P.E.R.C. NO. 94-121

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CAMDEN,

Respondent,

-and- Docket No. CO-H-92-374

CAMDEN COUNCIL NO. 10,

Charging Party.

SYNOPSIS

In an unfair practice charge filed by Camden Council No. 10 against the County of Camden, the Public Employment Relations Commission finds that although the County had not repudiated the parties' contract, it violated its duty to negotiate in good faith when it unilaterally increased a unit employee's salary.

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In the Matter of

COUNTY OF CAMDEN,

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-and- Docket No. CO-H-92-374

CAMDEN COUNCIL NO. 10,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys (David F. Corrigan, of counsel)

For the Charging Party, Tomar, Simonoff, Adourian & O'Brien, attorneys (Mary L. Crangle, of counsel)

DECISION AND ORDER

On May 20, 1992, Camden Council No. 10 filed an unfair practice charge against the County of 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), (3) and (5),[1/] when it unilaterally increased unit member Maryann Frye's salary in derogation of the negotiated salary guide and without notice to or negotiations with Council 10.

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

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On July 27, 1992, a Complaint and Notice of Hearing issued. On August 27, the County filed its Answer admitting that it changed Frye's salary, but claiming that it acted consistent with established practice and the parties' contract. It further claimed that the matter should have been deferred to the parties' arbitration procedure.

On December 10, 1992, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. Post-hearing briefs were received by February 22, 1993.

On March 22, 1993, the Hearing Examiner reopened the record to receive additional evidence regarding meetings between May 1992, when the Freeholders passed the resolution increasing Frye's salary, and September 1992, when the increase was implemented. On August 26, 1993, an additional day of hearing was held.

On December 2, 1993, the Hearing Examiner issued his report and recommendations. H.E. No. 94-10, 19 NJPER 30 (¶25011 1993). He found that although the County had not repudiated the parties'

1/ Footnote Continued From Previous Page

condition of employment to encourage or discourage 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."

contract, its unilateral action violated the duty to negotiate in good faith. He recommended that the County be ordered to rescind the resolution increasing Frye's salary; negotiate with Council 10 over her salary prospectively and retroactively; and begin recouping the difference in Frye's related salaries after 60 days should agreement on a retroactive salary not be reached.

On December 29, 1993 and January 19, 1994, respectively, the County and Council 10 filed exceptions and an answering brief. We will address the exceptions and response in our analysis. We deny the County's request for oral argument. The factual and legal issues have been fully briefed by the parties.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-15).

On May 5, 1992, Council 10's president became aware of a proposed resolution for the Freeholders that would have placed Maryann Frye in a new variant of the chief clerk title with a $4000 annual salary increase. Council 10's president asked the County's director of human resources to have the matter pulled from the Freeholders' agenda because the increase had not been negotiated. Nevertheless, the Freeholders adopted the resolution two days later. The director decided not to implement the resolution because he was concerned about the impact of the increase on successor contract negotiations. He informed Council 10's president that the increase would not be implemented. After this unfair practice charge was filed, the County offered to negotiate. Council 10

responded that the County should rescind the resolution and then negotiate a new salary. The County implemented the salary increase in September retroactive to May 10.

Because compensation is mandatorily negotiable, a public employer cannot unilaterally set or change salaries. N.J.S.A. 34:13A-5.3; Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973). Here, the Freeholders passed a resolution in May 1992 unilaterally increasing Frye's salary, but it did not implement the increase until September. The County claims that the Complaint should be dismissed because the unfair practice charge itself alleges that the County unilaterally increased Frye's salary on or about May 7, 1992 and Council 10 never amended the charge to allege a September implementation. Council 10 responds that the County's delay in implementing Frye's increase is irrelevant to a determination that the County engaged in unlawful unilateral action as a result of the May 7 Freeholder resolution.

Absent a valid defense to its unilateral action, the County's adoption of the resolution increasing Frye's salary violated its obligation to negotiate in good faith over compensation. That is so even though the resolution was not implemented immediately. Passage of the resolution was the only formal act needed to authorize the increase. That unilateral action, taken over Council 10's protest, was destructive of the collective negotiations process. Indeed, the increase was ultimately implemented based on the May resolution.

The County claims that the Complaint should be dismissed because Frye was not made a party to this proceeding. Council 10 responds that Frye's position on this dispute is easily ascertainable and irrelevant and, in any event, intervention was not sought.

Frye testified at the hearing and did not move to intervene. In addition, whether she approved or disapproved of Council 10's position has no bearing on whether the County breached a negotiations obligation. This case is about the negotiations relationship between a majority representative and an employer, not about an individual employee's rights under a contract. Contrast Saginario v. Attorney General, 87 N.J. 480 (1981).

The County claims that this matter should have been deferred to the parties' grievance procedure. Council 10 responds that there is no contractual clause in dispute and that the issue instead concerns the employer's failure to negotiate over compensation with the majority representative.

Deferral to arbitration is most appropriate when, unlike here, resolution of a grievance will likely resolve the parties' dispute. The essence of this dispute is whether, after having decided to create a variant title, the County had to negotiate with Council 10 before setting a salary for that title. Whether the contract or the parties' practice in similar situations constituted a waiver of Council 10's right to negotiate salaries in this situation can and will be considered by us in assessing the County's affirmative defenses.

