" (emphasis added) (Tr. V, 114). The Hearing Examiner did not credit Miraglia's testimony, because of her assessment of his and other witnesses' demeanor, the unlikelihood of the numerous PBA team members not challenging such a response, and the presumed unreasonableness or unresponsiveness of his purported answer (H.E. finding #39). We accept this credibility determination to the extent it is based on demeanor evaluation and the unlikelihood of this answer going unchallenged.^{9/} We add, however, that the answer would not

^{9/} We ordinarily will not overturn a Hearing Examiner's credibility resolutions based on demeanor observations unless a clear preponderance of all the relevant evidence convinces us they are incorrect. However, when a credibility resolution is based on factors other than demeanor observations, we may independently evaluate the witnesses' credibility. Compare City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980) with SCA Services of Georgia, Inc., 275 NLRB No. 120, 119 LRRM 1247 (1985). Hearing Examiners should generally attempt to resolve testimonial conflicts through objective analysis of such factors as internal inconsistencies, corroborating or

necessarily have been unresponsive or misleading since it would have been consistent with Miraglia's testimony that Villano needed the appearance of a salary guide to sell the settlement to his membership.

The PBA ratified the memorandum shortly (Tr. II, 21, 71, 120). At the ratification meeting, Villano distributed a written summary of negotiations (CP-4). That summary states, in part:

The guide contained herein represents a total compromise based on the following concepts.

1. Anniversary date - rejected, unrealistic in light of fact categories are the same and span was too great.
2. Minimum - Maximum - rejected. Highest priority of PBA was guide - minimum - maximum was loss of any accumulated earning + leverage moves to County with new facility.
3. Ceiling on top - percentage in middle - rejected.

No base or guarantee increment. Last settlements all fixed dollar amount as base moved up - the dollar was same thus smaller percentage.

4. Steps - Agreement in principal on steps as years of experience - adjust the total unit to some step with maximum ceiling - develop increment pattern in second year.

9/ Footnote Continued From Previous Page

contradictory evidence, and the witnesses' relative knowledge and experience before making subjective evaluations of demeanor.

According to Villano, the County rejected number 1, the PBA rejected numbers 2 and 3, and the parties agreed to number 4 (Tr. IV, 98-94, 119). The memorandum also set forth the percentage increases between steps on the salary guide:

Step 1-2	16%
Step 2-3	28%
Step 3-4	9%
Step 4-5	11%
Step 5-6	7%
Step 6-7	8%
Step 7-8	10%
Step 8-9	8%

Immediately after he met with the PBA's team on September 9, Miraglia talked with Villano in the hallway. Miraglia testified:

I told Ron Villano after that, Ron, we are going to have to change the language in this because I don't want anybody to get the impression that they are going to get a windfall in 1984, because that is what it was going to be. If I was negotiating an incremental step system, you don't think I would put in 20 percent.

Now, we ultimately changed the language in the contract maybe to insure that wouldn't happen. At least, we thought we did. (Tr. V, 56, 57)

He added:

If you notice in the memo, we said the following salary guide shall be implemented after April 1, 1982 and 1983, and after we came out of there, I told Ron there is no way we are going to get that because we are going to have a problem in '84, and I said we are going to say these are negotiated and agreed steps that people will be placed on. (Tr. V, 57-58)

Villano did not specifically deny this hallway conversation, although he did deny that Miraglia said that the language changes

would eliminate any questions concerning entitlement to increments. (Tr. IV, 138). The PBA elected on the record not to have Villano rebut Miraglia's testimony about their conversations concerning a salary guide at the time of the memorandum (Tr. V, 163). The Hearing Examiner's rejection of Miraglia's testimony is not based on demeanor evaluation and instead assumes that the statement was not definitive and that Miraglia should not have answered a question with a question. The statement, however, would have signalled to Villano Miraglia's concern about the windfall effects of automatic step increases ranging up to 28% serving as a given prior to negotiating an across the board increase. The question Miraglia asked at the hearing illustrated precisely that concern.^{10/} Accordingly, we reject the Hearing Examiner's bases for discrediting Miraglia's testimony on this point.

Villano and Miraglia agreed to insert the words "negotiated and agreed step" in the final contract and delete the words "salary guide" (Tr. IV, 138-39; Tr. V 118). Villano did not submit this change for a ratification vote (Tr. IV, 128).

The parties have different explanations of why this change was made. Miraglia testified that it was made to clarify that employees were not getting an automatic incremental step system (Tr.

^{10/} The Hearing Examiner did not credit Miraglia when he answered a question with a question illustrating his concerns, yet credited Villano's testimony on good-boy pay when he answered a question with a question (Tr. IV, 119)

V, 56-58). In addition, Miraglia believed this change would prevent court attendants and other employees from thinking they were going to move on their anniversary date (Tr. V, 58, 115-116). Villano testified that this change was made to exclude court attendants from the deal struck in Article IV and to preclude any claim they should be placed at the top of the guide (Tr. IV, 42, 139-140). The final contract, however, contains a provision (Article XXVIII) providing that court attendants shall be placed on Article IV's salary guide at the level recommended by the County Sheriff and approved by the Freeholders. It would be more logical to address the issue of court attendants by changing a provision specifically covering them rather than a provision covering the compensation of all employees (Tr. V, 122-23). The unlikelihood of such an indirect resolution supports our determination that Miraglia's testimony concerning the hallway conversation was not necessarily incredible.

On November 5, 1982, Villano prepared and sent Miraglia a draft contract incorporating the agreed-upon changes (R-5) (Tr. II, 3). The Hearing Examiner erred in finding that Killian did so.

The parties, after agreeing to a training officer stipend at the Sheriff's request, signed the contract on January 13, 1983. The Freeholder Director signed for the County, and Villano and two officers signed for the PBA. The Freeholder's clerk attested the signatures and the Sheriff added his signature six days later.

Article IV, the provision controlling salaries, has been set forth at p. 6 of this opinion. The contract also contains a

duration clause (Article XXIV) making the agreement effective until March 31, 1984. A fully-bargained clause (Article XXVIII) provides:

"This Agreement contains the entire understanding of the parties. There are no representations, promises or warranties other than those set forth herein.

Evidence was introduced concerning how the final contract did or did not depart from the practice in the New Jersey public sector concerning negotiations over incremental salary guides. Both Villano and Miraglia are experts on this subject. Teachers' guides are mandated by law and according to Villano, generally average 15 or 16 steps increments averaging between 2% and 5%. Movement generally occurs on the contract anniversary date (Tr. IV, 111). Police guides are not mandated by law and do not exist unless negotiated. According to Miraglia, they generally average four or five steps with approximately equal increments between each step with the possible exception of a one-step balloon payment. He further testified that movement generally occurs on the employment anniversary date because that date is less expensive than the contract anniversary date (Tr. V, 67-68).

Miraglia added that "there are steps and there are steps" (Tr. V, 103). Sometimes, as with teachers, the law mandates a salary guide and automatic movement. Sometimes, as with many police officer contracts, the parties negotiate a salary guide with agreed-upon and express automatic movement. He further testified that at other times parties negotiate salary provisions with steps

during the contract, but negotiate an entirely new guide with new steps after the contract's expiration (Tr. V, 103-104). This explanation is accurate in practice and consistent with Miraglia's testimony that Article IV's steps were designed to reduce inequities and to provide a narrower range of salaries upon which future negotiations could be based (Tr. V, 51-54, 100).

Each employee received the salary Article IV called for in each of the two contract years. A dispute arose, however, when the County placed each court attendant on the salary step immediately above his or her pre-transfer salary. Fact-finder Herbert Haber conducted a hearing at which the PBA and Villano contended that court attendants should have been placed on the same step as the highest-paid employees with the same seniority. This position contradicted Villano's testimony that the parties changed Article IV's language for the purpose of excluding court attendants from its benefits (Tr. IV, 42, 141-42). On August 1, 1983, the fact-finder rejected the PBA's position (R-2). He found that the parties had placed employees on the guide based on their current salaries rather than past service and that the unequal adjustments were necessary to establish a guide which otherwise would have been prohibitively expensive. He also noted that the superior officers' contract contained salary ranges negotiated on the basis of responsibilities and duties.

The PBA then invoked binding arbitration. Before arbitrator Jack Tillem, the PBA and its attorney contended that

Article IV required placement of court attendants on the salary guide in accordance with their seniority. This position was again inconsistent with Villano's testimony. On December 17, 1983, the arbitrator rejected the PBA's position (R-1). His award stated: "the proximate cause of the salaries paid in this contract is not seniority, but, rather the bargaining of the PBA to achieve a step guide which would distribute a finite sum of money among its members that would induce them to ratify the contract. Not incidentally, it also bears noting that movement on the step guide occurred on the contract anniversary date and not on the employee's seniority date" (pp. 8-9). The arbitrator also noted that superior officers did not have a salary step guide. The inconsistency between the PBA's positions in fact-finding and arbitration proceedings and Villano's testimony reinforces our determination that Miraglia's testimony concerning the hallway conversation was not incredible.

Villano testified that in August, 1983, he discussed Article IV with James Kennedy, the new County administrator. The administrator noted that the increments exceeded 9-10%, far beyond the 6 1/2% budgeted for raises in the next year. The administrator stated that even if the PBA could prove its entitlement to increments following the contract's expiration, the County would not offer any other raises (Tr. IV, 56-57). Miraglia testified that he discussed the 1982-84 contract with the new County administrator after the contract was signed; the administrator was worried about the disparity in percentages, but Miraglia told him that all that

had been negotiated was a two year settlement and that anything further would have to be negotiated (Tr. V, p. 127-128).^{11/}

On March 31, 1984, the parties' collective negotiations agreement expired. On April 1, 1984, officers did not receive raises or step increases (Tr. V, 117-118; CP-6). This charge ensued.

Analysis

A. Did the Sheriff Violate the Act?

We first consider whether the Sheriff was an employer or joint employer at the time -- April 1, 1984 -- the predecessor contract expired. If not, then the Sheriff did not violate the Act, regardless of whether increments were automatically due after the contract's expiration. We hold it was not.^{12/}

The Hearing Examiner found, as a matter of law, that the Sheriff and County were joint employers on April 1, 1984. She

^{11/} The Hearing Examiner made no findings of fact or credibility determinations concerning Villano and Miraglia's conversations with the new County administrator. Nor did she consider the testimony of a PBA witness who said that the Undersheriff told him in March 1984 that the money for an increment had been budgeted and the officers would receive that money, although they would first "be screwed around with" (Tr. I, 39).

^{12/} The Sheriff may file exceptions even though it did not participate at the hearing. The Sheriff filed an Answer and may contest the sufficiency of the evidence the PBA introduced against it. Further, a Hearing Examiner's report is only a recommendation; we must review the record independently to determine whether the recommendations are factually supported and legally sound. Maywood Ed. Ass'n v. Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).

relied entirely on Bergen County Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984) where we held that the Bergen County Sheriff and Bergen County were joint employers of sheriffs and corrections officers for purposes of a representation proceeding. That determination, however, was based on all the circumstances of that case and a record of facts establishing that the Sheriff and County each possessed independent, distinct and controlling authority over separate aspects of the employment relation. Here, by contrast, we have an unfair practice proceeding in which the charge does not contain any factual allegations against the Sheriff and the parties stipulated that the County was the employer from April 1, 1982 through March 31, 1984. The facts in the record do not establish a joint employer relationship starting the next day.

It would be unfair to transform a legal result based on all the facts of a prospective representation case into a governing doctrine regardless of the facts in an retroactive unfair practice case. Further, even if Bergen County applied, it clearly recognized that sheriffs did not then have control over compensation issues. In short, given that no one considered the Sheriff to be the employer on April 1, 1984, and given that it did not negotiate the predecessor contract, our Act did not require the Sheriff to pay salary increments if otherwise due at that time.^{13/} Accordingly,

^{13/} Effective April 19, 1984, the Legislature amended N.J.S.A. 40A:9-117 to empower County sheriffs to fix the compensation of deputies, chief clerks and other personnel in accordance

we dismiss the Complaint against the Sheriff.

B. Did the County Violate the Act?

We next consider whether the County violated subsection 5.4(a)(3) on April 1, 1984 by not paying increments allegedly required under the predecessor contract. In the absence of proof of discriminatory motivation, the Hearing Examiner found it did not. No one has disagreed. Based on our review of the record, we dismiss this allegation.

We next consider whether the County violated subsections 5.4(a)(1) and (5) on April 1, 1984 by not paying increments allegedly required under the predecessor contract .

N.J.S.A. 34:13A-5.3 provides, in part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

During successor contract negotiations, an employer may not unilaterally change existing terms and conditions of employment since changes in the status quo may disrupt negotiations and lead to strife. NLRB v. Katz, 369 U.S. 736 (1962).

13/ Footnote Continued From Previous Page

with the generally accepted county salary ranges and within the confines of the governing body's budget allocation. Neither the PBA's charge nor its post-hearing brief asserted that the Sheriff violated the Act by failing to pay increments on or after April 19, 1984 and in its opening argument, the PBA asserted that April 1, 1984 was the operative date.

Refusal to pay an increment during successor contract negotiations may unilaterally alter existing working conditions under section 5.3 and thus violate section 5.4(a)(5). Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Whether a refusal does so depends upon whether payment of the increments is automatic, scheduled, and required to preserve the status quo or whether such payment is discretionary and a matter to be resolved in negotiations. Id. at 49.

In Galloway, the Court held that a refusal to pay increments to teachers during successor contract negotiations violated subsections 5.4(a)(1) and (5). A statute, N.J.S.A. 18A:29-4.1, compelled such payment. Here, however, there was no statutory compulsion to pay increments and no past practice of paying increments. Instead, if the County was required to pay automatic increments in order to preserve the status quo, it was because it and the PBA had contractually agreed to that obligation. Essex County, P.E.R.C. No. 82-41, 7 NJPER 610 (¶12272 1981); Rutgers, The State University, P.E.R.C. No.80-66, 5 NJPER 539 (¶10278 1979), aff'd App. Div. Dkt. No. A-1572-79 (9/1/81); Hudson County Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶14041 1978), aff'd App. Div. Dkt. No. A-2444-77 (4/9/79); City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); Borough of Fanwood, I.R. No. 85-5, 10 NJPER 606 (¶15284 1984).

