P.E.R.C. NO. 89-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY,

Respondent,

-and- Docket No. CO-H-89-165

OPEIU, LOCAL 153,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by OPEIU, Local 153 against the County of Essex. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act by failing to present to the Board of Freeholders for ratification a tentative agreement, and by refusing to pay unit members annual salary increases on July 1, 1987 and July 1, 1988. The Commission adopts the Hearing Examiner's finding that the County explicitly reserved the right to submit any agreement to the County Executive for ratification. The Commission further finds that the allegations concerning merit increases are untimely.

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In the Matter of

COUNTY OF ESSEX,

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-and- Docket No. CO-H-89-165

OPEIU, LOCAL 153,

Charging Party.

Appearances:

For the Respondent, H. Curtis Meanor, Acting County Counsel (Lucille LaCosta-Davino, Assistant County Counsel, of counsel)

For the Charging Party, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs. (Bruce D. Leder, of counsel)

DECISION AND ORDER

On December 14, 1988, OPEIU, Local 153 ("Local 153") filed an unfair practice charge against the County of Essex ("County"). The charge alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by failing to present to the

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 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."

Board of Freeholders ("Board") for ratification a tentative agreement, and by refusing to pay unit members annual salary increases on July 1, 1987 and July 1, 1988.

On March 21, 1989, a Complaint and Notice of Hearing issued. On April 10, the County filed its Answer claiming that the ground rules for negotiations included ratification by Local 153, then the County Executive, and then the Board. It claims that since the County Executive refused to ratify the agreement, it could not present the agreement to the Board for ratification. The County further claims that the salary increase allegation is untimely and that Local 153 waived any right to negotiate over that issue.

On April 11, 1989, the County filed a motion to dismiss. It argued that pursuant to N.J.S.A. 40:41A-1 et seq., absent the County Executive's approval, a contract cannot be presented to the Board for ratification. It also argued that the salary increase issue was untimely.

On April 21, 1989, Hearing Examiner Arnold H. Zudick conducted a hearing. Local 153 argued orally against the motion. The Hearing Examiner reserved decision on the ratification issue. He granted the motion as to the 1987 salary increase and denied the motion as to the 1988 increase. The parties then examined witnesses and introduced exhibits. They waived closing arguments but filed post-hearing briefs.

On May 30, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 89-40, 15 NJPER ___ (¶ 1989). He found that the County did not unlawfully refuse to ratify

the parties' agreement because it had reserved the right to have the County Executive ratify the agreement. He further found that the County lawfully discontinued the payment of merit increases.

On June 14, 1989, the parties filed exceptions. Local 153 claims that there is nothing in the record indicating that the County clearly reserved the right to have the County Executive ratify the agreement. It also claims that the July 1988 salary increases were unlawfully withheld because they were part of an automatic increase program. The County urges adoption of the recommended report. However, in the event we do not adopt the recommendation in its entirety, it claims its negotiator was unable under the law to be the Executive's agent and that the allegation regarding the 1988 increase is untimely.

On June 20, 1989, the County filed a reply urging rejection of the charging party's exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-14) are accurate. We incorporate them.

The Hearing Examiner found that the County explicitly reserved the right to submit any agreement to the County Executive for ratification. He rejected contrary testimony from two Local 153 witnesses. Absent compelling evidence not present here, we will not substitute our reading of the transcript for the Hearing Examiner's credibility determination. City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

As for the merit increases, the County apparently abandoned its program of paying merit increases in 1987. Local 153 was on

notice of this change no later than July 1987 when increases were due and not paid. N.J.S.A. 34:13A-5.4(c) restricts unfair practice findings to events that occurred within 6 months of the filing of the charge. We are therefore constrained to dismiss this allegation first raised in December 1988.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Ruggiero and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed.