The County claims that the Hearing Examiner should not have restricted its ability to present witnesses. Council 10 responds that the County did not attempt to call any other witnesses.

In his letter reopening the hearing, the Hearing Examiner noted that the parties were "restricted from presenting other witnesses absent a joint request" (C-3). At the second day of hearing, the Hearing Examiner informed the parties that only the three witnesses who had been available would be allowed to testify. Neither party objected. Absent any objection or offer of proof at the hearing from the County, we cannot find that the Hearing Examiner excluded any relevant testimony.

The County claims that the Hearing Examiner erred in finding that the County unilaterally increased Frye's salary. It argues that Council 10 waived its right to negotiate and it relies on Article XXX, Section B and Article XXIX, Sections A and B of the collective negotiations agreement and the parties' practice. Council 10 responds that it did not waive its right to negotiate salaries, either by contract or by practice.

Article XXX, Section B provides:

> During the term of this agreement, neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both parties at the time they negotiated or signed this agreement.

Article XXIX provides:

> A. The County of Camden hereby retains and reserves unto itself, without limitation, all

> powers, rights, authority, duties, and responsibilities conferred upon and vested in it prior to the signing of this Agreement....
>
> B. In the exercise of the foregoing powers, rights, authority, duties and responsibilities of the County, the adoption of policies, rules, regulations, and practices and the furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only to the specific and express terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of New Jersey and of the United States.

In order for any or all of these contract provisions to operate as a waiver of Council 10's right to negotiate this salary increase, there must be clear and unequivocal language in the provisions authorizing the employer to set salaries unilaterally. State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82). There is no such language. None of the provisions addresses salary increases or the County's claimed right to set salary unilaterally. Broadly worded "zipper," "management rights," or "fully bargained" clauses alone do not constitute waivers of the right to negotiate over specific subjects. The parties' practice regarding salaries for variant titles is inconsistent. In any event, Council 10 made it clear, before the County acted, that it wanted to negotiate over this salary increase.

The County claims that Council 10 waived its right to negotiate after May 1992 and that, in the alternative, the County negotiated to impasse. Council 10 responds that an employer cannot meet its statutory obligations by negotiating after the fact.

The County's attempt to negotiate Frye's salary came after the Freeholders acted and after this unfair practice charge was filed. That attempt could have formed the basis for settling the parties' dispute. Absent a settlement, the attempt to negotiate does not insulate the County from the consequences of its unilateral action.

Finally, the County claims that the recommended remedy should be rejected because requiring it to agree goes beyond its duty to negotiate. Council 10 responds that a return to the status quo is the appropriate remedy and that the Hearing Examiner had favored the County already by delaying implementation of the remedy.

We order an immediate restoration of the status quo pending negotiations over Frye's salary. The status quo should include any interim increases Frye would regularly have been entitled to. We will not ordinarily order the recoupment of benefits unilaterally granted as part of a return to the status quo and do not do so here. No negotiated salary provision has been repudiated. Instead, the employer and union had a dispute over whether the employer had an obligation to negotiate an employee's salary. Under all the circumstances of this case, it would unduly punish the employee for the employer's unfair practice to allow the employer to recoup salary already paid to the employee.

Having considered the Hearing Examiner's recommendations, the County's exceptions, and Council 10's response, we find that the County violated its negotiations obligation under subsection

5.4(a)(1) and (5). Council 10 has not proven a violation of subsection 5.4(a)(3).

ORDER

The County of Camden is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate with Camden Council 10 before increasing Maryann Frye's salary.

2. Refusing to negotiate in good faith with Council 10 concerning terms and conditions of employment of employees in Council 10's unit, particularly by refusing to negotiate with Council 10 before increasing Maryann Frye's salary.

B. Take this action:

1. Immediately rescind that portion of the May 7, 1992 Freeholder resolution changing Maryann Frye's salary and restore her salary to its former level plus any interim increases Frye would have regularly been entitled to.

2. Immediately begin negotiations over Frye's prospective salary.

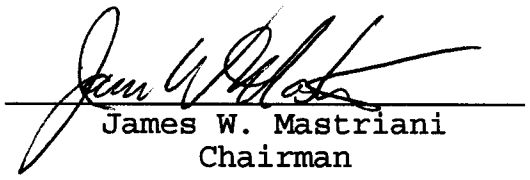
3. Negotiate in good faith with Council 10 before changing any salary or establishing any variant salary.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 30, 1994
Trenton, New Jersey
ISSUED: June 30, 1994

NOTICE TO 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate with Camden Council 10 before increasing Maryann Frye's salary.

WE WILL cease and desist from refusing to negotiate in good faith with Council 10 concerning terms and conditions of employment of employees in Council 10's unit, particularly by refusing to negotiate with Council 10 before increasing Maryann Frye's salary.

WE WILL immediately rescind that portion of the May 7, 1992 Freeholder resolution changing Maryann Frye's salary and restore her salary to its former level plus any interim increases Frye would have regularly have been entitled to.

WE WILL immediately begin negotiations over Frye's prospective salary.