In determining whether the County contractually agreed to an automatic incremental salary guide, we apply the normal principles of contractual construction. We must examine the totality of the circumstances to determine what the parties' contractual agreement was or indeed whether there was any meeting of their minds. Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983). The polestar of contractual interpretation is to discover the parties' intention. Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). As stated in Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979):

Any number of interpretative devices have been used to discover the parties' intent. These include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct. Several of these tools may be available in any given situation - some leading to conflicting results. But the weighing and consideration in the last analysis should lead to what is considered to be the parties' understanding. Individual interpretative rules should be subordinated to that goal. See Ace Stone, Inc. v. Tp. of Wayne, 47 N.J. 431, 439 (1966, and cases cited. Id. at 221-222.

See also Jersey City, supra.

The PBA bears the burden of proving its unfair practice allegations by a preponderance of the evidence. N.J.A.C. 19:14-6.8. Specifically it must prove that it and the County had a meeting of the minds and that they agreed upon an incremental system

requiring the automatic payment of increments as an existing term or condition of employment at the time the contract expired.

The parties indisputably shared a desire to reduce salary inequities and to bring some order to salary payments. The County contends that Article IV did so for a two year period by distributing a pot of money to individual employees placed on "negotiated and agreed steps"; Article IV might in turn make possible future negotiations over an automatic incremental step. The PBA contends that Article IV both reduced past inequities and established a present and future system of automatic annual increments. The narrow question is whether the PBA proved its contention. We do not decide the fairness or wisdom of whether the contract should or should not contain an automatic incremental schedule. Such questions are solely matters for negotiations and/or interest arbitration and are not properly before us.

We conclude, based upon our careful review of the record, that the parties did not have a true meeting of the minds on whether increments would or would not be automatically paid. Mt. Olive Bd. of Ed.; Jersey City Bd. of Ed. On the one hand, the final contract's wording and features strongly undercut the PBA's contention that it secured a contractual right to an automatic increment system. On the other hand, the negotiations history before the memorandum of agreement strongly undercuts the County's contention that the parties merely settled existing salary inequities. Neither party has satisfactorily established what the

parties intended by changing the salary provision after the memorandum of agreement and before the final contract, and both primary negotiators acted inconsistently with their parties' positions in this proceeding. Reading the record as a whole, and given the discrepancies between the memorandum of agreement and the final contract and the internal inconsistencies in the parties' positions, we firmly believe that the parties mutually failed to obtain what each had sought and never reached agreement on the issue which separated them. In light of this holding, it would be fundamentally unfair to dismiss this Complaint without recognizing that the PBA has a statutory right to continued negotiations so that the parties may now reach a true meeting of the minds. We specifically find that the parties' recent interest arbitration award does not address or resolve this major salary issue and that only renewed negotiations can do so.

We start our analysis with the final contract the parties ultimately signed, not the preliminary memorandum of agreement they later changed. We denied the County's motion for summary judgment because the contract did not definitively preclude the PBA's assertion that it had secured a right to automatic increments where none had existed before. But the contract offers little support for the PBA's claim.

Article IV controls salaries. It creates a salary structure and steps upon which employees were placed in the first contract year and moved in the second. Article XXVIII refers to

Article IV's salary guide, and the fact-finder and arbitrator found that Article IV creates a salary guide. But, on balance, Article IV's wording and features do not suggest the existence of an automatic incremental pattern. First, the parties "negotiated and agreed" on the step placement of each employee for each of two years. No language expresses an intention to have all employees receive automatic increments; the parties indeed rejected the PBA's proposed wording that steps would reflect years of experience that increments be paid on employee anniversary dates. An appendix codifies the placement of each employee for the second year (4/1/83); this feature would presumably be unnecessary in a normal salary guide and appears to emphasize the negotiated, rather than automatic, nature of step placement in the second year. Also, the salaries at each step are the same for both years, a feature that shows that the PBA did not obtain for the contract's second year what it claimed it achieved for the year following the contract's expiration: negotiations over percentage increases on top of automatic increments received as a matter of right rather than negotiations. Under all these circumstances, we conclude that Article IV's language does not support the PBA's position.^{14/}

We next look at the final contract in light of the surrounding circumstances. Resolving the salary issue, reducing

^{14/} The fully-bargained clause also undercuts somewhat the PBA's reliance on any representations made before the final contract.

existing salary inequities and addressing the PBA's demand, and the creation of an increment system were clearly the issues central to reaching a successor collective negotiations agreement. Despite the centrality of these issues and the PBA's claim that the parties created an increment system requiring automatic payments where none had existed before of between 7% and 28%, Article IV has no language creating automatic incremental movement.

We next look to the two precedents interpreting Article IV and the parties' contract: the fact-finder's report and the binding arbitration award. These awards concerned an issue -- salaries of court attendants and identification officers transferred to the sheriff's department -- different from the issue in this case -- alleged automatic increments for all employees following the contract's expiration. Res judicata does not apply. But certain relevant facts were found in both proceedings. We thus know that seniority was not determinative of salary guide placement; each employee's placement was negotiated and agreed-upon in light of the available "pot of money." In this sense, collateral estoppel does have a limited role: any argument that merely serving an extra year in a position requires a step increase is diminished. These proceedings are also significant because the positions the PBA took there contradict the position it took here. There the PBA argued that court attendants were entitled to Article IV salaries according to their seniority; here it argues that the purpose of changing Article IV's language was to preclude court attendants from making such a claim. This conflict disturbs us.

In sum, the wording, features and interpretation of the final contract do not suggest that the PBA secured an automatic increment system where none had existed before. We would ordinarily find this evidence dispositive, but the evidence concerning the negotiations history leading up to the memorandum of agreement requires a closer look at this question.

The Hearing Examiner stressed the County's final offer in the never-completed interest arbitration proceedings. There, the County offered an 8% increase in 1982 and an 8% increase including increments in 1983 while the PBA wanted a five step salary guide in 1982 and a "9% increase plus increment; 9% applied to guides" in 1983. The County's submission illustrates that it was not necessarily opposed to paying increments, provided they were included within an overall percentage raise of 8%. But this submission is also consistent with the County's position that its main concern was staying within the available pot of money and that it did not want to pay increments which were not included within overall percentage if the increments and percentage raises together would total more than 8%. Further, the PBA did not obtain in either the memorandum of agreement or the final contract what it had sought to obtain in interest arbitration: instead of obtaining both a step up for 1983 and a negotiated 9% increase applied to each step, the PBA agreed that there would be no percentage increases or changes in the steps for 1983 besides the creation of a ninth step. The second year, in short, does not set the pattern of increments plus

negotiated increases the PBA had hoped to obtain for 1983 and claims it did obtain for future years.

To this point, the evidence does not support the PBA's position. We now turn, however, to that aspect of the case which most strongly suggests that the County did not obtain its position either. The Hearing Examiner found, based primarily on her credibility determinations that Miraglia told the PBA's negotiations team on September 9 that employees would move up a step following the contract's expiration unless "we bargained it out." We have accepted this finding. Moreover, by his own admission, the County's negotiator helped the PBA's negotiator create the appearance of a salary guide. These facts are especially distressing since the employees voted to ratify the memorandum and to surrender good-bay pay with that impression. We must weigh these facts heavily against the County. The chief negotiations spokesperson's statements concerning the meaning of a contract are certainly strong evidence of intent. Indeed, we would be inclined under most circumstances to find them dispositive. However, in this case the language significantly changed after these statements were made and before the final contract was signed.

We now examine the change in Article IV between the memorandum of agreement and the final contract. The memorandum stated, in part: "The following salary guide shall be implemented as of April 1, 1982 and April 1, 1983." The final contract deleted the reference to "salary guide" and placed personnel upon their

"negotiated and agreed step." While omitting the words "salary guide" from Article IV might not alone be critically significant, substituting "negotiated and agreed step" appears to be more meaningful. The PBA's explanation is that this change was meant to preclude court attendants from being placed on Article IV's top steps, but this explanation is not persuasive. The PBA's own behavior at fact-finding and arbitration contradicts and belies its explanation of the change. Further, Article XXVIII, covering salaries for court attendants, would have been a more logical place for such a limited change than the salary provision covering sheriff's officers. We therefore reject the PBA's explanation.^{15/}

We do not accept, however, the County's explanation of the language change. Miraglia testified that he told Villano that the language would have to change so that employees would not get the impression they were getting a windfall. While the Hearing Examiner's reasons for discrediting Miraglia's testimony on this point were erroneous, we are not willing to substitute an affirmative credibility determination either, especially since Miraglia had helped to create the appearance of a salary guide in the first place. In sum, the language change undercuts the PBA's position, but does not prove the County's position.

^{15/} Villano drafted the document (R-5) first codifying the language change. Doubts concerning disputed language may be resolved against the party drafting the document. Moses v. Edward H. Ellis, Inc., 4 N.J. 315 (1950). The Hearing Examiner applied this doctrine against Miraglia (pp. 57-58), but not Villano. In either case, we place no weight on this doctrine.

We now look at the circumstances of this case as a whole. The wording of the final contract suggests that the parties did not agree on an automatic increment system; the negotiations history before the memorandum of agreement suggests they did. Between the final contract and the memorandum of agreement is an important change in contract language which neither party has satisfactorily explained, especially in light of the primary negotiators' conduct. The County's negotiator, by his own account, helped the PBA's negotiator give the "appearance" of a salary guide and, by the facts we have found, went even further by telling the PBA's negotiations team that they would receive increments following the contract's expiration. The PBA's negotiator, by his own account, agreed to material changes in the memorandum of agreement without PBA ratification and, by the facts we have found, took a position in fact-finding, repeated by the PBA's attorney at arbitration, which contradicted the PBA's explanation of this change. In sum, the parties' minds never met and each party instead separately believed it had succeeded in its negotiations objectives. The memorandum of agreement PBA members ratified significantly differed from the final contract the Freeholders' Director signed.

We have held that the parties did not reach agreement on what they considered to be the most important issue in negotiations. Thus, under N.J.S.A. 34:13A-5.3, both parties had an obligation to continue to negotiate in good faith. See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

In view of our holding, we need not decide the County's claim that the interest arbitration award moots the unfair practice proceeding. We do, however, deem it important to discuss whether the award satisfies the parties' negotiations obligation. We conclude that it unfortunately does not.

We have carefully reviewed that award. We do not read it to resolve the important unresolved automatic increment issue. The parties did not present the issue of whether there was an automatic increment system at the time the prior contract expired. The PBA simply assumed one did, the County simply assumed one did not. The interest arbitrator said nothing to resolve this underlying question of conflicting assumptions. The award makes no factual findings and only cryptic conclusory statements. It states, in pertinent part:

1. Effective April 1, 1984, there shall be a 6.5% across-the-board increase, which increase is to be added to the salary of each Officer.
2. Effective April 1, 1985, there shall be a 6.5% across-the-board increase, which increase is to be added to the salary of each Officer.

The arbitrator's rendering of this award without a resolution of the increment question is troubling. It appears to us that such a resolution was a necessary predicate for a valid interest arbitration award. It is not sufficient to merely conclude that "there shall be a 6.5% across the board increase" without deciding the important question whether it includes the purported automatic increment. This is especially true since the increments

would have a substantial cost. Failing this, the arbitrator did not know and could not have known the actual employees' salaries and could not have complied with the statutory criteria set forth in N.J.S.A. 34:13A-16(g) (arbitrator must consider, among other things, comparison of wages and salaries with others similarly situated; overall compensation currently received and financial impact).

Accordingly, the County and PBA still must fulfill their negotiations obligations so that this matter may finally be resolved. Failing such agreement, this issue must be submitted to interest arbitration. N.J.S.A. 34:13A-16. We cannot decide whether there should be automatic increments. Our jurisdiction is limited to determining whether the County violated our Act by changing the status quo during negotiations by refusing to pay salary increments that the employees were allegedly automatically entitled to receive. Conversely, we do not have the jurisdiction to resolve the substantive terms of the parties' contract. Clearly, under our Act, that is the province of the parties to resolve during negotiations or, failing that, at interest arbitration. We simply hold only that the award has not resolved the automatic increment issue and the parties must still fulfill their negotiations obligation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey

April 18, 1986

ISSUED: April 18, 1986

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

In the Matter of

OCEAN COUNTY BOARD OF CHOSEN
FREEHOLDERS & OCEAN COUNTY
SHERIFF,

Respondents,

-and-

Docket No. CO-84-328-13

OCEAN COUNTY SHERIFF'S
DEPARTMENT, P.B.A. LOCAL 258,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the County and Sheriff violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when they failed to pay increments to Sheriff's Officers and Corrections Officers on April 1, 1984. The Hearing Examiner found that on April 1, 1984 the Sheriff and the County were joint employers of the affected employees (In re Bergen Cty. Sheriff & PBA Local 134 and Cty. of Bergen), P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). She also found that the County and the PBA had negotiated a salary guide providing for annual step increases on the contract anniversary date, April 1 of each year. In this case she found that the employer failed to pay the increments due upon the expiration date of the contract and therefore violated §§5.4(a)(1) and (5) of the Act. Galloway Twp. Ass'n of Ed. Secretaries v. Galloway Twp. Bd.Ed., 78 N.J. 1 (1978).

The Hearing Examiner also recommended that the Commission dismiss the Complaint regarding the allegations that the County and the Sheriff violated §5.4(a)(3) of the Act as no evidence was offered on those allegations.

As remedial action, she recommended that the Commission make the employees whole; that the County and the Sheriff pay the affected employees the salary increments retroactive to April 1, 1984, plus 12% interest.

H.E. NO. 86-13

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. 86-13

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

OCEAN COUNTY BOARD OF CHOSEN
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SHERIFF,

Respondents,

-and-

Docket No. CO-84-328-13

OCEAN COUNTY SHERIFF'S
DEPARTMENT, P.B.A. LOCAL 258,

Charging Party.

Appearances:

For the Respondent,
Berry, Kagan, Privetera & Sahradnik, Esqs.
(John C. Sahradnik, Esq.)

For the Charging Party,
Oxford, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S
REPORT AND RECOMMENDED DECISION

On May 31, 1984, the Ocean County Sheriff's Department, P.B.A. Local No. 258 (PBA) filed an Unfair Practice Charge against the Ocean County Board of Chosen Freeholders (County) and the Ocean County Sheriff (Sheriff) with the Public Employment Relations Commission (Commission). The Charge alleges that both the Sheriff and the County had violated §§5.4(a)(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

(Act). The PBA alleges that the County and the Sheriff violated the Act when, following the March 31, 1984 expiration of the parties' collective agreement and during negotiations for a successor agreement, the County refused to pay PBA unit members automatic salary increments pursuant to the terms of the parties' expired agreement.