DATED: Trenton, New Jersey
June 23, 1989
ISSUED: June 26, 1989

H.E. NO. 89-40

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

In the Matter of

ESSEX COUNTY,

Respondent,

-and-

Docket No. CO-H-89-165

OPEIU, LOCAL 153,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the County of Essex did not violate the New Jersey Employer-Employee Relations Act by refusing to present a tentative agreement to the Board of Freeholders for ratification or by discontinuing the payment of merit increases. The County had reserved the right to have the County Executive ratify the agreement, and the merit increases were discretionary.

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. 89-40

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

In the Matter of

ESSEX COUNTY,

Respondent,

-and- Docket No. CO-H-89-165

OPEIU, LOCAL 153,

Charging Party.

Appearances:

For the Respondent, H. Curtis Meanor, Acting County Counsel (Lucille LaCosta-Davino, Assistant County Counsel, of counsel)

For the Charging Party, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs.
(Bruce D. Leder, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on December 14, 1988 by OPEIU, Local 153 (Union or Charging Party) alleging that the County of Essex (County) violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Union had ratified a collective agreement and

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

alleged first, that the County violated the Act by failing to present the agreement to the Board of Freeholders (Board) for ratification and by attempting to renegotiate the agreement; and second, alleged that the County refused to pay the employees an annual salary increase due on July 1, 1987 and July 1, 1988.

A Complaint and Notice of Hearing was issued on March 21, 1989. The County filed an Answer (C-2) on April 10, 1989 denying that it violated the Act. The County argued that pursuant to the ground rules for negotiations the agreement was subject to ratification first by the Union, then by the County Executive (Executive), then by the Board. The County further argued that since the County Executive refused to ratify the agreement that it was not obligated to - nor without the Executive's signature could it legally - present the agreement to the Board for ratification. The County further argued that the Union's allegations regarding annual salary increases should be dismissed because it is barred by the statute of limitations, and because the Union waived any right to negotiate over that issue.

1/ Footnote Continued From Previous Page

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

On April 11, 1989, the County filed a motion to dismiss the complaint. It argued that pursuant to N.J.S.A. 40:41A-1 et seq. the Executive is required to approve and sign all contracts, that he cannot delegate the authority to approve contracts, and that absent the Executive's approval, a contract cannot be presented to the Board for ratification. The County also argued that the salary increase issue was barred by the statute of limitations. N.J.S.A. 34:13A-5.4(c). In its letter accompanying the Motion the County requested that the Motion not be permitted to delay or suspend the hearing that was scheduled for April 21, 1989.

Pursuant to the County's request, by letter of April 13, 1989, I advised the parties that the Motion would not delay the hearing and I gave the Union the option of filing a written - or making an oral - response to the Motion at hearing.

The hearing was conducted on April 21, 1989.[2/] The Union argued orally against the Motion. I reserved decision on the Motion regarding the issue of the Executive's ratification of the contract. I granted the Motion regarding the payment of a salary increase allegedly due on July 1, 1987. That issue was barred by the statute of limitations. I denied the Motion regarding any salary increase allegedly due on July 1, 1988 (T14-T16, T78-T79).

Both parties filed post-hearing briefs by May 22, 1989.

Based upon the entire record I make the following:

2/ The transcript from April 21, 1989 will be referred to as "T."

Findings of Fact

Background

1. On October 2, 1986, the Union filed a petition (RO-87-58) with the Commission seeking to represent certain County employees. An election was held, and on December 17, 1986, the Union was certified as the majority representative.[3/] The parties held their first negotiations session on April 20, 1987.[4/] They had approximately 11 sessions and on July 11, 1988, they reached a final tentative agreement on all outstanding issues (T24, T29). Although no memorandum of agreement was prepared, the Union presented the terms of the tentative agreement to its membership and the membership ratified the agreement on July 19, 1988, and notified Delores Capetola, the County's Director of Labor Relations, of its ratification on July 20, 1988 (R-1).

3/ Pursuant to N.J.A.C. 19:14-6.6, I took judicial notice of the facts in RO-87-58, and of the facts in RD-89-9 and RD-89-12 to be discussed infra.