WE WILL negotiate in good faith with Council 10 before changing any salary or establishing any variant salary.

Docket No. CO-H-92-374 COUNTY OF CAMDEN
(Public Employer)

Date: _____ By: _____

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 the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 94-10

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

In the Matter of

COUNTY OF CAMDEN,

Respondent,

-and- Docket No. CO-H-92-374

CAMDEN COUNCIL NO. 10,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the County of Camden violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed the salary of employee Maryann Frye. The Hearing Examiner found that Camden Council 10 did not waive its right to negotiate over the salaries for variant positions.

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. 94-10

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

In the Matter of

COUNTY OF CAMDEN,

Respondent,

-and-

Docket No. CO-H-92-374

CAMDEN COUNCIL NO. 10,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys (David F. Corrigan, of counsel)

For the Charging Party, Tomar, Simonoff, Adourian & O'Brien, attorneys (Mary L. Crangle, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On May 20, 1992, Camden Council No. 10, N.J.C.S.A. filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that Camden County violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/]

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. (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."

Council 10 alleged that on or about May 7, 1992 the County, without notice or negotiations, and in derogation of a contractual salary guide, unilaterally "increased" employee Maryann Frye's salary from $26,193 to $30,193. Council 10 further alleged that by the above action the County unilaterally "implemented" a salary increase in violation of the Act; and acted in bad faith and intended to repudiate the parties' collective agreement. Council 10 did not indicate in the charge the remedy it was seeking.

A Complaint and Notice of Hearing was issued on July 27, 1992. The County filed an Answer with affirmative defenses (C-2) on August 27, 1992. The County denied violating the Act but admitted "changing" Frye's salary effective May 10, 1992. It argued that its actions were consistent with established practice and the parties' collective agreement, and that the matter should have been deferred to the parties' arbitration procedure.

A hearing was held on December 10, 1992. Post-hearing briefs were received by February 22, 1993. By letter of March 22, 1993 (C-3), I notified the parties I was reopening the hearing to gather additional evidence.[2/] A limited hearing for that purpose

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2/ At the hearing of December 10, 1992, the County's attorney sought to admit testimony regarding meetings between the parties between May and September 1992. Council 10's attorney objected to such evidence arguing it wasn't relevant because the charge concerned events leading up to May 7, 1992. I sustained the objection and did not allow the testimony. In his original post hearing brief the County's attorney

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was held on August 26, 1993. Supplemental briefs were submitted by October 15, 1993. At hearing, Council 10 argued that Frye's salary be rolled back to her pre-May 7 salary of $26,193 plus a 4.3% increase arrived at for the new collective agreement (1T62).[3/]

Based upon the entire record I make the following:

Findings of Fact

1. Maryann Frye was first employed by the County in December 1981 as a data control clerk. By January 1988 she was promoted to a chief clerk, a seven-hour permanent position (J-3).[4/] In August 1990, Frye was promoted to a six-hour program analyst position on a temporary basis. But in May 1991 the County instituted a layoff and Frye was bumped, in July 1991, from her temporary program analyst position earning $29,554, into a six-hour chief clerk position earning $22,452 (1T64-1T65, 1T74, J-3). Frye filed a grievance over being placed in the six-hour chief clerk

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2/ Footnote Continued From Previous Page

requested I reconsider my ruling regarding the above mentioned testimony. After reviewing the record, I granted the County's request by letter of March 22, 1993 (C-3). I found that since Council 10 was relying on a September 1992 event to help prove its case, the County was entitled to show what occurred after May and leading up to the September event. But I also reminded the parties I might not rely on events or facts that were outside the confines of the charge.

3/ The transcript from December 10, 1992 will be referred to as 1T, the transcript from August 26, 1993 will be referred to as 2T.

4/ Exhibit J-3 is Frye's personnel card showing her County employment history.

position resulting in her being placed in July 1991, in a seven-hour chief clerk position earning $26,193, still less than what she earned as a program analyst (1T75, J-3).

Even after being placed in the seven-hour chief clerk position, Frye continued to perform the duties she performed as program analyst (1T63). In January 1992 the employee Frye worked for who was earning approximately $46,000, left the department, and Frye assumed his duties without receiving additional pay (1T63). The County did not request a desk audit of her position (1T121).

In view of the duties Frye was performing, the County decided to create a variant position for her which would more accurately reflect her job responsibilities, and it wanted to establish a salary appropriate for that position (1T93). As a result, the County then listed, for Frye, the variant job title of Chief Clerk-Alcohol Abuse on the personnel action list (C-1B) that was scheduled to be voted on by the Board of Freeholders on Thursday, May 7, 1992. C-1B showed a $4,000 increase for Frye listing her salary as $30,193.