On May 31, 1984 the PBA sought an interim relief order requiring the County to pay the salary increments pending a final determination in the unfair practice litigation. On June 11, 1984, Commission designee Edmund G. Gerber conducted a hearing on the request. On June 15, he issued a decision denying the PBA's request for interim relief I.R. No. 84-14, 10 NJPER (¶15184 1984). He specifically found that the Charging Party had not demonstrated a substantial likelihood of proving that the provisions of the prior collective agreement required annual automatic salary increments.

On August 7, 1984 the Administrator of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1 (C-1).^{2/}

On August 13, 1984, the County moved to continue the hearing to provide a full ten days to answer the Complaint which the County received August 8, 1984.^{3/} N.J.A.C. 19:14-3.1. This Hearing Examiner granted the County's motion to continue the hearing pursuant to Commission rules and to serve an Order Rescheduling the matter. On August 17, 1984, the Sheriff filed an answer asserting that the complaint against him be dismissed because the

County was the public employer for the contract period April 1, 1982--March 31, 1984 (C-3).

On August 20, 1984, the County filed its answer (C-2) in which it denied that the parties' prior collective agreement contained a salary guide providing for automatic incremental salary increases April 1 of each year. Further, the County avers, as a separate defense, that a prior fact finder's report and a binding arbitration award established that the salary guide did not provide for automatic incremental salary increases; and therefore the charge is barred by the doctrine of collateral estoppel and res judicata.

On August 27, 1984, the County filed a Motion for Summary Judgment and a request for a stay of the instant hearings, with a supporting brief, documents and certification. The Chairman, acting pursuant to authority delegated to him by the full Commission, granted the County's request for a stay of the hearings.

On September 20, 1984, the Commission issued a decision denying the County's Motion for Summary Judgment (P.E.R.C. No. 85-38, 10 NJPER ___ (¶15268 1984). The Commission specifically determined that the contract language neither established nor precluded the PBA's claim for an automatic annual increase and that a plenary hearing was necessary to decide the disputed matter. Additionally, the Commission found that both the fact finder's report and the arbitration award "dismisses any argument that seniority determined salary guide placement under Art. IV." However, the Commission was not convinced that Art. IV precluded

automatic annual increments. The Commission remanded the matter to this Hearing Examiner for a plenary hearing. Hearings were conducted on October 22, 23, 24 and November 8, 19, 1984, pursuant to a Notice of Hearing. Post-hearing briefs were filed by the County and the PBA. The record was closed on April 30, 1985.

At the conclusion of the PBA's case in chief, the County filed a Motion to Dismiss claiming the PBA had failed to prove by a preponderance of the evidence that the County's actions violated the Act. The PBA responsively argued that the correct standard of proof at this juncture of the proceeding to withstand the motion to dismiss is a scintilla of record evidence to support the charges. I reserved my decision on the motion at that time and indicated I would issue the decision based on the record as a whole.^{4/}

On September 6, 1985, the County filed a motion to dismiss the complaint claiming that the instant matter was moot because the interest arbitration opinion and award for the parties' 1984-1985 agreement decided the matter. In re Matter of Interest Arbitration between Ocean County Board of Chosen Freeholders & Ocean County PBA Local 258, Docket No. IA 85-8. Along with the motion, the County filed a letter memorandum, supporting documents and a certification served on September 11, 1985. The PBA filed its reply to the Motion to Dismiss, along with a supporting letter memorandum, supporting documents and a certification of service. The PBA argues that the motion is not moot as the interest award does not address or decide the increment issue. I reserve my decision now in favor of a decision in my report and recommendations.^{5/}

POSITION OF THE PARTIES

In its post-hearing brief by the PBA argued firstly, that it is beyond dispute that refusal to pay incremental salary increases during negotiations for a successor contract constitutes an illegal alteration of the status quo. Galloway Twp. Bd/Ed v. Galloway Twp. Ed/Assn, 78 N.J. 25 (1978); In re Union Cty. Reg. H.S. Bd/Ed, 4 NJPER 11 (1977); Hudson Cty. Bd. of Chosen Freeholders v. Hudson Cty. PBA Local 151, 4 NJPER 87 (1978), aff'd App. Div. Docket No. A2444-77 (4/9/79). In the present case it is undisputed that the County Board of Freeholders, on April 1, 1984, refused to pay the salary increments to which the PBA was entitled during negotiations for a successor contract.

Secondly, the PBA argued that the evidence supports a finding that the parties created an incremental step salary guide. In support of this contention the PBA cites the credible evidence and testimony of its entire negotiating team in the matter of the 1982-84 contract. Additionally, it points to the documentary evidence, most particularly the notes of the interest arbitrator evidencing the parties' fair and final offers in the interest arbitration proceedings as well as the memorandum of understanding embodying the parties' final agreement authored by the County's negotiator. The PBA argued that these writings coupled with the action of the County in moving all Sheriff and Corrections Officers to the next highest step on the salary guide on the anniversary date

of the second year of the contract, April 1, 1983, clearly supports the PBA's understanding that the parties negotiated an incremental salary guide.

Third, the PBA maintained that the bargaining history in this matter supports a finding that, in fact, the PBA, in order to secure an incremental salary guide changed its economic proposal numerous times finally agreeing to give back merit pay, of \$300 per year per officer, in order to establish a larger pool from which to create the incremental step salary guide. Further, in creating a guide of eight and nine steps for the first two years, the PBA incurred the wrath of individual members by agreeing to disproportionate initial placement in its effort to bring some uniformity to the myriad salaries and inequities that had existed over the prior years. The PBA asked the Hearing Examiner to note that no other County witnesses testified other than its chief negotiator. Therefore implying that their testimony would not corroborate that of its chief negotiator or lend further support to its claims. The PBA asked that the Hearing Examiner award all increments with interest retroactive to April 1, 1984 as remedial action.

The PBA by way of reply brief incorporates its brief submitted to the Commission in opposition to the County's Motion for Summary Judgment on the grounds of res judicata and collateral estoppel. The PBA argues that the question involved in the prior fact finding and arbitration proceedings - the proper placement of

certain employees on the existing salary scale - is different from the question involved in this proceeding - the alleged entitlement of all employees to automatic step increases on the contract anniversary date. Therefore, the PBA argues the material issue of fact before the Commission in this unfair practice proceeding is not barred by prior litigation of a different material issue of fact between the same parties.

In its post-hearing brief, the County, firstly, argued that the salary schedule in Art. IV of the parties' prior contract does not constitute an incremental salary guide providing for salary increases on the contract anniversary date. In support of this position it points out that Art. IV is clear and unambiguous on its face and that the salaries negotiated and agreed to were for contract years commencing April 1, 1982 and April 1, 1983. The County further claims that the final contract language was negotiated between its chief negotiator and the PBA's chief negotiator, following a meeting with the full PBA team on September 9 and after the September 1982 PBA ratification meeting. Further the County claims that this later final agreement as embodied in the contract was never submitted to the full PBA team for ratification. Additionally, in support of the County's position that it never negotiated an incremental salary guide, the County asserts its original rejection of the PBA five-step incremental guide based on employees' anniversary date. The County argues that at a minimum there was no meeting of the minds on Art. IV. Further if there is

any ambiguity in Art. IV it must be construed against the author of the language; the County claims that PBA drafted the language.

Secondly, the County argues that the PBA claims are barred by the doctrines of res judicata and collateral estoppel. It argues that where an ultimate issue of fact has been determined after a full and fair hearing between the parties that that issue cannot later be relitigated between the same parties in a future action. Ash v. Swinson, 397 U.S. 436, 443, 25 L.ed. 2d 469, 475 (1970); State v. Gonzalez, 75 N.J. 181, 186 (1977). The County argues that in the instant case the instant issue was determined adversely to the PBA by both the fact finding proceeding and a binding grievance arbitration award. The County claims that both awards held that Art. IV of the parties' agreement did not give rise to an incremental salary guide based on an employee's seniority or length of service. The County acknowledges that the fact finder's report was not binding on the parties; however, the interest arbitration award was and both reports represent determinations on the merits of the issue. The County notes that the parties to the fact finding and arbitration proceedings are the same parties in the instant unfair practice proceeding. The County argues that Art. IV reflects the salaries of the members of the unit which were negotiated and bargained for based on how much money the County agreed to spend over a two-year term of the contract and nothing more. The County notes that there is no statutory provision which provides for automatic increases in this case. It respectfully requests that

judgment be entered in favor of the County and that the Charge be dismissed.

In its reply brief the County asserts that the PBA has failed to address a critical issue - the language of Art. IV in the contract - and has instead addressed the language contained in the September 9 memorandum which the County claims was admittedly revised by the union's negotiator and never resubmitted to the union's membership for ratification. At most, the County argues, the Charging Party has demonstrated there was no meeting of the minds between its membership and the County and that therefore there is a failure of a material term of the contract. The Commission has held that where there is no meeting of the minds in an understanding signed by the parties, no unfair practice lies. South Amboy School Board, 7 NJPER 192 (¶12084 1981) and Mt. Olive Bd. of Ed., 3 NJPER 382 (1977).

The County further argues that the PBA's request for interest on any award in the instant case is inappropriate as it has failed to cite any authority for the prosecution it is entitled to interest and additionally there has been no showing of bad faith on the County's part. The County and the Sheriff have remained ready, willing and able to negotiate a successor agreement and negotiations have been ongoing. Additionally the County asserts that if it has committed an unfair practice the likelihood that the conduct would recur is minimal and any harm to public rights is de minimis, Union Cty. Reg. H.S. Bd. of Ed., 5 NJPER 229 (¶10126 1979).

FINDINGS OF FACT

Based on the entire record in these proceedings, the Hearing Examiner finds the following facts:

1. The Ocean County Board of Chosen Freeholders is a public employer within the meaning of the Act and is subject to its provisions (C-2).
2. The Ocean County Sheriff's Department P.B.A. Local 258 is a public employee organization within the meaning of the Act and is subject to its provisions (Stipulation 1 T 6; C-1; C-2).^{6/}
3. The Ocean County Sheriff is a public employer within the meaning of the Act and is subject to its provisions (C-3).
4. The P.B.A. Local 258 is the majority representative of County Sheriff's Officers and Corrections Officers excluding superior officers (Stipulation, 1 T 6; J-1).
5. The County and the PBA entered into a collective negotiations agreement effective April 1, 1982 through March 31, 1984 (Stipulation, 1 T 6; C-2).
6. The County was the employer of the unit for the period April 1, 1982 through March 31, 1984. (Stipulation 1 T 6; J-1).
7. Appendix A attached to the agreement listed every unit employee as of September 9, 1982 and specified a salary for each employee for the years commencing April 1, 1982 and April 1, 1983 except for employees numbered 74 through 77 who are Court Attendants (Stipulation, 1 T 7; J-1).
8. The 1982-1984 agreement between the parties expired March 31, 1984 (Stipulation, 1 T 7; J-1).

9. The contract immediately preceding the 1982-84 agreements between the parties did not contain a salary guide (Stipulation, 1 T 7).

10. On April 19, 1984, the New Jersey Legislature passed Chap. 35 of the Laws of New Jersey 1984 amending N.J.S.A. 40A:9-11.9, P.L. 1972, c. 154 and P.L. 1982, C. 133, which provides in relevant part as follows:

The sheriff shall fix the compensation they [deputies, chief clerks and other personnel] shall receive in accordance with the generally accepted salary ranges and within the confines of the sheriff's budget allocation set by the governing body."

This act had immediate effect.

11. In November, 1981 the PBA sent a letter to the County stating the PBA's intent to negotiate a successor agreement for 1982 (1 T 88). Negotiations for the 1982-1984 contract commenced sometime in February 1982 (1 T 88; 3 T 34; 4 T 6). No one person served as a chief negotiator for the PBA team (2 T 76). Initially the following employees represented the PBA: Dennis Kelly (1 T 86, 88; 2 T 55); George Emmetts (1 T 87; 2 T 55); William Reilly (2 T 55); Paul Exel (1 T 87; 2 T 13, 14, 30, 31, 75). Later in the negotiations other employees joined the PBA team, including Carlton (Sam) Seaman (1 T 87; 2 T 55, 116, 117) and Thomas McDowell (1 T 87; 3 T 20, 23). Members Kelly, Reilly and Exel attended most negotiation sessions held with the County (1 T 87; 2 T 16, 60).

Dennis Kelly was hired September 1975 (1 T 98) as a Corrections Officer in the Sheriff's Department (1 T 85). On

January 6, 1983 he was provisionally appointed a sergeant and removed from the instant negotiations unit. On October 13, 1983 he was permanently appointed a sergeant (1 T 85, 86).

William Reilly has been a Sheriff's officer since 1978. He is a member of PBA Local 258 and currently serving his second two-year term (4th year) as the Local's State Delegate (2 T 55).

Paul Exel has been employed by the County for 12 years, the last four of which as a Sheriff's Officer (2 T 13). He served as Local 258 Vice President in 1982 and 1983 (2 T 13).

Carlton Seaman has been employed as a Corrections Officer for five years (2 T 115). He joined the Local 258 negotiations team at the beginning of September 1982 during the latter part of negotiations (2 T 116).

Thomas McDowell has been employed by the County for 13 years, currently as a Detective in the warrants division (3 T 19). He holds no office in PBA Local 258 (3 T 20).

Occasionally the then president, Marty Vavra, attended negotiations sessions (2 T 55).

12. The County was represented at these negotiations by John Miraglia, labor consultant, the County's chief negotiator (1 T 87, 88; 2 T 14, 29, 56, 57, 117; 4 T 7; 5 T 34, 36, 38). From time to time Inez Killian, Administrative Assistant, A. Paul King, and James Kennedy attended negotiations sessions. Inez Killian, County Administrative Assistant, served as Miraglia's liaison and resource person with the County (5 T 63, 79, 80, 89). A. Paul King is the

County Employee Relations Director (4 T 8). Kennedy is the County Administrator succeeding Kenneth Burdge (2 T 112; 5 T 55, 80).