4/ In a pre-hearing affidavit taken on March 13, 1989 and submitted in this matter (R-2), the Union's business agent, Thomas Havriluk, stated that the first negotiations session was held on March 3, 1987. During the hearing on April 21, 1989, however, he testified that the first session took place in the "Spring" of 1987 (T18). Delores Capetola, the County's Director of Labor Relations, also testified at the hearing and stated that the first session took place on April 20, 1987 (T81). Havriluk's statements are inconsistent. I credit Capetola's testimony on that point. She had a better recollection of the facts and explained that she had reviewed her negotiations notes and that the information was contained in those notes (T84).

After July 20, Capetola prepared a draft of the tentative agreement, the Union signed it and it was presented to the County Executive for his ratification and signature (T124, T126-T127).[5/] The Executive, however, did not ratify or sign the agreement. He had a problem with the projected cost of the proposed performance evaluation system (T93). Capetola then informed Havriluk of the problem and they engaged in some additional negotiations in October 1988, in an effort to resolve the problem (T48, T93). The Union also authorized its attorney in October or November 1988, to present an alternative proposal to the County's counsel (T49). The parties did not resolve the problem, however, and since the Executive had not ratified the tentative agreement, it was not presented to the Board (T96, T100, T127).

On December 13, 1988, a decertification petition (RD-89-9) was filed with the Commission seeking to decertify the Union as the majority representative. The Charge was filed on December 14, 1988, and by letter of December 23, 1988, the Union requested that the Charge block the processing of the decertification petition. On January 25, 1989, a second decertification petition (RD-89-12) was filed with the Commission also seeking to decertify the Union. By letters of March 21, 1989, the Director of Unfair Practices and

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5/ Although the Union disputed the County's claim that the Executive had to ratify the tentative agreement, Havriluk testified that he knew that the Executive had to sign all County contracts (T52). I credit that portion of his testimony.

Representation dismissed RD-89-9 and ordered that the Charge block the processing of RD-89-12.

2. At the first negotiations session between the parties on April 20, 1987, Capetola represented the County, and Thomas Havriluk, a business agent for Local 153, was the chief spokesperson for the Union, but the Union's negotiations team which consisted of employees Tarantino, Danzell, Weber and Hedin, were also present (T19, T81). Apparently, this was the first time that Havriluk and Capetola had ever negotiated with each other.

Havriluk has been the Union's business agent for nine years (T17). Capetola has been the County's Director of Labor Relations since July 1981. During that time her primary responsibility has been to negotiate collective agreements on behalf of the County with the 32 different unions representing County employees. In that position, she has negotiated over 100 contracts (T80-T81; R-4). These contracts had to be approved and signed first by the union in question, then the County Executive, and finally, the Board, and contained separate signature locations for each group (R-4).

The first time Capetola meets to negotiate with someone new or a new union, she reviews the procedure she uses presumably to negotiate and ratify an agreement (T120). She first negotiates over non-economic (language) items and does the economic proposal last, then any tentative agreement must be ratified through the process she explained, the union ratifies first, then it goes to the Executive and if he approves and signs it, it goes to the Board

(T86, T92). Capetola does not discuss or review proposals with the Executive prior to presenting them to a union in negotiations. In fact, she never discussed with the Executive any proposal she made to the Charging Party (T86-T87). Prior to presenting her economic proposal, however, Capetola will check with the County's Budget Department to see if there are adequate funds to support the proposal and she might speak to the County Administrator, the Budget Director and the Personnel Director for guidance (T91-T92, T116). But she does not discuss it with the Executive (T91-T92). After a tentative agreement is reached, she prepares a memorandum for internal use for the Budget Department to review the economic items and then the Budget Department and others review the agreement with the Executive. Capetola does not prepare a memorandum of agreement with the union she is negotiating with. Rather, she drafts the tentative agreement which the union must ratify and sign before she forwards it to the Executive for his approval and review (T85, T92, T100, T110). If the Executive approves of the agreement, he signs it and it is sent to the Board (T90, T92). Since Capetola has been the County's Director of Labor Relations, the Board has never considered a labor agreement without the Executives signature (T100).