2. Richard Riggs is Council 10's President. It was his practice to review the preliminary lists of personnel actions that were scheduled for Board vote two days prior to the regular meeting (1T25). In accordance with that practice, Riggs, on May 5, 1992, reviewed C-1B and, for the first time, became aware of the County's intent to increase Frye's salary (1T24). Riggs immediately questioned James Kennedy, the County's Director of Human Resources

at that time, about the proposed change. Riggs objected to the resolution (2T17, 2T41), but Kennedy responded that the department head or freeholder had decided to give Frye an increase (1T26, 1T93). Riggs told Kennedy that the County could not change Frye's salary without negotiations with Council 10 (1T26, 2T25). Riggs asked Kennedy not to institute the Frye personnel action in part because of ongoing negotiations (1T93). Riggs was concerned because in a number of other personnel actions some employees were promoted or received increases while there was still no new negotiated agreement (1T94). Riggs concluded by asking Kennedy to have the Frye resolution pulled from the Board agenda (2T41).5/

Kennedy agreed to check into the Frye matter and attempted to delay Board action on her salary increase, but he was unsuccessful (1T26, 1T94, 1T95). Kennedy, however, did not advise Riggs that he was unable to delay Board action (1T26). On Thursday,

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5/ Riggs testified that he told Kennedy that he (Kennedy) could not change an employees salary without negotiations with the union (1T26). Kennedy admitted that Riggs made a remark to that effect (2T25). Kennedy also admitted that Riggs asked him not to change Frye's salary and title (1T93) and further testified that Riggs told him that he (Riggs) was taking heat from unit members because there had already been several personnel actions where employees had either been promoted or received additional hours or salary increases before negotiations were completed, and he felt that if the Board changed Frye's status it would "screw up" negotiations (1T94).

I credit both Riggs' and Kennedy's testimony on these issues. Their testimony, while different, were not inconsistent with one another and there is no basis to doubt either witnesses recollection of that interchange.

May 7, 1992, Riggs went to the Board meeting and in reviewing the personnel action list noticed Frye's salary increase was still listed for a vote. Riggs protested to Kennedy that the County's action was an illegal act because Frye's salary had not been negotiated with Council 10 (2T25). Kennedy, nevertheless, indicated that the County would proceed with its action (1T26-1T27).

On May 7, 1992 the County Freeholders adopted resolution C-1B placing Frye in the newly created variant of the chief clerk position entitled "chief clerk, alcohol abuse" at a $4,000 increase (to $30,193) from her seven-hour chief clerk position (1T32). C-1B, and the Answer (C-2), indicated the salary change was effective May 10, 1992, and J-3 listed the salary change as May 10, 1992, but there was no indication in J-3 that it was actually implemented. While the County adopted the resolution changing Frye's salary effective May 10, the salary increase was not implemented at that time (1T32, 1T51).[6/] Similarly, while the County created the alcohol abuse variant for chief clerk, Frye did not receive a new civil service title because the State Department of Personnel does not recognize variant titles (1T32, 1T121).

Kennedy personally never negotiated with Riggs over Frye's salary (2T10, 2T19, 2T20, 2T23, 2T45), but in view of Riggs'

6/ Some reference was made in the transcript about the Board action of May 10, 1992. May 10 was a Sunday and I doubt there was any Board meeting that day. The relevant Board meeting was on May 7, 1992. The Board merely made C-1B effective starting on May 10, 1992.

objection to Frye's increase, Kennedy met with Riggs after C-1B was passed, but before the charge was filed, to discuss the matter (2T9-2T10, 2T24). Kennedy had decided not to process the paperwork to implement Frye's salary increase because he was concerned about the impact of Frye's projected salary increase on the ongoing negotiations between the parties (1T95, 2T18). Thus, shortly after C-1B was passed, Kennedy told Riggs that Frye's salary increase in C-1B would not be implemented (2T10, 2T18, 2T19).[7/]

Although Kennedy did not negotiate with Riggs over Frye's salary, he had several discussions with him, and Lou Bezich, the County's Chief Operating Officer, regarding the matter during the spring and summer of 1992 (2T10, 2T12). Kennedy told Riggs that he had to talk to Bezich to resolve the Frye matter.

In June and/or July 1992, when the parties were meeting for contract negotiations, Bezich, at one time, and George Norcross, County Democratic Chairperson, at another, sought to reach a settlement of the Frye issue. Riggs responded that since he had filed a charge, the only way Council 10 could resolve the Frye

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7/ Riggs admitted that Kennedy told him that C-1B would not be implemented with respect to Frye's salary (2T43), but testified that Kennedy did not tell him that until after the charge was filed (2T44). I credit Kennedy's testimony that he told Riggs about not implementing Frye's increase prior to the filing of the charge. He had a better recollection of that interchange. Riggs admitted that Kennedy told him about not implementing the increase, but also testified that he didn't recall specific conversations with Kennedy about the salary increase (2T44). Kennedy's testimony on that issue was more reliable.

matter was for the Board to rescind C-1B, and negotiate a new salary level for Frye (2T46-2T53).