Miraglia, as the County's labor consultant, represents the County in labor negotiations, labor arbitration and other related matters (5 T 34). He has been employed in labor relations since 1955 (30 years): as an independent consultant for the past 13 or 14 years and previously as a local union business agent, an agent of the National Labor Relations Board, Deputy Director of the Space Program during President Kennedy's Administration, the Assistant Maritime Director of Labor Affairs during President Johnson's Administration, and Director of Employee Relations for Johnson and Johnson (5 T 36). Miraglia has a degree in industrial psychology and a graduate degree in psychology (5 T 36). His past experience negotiating collective agreements for county correction and sheriff's officers is limited to two New Jersey counties -- Atlantic County many years ago and Hudson County briefly. He has also negotiated agreements covering other employees in Hunterdon County and has experience with police negotiations (5 T 83, 84).

13. In January or February 1982, the PBA team met with the County team headed by John Miraglia. The PBA presented and reviewed its contract proposal (2 T 15, 56; 4 T 7; 5 T 36, 37). At these first one or two early sessions the PBA also advised the County of its top economic priorities: a salary guide with increments, increased longevity payments, increased stipends, and improved health benefits (1 T 88, 89; 2 T 15, 16, 57, 60). This economic

package equaled a 62% increase (1 T 89; 2 T 61). The County, through Miraglia, rejected this proposal as too expensive (1 T 89; 5 T 38).

14. During the course of negotiations the parties met approximately 10 to 15 times, including the fact finding and interest arbitration sessions (4 T 8; 5 T 35, 88). Following one or two early 1982 meetings the PBA hired Ron Villano as its Chief Negotiator (1 T 88; 2 T 29; 4 T 7, 62).

Villano is a teacher with the Central Regional School District (4 T 109). Villano's labor relations experience includes serving as a New Jersey Education Association consultant for the last twelve years and as an independent labor consultant for the last five years with the firm of Villano and Walters (4 T 6).

As an NJEA consultant Villano negotiates collective agreements for school employees in all classifications and represents those employees in grievance proceedings, arbitration, fact finding and mediation (4 T 6).

Villano and Walters represent police and fire units throughout New Jersey in collective negotiations, grievance adjudication and interest arbitration (4 T 6). The first time Villano represented PBA Local 258 was during negotiations for the 1982-1984 contract (4 T 62).

15. Villano met with the PBA to review contract proposals (4 T 65), prepare a summary sheet of items and list priorities which then included an incremental salary guide, stipends, and prescription, dental and optical plans (4 T 8).

The PBA presented the revised proposal to the County at a negotiations meeting in early March 1982 attended by both Miraglia and Villano (4 T 9, 85; 5 T 38; R-4). Miraglia acknowledged his understanding of the PBA's priorities (5 T 88). This written proposal included a salary guide (R-4) which reads as follows:

ARTICLE IV

SALARIES AND SHIFT DIFFERENTIAL

A. Effective April 1, 1982, base salary for all employees covered by this Agreement shall be \$11,000.00 (Eleven Thousand).

The Maximum base salary for all employees covered by this Agreement shall be \$24,500 (Twenty-four thousand five hundred).

Salaries shall be determined by the following chart:

Starting date to 1 year	\$11,000.00
Step 2-----	13,700.00
Step 3-----	16,400.00
Step 4-----	19,100.00
Step 5-----	21,800.00
Step 6-----	24,500.00

All steps to reflect years of experience as a Sheriff's Officer.

B. Effective April 1, 1983, the minimum base salary for all employees covered by this Agreement shall be \$12,000.00 (Twelve Thousand One Hundred)[sic].

The maximum base salary for all employees covered by this Agreement shall be \$26,950 (Twenty-six Thousand Nine Hundred and Fifty).

Salaries shall be determined by the following chart:

Step 1-----	\$12,100.00
Step 2-----	15,070.00
Step 3-----	18,040.00
Step 4-----	21,010.00
Step 5-----	23,980[sic]
Step 6-----	26,950.00

The proposed salary guide consisted of a starting salary and five additional steps. The average number of steps in salary

guides for police forces in Ocean County is five steps (4 T 9).

16. The County rejected the PBA's written proposals as too expensive (4 T 12, 70, 75, 76; 5 T 41). However, the County did not reject outright the concept of a salary step guide at that time (4 T 75; 5 T 86).

I base these findings on the credible testimony of the PBA witnesses who, from my observations, were direct, clear, and composed.

Villano testified that Miraglia told the team to "go work out a guide as he was not opposed to guides" (4 T 75); Exel, testified that Miraglia said, "that he had no problem in that everyone had a right to know where they were to start and where they were ultimately going to be after a reasonable period of time" (2 T 20); Kelly testified that Miraglia said, "that everyone coming into a job should know eventually where they would wind up and we should have a way of getting to the top" (1 T 90, 95).^{7/}

Moreover, Miraglia himself acknowledged that early in the negotiations he told the PBA that it was fair that they know where they were going from one year to the next in salary, explaining that he said it in the context of a discussion about salary inequities (5 T 111-112).^{8/}

17. Miraglia did not obtain information regarding salary guides or benefits in other counties, he only looked at comparative salaries in preparation for these negotiations (5 T 82).

18. At these same meetings early in 1982 Miraglia advanced the County's economic position, without making a specific economic

proposal (1 T 126; 2 T 81, 82). Miraglia told the PBA negotiators that "we [you] had a certain pot of money and how we [you] divided that money had to be consistent with my direction (1 T 122; 2 T 29, 30, 60; 5 T 43;). Additionally, Miraglia did not tell the PBA the monetary value of the "pot of money." He said, "I assumed, everybody knew what it was" (5 T 43). He suggested that the PBA work it out (1 T 121-122; 2 T 15; 4 T 75). He merely alluded to the value of settlements with other county units (1 T 121, 122, 139, 140; 2 T 11).

19. From January 1982 until an interest arbitration proceeding in the summer (August) of 1982 the County made no specific economic offer (4 T 99, 100, 101; 5 T 43, 90).

20. I am not convinced that Miraglia told Villano in the hallway outside the negotiations room that the County had authorized for salaries, "no more than an 8% each year" (5 T 42). I find it more likely that Villano and the PBA negotiating team members, based on information from other sources, understood that the County may have had an 8% limit. First Miraglia testified that he "thinks he told Villano about the 8% limit" (5 T 44). Second, Miraglia himself had limited information on other Ocean County settlements. Miraglia testified that prior to meeting with the Sheriff's Officers he had met with County Freeholders in the afternoon. Further Miraglia testified that the Freeholders told him that they wanted a settlement consistent with settlements in the other units. However, time had only settled with one unit (the library board) for 8%.

Miraglia thought that the white collar supervisors (OPEIU) had settled "somewhere along those lines" but he had no information regarding the settlements for the Prosecutor's office (5 T 81). Third, Miraglia made no economic proposal at the negotiations table but did make statements to the PBA team that they should know what the County settlement pattern was. Obviously at this point of negotiations he was not willing to tell the PBA team his position. But at the same time he expected the PBA to fully understand the County's economic limits. Fourth, there is some evidence that the PBA had some ideas about the County's economic position; Kelly, PBA witness, testified that he was aware of the County pattern (1 T 138). I conclude here that Miraglia was vague in his discussions with the PBA about the County's economic proposal and the County's financial limits.

21. For a good part of the negotiations from January through August 1982 the parties discussed fashioning one comprehensive contract document (1 T 128, 129; 2 T 31, 33, 77, 81; 4 T 67, 68). In the spring of 1982 the PBA offered a comprehensive proposal (R-4) and then Villano prepared a summary guide (R-6) as a key for the petitions discussion (5 T 97).

22. The parties also discussed the salary inequities between officers with the same seniority (2 T 77, 79, 80; 4 T 71). The PBA considered this a reason to create a step guide (2 T 77).

23. By June of 1982 no agreement was reached on a contract. A Mediator, Julius Malkin, was appointed (1 T 91, 92, 93,

124, 125; 4T 13; 5 T 47;)). Three mediation sessions produced only a slight modification in the parties positions. However, no agreement was reached (1 T 93; 4 T 14, 84) and again the County made no economic offer, even after the PBA lowered its economic proposals (1 T 92; 5 T 90;). Miraglia still considered the PBA proposals out of reach (5 T 48, 49).

24. Following mediation the parties initiated requests for interest arbitration (1 T 126; 4 T 14; 5 T 91). In August 1982, PERC appointed Arbitrator Joel Weisblatt who convened a formal meeting (1 T 126, 128-132; 4 T 14; 5 T 91).

The PBA had substantially modified its economic position leaving only four issues open - a five-step salary guide, health benefits, longevity and increased stipends (1 T 92). Miraglia admitted (5 T 93) that the PBA made additional changes in its proposals (1 T 93; CP-5) bringing the salary requests down to 9% from 15% (4 T 26; 5 T 93) and lowered the requested increase for stipends (1 T 93). The County still maintained that the PBA's last proposal was still high and did not agree. However, again no voluntary agreement was reached (4 T 14). The parties moved to initiate formal proceedings (5 T 52). Therefore, at this session the parties submitted their final offers to the Interest Arbitrator (5 T 92). In earlier testimony, Miraglia said that the County did not talk about economics at the table (5 T 43) claiming he only discussed economics with Villano in the hall (5 T 42, 89). Later he again stated that he made no proposals nor did anyone else from the

County. However, immediately thereafter he remembered the economic proposal he submitted to interest arbitration and corrected his testimony (5 T 93-95). However, a few minutes later, after authenticating CP-5, Miraglia again misstated the County's economic proposals overlooking the increments offer for 1983 he made at interest arbitration (5 T 93).

25. I find that the County offered the PBA a salary guide with increments for 1983. The PBA and County proposals, as recorded by the interest arbitrator (CP-5) are attached as Appendix A (3 pages).

The arbitrator recorded the information and gave both parties a copy of his notes because Villano had spilled coffee on his own and needed the information (4 T 17, 18, 19; 5 T 49, 50). Miraglia also acknowledged that the arbitrator's notes had been given to both parties to avoid bias (4 T 91; 5 T 50;).^{9/}

The following is testimony of Miraglia on cross-examination:

Q So you did discuss a guide before September 9th, did you?

A No, we did not discuss it. This was our final position at the interest arbitration without discussion. The Arbitrator said I want to have your final and fair offer, he said PBA and Mr. Villano -- first he wanted the issues, which we gave to him, and then there was some discussion, really, that went nowhere, and he said okay, I want your final positions and I will take them under advisement and act on them, and that's what was given to him.

Q

Who enunciated the County's final position in August?

A I did

Q And did you then speak about a guide?

A I said to them that we would be willing to created a guide that was 8% including increment, but it could not be any more than that

Q So you specifically talked about not only a guide but the increment in the guide?

A If there was to be an increment in the guide.

Q It was your final proposal wasn't it?

A Yes, I am answering it yes.

Q May I see that proposal?

A Sure.

Q You don't believe that these notes of Arbitrator Weisblatt are in error do you?

A I don't think so.

Q Now you testified previously that you came to a point, and when I say you I mean the County, when you were agreeable to create a guide in the second year, is that right?

A Only until the Interest Arbitrator's provisions for a fair and final offer.

Q County's position now, you would give a flat rate for 1982 and then create a guide in 1983?

A That we would discuss creation of a guide.

Q When you said --

A It has to be mutual Mr. Blunda. They didn't want the County, obviously, to do it unilaterally it would have to be done by mutual consent.

Q Well, you have been in this public sector for 13 years?

A Yes.

Q How is fair and final arbitration resolved from your understanding?

A By both parties submitting their last best offer.

Q And who makes the determination?

A The arbitrator.

Q And is that determination binding?

A That determination is binding.

Q And isn't it a fact that in August the County submitted a final proposal to create a salary guide with an increment?

A I said yes, I testified yes. (5 T 93-95)

26. Since Weisblatt was leaving the employ of PERC to enter private practice in mediation and arbitration (4 T 6), there were no hearings or briefs. The parties would have to resubmit for arbitration (4 T 6, 19). This did not occur (5 T 97).

27. Sometime after the interest arbitration meeting Miraglia called Villano and told Villano that the County was interested in settling the contract. They arranged a meeting. Miraglia advised Villano that the PBA would have to "take things off the table" (5 T 98). Villano then secured consent of the PBA officers to modify the economic position (4 T 26). The parties met on September 9, 1982 (4 T 25; 5 T 98 & 99;) in the third floor conference room of the administration building (2 T 18; 5 T 4).

The full PBA team was present (1 T 96, 132-134; 2 T 17, 18, 65; 3 T 20; 4 T 27;) including Kelly, Reilly, Exel, and McDowell; Seaman arrived at the end of the meeting (2 T 117). Miraglia was present for the County; Killian and Burdge were in the building (2 T 18; 4 T 26, 94; 5 T 54, 55, 99). Again Miraglia advised Villano on that day that he had "X" amount of dollars; he would bend, but the PBA would have to give up some to get a guide (4 T 107). The PBA then withdrew its demands for a dental plan and increased longevity in 1982, in exchange for a 1983 reopener on both issues (5 T 98). The only remaining economic item to be negotiated was the PBA proposal for a five-step incremental salary guide (1 T 103, 104; 5 T 98, 99; R-4; CP-5).

28. Miraglia and Villano met together separate from their respective teams to prepare the salary guide. They met in a small room off of Killian's office down the hall from the main conference room. During the whole period of negotiations for the salary guide Villano went back and forth between his meeting with Miraglia and the PBA team in the conference room (2 T 65; 4 T 27, 92, 93, 94; 5 T 54) to report to the team and formulate positions. At some point during this negotiation Villano requested Kelly's assistance on computation and preparation of the final guide figures and salaries placement (4 T 92; 5 T 69).

29. Both Villano and Miraglia clearly understood the construction and operation of salary guides; they had negotiated with each other over many years (5 T 44).

30. Mr. Villano had clearly explained the PBA's proposal to Miraglia at the time it was originally made (4 T 9, 73, 74, 88). Villano's testimony on direct was as follows:

An officer would be placed on a step, as he started, and at the end of that year, he would move to the next subsequent step, and the end of that year the next step, to earn maximum earnings which would be five steps. If there was a contract settlement, we would bargain off that guide. If so, if we took a percentage settlement, we would take that step and increase it by that percentage. Thus, that officer would be moving between steps picking up the percentage and the increment (4 T 9).

* * *

Counsel for PBA asked Villano:

Q And now, I believe my last question was what would happen in the second year of the contract, under a five-step salary guide?