At the session on April 20, the Union had no proposals and Capetola told the Union that her procedure was to do language (non economic) items first and she suggested that the Union put their

language proposals in writing (T19, T82). There was no discussion of ratification procedures at that session (T82-T83; R-2).6/

The second negotiations session was held in June 1987. Capetola attended for the County and Havriluk and Danzell attended for the Union (T82). Capetola began the meeting by asking for the Union's proposals, restating that language issues that were to be done first and setting forth the ratification procedure which required the Union to ratify and sign first, then ratification and signature by the County Executive, then ratification and signature by the Board (T83, T124). The parties also discussed Danzell's performance evaluation, Tarantino's title change, a FICA matter and the budget (T83).7/

6/ Capetola testified that ratification procedures were discussed at the second session (T83). Havriluk testified that at the first session (April 20), Capetola said that any settlement would be subject to ratification by the Board (T19). In his affidavit of March 13, 1989 (R-2), however, Havriluk said that on April 20, no ground rules for negotiations were discussed except that the Union proposals should be reduced to writing. Havriluk's statements are contradictory, thus unreliable. I credit Capetola's testimony that ratification was discussed at the second session.

7/ Capetola testified that she reviewed her negotiations notes which enabled her to remember the substance of the first and second negotiation sessions (T84), and that she told Havriluk in June 1987, that any negotiated agreement was subject to ratification and signature by the Executive and then the Board after the Union had ratified and signed (T83-T84, T124). Havriluk only testified that Capetola said that for the County, an agreement would be subject to the ratification of the Board (T19). I credit Capetola's testimony that in June 1987, she told Havriluk that any agreement was subject to the

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Subsequent to June 1987 and throughout the first half of 1988 the parties had several negotiation sessions and agreed to several language items (T21-T24, T84-T85; CP-1). By February 1988, employee Joe Lovallo had joined the Union's negotiating team (R-3).

At a negotiations session on or about June 24, 1988 (T25), the parties reached a tentative agreement on all but two items (T26, T125). That meeting began with the Union asking Capetola to give it the County's last, best and final offer (T25). Capetola needed to "talk to her people" before she could do that and she left the room (T26, T91). Capetola left the room to locate some County officials, such as the County Administrator and Budget Director, for guidance on the County's position. She did not speak with or receive approval from the Executive regarding any proposals (T91-T92). Capetola returned to the session and gave the Union a proposal on all but two outstanding issues (T26). Both Havriluk and Lovallo assumed that when Capetola came back after talking "to her people" and presented the County's final offer that she had received the Executive's approval of that offer (T54, T67; R-4). However,

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7/ Footnote Continued From Previous Page

Executive's and Board's ratification. Havriluk did not remember the date of the first session, he did not remember whether the ratification discussion occurred at the first or second session and he may not have remembered that Capetola reserved the right to have the Executive ratify any agreement. Capetola was positive of her recollection of what she said, and what she said was consistent with other agreements she has negotiated with other unions on behalf of the County. Overall, I found her to be a more reliable witness.

Capetola never said that the Executive had approved that offer (T54, T65), and in fact, he had not (T87, T92).[8/] At the end of the session, Havriluk requested a memorandum of agreement, but Capetola refused and explained it was not County policy to enter into such agreements (T26-T27, T85). Capetola told Havriluk that the parties had to resolve the outstanding issues at another session (T27-T28, T64, T85).

Capetola then suggested that the Union present the tentative agreement to the membership for ratification in an effort to move the negotiations and contract along to completion so that the employees could get their increases quicker (T94, T125). She explained to Havriluk that the basis for her suggestion was that although the Board usually met four times a month, in July and August they met only twice a month, and that before approving a contract the Board usually had a conference meeting to review the document and would vote on it the following meeting (T94).

