

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BOGOTA,  
Respondent,

Docket No. CO-79-17

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,  
LOCAL #86 (BOGOTA UNIT),  
Charging Party.

SYNOPSIS

In the absence of exceptions to the Hearing Examiner's decision, the Commission adopts the Hearing Examiner's findings of fact and conclusions of law in an unfair practice proceeding. The Hearing Examiner found that, pursuant to a contractual re-opener clause, the public employer was obligated to negotiate with respect to specified terms and conditions of employment for calendar year 1975. However, the public employer refused to negotiate concerning 1975, and instead insisted on limiting negotiations to terms and conditions to be included in a successor agreement. The public employer is ordered to cease and desist from refusing to negotiate in good faith, and is affirmatively ordered to negotiate, upon request, for calendar year 1975 in accordance with the reopener clause.

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LOCAL #86 (BOGOTA UNIT),  
Charging Party.

For the Respondent, Osterweil and LeBeau, Esqs.  
(Richard D. Loccke, Esq., of Counsel)

For the Charging Party, Thomas A. Tinghino, Esq.

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on April 11, 1975 by Patrolmen's Benevolent Association, Local #86 (Bogota Unit) (the "P.B.A.") alleging that the Borough of Bogota (the "Borough") engaged in certain unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular the P.B.A. alleged that the Borough violated N.J.S.A. 34:13A-5.4(a)(5)<sup>1/</sup> in that it refused to negotiate in good faith with respect to certain items proposed by the P.B.A. pursuant to a reopener clause for the year 1975 contained in the parties' collectively negotiated agreement then in effect. The charge was processed pursuant

<sup>1/</sup> N.J.S.A. 34:13A-5.4(a)(5) provides: "Employers, their representatives or agents are prohibited from: (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

to the Commission's Rules, and it appearing to the Commission's Executive Director that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 2, 1975.

Pursuant to the Complaint and Notice of Hearing a plenary hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, on October 29, 1975, at which all parties were represented and were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. On February 17, 1976 the Hearing Examiner issued his Recommended Report and Decision, which Report included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.

Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.2.

Upon careful consideration of the entire record herein, and in the absence of exceptions to the Hearing Examiner's Recommended Report and Decision, the Commission hereby adopts the findings of fact and conclusions of law as stated by the Hearing Examiner substantially for the reasons set forth by him.<sup>2/</sup> The Commission finds and determines that the Borough violated N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate in good faith

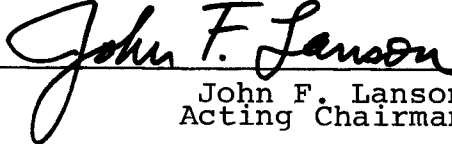
<sup>2/</sup> N.J.A.C. 19:14-7.3(b) provides in part that "Any exception which is not specifically urged shall be deemed to have been waived."

with the P.B.A. pursuant to the reopener clause for 1975, as more fully set forth by the Hearing Examiner.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(c), the Public Employment Relations Commission hereby orders the Borough of Bogota to cease and desist from refusing to negotiate in good faith with Patrolmen's Benevolent Association, Local #86 (Bogota Unit) and, upon request of the said P.B.A., to negotiate in good faith upon those matters set forth in Paragraph 23.6 of the parties' 1974-1975 contract for the calendar year 1975.

BY ORDER OF THE COMMISSION

  
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John F. Lanson  
Acting Chairman

DATED: Trenton, New Jersey  
March 23, 1976

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BOGOTA,

Respondent,

- and -

Docket No. CO-79-17

PATROLMEN'S BENEVOLENT ASSOCIATION,  
LOCAL #86 (BOGOTA UNIT),

Charging Party.

Appearances:

Thomas A. Tinghino, Esq.,  
For the Respondent.