A He would go to the next step.

Q What would the next step be?

A Step two if he was in step one that prior year.

Q And what would happen when the contract would expire at the end of two years?

A He would go to step three.

Q Now, what we have just discussed was anything like that discussed with Mr. Miraglia or any other representative of the County during the negotiations?

A During the negotiations we discussed the creation of a guide that the PBA 258 should have a salary guide and these people would be placed on the guide et cetera.

Q With whom were those discussions had?

A With John Miraglia at the bargaining table.

Q Did Mr. Miraglia respond to the PBA's position on the salary guide?

A Mr. Miraglia responded but [sic] he believed that everybody should be on a guide. He stated that at several sessions a person should know where he was going to, and he was not opposed to salary guides (4 T 12-13).

31. Miraglia clearly understood the impact of this guide proposed by the PBA, as indicated by Villano's testimony on cross:

A John Miraglia knew exactly the cost of that proposal he didn't have to go to a calculator to figure out what the PBA was asking for. I wasn't surprising John Miraglia, in any sense of the word....

Q You weren't surprising Mr. Miraglia. But the language in this particular provision doesn't reflect that people are to max out, anybody over six years of experience is to max out at \$24,500.

A No, it says that right there. You just read the same quote: all steps are to reflect years of experience (indicating). You were -- if you were there more than six years and you bought that proposal you would now be paying a Sheriff's Officer 24,700***the steps were based on years of experience.

Q And that proposal was rejected by Mr. Miraglia. Correct?

At 4 T 12 counsel for PBA asked:

Q And now, I believe my last question was what would happen in the second year of the contract, under a five-step salary guide?

A He would go to the next step.

Q What would the next step be?

A Step two if he was in step one that prior year.

Q And what would happen when the contract would expire at the end of two years?

A He would go to step three.

Q Now, what we have just discussed was anything like that discussed with Mr. Miraglia or any other representative of the County during the negotiations?

A During the negotiations we discussed the creation of a guide that the PBA 258 should have a salary guide and these people would be placed on the guide etc.

Q With whom were those discussions had?

A With John Miraglia at the bargaining table.

Q Did Mr. Miraglia respond to the PBA's position on the salary guide?

A Mr. Miraglia responded but [sic] he believed that everybody should be on a guide. He stated that at several sessions a person should know where he was going to, and he was not opposed to salary guides.

Miraglia clearly understood the impact of this guide (4 T 88-89) as he laughed a lot and then originally rejected it (4 T 90). Question on cross:

Q Oh. So, what you tried to do is use some language, which would give Mr. Miraglia a hint of what you wanted, but you were afraid to set it out in detail, because of the fact that the economic impact would scare him away?

A Mr. Miraglia spotted the economic impact, immediately....John Miraglia knew exactly the cost of that proposal he didn't have to go to a calculator to figure out what the PBA was asking for. I wasn't surprising John Miraglia, in any sense of the word....

Q You weren't surprising Mr. Miraglia. But the language in this particular provision doesn't reflect that people are to max out, anybody over six years of experience is to max out at \$24,5?

A No, it says that right there. You just read the same quote: all steps are to reflect years of experience (indicating). You were -- if you were there more than six years and you bought that proposal

you would now be paying a Sheriff's Officer 24,7....the steps were based on years of experience. (4 T 89).

Q And that proposal was rejected by Mr. Miraglia. Correct?

A He laughed a lot. If you want to interpret laughter as I did, at the table, yes, he rejected it, he laughed quite a bit. (4 T 89-90)

32. Miraglia's specialized knowledge and understanding of the construction and operation of salary guides as of September 9 is clear from his own testimony (5 T 66-68 on direct; 5 T on cross 117 & 118).[Miraglia testified as follows:

Q All right, in those types of incremental guides can you advise me and the Hearing Officer to whether there is generally language included in any way identifying it as an incremental or automatic guide?

A There are in PBA contracts, where they said that an officer will move on his anniversary date. Usually there are four or five step guides and they will say that an officer will move on his anniversary date to his first year, second year, third year, until he is a patrolman, full patrolman, and there is usually language in there which sets that forth.

Q Generally in the case PBA guides, what is the differential between steps in an incremental guide?

A Well, it would depend on what the starting salary was and it would depend on the final patrolman's salary on what the final patrolman's salary were. There maybe one word [sic]. What we call a balloon payment in there at some point to catch up from possibly the third or fourth step or the fiftyith [sic] step, if there is a fifth step, to the fifty step a balloon in there which is usually larger than the others.

Q ...Can you tell me in such a guide, PBA guide, do they normally contain minimum or maximum salary levels or salary scales?

A Well, they would contain a salary scale, they would contain a starting salary and how a man would move on their anniversary.

Q And generally when they are talking about anniversary date, is that anniversary date of employment, or contract?

A No it's anniversary date of the employment. If you would do it on a contract, it would cost significantly more money. If a person was employed November 1 and

you use the anniversary date of the contract, let's say its January 1st or April 1st, he would get a full increase at the time instead of waiting until November 1, when his anniversary date came around and he would be paid, so, consequently, that's how you keep the cost down in the PBA contract, anyway. That's why you have the anniversary dates. (5 T 66-68)

* * *

Miraglia on cross-examination testified as follows:

Q The intent and the concept, though, as I understand it, was that in the second year of the contract, everybody moved to the next step of this guide, right?

A That was the contract, sure.

Q As far as you understand it everybody did, or else you would have heard a grievance.

A Absolutely. (5 T 118)

Earlier on cross-examination, Miraglia testifies as follows:

Q

Well, in your 29 years of labor relations, do you know if there is a connotation to the word steps?

A There isn't any unless you explain it thoroughly.
There are steps and there are steps.

Q What kind of steps are there?

A Well, there are just steps where people are on, and then you negotiate another agreement and the steps change. There are steps that have --

Q Let me stop you there. You negotiate another agreement, and what happens to the people? Do they go from one step to the next?

A No, we create a new guide for them. Increments only occur in one of two ways, one, obviously, on a teacher's guide, which is mandated by law, to have a salary guide and their increment is paid September 1st, and the other is in a P.B.A. guide, and even in the teachers' guide, you do it by the length of service of the teacher, and in the P.B.A. guide, you do it on an anniversary date and a person moves, so that if you have a negotiation which goes on in year

one, you set forth what goes on in year two, and the policeman travels on his anniversary date until he reaches the max, so there are minimums, maximums, and he moves in between.

Q In a teacher salary guide, do the teachers move on their anniversary dates?

A Well, if they are placed on their proper step when they are hired, then, obviously, they move on the anniversary date of the contract because, as I said, that's all outlined under Title 18. That's mandatory. You can't take a teacher who is at the top of the guide and negotiate to put him in the middle of the guide. It doesn't work.

Q Well, in teacher bargaining, can you create a new guide whereby someone who had previously been at the maximum step is, in the next contract, not at the maximum step?

A You can add a step.

Q You can add as many steps as you want, can't you?

A

Yes, you can add steps or you can just give them the amount of money that the settlement calls for, so you don't have to do that, you can add a step or not add a step. You can do whatever you want to.

Q You do teacher bargaining, do you not?

A Yes.

Q In your extensive teacher bargaining, have you ever created new guides?

A Well, you create a new guide everytime you negotiate. It's called distribution. (5 T 103-105)

33. On September 9, 1982 Villano and Miraglia negotiated a salary guide and signed a memorandum of agreement (J-2). This memo provides:

RECOMMENDED MEMO OF AGREEMENT
BETWEEN OCEAN COUNTY AND PBA LOCAL 258

1. The following salary guide shall be implemented as of April 1, 1982 and April 1, 1983.

Step 1	10,000	10,000
2	11,600	11,600
3	14,900	14,900
4	16,200	16,200
5	18,000	18,000

6	19,300	19,300
7	20,900	20,900
8	22,900	22,900
9		24,700

Schedule of payment to individuals as attached.

34. The September 9 document consisted of the actual memo and a six-page attachment. On the first three pages of the attachment is a listing of every unit employee's name, current salary, and service date. This list was prepared by Kelly (1 T 97, 102, 137). The last three pages of the attachment represent a scattergram, prepared by Kelly, showing how many persons are at each different salary level and a cost figure for each salary level -- there are 78 employees listed and 16 different salary levels (J-2; 1 T 97 thru 98). There was no salary guide in effect immediately prior to April 1, 1982 (1 T 98). These attached sheets were used by Villano and Miraglia during negotiations for the salary guide. On the first three sheets, the two salary figures written in the far right column were added by Miraglia on September 9 during negotiations (1 T 102, 103, 135, 137). The nine-step guide was Miraglia's creation (1 T 139).

35. The various guide steps were worked out by Miraglia and Villano. At first, they costed out the PBA's five-step guide and determined it couldn't be done that way, and decided there had to be more steps to accommodate all the disparities in salaries (5 T 69). Finally, Miraglia, Villano and Kelly came up with the eight- and nine-step guide (5 T 69). The eight-step guide just evolved (4

T 27). The nine-step guide was Miraglia's creation. It developed by increasing step eight by 8% and making step 9 (1 T 139). Miraglia told Villano he had to hold the first step at \$10,000 and stay within the parameters of our settlement (1 T 102; 5 T 68-69). The PBA then gave up the "good-boy" pay to release funds to the pool to create the guide (4 T 28 & 29; 2-T 11). Miraglia, Villano and Kelly assigned employee's salary amounts for 1982 on the basis of employee's current salary (1 T 103; 5 T 68) without regard to years of service. Additionally, no salary was assigned for Court Attendants who were to be transferred over to Corrections (5 T 121).

36. Based on the credible testimony of various witnesses I find that Miraglia did tell Villano that the PBA would have to give up something to get their guide (1 T 108; 4 T 107); that Miraglia suggested they take the merit pay (1 T 29) [about \$33,000 per year] which other units had given up and plug it in and use it for working out inequities (5 T 53 & 54); and, in fact, Villano secured the agreement of the entire PBA team to give up "good-boy pay" (merit pay).

37. I also find that Miraglia did not withdraw the County's offer for 8% and 8% including increment which the County advanced at the interest arbitration meeting. I find that the County did not make this PBA unit the same offer the County made to the superior officers. I do not credit Miraglia's testimony that on September 9 he told Villano that Villano would have to do things in a way similar to the way the parties had settled the inequities for

the superior officers who, did not get increments (5 T 100). In fact, upon further examination he testified that the superior officers' contract settled after the instant contract and after September 9 (5 T 101).

38. Miraglia then reviewed the proposed guide with Killian and Burdge who, at that time, approved it (5 T 69). Miraglia advised them that the instant salary guide corrected inequities for Sheriff's Officers noting that he had prior to September 9 corrected inequities for lieutenants and captains (5 T 69). (However, I do not credit Miraglia's testimony on this matter of the superior's contract, as indicated previously, the Superior Officers' contract had not been negotiated by September 9.) Additionally, I note that superiors had not demanded increments nor steps (5 T 102). Although Miraglia advised Killian about the settlement, he had very little discussion generally with Killian throughout negotiations because she had no authority to act (5 T 100).

Villano, at the same time, returned to the conference room and explained the guide to the PBA team (2 T 41; 4 T 30). Then he and Miraglia returned to another room where Miraglia drafted the memorandum of agreement (4 T 30; J-2).

39. I believe Miraglia confirmed for the PBA team that the newly negotiated salary guide included increments. Since the PBA team had raised specific questions concerning placement on the guide Villano asked Miraglia to meet with the team and review the memo and answer any questions (2 T 37, 38, 118, 119; 4 T 32; 5 T 112, 132).

Miraglia agreed; he said "listen, anything to get a settlement, so I went in there." (5 T 57). During this meeting with the PBA team McDowell and Exel posed specific questions to Miraglia and Villano concerning movement on the guide and placement at the time the contract expired (1 T 95, 96). Miraglia explained that they would go to the top unless "We bargain it out" (1 T 96). Exel understood that on April 1, 1984 he would get an increment and whatever was negotiated in an 1984-85 contract would be put in those steps (2 T 21, 45-47).

McDowell understood that he would reach step 9 on April 1, 1984 (2 T 21). But, he was not positive whether it was Villano or Miraglia who answered him specifically (3 T 20-25).

However, I note that Miraglia was sitting at the table when this exchange occurred and if it was Villano who gave the answer, Miraglia made no counterstatement at that time (3 T 25; 4 T 32). Additionally, it is clear from the credible testimony of both PBA witnesses, that Miraglia told the PBA team that on the anniversary date of the contract all personnel would move up one step (2 T 20, 119; 4 T 32, 33) unless an increment was withheld for some reason or discipline (2 T 21).

Miraglia testified on cross examination as follows:

Q Did anyone from the P.B.A. ask you questions or make comments after you made your presentation?

A Somebody made a comment, and I don't know who it was, I'm not that familiar with all of the people that were there, I don't even know if they were all on the bargaining team that were in that room at that time, words to the effect of what happens if this agreement

expires, what will happen, and I said if this was a salary guide, you would move, if there was no other agreement ever negotiated, and that's the way I left it. (emphasis added)

Q If this was a salary guide --

A Right.

Q You would move if there was no agreement?

A If there was a salary guide and there was no agreement, you would move up, if there was never any other agreement, and that's what I said, and that would imply that the people who were at max would stay at max, people who were at the starting salary would stay at the starting salary. That was the implication of it all, but the question was more about what happens after this, if this negotiation -- if this contract expires and there is not another contract, that was the context of the question to me. (5 T 112, 114)

I do not credit Miraglia's testimony that he prefaced all his statements about increments with the word "If" (5 T 112, 114). It is not very likely that any answer from Miraglia beginning "If this was a salary guide" would have gone unnoticed by four correction officer's^{10/} especially the two who were asking specific questions. Additionally, that statement is not responsive to the employee's question. Moreover, during most of Miraglia's testimony he remained calm but at this time his face got very red in response to this question (5 T 112, 114). Only one other time did his face get very red when he was testifying on direct that he never agreed to a guide that would continue beyond the contract expiration date (5 T 78). Even, assuming that he said "if" it were a salary guide, he would at best be misleading the PBA. Miraglia testified

that he did not tell the PBA that the salary guide "was not an increment plan."