8/ Capetola testified that she did not discuss any proposals for this Union with the Executive during negotiations, nor received his approval for the offer made in June 1988 (T87, T92). In his affidavit (R-2), Havriluk said that it was "his understanding" that the Executive had approved every proposal. Similarly, during the hearing, Lovallo testified that he thought the Executive had approved the proposals because he did not believe Capetola would make offers without such authority (T67). I credit Capetola's testimony. Once again, her actions were consistent with her procedures for negotiations. I do not credit either Havriluk or Lovallo. They both admitted that Capetola never said that the Executive had approved the County's proposals and they offered no independent evidence to support their testimony, which I find was based on nothing more than their own assumptions.

Capetola, however, never promised that the employees would get their raises by September (T95).[9/]

During the discussions in June 1988, Capetola did not mention that any agreement was subject to ratification by the Executive prior to Board ratification (T28, T65).[10/]

Although Capetola had suggested at the June 1988 session that the Union present the tentative agreement to the membership for ratification, Havriluk and Lovallo preferred to resolve the two

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9/ In his January 4, 1989 affidavit, R-1, Havriluk acknowledged the conversation with Capetola after the June 1988 session regarding presentation of a tentative agreement to the Board in August. Havriluk said that Capetola told him that if the Board approved the contract in August, the employees would receive their raises in September. That statement does not directly conflict with Capetola's testimony, but I do credit Capetola's testimony that she only told Havriluk that if they came to an agreement she would "try" to present it in August and that she did not promise pay raises in September (T95).

10/ In R-2, Havriluk alleged that at the conclusion of the June 1988 meeting, Capetola said "this contract is subject to the ratification of your membership and the County Freeholders." Havriluk then, in R-2, alleged that he acknowledged Capetola's alleged remark and said "yes the membership would vote and understood that the County Freeholders and not the County Executive were going to ratify." I do not find that Havriluk made the above remark to Capetola and do not credit R-2 to prove that he did. Havriluk did not testify at this hearing to having made that remark, and both he and Lovallo testified that at that session Capetola did not mention the Executive. Having credited their testimony that Capetola did not mention the Executive at that meeting and having already credited Capetola's testimony that in June 1987 she told Havriluk that the Executive had to ratify any agreement before it could be sent to the Board, I cannot believe that if Havriluk had, in fact, said to Capetola in June 1988, that an agreement was not subject to the Executive's ratification, that she would not have corrected him and mention the Executive by name or title. I draw a negative inference regarding Havriluk's veracity from that remark in R-2.

outstanding issues prior to seeking ratification, thus, a final negotiations session was held on July 11, 1988 (T28-T29, T65). The parties reached a final tentative agreement on all issues at that meeting. The Union again asked for a memorandum of agreement, but again Capetola refused (T30). Instead, Capetola told the Union to get the agreement ratified, after which she would prepare a document for the Union's signature (T30-T31, T52), and she told Havriluk and Lovallo that she would then present the agreement to the Executive for his ratification and signature, then to the Board for its ratification and signature (T96, T127).11/

11/ Both Havriluk and Lovallo testified that Capetola made no mention at the July 11 session of any need or requirement for the Executive to ratify the tentative agreement (T32, T67). In addition, in R-2, Havriluk alleged that Capetola did not advise the Union that the Executive was reserving the right to ratify, but then he alleged in R-2 that Capetola did mention the Executive, but only to say that the Executive had to give her his approval of a proposal before she would present it to the Union. Capetola testified in direct contradiction to Havriluk's above remark in R-2, she said she told the Union that the Executive had to ratify an agreement and she testified that she never reviewed proposals with the Executive (T87, T96-T97). She also directly contradicted Havriluk and Lovallo when she testified that she did tell them that the agreement was subject to Union, then Executive, then Board ratification (T95-T96, T127). I again credit Capetola's testimony. I did not find Havriluk, in particular, to be a credible witness. His remark in R-2 that Capetola said that the Executive had to give her his approval for proposals was unsupported at hearing. I credited Capetola's uncontradicted testimony at hearing that she never discussed proposals with the Executive. In addition, Havriluk testified under cross-examination that in July 1988, Capetola told him that the agreement had to be "reviewed" and he knew that the Executive had to sign it (T52). Given my earlier findings regarding Havriluk's credibility, I infer from his above testimony that Capetola did tell him that the Executive had to "ratify" and sign the agreement.