Later that summer, Riggs told Kennedy that he and Bezich had resolved the Frye matter. Bezich confirmed the resolution but neither man had conveyed to Kennedy the details of the settlement at that time (2T12-2T13). In September 1992, Riggs told Kennedy that the resolution concerning Frye included keeping the new title and paying the new salary retroactively, but that the May resolution for Frye would be rescinded, and a new resolution would be passed keeping the title, salary increase and effective date in place (2T13-2T14). Kennedy then spoke to Bezich who confirmed that he and Riggs had agreed on Frye's new title, salary and effective date, but he did not confirm that the May resolution had to be rescinded and a new resolution passed. Kennedy again spoke to Riggs and told him to speak to Bezich to resolve the matter. A couple of days later Bezich told Kennedy that the Frye matter had been resolved and directed him to process Frye's salary increase (1T96, 2T14-2T15, 2T27, 2T30). The County then processed a "request for personnel action" form (J-4), notifying the Department of Personnel of Frye's job variant and new salary. Exhibit J-4 was signed on September 23, 1992 but listed the effective date as May 10, 1992. Exhibit J-3 does not show that the salary increase was implemented in September 1992 but made retroactive to May 10, 1992. It simply shows Frye's salary for May 10 as $30,193. Frye has received the salary increase since September 1992, retroactive to May 10, 1992.

By December 1992 the parties had signed a new collective agreement (1T96). As a result, Frye (and presumably all unit employees) received a 4.3 per cent increase. Frye's salary was, therefore, raised to $31,491 (1T62, J-3).[8/]

3. The County and Council 10 were parties to a collective agreement (J-1) effective from January 1, 1989 to December 31, 1991. J-1 did, in fact, expire at the end of 1991 and negotiations for a new agreement were ongoing in May 1992 when the County adopted C-1B (1T48).

The salaries implemented for the last year of J-1 were listed in a supplemental document (J-2) and became effective on December 23, 1990. J-2 has six salary steps for each title and shows a chief clerk title, and twenty apparent chief clerk variant titles from chief clerk bookkeeper to chief clerk, youth center. There was no listing in J-2 for chief clerk, alcohol abuse. J-2 showed the salary for a seven-hour day chief clerk at step six as $26,193.

There is no clause in J-1 explaining how salaries are determined for variant titles, and there is no past practice clause. The grievance procedure contains binding arbitration and there is a fully bargained clause.

8/ J-3 shows Frye's salary change to $31,491 as of December 22, 1991. The increase resulted from the completion of contract negotiation in December 1992. I am not certain whether the December 22nd date listed on J-3 was intended to be 1991 or 1992.

Negotiations for a new collective agreement were ongoing in May 1992 and continued into the fall of 1992. A memorandum of agreement was reached in October 1992, and a new agreement was signed in December 1992 (1T96).[9/] Neither party raised Frye's variant salary issue in the negotiations for the new collective agreement (1T97).

4. The parties did not have a well-defined practice for establishing salaries for variant positions, but generally, the County, prior to formal County adoption, did obtain Rigg's consent to variant salaries it wanted to establish. Kennedy had become Director of Human Services in April 1991. Shortly thereafter he met with his predecessor, Richard Dodson, to review the labor practices that existed between the County and Council 10 (1T80-1T82). With respect to the creation of new titles, Kennedy testified that Dodson told him that if he (Dodson) felt the title did not belong in the unit, he simply set the salary, but if he believed the title belonged in the unit, he would negotiate over the salary. If the parties reached impasse, he would implement (1T83).

With respect to individual salaries, Kennedy testified that Dodson said that if a change in an individual salary affected other employees it had to be formally negotiated. But if it only affected one employee, Dodson would give Riggs the salary and Riggs would consent to it (1T84).

9/ The new agreement was not offered for evidence.

Dodson and Kennedy also spoke about how the variant salaries were determined. Kennedy testified that Dodson said that he met with the department head and freeholder and determined a salary for the particular variant position. Kennedy also testified that Dodson said that sometimes they just implemented, other times they consulted with the union, but there were no real negotiations (1T85-1T86). I cannot rely on Kennedy's testimony of what Dodson allegedly said regarding variant salaries to prove the practice. Kennedy's testimony of what Dodson said is unsupported hearsay. Since Dodson was not offered by the County at anytime to testify about the variant salary procedure, and be available for cross-examination, I cannot rely on what he allegedly told Kennedy to prove the variant procedure, and Kennedy, himself, had no personal knowledge of the prior variant procedure.

After speaking with Dodson, Kennedy spoke to Riggs. They first discussed how the Board resolutions were passed. The Board of Freeholders generally met on a Tuesday for a caucus meeting, and then held the formal meeting on Thursday (1T87). Kennedy told Riggs the practice was for Riggs to come to his office after the caucus meeting to review the resolution that would be presented on Thursday. Kennedy and Riggs talked about how variants were created and they agreed the procedure was a mess. Kennedy also testified that Riggs did not specifically disagree with what Dodson had allegedly told Kennedy about how variant salaries were established (1T88-1T89).