I do not credit Miraglia's testimony that immediately following the September 9 meeting with the PBA full team, Miraglia told Villano in the hallway that Miraglia didn't want them to expect a windfall in 1984. First, this statement does not clearly mean that the salary guide does not provide for increments and, second, Miraglia here testified by answering questions with questions not statements (5 T 56).

40. Shortly after the September 9 meeting the PBA and the County ratified the memorandum (2 T 21, 71, 120). At the PBA ratification meeting, sometime in late September (1 T 106), Villano explained the memo of agreement and salary guide as he understood it to mean annual increments on the anniversary dates of the contract of each year (1 T 67, 106, 113, 173; 2 T 73, 96, 97, 98, 126). He also distributed a written summary of negotiations (1 T 76; 4 T 35; CP-4). This summary accurately reflected the negotiations process for the contract in all but one specific instance, p. 2, para. 4. That paragraph provided that the salary guide steps were a reflection of years of service (CP-4). This is not accurate at least as to current employees, who were slotted by salaries not seniority. As applied to new employees it may reflect years of service. This document, with its shorthand statements, is not very helpful in determining the PBA's interpretation of the September 9 memo.

41. Pursuant to the memo signed on September 9 Miraglia and Villano continued discussing contract language. Almost immediately following the September 9 meeting Miraglia requested that the words "negotiated" and "agreed step" be inserted in the new salary provision (4 T 138-139; 5 T 118).

Villano, on cross-examination testified:

Q: ...I'm characterizing, you can tell me if my characterization is wrong -- the purpose of the change in the language from -- to the September 9th memorandum, to that included in J-1, was to give the County some type of protection, let's say, concerning the placement of court attendants?

A No, it didn't give the County protection. The County -- the statement by John Miraglia was for -- the reason for the change, because, one, the changes reflected what we had done to construct the guides' increments. And, number two, the deal we gave was for those sherriffs' officers, and corrections. The court attendants people did not deserve that, and they had no intention of giving it. And if I was pushing this, I was violating the deal.

Q All right. Well, did Mr. -- did not Mr. Miraglia explain to you, at that time, that one of the purposes of the language change was to provide that the schedule, contained in the guide, was a negotiated schedule, and to eliminate any question concerning whether or not there would be entitlement to increments?

A No, never.

Q Well --

A John knew there was increments, at the end of that contract. He knew there was increments in 1983.

Q All right. So, what you're -- Then, so I understand what you're saying, is that what you put in there? That language change was made to deal with court attendants coming into the unit. Is that correct?

A There was the court attendants. There was other questions he had. He had told me, he had this crazy meeting with the Ocean County Sheriff. The guy said this was the worst contract he had ever saw. He said, you know: There's stipends coming. I don't want any questions, whatsoever. I knew what I gave you. These sheets will attest to it. These are the reasons for the change. And John was saying the truth. A couple weeks later --

Q So that I understand --

But in your direct testimony, did you not say that the reason you worked out different language for the memorandum to J-1, was because of the fact that court attendants coming into the County unit, the County was concerned that the court... (4 T 138-139).

Miraglia's explanation was that it would cure the problem of salary determinations for the Court Attendants, the issue left open in the parties' negotiations (5 T 58).

However, Art. 27 of the contract, regarding the transfer of Court Attendants provides that the Sheriff and the County make the final determination on the salary consistent with the the statute's requirement that the Court Attendants suffer no decrease in salary.^{11/} Villano consented to the language change in the salary article believing that it had to do with the Court Attendants salary issue. Villano was authorized to finalize the contract without further ratification (4 T 128, 129, 130); he says he and Miraglia went over language changes on a working draft some time three or four weeks after the September 9 meeting (4 T 133).

After the meeting of September 9, Miraglia and Villano then had several conversations regarding other language changes and

errors. Under cover letter dated November 5, 1982 Killian sent Miraglia a final draft contract incorporating these changes (R-5). Miraglia agrees that the proposed changes in Art. IV language because he didn't want officers to think they were going to move on their employment anniversary dates (4 T 126; 5 T 58, 118).

42. A contract (J-2) was prepared by the County (4 T 125) for signing scheduled on January 13, 1983; however, by January 13, the Sheriff had submitted requests for numerous changes in the draft document. (4 T 44) On January 13, the County and the PBA agreed to only one change - requested by the Sheriff - a special stipend for the training officer position (4 T 43J-1, p. 20). Copies of the contract were distributed to every PBA member (4 T 127). The contract was then signed January 13, 1983. This final document contained as Art. IV the language as it appeared in the November final draft.(R-5) The contract language is as follows:

ARTICLE IV

SALARIES

All personnel covered by this Agreement shall be placed upon their negotiated and agreed step for the April 1, 1982 and April 1, 1983 contract. See attached Appendix A.

<u>Step 1</u>	<u>4/1/82</u>	<u>Step 2</u>	<u>4/1/83</u>
1	\$10,000.00	1	\$10,000.00
2	11,600.00	2	11,600.00
3	14,900.00	3	14,900.00
4	16,200.00	4	16,200.00
5	18,000.00	5	18,000.00
6	19,300.00	6	19,300.00
7	20,900.00	7	20,900.00
8	22,900.00	8	22,900.00

Except as, modified, deleted, or changed, this Agreement shall hereinafter provide all benefits existing at the time of this Agreement, shall continue in effect. Nothing contained herein shall be interpreted or applied so as to eliminate, reduce or detract from any employee benefit existing prior to this date.

43. Kelly testified as follows:

A Again, salary agreement and step means exactly the same thing to me. I don't understand what the purpose to having steps would be if you don't work up the ladder. (1 T 164)

* * *

44. Prior to the 1982-84 contract, there was no written contract or salary guide in effect. However, at the time that Kelly was hired in 1975, as a matter of practice, increments were given. Subsequent negotiations between the parties, memorialized in letters and memoranda, resulted in the removal of the increments. Officers thereafter received across the board raises in 1979, 1980, 1981 (1 T 98-100).

45. On April 1, 1982 all officers received an increase in salary pursuant to Art. IV and the Appendix A of the contract. Officers who had received \$150 of their merit pay were not required to refund that money (1 T 58). On April 1, 1983 all officers received salaries equal to one step higher on the salary guide in Art. IV (1 T 27, 40). The contract expired March 31, 1984; no successor agreement was reached or executed. On April 1, 1984 no raises or step increases were paid to the officers (5 T 117-118; CP-6).

46. In 1983 a dispute arose regarding the salary to be paid officers who previously had been employed as Court Attendants or Identification Officers. On August 1, 1983, following a hearing held by fact finder Herbert Haber he issued his report and recommendations (R-2). In relevant part, Haber determined that "the officers' contract contains a salary guide;" the "superior officers' contract contains salary ranges." Haber found that placement on the correction officers' guide was done on the basis of their current salaries rather than on any consideration of past service. He found that the unequal adjustments in the salary guide were agreed upon so as to make possible the establishment of the guide, which otherwise would have been prohibitively expensive. As for the supervisors' contract he determined that "the different salary ranges established in the contract for sergeants, lieutenants and captains in those divisions were negotiated by the parties on the basis of the responsibilities and duties performed by those differing levels of supervision. (R-2, pp.3-4)

47. The PBA rejected the fact finder's recommendations and submitted the instant dispute to binding grievance arbitration pursuant to the 1982-84 contract. The stipulated issue before the arbitrator was "Did the County violate the contract by its salary placement of the four grievants? If so, what shall be the remedy?"

An Opinion and Award was issued by Jack Tillem (R-1) who found that "the proximate cause of the salaries paid in this contract is not seniority, but, rather the bargaining of the PBA to achieve a step guide which would distribute a financed sum of money amongst its members that would induce them to ratify the contract. Not incidently, it also bears noting that movement of [sic] the step guide occurred on the contract anniversary date and not on the employees' seniority date." (R-1, p. 9).

Since two of the grievants were superior officers, the second section of arbitrator Tillem's opinion concerns the appropriate salary for those superior officers. There he notes:

the issue herein...differs from the prior case in certain ways. First of all, the collective bargaining agreement for the superior officers does not have a salary step guide. Instead, the salary provision reads as follows:

ARTICLE XXIII

1. Salaries for currently employed, based on their present base, effective:

	<u>April 1, 1982</u>	<u>April 1, 1983</u>
Capt.	8%	8%
Lt.	8%	8%
Sgt.	8%	8%
2. All permanent Sergeants currently employes shall receive an additional \$2,000.00 effective July 1, 1982, and \$2,000.00 effective July 1, 1983.
3. Captains of Jail Division and CIU shall receive July 1, 1982 \$882.00 and \$882.00 July 1, 1982.
4. Effective November 18, 1982 and April 1, 1983 salary ranges for new Sergeants,

Lieutenants, and Captains will be:				
	November 18, 1982		April 1, 1983	
	Minimum	Maximum	Minimum	Maximum
Sergeants	\$24,000	\$26,300	\$25,500	\$26,500
Lieutenants	\$29,000	\$34,000	\$31,500	\$35,000
Captains	\$31,000	\$35,600	\$32,500	\$36,100

* * *

Arbitrator Tillem further explained,

Art. XXIII speaks for itself: It essentially provides that everyone gets 8% per year with some additional money for certain members of the unit spelled out in Sections 2 and 3 thereof...one of the concerns of the PBA, according to the undisputed testimony, was to afford a larger differential between officers and sergeants. (R-1, p. 14).

48. I find that the County and the Sheriff were joint employers of Sheriff and Correction Officers on April 1, 1984.

In, In re Bergen Cty. Sheriff and PBA Local 134 and County of Bergen, P.E.R.C. No. 84-98, 10 NJPER 168 (para 15083 1984), the Commission determined that the County and the Sheriff were joint public employers of the sheriff and correction officers because each possessed "independent, distinct, and controlling authority over separate aspects of the employment relationship."

The Commission determined as follows:

The Sheriff's authority over the instant employees is extensive and parallels that which existed in Monmouth County. [In Re Monmouth County Board of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1976)] He hires all the law enforcement personnel working in his department and is the Civil Service appointing authority for these employees. He completely directs the workforce and assignment of duties. He is responsible for promoting, evaluating, and disciplining these employees. The Sheriff has control over their equipment. Perhaps most importantly, all these attributes of his authority come from the

Legislature, not the County. N.J.S.A. 40A:9-117 provides:

'The sheriff shall select and employ the necessary deputies, chief clerks and other personnel. They shall receive such compensation as shall be recommended by the sheriff and approved by the board of chosen freeholders. The annual compensation of the undersheriff shall not exceed 3/4 of the annual compensation of the sheriff. The compensation of the personnel in the office of sheriff shall be paid at the same time and in the same manner as the county officers and employees are paid. The limitations of the salaries set herein shall not be construed to restrict any of said employees from participating in or benefiting from any cost of living bonuses or longevity program provided for or established in the county.'
(footnote omitted)

Given all the circumstances of this case, we agree with the Hearing Officer that the Sheriff is a public employer of the petitioned-for employees.

But the Sheriff's authority as employer is not complete. He has no power to compensate these employees. That remains with the County. In pertinent part, N.J.S.A. 40A:9-117 provides, that sheriff's employees 'shall receive such compensation as shall be recommended by the Sheriff and approved by the governing body.' Thus, the County has ultimate control over the compensation for the petitioned-for employees. In fact, the County conducts a budget hearing to scrutinize the Sheriff's recommendations and has exercised its power to deny the Sheriff's funding requests. (footnote omitted)^{12/} (slip opinion pp 5-6).

Amendments to §40A:9-117 were effective April 19, 1984.

Therefore, they would not apply for the time period April 1 through and inclusive of April 18, 1984.

I find Bergen County Sheriff, supra. dispositive of the issues in the instant case.

Therefore as a matter of law, I find that on April 1, 1984 the County and the Sheriff were joint employers of Sheriff's and

Correction Officers.

50. Based on the credible evidence in this record I find as a matter of fact that the County and the PBA negotiated a salary guide providing for annual step increases on the contract anniversary date, April 1 of each year.

The Commission has jurisdiction to construe the parties' labor agreement when necessary to decide an unfair practice case. Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Secs., 78 N.J. 1 (1978), In re Twp. of Jackson, P.E.R.C. No. 82-78, 8 NJPER 129 (¶13057 1983), reaff'd In re State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (para 15191 1984).

In this case the parties' written contract was intended to embody their final negotiated agreement (J-1).

ARTICLE I
PURPOSE

The purpose of this agreement is to set forth herein all terms and conditions of employment to be observed between the parties hereto.

* * *

ARTICLE XVIII
FULLY-BARGAINED CLAUSE

This agreement contains the entire understanding of the parties. There are no representations, promises or warranties other than those set forth herein.

Article IV and Appendix A of the contract does not clearly mandate nor preclude the PBA's claim for automatic increments on the contract anniversary date (P.E.R.C. No. 85-38, 10 NJPER ____ (para 15268 1984). denying the County's Motion for Summary Judgment, C-4). This conclusion was also reached by Commission Hearing

Examiner Gerber in denying interim relief to the PBA when he determined that the contract did not on its face mandate increments (I.R. No. 84-14, 10 NJPER ___ (para 15184 1984). Additionally, Article IV is silent on the issue of increments.

In this case there are no representations that the contract is not the parties' complete agreement. The question of fact is whether the County agreed to pay annual increments.

In cases where the language of the integrated agreement is unclear or ambiguous, extrinsic evidence, including evidence of the practice of the parties, implementation of the contract provision, the circumstances surrounding contract negotiations and the parties' contemporaneous expressions may be examined to ascertain the meaning of the language. In re Hanover Twp. Ed. Assn., H.E. No. 76-10, 2 NJPER 160 (1976). Language is ambiguous if it is "capable of being understood in two or more possible senses." Webster's New Collegiate Dictionary, G. & C. Merriam Co., Springfield, Mass., 1980. This is the instant case. The meaning of the first two sections of Article IV is not clear and therefore susceptible to different interpretations.

The PBA maintains that it negotiated a salary provision in Article IV which establishes a uniform pay guide with increments -- the guide consisting of eight steps for 1982 and nine steps for 1983.

The County contends that it negotiated a salary provision which merely established a two-year pay guide to correct salary inequities and which provided for raises in 1982 and 1983 in specific negotiated amounts.

I am persuaded that the particular facts in this case support the PBA's theory.