Osterweil & Le Beau, Esqs.,  
BY: Richard D. Loccke, Esq.,  
For the Charging Party.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On April 11, 1975 an Unfair Practice Charge was filed by the Patrolmen's Benevolent Association, Local #86 (Bogota Unit) (herein called the "P.B.A.") against the Borough of Bogota (herein called the "Borough") claiming the Borough violated N.J.S.A. 34:13A-5.4(a)(5) and engaged in an unfair practice by refusing to negotiate in good faith. It appearing to the Executive Director, Jeffrey B. Tener, that the allegations of the charge, if true, might constitute an unfair labor practice, a complaint and notice of hearing was issued on October 2, 1975. A hearing was held on this matter pursuant to said complaint on October 29, 1975 at 1100 Raymond Boulevard, Newark, New Jersey before Edmund G. Gerber, Hearing Examiner of the Public Employment Relations Commission.

Both parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to

introduce relevant evidence. Upon the entire record in this proceeding the Hearing Examiner finds:

1. The Borough of Bogota is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended and is subject to its provisions.
2. The Patrolmen's Benevolent Association, Local #86 (Bogota Unit) is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.<sup>1/</sup>
3. As noted, an Unfair Practice Charge having been filed with the Commission alleging that the Borough of Bogota has engaged or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning an alleged violation of the Act exists and this matter is appropriately before the Commission for determination.

<sup>1/</sup> At the hearing the Borough took the position that PBA Local #86 did not negotiate the contract in dispute. It is claimed that the Policemen's Negotiating Committee did the negotiating. The Respondent's answer, however, does not raise the standing of the PBA Local #86 as an issue, even by way of general denial. Under N.J.A.C. 19:14-3.1 any allegation of a complaint not specifically denied or explained in an answer is deemed to be admitted. Further, there was a timely objection by the Charging Party to this line of inquiry at the hearing. It should be noted that while the agreement is between the Borough and the Policemen's Negotiating Committee of Bogota, "representing the full-time police personnel of the Bogota Police Department... and recognized as members of the Police Benevolent Association Local #86," the recognition clause of the contract states at 1.1, "The Borough recognizes the employees as PBA Local #86 members and as the sole and exclusive representative for all the full-time law enforcement personnel of the Bogota Police Department." In any event, it is clear that PBA Local #86 is at least the successor employee representative (pg. 39, line 10).

BACKGROUND

On March 28, 1974 a contract was entered into between the parties. The contract was to remain in full force and effect until December 31, 1975. Paragraph 23.6 of the contract provides that "Employees may, commencing on or about October 1, 1974, reopen discussions for the year of 1975 as to the following items only: (A) College credits, (B) Personal days off."

In its Complaint the Petitioner alleges:

Pursuant to this agreement, the parties embarked upon a long course of negotiations during which several offers, counter-offers and proposals were made between the parties.

When no agreement was reached, based upon various offers and counter-offers the Public Employer stated to the PBA that it had no obligation to negotiate under the terms of the agreement and that it had met its obligation by having a mere discussion. All of it was contrary to the intent and language of the agreement and contrary to the action of the party as demonstrated by the parties at numerous meetings.

In addition to the foregoing, the Public Employer withdrew every offer then on the table which it had made to the PBA and refused to proceed any further.

The Borough's Answer to the Complaint alleges in part:

The Mayor and Council of the Borough of Bogota contends that it did not refuse to discuss the two issues involved but did discuss same through its committee on numerous occasions with the employees' representatives. The employees themselves could not agree on a concise proposal after several meetings and agreed that the matter would be negotiated as one of the general proposals for the 1976 contract; whereupon, all suggestions and all counter suggestions were withdrawn with the understanding that the matter would be negotiated as a part of the entire 1976 contract.

It was not until July 31, 1975, at the PERC hearing that the Mayor and Council of the Borough of Bogota were apprised of the fact that the employee representatives were talking about the year 1975. The Mayor and Council of the Borough of Bogota had never understood that the discussions regarded the 1975 contract year. The Mayor and Council of the Borough of Bogota made it clear that they would discuss and negotiate the two items in question as part of the 1976 contract negotiations.

I.