Capetola did present the tentative agreement to the Executive, but he refused to ratify the agreement because of a problem he had with the performance evaluations, and Capetola informed Havriluk of the problem (T93). Since the Executive did not ratify the agreement, it was not sent to the Board for its ratification. The parties attempted to resolve the problem (T93), but it was not resolved prior to the filing of RD-89-9.

3. For sometime prior to 1987, the County had a performance evaluation system for employees in the Executive Service II level, employees now in the Charging Party's unit, to determine whether they were entitled to a yearly merit increase. The evaluations were done twice a year, from July 1 through December 31, and from January 1 through June 30 (T68, T128-T129). There is a standard form for the evaluation with objectives for all employees to satisfy, plus individual objectives designed by supervisors related directly to specific jobs. Employees consented to a performance agreement and were then evaluated twice a year on the objectives. The evaluations resulted in an overall performance rating (T129).

The evaluations and performance ratings were used to determine what, if any, monetary increase was available for that year. There could be an increase of anywhere between zero and nine percent of an employees base salary. The percentage of increase could be changed from year to year based upon an employees performance. If an employee was not evaluated and did not have a

signed performance evaluation form, he/she could not receive an increase. Increases were given effective July 1 of the year in question (T129-T130).

Lovallo received a merit increase on July 1, 1986. Over the years, however, he did not receive the same increase each year (T76). He was evaluated in December 1986, but was not evaluated in June 1987, and did not receive an increase in July 1987 (T69-T71). He was not evaluated in December 1987, but did not know if other unit members were evaluated at that time and he did not receive an increase in July 1988 (T71).12/

Other unit members were evaluated in June 1987, December 1987 and June 1988, but did not receive increases in July 1987 or July 1988 (T71-T72, T132-T133).

ANALYSIS

The County did not violate the Act by not forwarding the July tentative agreement to the Board for ratification, nor by not paying merit increases in July 1988. The credible evidence shows

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12/ Lovallo testified on direct examination that he was not evaluated in June 1987 (T70) or December 1987 (T71). On cross-examination, however, he testified that he signed a performance evaluation agreement in July 1987 (T77) and he testified that he thought he was evaluated in December 1987 (T76). Given the discrepancy between his direct and cross-examination on these points, Lovallo's testimony regarding when he was evaluated is not very reliable. However, since no July 1987 performance evaluation agreement was produced at hearing, and since he only "thought" he was evaluated in December 1987, I credit his direct testimony on these points.

that the County's negotiator had reserved the right to have the County Executive ratify any agreement and that the merit increases were not automatic salary increments.

The Ratification Issue

In its post hearing brief, the Union correctly argued that in Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975); East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), mot. for recon. den. P.E.R.C. No. 77-26, 3 NJPER 16 (1977), dism. as moot App. Div. Dkt. No. A-250-76 (12/2/77); and Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 78-83, 4 NJPER 249 (¶4126 1978) (Black Horse), the Commission established criteria to determine a negotiator's level of authority and the ratification procedures that would be used to finalize an agreement.

In Black Horse, the Commission held:

> In order for collective negotiations to be effective and productive, it is essential that each participant know with certainty the extent of the opposing negotiating team's authority. A party must be able to rely on the statements and general conduct of the other side's representatives during the negotiations process. Accordingly, the Commission, in applying the criteria established in the Bergenfield and East Brunswick decisions, will consider only whether, during the course of the particular negotiations in dispute, there was an absence of oral or written qualifying statements or general conduct by negotiating representatives from which binding authority on the part of the negotiating teams to conclude an agreement could reasonably be inferred. To consider the additional factor of past history of ratification would only cause confusion and disruption to the negotiating process. A party would be uncertain whether to rely on the practice of ratification in previous negotiations or the current representations of

binding authority by the negotiating representatives. 4 NJPER at 250.