A. The language of Art. IV reveals the following.

The value of the first eight steps in both columns is exactly the same, step for step, the only new value is that assigned to step nine in the 1983 column.(J-1) The difference between the steps is not uniform. However, there is no labor relations practice or general rule of construction or agreement between these parties in evidence which suggests that the step increases be uniform. In fact, the County negotiator's description of police pay guides and teacher pay guides fits the description of these two columns. The County negotiator indicated that police pay guides often have a balloon increment in one of the lower steps so it is not uniform throughout. He also indicated that teacher pay guides, especially when there is a redistribution, have a step added at the end to reflect a negotiated increase.(fact #32)^{13/}

Both chief negotiators are skilled at developing police and teacher incremental salary plans.(fact #29) The PBA negotiator did not dispute the County negotiator's general description of salary guides with increment steps. The PBA negotiator did acknowledge, however, that in addition to a pay guide, teachers receive annual increments by statute.

Art. IV on its face read together with Appendix A does not prove either the PBA's or the County's theory conclusively.

B. A look at Art. IV's implementation is helpful. On April 1, 1982 each employee received a negotiated salary placement

on the eight-step guide.(fact #45) Employees were slotted in at the step reflecting the amount next highest to the employee's current salary. Placement therefore was by salary and each employee received an increase.(fact #35)

On April 1, 1983 employees each moved up one step on the nine-step guide.(fact #45) Employees at step eight moved to a new step nine valued at approximately 8% higher than the original step eight.(fact #35)

Appendix A sets out each employee's exact salary amounts for each of the two years. These amounts correspond to the steps on the two pay guides. The movement occurs on the contract anniversary date, not the employee's anniversary date. Thus, employees in 1982 were placed on the guide and in 1983 employees each received a one-step salary increase - which the PBA called an increment. An increment is defined in Webster's New Collegiate Dictionary as follows: "(1) An increase especially in quantity or value; (2)a something gained or added; (2)b one of a series of regular consecutive additions."

C. The parties' negotiating history lends support to a finding that the County and the PBA were clearly both offering a percent increase and an increment plan.

Initially, the PBA submitted a two-year proposal requesting a five-step incremental salary guide and that all steps reflect years of experience as a Sheriff's Officer.(fact #15) After the County rejected this proposal as too expensive, the County made no

other specific oral or written counteroffer.(fact #16) However, the County did propose that the PBA work out the guide within a certain pool of money but the County did not state the sum of money available.(fact #18) The County has made similar proposals a number of times and each time did not specify the value of the pool of money available to construct the salary guide.(facts #19,20) Therefore, the parties failed to agree on salaries. The parties then entered mediation with no successful result;(fact #23) subsequently they filed for interest arbitration.(fact #24) By that time the PBA had made some further modifications in its total economic proposal, lowering the requested increase in stipends. However, the PBA did not retreat on its demand for an incremental salary guide and it remained the PBA's top priority.(fact #24)

In interest arbitration, the arbitrator first tried to mediate the dispute with no success; he then requested that the parties jointly identify the disputed issues and make a formal submission of their final offers.(fact #25) Both the testimony of the parties and the arbitrator's notes in evidence reflect that the open, joint economic issues for 1982 were (1) the salary guide and (2) increased stipends. For 1983 the joint economic issues were increased allowances for (1) uniforms and maintenance (2) medical and health benefits (3) longevity (4) cost of living.(CP-5)

The interest arbitrator's notes as well as testimony support a finding that the parties made the following final economic offers:

1. The County's final offer for 1982 was an "8% increase for total salary costs and that the County will create a guide." For 1983 the County's final salary offer was for "8% including increments." (emphasis added) Chief negotiator for the County, Miraglia, testified that the guide would have to be mutually created.

2. The PBA's final salary offer for 1982 was for "a five-step salary guide (costs to follow)" and for 1983 "9% plus increment and 9% applied to the guide." (emphasis added).

Clearly both parties offered a salary proposal containing both a percent increase and increment plan.

Instead of continuing with the interest arbitration procedures, the parties agreed to meet on September 9 in an attempt to negotiate a settlement without an arbitrator. (fact #27) On that date they immediately negotiated 1983 reopeners for two issues (longevity and dental plan). Other economic issues were dropped. Thus, the salary guide was the only economic item left to be discussed. (fact #27)

D. The credible evidence supports a finding that the parties negotiated an incremental salary guide to be effective on the contract date.

First, because the last final offer of "8% including increment" made by the County was never changed or withdrawn. (CP-5;

fact #37)

Second, because the County required that the PBA buy its guide by giving back the "good boy" or merit pay of \$300 per officer per year to increase the pool of money to fund the incremental salary guide.(facts #35, 36)

Third, I believe, that the County negotiator told the PBA team that unless negotiated otherwise employees would advance one step on the guide each April 1st. And, if the next negotiations resulted in raises then the value of the steps would change.(fact #39) Additionally, I believe, the County negotiator specifically told an individual PBA team member that that employee would be at step nine on the guide effective April 1, 1984; and the County negotiator, in fact, remained silent while the the PBA's chief negotiator told the PBA team members that the salary agreement included an annual increment.(fact #39)

E. I believe that the September 9, 1982 memorandum confirming the agreement made that date provided for a uniform salary guide and annual increments. (1) The memo guide sets out the same salary steps as they appear in Article IV of the final agreement. However, the prefatory language of the memo salary provision differs from the final prefatory language of the contract's Art. IV. The County requested that the language be changed for the contract from the memo language which read "salary guide shall be implemented as of" to the final language appearing in Art. IV of the contract which reads "negotiated an agreed step for

the April 1, 1982 and April 1, 1983 ."(fact #41) (2) The PBA acknowledges it agreed to the language changes. It did so because (a) the changes seemed to solve the problem concerning the salary of Court Attendants who would be transferring over to the Sheriff's department as Sheriff's Officers and (b) the language change had no affect on the actual agreed terms of the salary provision, an agreement reached on September 9.(fact #41)

As to the first reason I credited the PBA's testimony that the language change concerned the problem of Court Attendants' salary. Additionally the County negotiator testified that he told the PBA negotiator Villano that this language would solve the same problem created because no salary was listed in Appendix A for the Court Attendants.(fact #41) The same rationale for the change is supported by the provisions of Article XXVIII of the contract entitled Senate Bill No. 1021 reads:

It is understood and agreed the parties that employees who may be transferred to this bargaining unit pursuant to the provisions of Senate Bill #1021 shall be placed on the salary guide (Article IV) at the level recommended by the County Sheriff and approved by the Board of Chosen Freeholders, provided; however, that the level of compensation shall not be reduced by virtue of said transfer.(J-1)

As for the second reason the PBA agreed to the language change -- that it did not change the meaning -- I am persuaded that the PBA's understanding of the memo's salary provision is more reliable than the County's.

First, because the PBA attached no special significance to the terms "salary guide"; it did not advance any specific meaning or

usage to the term; and it did not insist on that term for any particular reason (some team members thought it interchangeable with other terms in describing the pay plan - i.e. step plan, chart and guide).

Second, the County and the PBA had fully discussed the operation of the memo's salary provision and as I indicated earlier I credited the PBA account of those discussions. (fact #15, 36-39)

For the above reasons I believe that the PBA's interpretation of the meaning of the provision in the memorandum of agreement is correct and that there is no special significance to the term "salary guide" as used by the County.

F. Finally, the County argues that the key to this case is the fact that there was this language change between the salary provision in the memorandum of agreement and the salary provision in the contract itself.

I believe not.

First, the County maintains that it negotiated a pay plan to remedy inequities, not to provide increments. However, the County provided no evidence to support this theory. It offered no evidence to explain the inequities or to demonstrate how the pay plan corrected those inequities for the first year or the purpose of the step movement in the second year.

Second, for me to credit the County's theory also requires that I infer some special meaning to the phrase "salary guide." The County offered no evidence, testimonial or documentary, to support

that point. However, its negotiator was very particular about the use of that term.

On this point, I find that the term "salary guide" has no specific operational meaning; it is general and may be used to describe the pay plan which served various functions including adjustments of pay inequities, provision for annual increment steps, provision for across-the-board increases and establishment of minimum and maximum rates, none of which are mutually exclusive.^{14/}

Therefore, the County's current insistence that it negotiated a salary guide not an increment plan does not shed light on the meaning of the writing in Article IV of the contract or the term salary guide as the County used it in the memorandum of agreement on September 9th.

Additionally even if the County negotiator may have attached some special meaning to the phrase, he failed to communicate that to the PBA negotiating team. Therefore, the fact that the County negotiator told Killian, the County Assistant Administrator, that this was only a two year salary guide doesn't shed any light on whether or not the salary guide provides increments.(fact #38) The fact that the County negotiator says he kept insisting that he said, "If" this were a salary guide, during his explanation of the memo to the PBA team is not important.(fact #39) The fact that the County negotiator felt it necessary to change the memo language because of some unspoken meaning to the phrase "salary guide" doesn't make that change significant or

effective. The fact that the County negotiator may have believed the phrase "salary guide" was used in any very specific way and that by removing that from the memo he changed what the parties negotiated does not make it so.

Additionally, the County negotiator testified that he told the PBA negotiator that the County wanted to work out some provision for granting raises and providing for salary adjustments, the same as the County had done in the superior officers' contract. (fact #37) Putting aside the fact that the superior officers' contract was not negotiated until after the instant contract, it's clear on the face of the two clauses that they're not the same. The salary clause in the superior officers' contract, granting 8% raises and making adjustments in salary inequities for only the two year period involved, looks nothing like the clause in the instant contract. The supervisors' contract specifically states an 8% across the board raise for each of the two years for each of the officer ranks and then lists specifically the exact dollar amount adjustment to the various officer ranks. Clearly the parties knew how to negotiate a salary clause for percentage raises and adjustment of inequities if one believes that that's what the County wished to do. They did not do that in the language of the instant contract.

Finally, again, even if the County negotiator believed the phrase "salary guide" meant a salary guide with "increments" he never told the PBA.

According to general principles of contract interpretation if a provision in an integrated agreement fails to express the

parties' intent with clarity the following general principles of contract interpretation apply. In a case of doubt as to the meaning of a written contract the language is to be taken most strongly against the party preparing the document or employing the word upon which the doubt arises. Moses v. Edward H. Ellis, 72 A.2d 856, 4 N.J. 315, (1950). Additionally, ambiguities will be construed most strongly against the party preparing the language and defending its own interpretation. Jennings v. Pinto, 76 A.2d 669, 5 N.J. 562 (1950); accord. F.R.H. Corp. v. Rogers Trailer Park, Inc., 54 N.J. 24 (1969).^{15/}

In the instant case the County drafted the original memo employing the words "salary guide"; the County subsequently requested that the PBA acquiescence to changes in that language. Based on all the circumstances of these negotiations and pursuant to the general rules of contract construction, the interpretation of that language must be construed against the County.

ANALYSIS

1. DID THE COUNTY AND THE SHERIFF COMMIT A VIOLATION OF SECTIONS 5.4(a) (1) AND (5) WHEN THEY FAILED TO PAY AN INCREMENTAL STEP INCREASE TO SHERIFF'S AND CORRECTION OFFICERS ON APRIL 1, 1984?

The Commission and the Courts have consistently held that salary increments authorized by the terms of the parties expired contract must be paid during the period of successor contract negotiations. In re State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶ 12235 1981) the Commission Chairman ordered the employer to pay

salary increments due employees pursuant to the terms of the parties expired contract. The Chairman said:

It must be emphasized that it is not the contracts per se which are being extended. Rather, it is the terms and conditions of employment which were in effect at the time that the contracts expired which are being maintained. Those terms included salary structure which provided for the payment of increments upon the passage of additional periods of service measured by assigned anniversary dates. The employees involved herein have successfully completed that additional period of service. The proper placement upon the salary guide must remain, in fact, requires that they move up one step and receive the appropriate salary increment. At 7 NJPER 536.16/

In the instant matter, on April 1, 1984, the County and the Sheriff both failed to advance Sheriff's and County Correction Officers one step forward on the salary guide. I have already determined, that as a fact, the County and the PBA negotiated and contractually agreed to provide annual incremental increases to those employees on the contract's anniversary date. In this case that date is April 1 of each year. It is quite clear that the failure to pay these increments during negotiations has a chilling effect on the negotiations process itself State of N.J., supra at page 534-535. The County acknowledges that where a scheduled annual increment in employees' salary constitutes an existing rule governing working conditions, the unilateral denial of that increment constitutes a modification of working conditions without

negotiations as required by N.J.S.A. 34:13A-5.3. (County's post-hearing brief, page 21)

I am not persuaded that this case is any different than the cases cited supra. footnote 16. I am convinced that the PBA has proved by a preponderance of the evidence that the County and the PBA negotiated an incremental salary plan in the 1982-84 collective agreement; and that the County and the Sheriff, joint employers, failed to pay on the anniversary date of that contract, April 1, 1984, the increments due Sheriff's and Correction Officers. Therefore, I find that the County and the Sheriff, joint employer, violated sections 5.4 (a) (1) and (5) of the Act.

II. DO THE FACT-FINDING REPORT AND BINDING ARBITRATION AWARD BAR FURTHER LITIGATION OF THE INSTANT UNFAIR PRACTIC CHARGE?

The County argues that the fact finder's report and the arbitration award bar litigation of the unfair practice charge under the theories of res judicata and collateral estoppel.

Under the legal theory of res judicata the final judgment or decree on the merits by a court or tribunal of competent jurisdiction is conclusive of rights of parties or their principles in all later suits on matters determined in the former suit. For the principle to apply there must be identity of the cause of action, of persons and parties to the action, and of the facts and issues.

Collateral estoppel applies in future actions, where a competent tribunal of general jurisdiction over the subject has made

a determination on the issue.

Estoppel applies on the issues in the second action actually determined in the first action, where that prior judgment is between the same parties, which is not strictly res judicata because it is a different cause of action. (McCormack, Evidence (2d ed. 1972)) In In re Newark Board of Education, P.E.R.C. No. 84-156, 10 NJPER 445, 446 (¶ 15199 1984) , the Commission found that:

Collateral estoppel applies when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally the same two parties, regardless of whether the causes of action were identical. It bars relitigation of the particular question of fact. State v. Redinger, 64 N.J. 41 (1973); Harbor Land Development Corp., Inc. v. Mirne, Newels, Turmen, Magie and Kirschner, Esq., 168 N.J. Super 538 (App. Div. 1979).