While I generally found Kennedy to be a credible witness and thus, believe that Riggs may not have "disagreed" with what Kennedy had testified was Dodson's explanation about how variant salaries were established, I do not infer from that testimony that Riggs "agreed" that the salaries for variant positions were not negotiated with Council 10. First, Kennedy's testimony of what Dodson said is hearsay, and inherently unreliable. It doesn't prove what the variant salary procedure was prior to Kennedy's tenure. Second, since I don't know what Dodson actually said, and I don't know what Kennedy actually told Riggs regarding what Dodson allegedly said,[10/] I cannot infer that Riggs "not disagreeing" to what Kennedy said was an agreement to Dodson's characterization of the variant salary procedure. Third, Kennedy only testified that Riggs "did not disagree" (1T88, 1T89), he didn't testify that Riggs made any verbal response to what Kennedy was saying. Thus, Riggs may have said nothing, and then Kennedy's testimony that Riggs "did not disagree" would be accurate, but misleading on the issue of whether he was agreeing to Dodson's alleged variant procedure. Finally, I cannot, without any supporting evidence, find waiver by inferring the positive, "that Riggs agreed with Kennedy and/or Dodson", by Kennedy's mere assertion of the negative, "that Riggs did not disagree." In addition, Dodson had apparently explained

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10/ Kennedy was asked on direct examination if he told Riggs what Dodson had told him (Kennedy), and he (Kennedy) responded, "yes" (1T89). Kennedy gave no further explanation of what he actually told Riggs that Dodson told him.

that Riggs would "consent" to variant salaries and I cannot infer waiver where Riggs has apparently agreed to the salary.

When Kennedy was asked on cross-examination whether Riggs had agreed that variant salaries had never been negotiated and continued not to be negotiated, Kennedy did not respond, "yes" (1T104). Rather, he responded that Riggs agreed "this is how it had been done, that it was a mess, he didn't know what to do about it..." (1T104). While Riggs may have given that response, I do not infer from that response that he agreed Council 10 waived the right to negotiate over variant salaries. I cannot be sure of "how it had been done" because that explanation allegedly came from Dodson as hearsay from Kennedy which is unreliable to prove Council 10 clearly and unequivocally agreed to waive the right to negotiate.

In support of his testimony Kennedy briefly explained that employee Ella Kates received a variant salary. Kennedy testified that he told Riggs that Kates was caught up in a change in department titles and that "this is the salary we wanted to pay her...." Kennedy said Riggs "had no problem with the salary", but he conceded there were procedural problems "we" had to work out (1T91). I cannot infer from that example that Riggs or Council 10 had agreed that the County had the right to unilaterally fix variant salaries. Kennedy admitted that Riggs "had no problem" with the salary, which minimally meant that Riggs knew of the salary and from

which I infer he either acquiesced or consented to it.[11/] While Kennedy did not consider that to be negotiations because it involved a variant title (1T91), he conceded that he and Riggs had to work out procedural problems for Kates, and he further conceded that it was negotiations if Riggs just answered "yes" to Kennedy's statement that the County wanted to give an increase to a particular employee (1T108). I find that the Kates interchange was more negotiations than not, but, at least, was not a waiver, and does not support a finding that the County had the right to unilaterally set variant salaries.

Riggs had a different view of how variant salaries were determined. He indicated they were established through negotiations (1T20). Riggs explained that when he saw a resolution listing a title or salary that had not been negotiated he notified County officials and they quickly negotiated a salary and he would sign-off on the salary (1T30-1T32, 1T35-1T36). He testified he negotiated the variant salaries for the chief clerk/board of taxation; chief

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11/ When Kennedy testified that Riggs "did not disagree" with his (Kennedy's) explanation of what Dodson said about the history of establishing variant salaries, I refused to infer therefrom that Riggs consented to what Dodson allegedly said. I made that decision because the premise of anything Riggs may have consented to by not disagreeing was Kennedy's hearsay testimony of what Dodson allegedly said. Since I could not rely on the hearsay to prove what Dodson said, I could not infer Riggs consented to it. But here, in the Kates discussion, Kennedy testified about what he said to Riggs , and Riggs reaction/response. Since Kennedy's testimony of what he said is inherently more reliable than his testimony of what Dodson said, I can infer that Riggs "having no problem with [Kates'] salary" was a consent to that salary.

clerk/county clerk; chief clerk/county adjuster; and, chief clerk/insurance mostly with Dodson (1T37-1T38). He said the County proposed a salary for the variants and the parties reached written agreements (1T39). But when Riggs was asked on cross-examination about the details of the above listed chief clerk variant negotiations, he could not recall, or was uncertain about the facts (1T40-1T43).

Since Riggs was uncertain about when the parties allegedly negotiated over the specific variant salaries for the four previously listed positions, and since Council 10 did not offer the alleged written agreements of those negotiations for evidence, I cannot rely on Riggs testimony to prove those specific points. However, I do credit Riggs' testimony that he minimally consented to the variant salaries for other chief clerk positions, and thus, did not clearly and unequivocally waive the right to negotiate over such salaries.

ANALYSIS

This charge alleges that the County violated the Act on or about May 7, 1992 by unilaterally increasing Frye's salary. The charge does not allege, nor did Council 10 seek to amend the charge to allege, that the County also violated the Act by implementing a salary change in September 1992. The charge did allege that by the County's actions on May 7, 1992, it unilaterally implemented a salary increase in violation of the Act, but that allegation is tied to the May 7th event and did not include events occurring after that

day. Thus, it was not a separate allegation of subsequent unlawful implementation. Although the parties at least partially litigated over events that occurred between May and September 1992, those events were not the subject of the charge, thus, are not properly before me. I, therefore, will confine my decision to the facts leading up to the filing of the charge on May 20, 1992.