It would appear from the pleadings that the Borough would have relied on the language of 23.6 as a defense to the charge at the hearing, for the provision in question uses the term "reopen discussions" rather than "reopen negotiations." It is noted that the word negotiate, or negotiation<sup>2/</sup> appears some seven times in the contract,<sup>3/</sup> while the word discuss, or discussions, appears only this one time.

The plain meanings of these words are different and as a term of art in labor relations, particularly in the public sector, the duty to discuss may be something less than the duty to negotiate.

At the hearing, however, the Borough never raised this as an issue. Indeed the Board introduced no evidence at the hearing of any kind. The only testimony at the hearing was that of the PBA's witness Patrolman William Hancock, chairman of the Policemen's Negotiating Committee. Regarding the meaning of the language in question, his testimony was that the parties did not intend that discuss should mean anything but negotiate, as example pg. 10, line 20.

<sup>2/</sup> Not counting its use in the title Police Negotiating Committee.

<sup>3/</sup> As an example, 23.5 which immediately precedes the language in question, states the parties "will meet and negotiate" over proposed new Changes in the 1976 contract.



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A. There were discussions before the signing of this contract, that the stipulation was that the two issues (i.e. College Credits and Personal Days Off) were to be negotiated for the year 1975.<sup>4/</sup>

Further, on pg. 36, line 21.

Q. When you met with Mr. Penna...in the fall of 1974 did he promise to negotiate with you?

A. Yes, he did.

Pg. 37 (continued).

Q. Did he use the word negotiation?

A. Yes, he used the word negotiation as well as I did.

Q. Did he tell you he would set down a date for negotiations?

A. Yes, he did.

Significantly, at the conclusion of the case for the Charging Party the attorney for the Respondent stated:

Well, I don't see any purpose to bring out any more testimony. I think everything that could have been brought forth has been brought forth by Officer Hancock, who is telling the truth. And I believe that the truth lies in the fact that there have been discussions -- we call them discussions, we call them negotiations, whatever words you are going to use. (emphasis added)

This statement may be construed as a judicial admission that the Borough saw no difference in meaning between these two words. Yet the PBA in its charge admits that the public employer maintained "It had no obligation to negotiate under the terms of the agreement and that it met its obligation

<sup>4/</sup> In a court proceeding, such testimony might be barred by the parole evidence rule. However, under N.J.A.C. 19:14-6.6, "The parties shall not be bound by the rules of evidence whether statutory, common law or adopted by the Rules of Court. All relevant evidence is admissible."

by having a mere discussion."<sup>5/</sup>

These two admissions so squarely oppose each other that no inference can be drawn from either; they are in equipoise. Therefore, a determination must be made as to the parties' intended meaning of the language solely on the testimony of Patrolman Hancock. Again, the admission of the Borough's attorney was that "Officer Hancock...is telling the truth." I also find that Patrolman Hancock was a credible witness. In light of his testimony concerning conversations both before and after the signing of the contract, I find that the parties meant the language of 23.6 ("The Parties agree the employees may, commencing on or about October 1, 1974, reopen discussions on the following items only, A) College Credits, B) Personal Days Off.") to obligate the employer to negotiate over college credits and personal days off.

## II.

Having found the duty to negotiate, the next line of inquiry is whether the parties in fact did so in accordance with N.J.S.A. 34:13A-5.3.<sup>6/</sup> The Borough contends, that by way of oral argument and brief, they did negotiate but the parties simply failed to reach an agreement.<sup>7/</sup> The

<sup>5/</sup> Judicial admissions are evidentiary whether they are part of the pleadings, Winn V. Wiggin, 47 N.J. Super 215 (App Div 1957) or an admission made by an attorney on the record of a proceeding, Muller Fuel Oil v. Insurance Co. of North America, 95 N.J. Super 564 (App Div 1967).