Moreover, collateral estoppel does not apply where the finding is dictum, not ultimate fact. Newark, supra. See also, Oakland Board of Education, P.E.R.C. No. 82-125, 8 NJPER 378

(para 13173 1982) aff'md App. Div Docket No. A-49758113 (6/20/83), 17/

In the case before me, the County argues two prior decisions bar litigation of the unfair practice charge. The dispute heard by the fact finder concerned

...the proper placement on the existing salary guides set forth in the current contracts between the parties, of those employees performing court attendant and related duties whose job titles had been changed to sheriff's officer under recent state legislation." (R-1, p. 1).

In the matter before the arbitrator, the stipulated issue concerning the sheriff's and correction officer's grievance was,

"Did the County violate the contract by its salary placement of the four grievants?" (R-1, p. 2).

It is clear that the issue in dispute and decided by the fact finder and arbitrator is not the same issue in the instant case. The issue before the Commission is whether the County and the Sheriff violated the New Jersey Employer-Employee Relations Act by failure to pay increments on April 1, 1984.

Both the fact finder and the arbitrator found that placement of the salary guide in the parties contract (J-2) was not by seniority. Additionally the arbitrator, in dicta, commented: "Not incidently, it also bears noting that movement of [sic] the step guide occurred on the contract anniversary date and not on the employees' seniority date." (R-1, p. 9).

Therefore, I find that, neither the principle of res judicata nor collateral estoppel apply. Newark, supra. First, because, the issue in the instant case is not the same as the issue in the two prior proceedings. The issue in our case is whether the parties agreed to annual increments, not as in the prior proceeding -- the proper salaries to be paid transferring court attendants. Therefore, res judicata does not apply as there is no identity of issue.

Second, the parties in the instant case agree that the original placement on the salary guide was by salary not by seniority -- an ultimate fact, determined in the prior proceeding. Contrary to the County's contentions, the PBA is not arguing that placement and movement on the guide is by seniority. The PBA maintains that advancement on the guide is on the contract anniversary date, not the employee's employment anniversary date.

Therefore, collateral estoppel does not apply here as there is no dispute regarding an ultimate fact decided in the prior proceeding. 18/ Galloway is dispositive of the issue in the County's motion. On that basis, I deny the County's motion to dismiss.

3. REMEDY.

The Commission and the Courts have repeatedly held that in cases where the employer's actions violate the "status quo", the charging party may be entitled to an immediate return to the status quo, and to a make whole remedy. In the instant matter, the employer failed to pay the required increments on April 1, 1984. I have found the County's acts did violate the status quo. The affected employees were entitled to payment of the increments at least until the County and the PBA negotiated otherwise. In this case, the employees would have had use of the additional monies for more than 17 months.

I find that the PBA is entitled to immediate return to the status quo and a make whole remedy. Therefore, a back pay award is necessary to achieve a make whole remedy. In Galloway, supra, the Supreme Court held:

The Court (U.S. Supreme Court) has stressed that

the primary purpose of a back pay award is to make the aggrieved employees whole...back pay is...a remedy designed to restore in so far as possible, the status quo that would have obtained but for the wrongful act. NLRB v. J.H. Ruther-Rex Mfg. Co., 396 US 258, 265 (1969). 78 N.J. at 11. See also, In Re Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (para 16024 1984).

CONCLUSIONS OF LAW

Based upon the entire record and the foregoing analysis, the Hearing Examiner makes the following conclusions of law:

1. The Ocean County Board of Chosen Freeholders and the Ocean County Sheriff violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when they failed to pay increments for Sheriff's officers and correction officers on April 1, 1984.

2. The Ocean County Board of Chosen Freeholders and the Ocean County Sheriff did not violate N.J.S.A. 34:13A-5.4 (a) (3) because no evidence was proffered by the PBA on this issue.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Ocean County Board of Chosen Freeholders and the Ocean County Sheriff 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 pay salary increases to Sheriff's and Correction Officers from April 1, 1984 in accordance with the collective negotiations agreement for 1982-84.

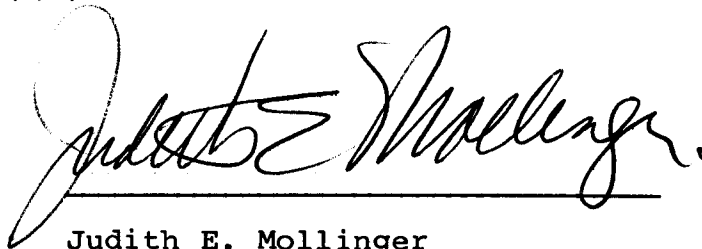
B. That the County Board of Chosen Freeholders and the Ocean County Sheriff take the following affirmative action:

1. Immediately pay to the eligible employees in the unit represented by the PBA Local 258 their salary increments retroactive to April 1, 1984, in accordance with the parties' collective negotiations agreement plus interest at 12%.

2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "B". 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 employers' authorized representative shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the employers to insure that such notices are not altered, defaced or covered by other materials.

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

C. That the Complaint be dismissed regarding the allegation that the Ocean County Board of Chosen Freeholders and the Ocean County Sheriff violated subsection (a)(3) of the Act.



Judith E. Mollinger

Hearing Examiner

DATED: September 18, 1985

Trenton, New Jersey

FOOTNOTES

- 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; and...(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.
- 2/ Commission exhibits will be designated as (C) Joint exhibits as (J), the PBA's exhibits as (CP) and the County's as (R). The Sheriff did not participate in the hearing nor offer any documentary evidence
- 3/ The hearing convened on August 13, 1984 for the limited purpose of hearing argument on the County's motion to adjourn.
- 4/ I now rule that the correct standard of proof to withstand Respondent's motion to dismiss is that there is a "scintilla" of credible evidence on the record to support the charges. Additionally, I now decide that there is a scintilla of credible evidence, both testimonial and documentary, to support the complaint and for me to issue a report and recommendations on the record as a whole. The PBA has established during its case in chief that the County offered an incremental salary guide as its fair and final offer in an interest arbitration session held August 1982; that the County's offer was not formally withdrawn; that the parties negotiated a salary guide which reflects that offer; and that the County refused to pay increments on April 1, 1984; and unless rebutted, there is at least a scintilla of evidence to support the PBA's charges.
- 5/ This motion was filed while I was in preparation of this report and after the record in this matter closed but before transmission of the case to the Commission.
- 6/ References to Transcript of Proceedings are as follows: October 22, 1984 as 1T; October 23, 1984 as 2T; October 24, 1984 as 3T; November 8, 1984 as 4T; and November 19, 1984 as 5T.
- 7/ Each of the PBA witnesses except Villano was sequestered prior to the testimony. However, neither Miraglia nor Villano were
(Footnote continued on next page)

(Footnote continued from previous page)

present for all the days of hearing. After they testified, each witness remained in the hearing room (1 T 18-19). On another related point, that of preparation of witnesses, Exel testified that he had prepared his testimony by explaining what happened at the negotiations meetings to the PBA attorney, not to Mr. Villano (2 T 27, 30, 31).

8/ At this point it is sufficient to say that the two proposed salary guides are not mutually exclusive -- a guide to provide incremental steps and a guide to correct salary inequities.

9/ Counsel for Respondent had previously objected to receipt of CP-5 in evidence questioning its confidential status and authenticity (4 T 18, 19). This Hearing Examiner overruled the objection finding that as a formal submission of the party's last best offer it was not the confidential work product of an interest arbitrator and its authenticity could be challenged by cross-examining Villano's identification of the document and submission of rebuttal evidence. Subsequently, however, the County negotiator, Miraglia, both identified the document and attested to its authenticity as the partys' formal submissions to an interest arbitrator and to its accurate reflection of the County's proposal (5 T 92).

10/ Kelly, McDowell, Exel & Reilly.

11/ N.J.S.A 40A:9-117.6 effective September 14, 1982 provides that the sheriff of each county appointing as Sheriff's Officers persons who were previously employed as court attendants or in criminal investigations shall calculate seniority for employees appointed as sheriff's officers "so as to include permanent time in grade in their former titles."

12/ Indeed, the position of Sheriff is established by our Constitution, N.J. Const. (1947), Art. 7, Sect. 2, para. 2, pursuant to which N.J.S.A. 40A:9-117 was enacted. Compare In re Bergen County Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd Bergen Cty. Freeholder Bd. v. Bergen Cty. Pros'r, 172 N.J. Super. 363 (App. Div. 1980), where the County was found not to be an employer of employees in the prosecutor's office because the prosecutor has the statutory authority to submit his budget request to the Assignment Judge in the event it is not approved by the County.

13/ Fact paragraphs are from this decision

14/ Words are generally given their commonly understood meaning
(Footnote continued on next page)

(Footnote continued from previous page)

unless defined otherwise by the parties. Webster's New Collegiate Dictionary defines "salary" as "fixed compensation paid regularly for services, and defines "guide" as "something that provides a person with guiding information."

15/ Accord. Restatement of Contracts §230;

16/ Galloway Twp. Bd/Ed, 78 N.J. 25 (1978); In re Union Cty. Reg. H.S. Bd/Ed, P.E.R.C. 78-27, 4 NJPER 11 (¶ 4007 1977); In re Hudson Cty. Bd/Chosen Freeholders v. Hudson Cty. PBA Local No. 51, P.E.R.C. No. 78-48, 4 NJPER 87 (¶ 14041 1978) Aff'd App. Div. Docket No. A-2444-77 (4/9/79); Rutgers the State Univ., P.E.R.C. No. 80-66, 5 NJPER 539 (¶ 10278 1979) App'd App. Div. Docket No. A-1572-79 (4/1/81); In re City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶ 12142 1981) Enforced and leave to Appeal Denied, App. Div. Docket No. AM1037-80T3 (7/15/81); In re Newark Public Library, I.R. No. 84-9, 10 NJPER 321 (¶ 15154 1984); In re County Sussex, I.R. No. 84-7, 10 NJPER 192 (para 15095 1984) Affirmed P.E.R.C. No. 84-115, 10 NJPER 260 (¶ 15125 1984) (Accord for expired Interest Arb. Award); In re Alexandria Twp. Bd/Ed, I.R. No. 84-5, 10 NJPER 1 (¶ 15000 1983); In re Carteret Bd/Ed, I.R. No. 85-2, 10 NJPER 492 (¶ 15223 1984); In re Bayonne Bd/Ed, I.R. No. 85-6, 10 NJPER 611 (¶ 15287 1984)

17/ Generally, see also, Donegal Steel Foundry Co. v. Accurate Products, 516 F.FF12d 583 (2nd Cir. 1975); Lubliner v. Board Alcoholic Beverages Control for the City of Paterson, 33 N.J. 428, 435 (1960).

18/ While this report was being prepared, the County filed a motion to dismiss the complaint in the grounds of mootness.

The County argued that a recent interest arbitration award for the contract covering 1985-1986 decided the salary issue retroactive to April 1, 1984. Further the County contends that the PBA sought payment of the increments from April 1, 1984 until a successor agreement was reached. Since the successor contract has been awarded, the County concludes that the increment issue is moot. The PBA filed a timely response arguing even when the employer corrects the illegal conduct, the issue is not moot. In Galloway, 78 N.J. 39, 40, the New Jersey Supreme Court determined:

"Moreover, the termination of unlawful conduct by a party charged with an unfair practice is similarly immaterial to the issue of the enforceability of PERC's order in an action initiated pursuant to N.J.S.A 34:13A-5.4(f). The federal decisional law in unfair labor practice cases arising under the Labor Management Relations Act (LMRA) 29 USC 141 et seq. (which we have today commended for use, to the extent applicable, as a guide in unfair practice cases in the public sector, see Galloway Twp. Ass'n of Ed. Secretaries v. Galloway Tp. Bd. of Ed., 78 N.J. 1 (1978)), cogently demonstrates the rationale for such a rule. These cases hold generally that judicial enforcement of the orders of the National Labor Relations Board is normally not to be denied because of mootness allegedly resulting from events occurring after the commission or unfair labor practices but before the decision by the appellate court in enforcement proceedings instituted by the NLRB or, in some cases, before decision by the NLRB itself.

The seminal decision on the question of whether subsequent events moot an order issued by the NLRB in an unfair labor practice case was NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 58 S. Ct. 571, 82 L. Ed. 831 (1938), where the Supreme Court held that such an order

"...lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made. [Id. at 271, 58 S. Ct. at 576].

11-8-84
CP-510
ADD

JI
ISSUES

Ocean Co. ? PBA Local 258

(Sheriff's & Corrections)

1982

Economic Issues

- ① Salary - 2 yrs guide
- ② Stipends - ^{new} correction officers; sheriff's off. di
- ③ radio room increase existing stip by 2% 2nd yr. of stipends increased 7%.

Non-economic - (A) New recognition clause

1983

Economic Issues

- ① Uniform & maintenance ↑
- ② Medical & Health bene's.
- ③ Longevity.
- ④ ↑ cost of living

Non-economic - (A) Maintenance of Bene's clause

- (B) Member & Union rights
- (C) Grievance Procedure.
- (D) Dues Checkoff -

Complete OK

~~PBA Opening~~

FINAL POSITION

- 1982
- (PBA)
- ① 5 step salary guide
(cost to follow)
 - ② Stipends
 - \$1500 corrections
 - \$800 detectives
 - \$1200 radio room
 - 9.5% on existing stipends

- 1983
- ① Salary 9% plus increment
9% applied to guides
 - ② Stipends 9% to stipends
 - ③ Uniform \$100 ↑
Maintenance \$50 ↑
 - ④ Medical Plan - Dentl \$256 / fee (New Bene)
 - ⑤ Longevity — revise to 4% @ 15
flow ↓ through
 - ⑥ cola — reduce index to 7.5%

FINAL POSITION

County

① ¹⁹⁸² 8% increase — total cost-salary
will create a guide
1983 8% including increment.

as relates
to minimum
of benefit
clause.

② Non-Eco - probation
grievance proc.
uniform allowance
physician
merit pay

Briefing schedule

- Monday 8/30 briefs
- September 10 reply briefs

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, and

WE WILL forthwith restore the status quo ante by immediately paying the salary increments retroactive to April 1, 1984 in accordance with the parties' collective negotiations agreement plus interest at 12%.

OCEAN COUNTY BOARD OF CHOSEN FREEHOLDERS
& OCEAN COUNTY SHERIFF

(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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State State Street, Trenton, New Jersey 08618 Telephone (609) 292-9830.