The County argued in its post-hearing brief that it did not violate the Act because there was no salary "increase" on or about May 7, 1992, and because no increase was implemented until September 1992 which was well beyond the filing of the charge. The County admitted in its Answer, however, that it "changed" Frye's salary from $26,193 to $30,193 effective May 10, 1992. The record shows that the County made that change unilaterally on May 7, 1992, and after Riggs demanded to negotiate over the variant salary. Since Frye, with or without the variant title designation, occupied a title within Council 10's unit, Council 10 had a right to negotiate over Frye's salary prior to the County making any change thereto, regardless of when the change was actually implemented, because compensation for Frye's variant salary was a negotiable term and condition of employment. Thus, without an acceptable defense, the County violated subsection 5.4(a)(5) of the Act by not negotiating with Riggs prior to Board adoption of C-1B.

But the County did offer a defense. It argued that the parties had developed a practice allowing the County to unilaterally establish variant salaries, otherwise alleging that Council 10

waived the right to negotiate over those salaries. In order for a contract clause, or as here, prior practice, to constitute a waiver of a majority representative's right to negotiate, the evidence must support a finding that the particular unilateral change is clearly, unequivocally and specifically authorized by the prior practice. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. B.d of Ed., 78 N.J. 122, 140 (1978); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32, 33 (¶17012 1985); Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977). Thus, the issue here is whether the County submitted sufficient evidence to prove the pre-existing practice, and whether it was enough to constitute waiver.

Council 10 met its burden of proof. It proved that it represents the chief clerk title and variants thereto, it proved that Riggs demanded negotiations over Frye's variant salary once he became aware of the County's intent to fix that salary, and it proved that the County failed to negotiate over the salary prior to adopting the salary change. The burden then shifted to the County to prove its defense..

The heart of the County's case lies in Kennedy's testimony of what he believed the practice to be for establishing variant salaries based primarily on what Dodson told him, and, secondarily, on some of his own experience. But I have held that Kennedy's

hearsay testimony of what Dodson had said is insufficient and unreliable to prove that a clear and unequivocal waiver existed prior to Kennedy's employment with the County. Kennedy had no first hand knowledge of the variant practice prior to his employment. Riggs testified that variant salaries were arrived at by agreement, and Dodson was not offered as a witness at anytime to testify about what he allegedly told Kennedy, nor to rebutt Riggs testimony.

The County is left to rely on Kennedy's testimony of his limited experience in establishing variant salaries. He gave only two examples; the first involved employee Ella Kates, the second concerned an employee in the tax department. In the Kates example Kennedy explained that he told Riggs the salary the County wanted to pay Kates, and that Riggs had no problem with the salary. Kennedy concluded that there was "no pretense of negotiation" by either of them regarding salary. In the second example, no employee name was given and Kennedy said it was the same kind of process, presumably meaning it was similar to the Kates example.

Kennedy's explanation of those matters, however, does not rise to the level of establishing a clear and unequivocal waiver of Council 10's right to negotiate over variant salaries. Kennedy's testimony that there was "no pretense of negotiations" between he and Riggs over the Kates matter was self-serving and nothing more than his opinion. It was not evidence that there were no negotiations. In fact, I find, pursuant to Kennedy's testimony, that Riggs either acquiesced or actively consented to Kates variant

salary. In either case, in order for Kennedy to know that Riggs "had no problem" with Kates variant salary Riggs had to make some response to Kennedy's statement to him that "this is the salary we wanted to pay her...." I can only infer that Riggs gave an affirmative response, and that, to me, establishes that Council 10 did not waive its right to negotiate over variant salaries.

Even if that interchange did not formally constitute negotiations within the meaning of the Act, it would be an even greater stretch to infer from those facts that Riggs was waiving the right to negotiate over variant salaries. I make no such inference.

In its posting hearing brief the County, relying on Phillipsburg Bd. Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989), and South River Bd. Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd. App. Div. Dkt. No. A-5176-85T6 (2/10/87), argued that Council 10 waived its right to negotiate because it has routinely permitted the County to establish variant salaries in the past. I reject that argument. Unlike the facts in both Phillipsburg and South River which showed clear waivers by the respective labor organizations, the facts here do not support such a finding. I have already held that the variant salary history Dodson was involved with was not reliable to prove waiver. Kennedy was only personally aware of two variant salary determinations and in both cases Riggs was told of the County's preference and he gave some affirmative response. That is not the type of behavior nor sufficient evidence to constitute waiver, nor is it sufficient evidence of an established practice.

Consequently, I find that Council 10 did not waive its right to negotiate over variant salaries and the County, therefore, violated subsection 5.4(a)(5) of the Act by unilaterally changing Frye's salary by fixing her variant stipend.

Repudiation

In addition to the standard (a)(5) allegation, Council 10 also alleged that the County violated the Act by repudiating the parties collective agreement. I disagree. While the County violated the Act by unilaterally changing Frye's salary, that does not leap to a repudiation of the parties contract. The County, in good faith, offered a defense to its unilateral action: that Council 10 waived the right to negotiate. The County's failure to prove waiver, however, does not translate to a repudiation of the contract.