Contrary to the Union's assertions, however, I found that Capetola clearly qualified the County's ratification procedure at the second and last negotiations sessions to include a separate ratification by the County Executive after the Union's ratification and before it could be submitted to the Board for its ratification. Capetola did more than just reserve the right to have the Executive "review" and sign an agreement, she specifically reserved the right for the Executive to "ratify" the agreement.

Although the Union presented two witnesses to contradict Capetola's assertion that she had reserved the right to submit an agreement to the Executive for ratification, their testimony was not reliable. Havriluk was wrong about the date of the first negotiations session, wrong about when ratification was discussed, and there were several inconsistencies between his testimony and his pre-hearing affidavits. Lovallo, similarly, did not have a good recollection of the facts.

The Union's assertion that because Capetola frequently "spoke to her people" before making proposals to the Union negated or waived the need to obtain the Executives ratification, is without merit. Capetola did not review proposals with the Executive prior to offering them to the Union and she, nevertheless, reserved the right for the Executives ratification.

Since the agreement was presented to the Executive for ratification, but since he refused to ratify based upon a legitimate

economic concern, the County was not obligated to forward the agreement to the Board for its ratification consideration. After the Executive refused to ratify, the County did not violate the Act by negotiating with Union representatives in an attempt to resolve the outstanding problem. On the merits, this aspect of the Charge should be dismissed.

The County argued in its Motion to Dismiss that pursuant to N.J.S.A. 40:14A-1 et seq. and the powers of a county executive as specifically presented in N.J.S.A. 40:14A-36, that despite anything that was or was not said during negotiations, the Executive had the legal right to ratify and sign any agreement before it was submitted to the Board. I find, however, that because there was sufficient evidence on the merits to support the County's contention that Capetola had reserved the right of the Executive to ratify the agreement, it is unnecessary for me to consider the County's legal defense.

The Merit Increase Issue

In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), the State Supreme Court held that an employer's failure to pay automatic salary increments violated the Act. But it also concluded that if the increments were discretionary rather than automatic, the failure to pay them was not a violation of the Act and the matter could be resolved in negotiations. Id at 49, 50.

An increment is automatic where, for example, it is only conditioned on the start of another year of employment. Id. at 51.

Based upon the facts developed here, the granting of merit increases was not automatic. The County had the discretion to decide whether - and how often - to evaluate the employees, the discretion to give anything between zero and nine percent if it did evaluate employees, and when increases were given, they were not the same from year to year. The Union did not show by a preponderance of the evidence that increases had to be given or that they were given to all employees merely for starting another year of employment or having a satisfactory evaluation. Thus, this aspect of the Charge should be dismissed.[13/]

Accordingly, based upon the above findings of fact and analysis, I make the following:

RECOMMENDATIONS

1. I recommend that the Complaint be dismissed.

2. I recommend that the block to the further processing of RD-89-12 be dissolved.

Arnold H. Zudick
Hearing Examiner

DATED: May 30, 1989
Trenton, New Jersey

13/ In its Motion to Dismiss and its post-hearing brief, the County sought dismissal of the merit pay issue arguing that that aspect of the Charge was beyond the Commission's six-month statute of limitations. N.J.S.A. 34:13A-5.4(c). I granted the Motion with respect to the alleged failure to pay increases on July 1, 1987. That date was outside the statue of limitations. I denied the Motion regarding the alleged failure to pay increases on July 1, 1988. I now find that the County's statute of limitations argument regarding the July 1, 1988 date is without merit. I rely upon my decision on the merits to dismiss that aspect of this Charge.