<sup>6/</sup> N.J.S.A. 34:13A-5.3 provides: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

<sup>7/</sup> It is the Borough's position that the requirement for good faith negotiations does not require them to reach an agreement. This position is in accord with the Commission decision in State of (continued)

evidence before me does not so indicate. The contract clearly and unequivocally states that the PBA may re-open discussions for 1975, yet Patrolman Hancock's uncontroverted testimony was that the Borough never negotiated for 1975.

There were informal discussions between Hancock and Commissioner Penna over the two issues involved but all the evidence before me indicates that the Borough would only enter into discussion over 1976, not 1975. On one occasion the Borough did make a contract offer that coupled one personal day for 1975 with a settlement for college credits in 1976, but this offer was then withdrawn by Commissioner Penna, stating, "They (the Borough) were under no duty to negotiate for 1975." pg. 28, line 18 <sup>8/</sup>

In fact the Borough admits in their answer:

The Mayor and Council of the Borough of Bogota had never understood that the discussions (which they did have) regarded the 1975 contract year. The Mayor and Council of the Borough of Bogota made it clear that they would discuss and negotiate the two items in question as part of the 1976 contract negotiations.

The Respondent does not question that the parties to a contract may obligate themselves through a reopener clause in the contract to enter into good faith negotiations during the life of the contract. Further, such negotiations must be in accordance with the terms of the contract. <sup>9/</sup>

<sup>7/</sup> (continued) New Jersey and Council of State College Locals, NJSFT-AFT/AFL-CIO, E.D. No. 76, 1 NJPER 39, aff'd P.E.R.C. No. 76-8 (1975), appeal pend. on other grounds App Div, Sup Ct, Docket No. A-531-75.

<sup>8/</sup> This statement would seem to be consistent with a contract language defense as discussed above, yet standing by itself it falls short. There is no evidence as to why Penna maintains there is no obligation; it is tantalizing but nothing more.

<sup>9/</sup> State of New York and Council 82 AFSCME, AFL-CIO, 5 PERB 4523 and Local 520 ILGWU v. Glendale Mfg. Co., 179 F. Supp. 222; 45 LRRM 2985.

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Here notice was timely served to commence negotiations,<sup>10/</sup> yet the Borough refused to comply with the terms of the contract, specifically to negotiate for 1975 pursuant with paragraph 23.6.

The Commission has stated in the State of New Jersey and Council of State Colleges, supra, at page 8:

A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement.

In the instant case the Borough did not even go through the motions of negotiations; there was an open refusal to enter into negotiations in accordance with the contract provisions.

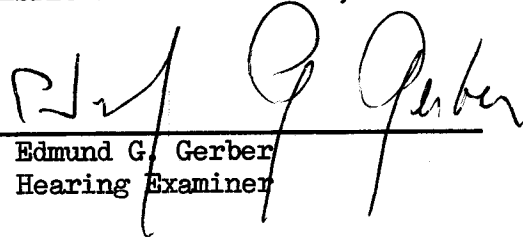
I therefore find on the basis of the evidence before me that the Borough's consistent refusal to negotiate for 1975, constituted a violation of N.J.S.A. 34:13A-5.4(a)(5), as alleged.

<sup>10/</sup> See Exhibits P-2 and P-3 in evidence. Both of these letters from the PBA attorney to the Borough specifically call for the "commencement negotiations for the year 1975".

ORDER

Accordingly, for the reason set forth above, IT IS **HEREBY ORDERED** that the Respondent, Borough of Bogota, shall cease and desist from refusing to negotiate in good faith, upon request, with the Patrolmen's Benevolent Association, Local #86 (Bogota Unit) for the calendar year 1975 in accordance with Paragraph 23.6 of the parties 1974-1975 contract.\* 11/

RESPECTFULLY SUBMITTED,

  
Edmund G. Gerber  
Hearing Examiner

DATED: Trenton, New Jersey  
February 17, 1976

11/  
\*

This order does not mean that any ongoing negotiation for a 1976 contract must cease and the parties must turn to 1975. Indeed, the 1976 settlement may provide for a settlement for 1975. Rather the order states an obligation on the employer which the public employee representative has the right to enforce.