The (a)(3) Allegation

Although Council 10 alleged in the charge that the County violated Subsection 5.4(a)(3) of the Act, it did not include any statement in the charge, nor present any evidence at hearing, to support that allegation. I recommend that allegation be dismissed.

Remedy

In its initial post-hearing brief Council 10 argued that the only appropriate remedy is a return to the status quo retroactive to May 10, 1992. It further argued that "only by rescinding the salary increase retroactively will...Council 10's rights...be...vindicated...." It appears from that language, that

Council 10 is arguing that Frye should either pay back or be docked the difference between what she earned and what she should have earned from May 10, 1992. I am not, however, recommending that result as part of the immediate remedy. Fundamental fairness to Frye requires that the parties make a reasonable effort to negotiate a retroactive salary for her prior to the County being required to recoup the difference between her salaries.

The charge here concerned those events leading up to the filing of the charge on May 20, 1992. Even though Frye's salary change was implemented retroactively to May 10, 1992, it was not implemented until September 1992. The violation that occurred on May 7, 1992 was that the County Board of Freeholders changed Frye's salary without first negotiating with Council 10. Since Frye's salary change was not implemented prior to May 20, 1992, the remedy should primarily be confined to the unlawful salary change. The remedy for that violation is to order the County to rescind that part of C-1B which changed Frye's salary, and to reinstate Frye's salary to what it had been before the change ($26,193) plus a 4.3% increase, and to negotiate prospectively and retroactively with Council 10 over a salary for Frye's variant position.

Although Council 10 is entitled to negotiate both retroactively and prospectively over whether Frye should receive the same, more, or less money than what the County had established for her variant position, since it did not file a charge over the implementation of the salary, I will not recommend that the County

immediately begin recouping from Frye the difference between what she actually earned from May 10, 1993 to present, and what she would have earned had her salary not been unlawfully changed. At the same time, however, I cannot ignore Council 10's need to return to the status quo prior to commencing retroactive negotiations. But that need is balanced against fundamental fairness to Frye who should not be made to suffer unnecessarily for the County's unlawful act.

Thus, I recommend that from the date of a Commission Order Frye be paid prospectively $26,193 plus a 4.3% increase until a new salary is negotiated for her, but that the County not recoup the prior increase from her for a minimum of sixty (60) days during which time the parties will be expected to engage in good faith negotiations over Frye's retroactive salary.

Based upon the above findings and analysis, I make the following:

Conclusions of Law

1. The County violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act by unilaterally changing Maryann Frye's salary.

2. The County did not violate subsection 5.4(a)(3) of the Act.

Recommended Order

I recommend the Commission ORDER:

A. That the County cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate with the Camden Council 10 before changing Maryann Frye's salary.

2. Refusing to negotiate in good faith with Council 10 concerning terms and conditions of employment of employees in Council 10's unit, particularly, by failing to negotiate with Council 10 before changing Maryann Frye's salary.

B. That the County take the following action:

1. Immediately rescind that portion of the May 7, 1992 Freeholder resolution (C-1B) changing Maryann Frye's salary.

2. From the date of a Commission Order pay Maryann Frye the salary of $26,193 plus a 4.3% increase (plus any other negotiated increase that may have been implemented) until the parties reach a negotiated agreement on a new salary for her variant position.

3. Negotiate in good faith with Council 10 over a prospective salary for Maryann Frye's position of Chief Cerk-Alcohol Abuse.

4. From the date of a Commission Order negotiate in good faith with Council 10 for up to at least sixty (60) days, if needed, over a retroactive salary for Maryann Frye's variant position.

5. Begin recouping the difference in Maryann Frye's related salaries, if, after sixty (60) days, the parties have been unable to agree on a retroactive salary for her variant position.

6. Negotiate in good faith with Council 10 before changing any salary or establishing any variant salary.

7. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

8. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the 5.4(a)(3) allegation be dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: December 2, 1993
Trenton, New Jersey

Recommended Posting
Appendix "A"

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, particularly by failing to negotiate with Camden Council 10 before changing Maryann Frye's salary.

WE WILL NOT refuse to negotiate in good faith with Council 10 concerning terms and conditions of employment of employees in Council 10's unit, particularly by failing to negotiate with Council 10 before changing Maryann Frye's salary.

WE WILL immediately rescind that portion of the May 7, 1992 Freeholder resolution changing Maryann Frye's salary.

WE WILL, from the date of a Commission Order, pay Maryann Frye the salary of $26,193 plus a 4.3% increase (plus any other negotiated increase that may have been implemented) until the parties reach a negotiated agreement on a new salary for her variant position.

WE WILL negotiate in good faith with Council 10 over a prospective salary for Maryann Frye's position of Chief Clerk-Alcohol Abuse.

WE WILL, from the date of a Commission Order, negotiate in good faith with Council 10 for up to at least sixty (60) days, if needed, over a retroactive salary for Maryann Frye's variant position.

WE WILL begin recouping the difference in Maryann Frye's related salaries if, after sixty (60) days, the parties have been unable to agree on a retroactive salary for her variant position.

WE WILL negotiate in good faith with Council 10 before changing any salary or establishing any variant salary.

Docket No. CO-H-92-374 County of Camden
(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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.