P.E.R.C. NO. 78-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-76-241-36

HUDSON COUNTY P.B.A. LOCAL 51,

Charging Party.

SYNOPSIS

The Hudson County P.B.A. Local 51 filed an unfair practice charge against the Hudson County Board of Chosen Freeholders alleging that without prior notification the Board unilaterally determined not to provide certain named members of the Hudson County Police Department with their regular increments which they had previously received under a long standing practice, thereby violating N.J.S.A. 34:13A-5.4(a)(1) and (5).

The Hearing Examiner found that, in addition to those salary benefits specifically provided by collective negotiations agreement, there existed, from 1972 through 1975, inclusive, an established practice of increment payments to employees, the Union not having agreed to the termination of this practice at the final negotiations meeting for the 1974-75 contract. Accordingly, the Hearing Examiner concluded that, irrespective of whether the Union raised the issue of increments at the negotiating session for the 1976-77 agreement, the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally discontinued the increment practice without prior notification and negotiations.

The Commission, after a careful consideration of the record, briefs, exceptions, and oral argument, accepts the Hearing Examiner's findings of fact and conclusions of law and adopts his Recommended Order.

The Commission finds that, under the decision in Torrington Co. v. Metal Products Workers' Union, 362 F.2d 677 (2nd Cir. 1966), even assuming that the parties did discuss the question of increments during negotiations did not provide specifically for the payment of said increments within their 1974-75 and 1976-77 contracts, this conduct does not evidence that there was an agreement to eliminate this benefit in view of other subsequent actions taken by the parties. The Commission, consistent with its prior decisions, declines to adopt the decision in Board of Coop. Ed. Serv., Rockland Cty. v. N.Y.S. PERB, 41 N.Y.2d 753, 10 PERB 13, (1977) that increments cannot be

considered part of the status quo. Further, the Commission finds that when an employer has clearly evidenced his bad faith by unilaterally altering a term and condition of employment, the employee organization, provided it has filed an unfair practice charge with the Commission, is relieved of its obligation to negotiate further on the particular subject as long as the employer, by failing to reinstitute the status quo, demonstrates his continued bad faith.

The Commission accepts the Hearing Examiner's recommended order by ordering the Board to cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act by unilaterally altering terms and conditions of employment during the course of collective negotiations with the Hudson County P.B.A. Local 51. The Board was further ordered to pay, during the course of collective negotiations with the Hudson County P.B.A. Local 51, retroactively to March 1, 1976, to those of its employees in the affected unit on the payroll as of December 13, 1974, the regular increments due them under the practice as it existed prior to the Board's unilateral alteration. Two other portions of the Hearing Examiner's recommended order have been eliminated as unnecessary to adequately remedy this matter.

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HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS,

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HUDSON COUNTY P.B.A. LOCAL 51,

Charging Party.

Appearances:

For the Respondent, Murray, Meagher & Granello, Esqs. (Mr. John Meagher, Of Counsel and James P. Granello, On the Brief; James P. Granello argued orally before the Commission)

For the Charging Party, Bruce Fox, Esq. and Schneider, Cohen & Solomon, Esqs. (Mr. David Solomon, Of Counsel and Martin List, On the Brief; David Solomon argued orally before the Commission)

DECISION AND ORDER

On March 15, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the Hudson County P.B.A. Local 51 (the "Union"), alleging that the Hudson County Board of Chosen Freeholders (the "Board") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Union alleges that without prior notification the Board unilaterally determined, as of March 1, 1976, not to provide certain named members of the Hudson County Police Department with their regular increments which they had previously received under a long standing practice, thereby violating

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

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 27, 1976. A hearing was held on December 17, 1976 and April 22, 1977 before Robert T. Snyder, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of the hearing the parties submitted memoranda of law, the final memorandum being received on June 9, 1977. On August 31, 1977, the Hearing Examiner issued his Recommended Report and Decision,[2/] which 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 to this Decision and Order and made a part hereof. Exceptions and a brief in support thereof were filed by the Board on October 7, 1977. At the request of the Board, oral argument was

1/ These subsections prohibits 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. (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 girevances presented by the majority representative.

2/ H.E. No. 78-4, 3 NJPER ___ (1977).

held before the Commission on November 15, 1977.

The Hearing Examiner found that, in addition to those salary benefits specifically provided by collective negotiations agreement, there existed, from 1972 through 1975, inclusive, an established practice of increment payments to employees, the Union not having agreed to the termination of this practice at the final negotiations meeting for the 1974-75 contract. Accordingly, the Hearing Examiner concluded that, irrespective of whether the Union raised the issue of increments at the negotiating session for the 1976-77 agreement, the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally discontinued the increment practice without prior notification and negotiations. The fact that the Board negotiated with the Union on all other matters and genuinely desired to reach an agreement was found to be irrelevant to the issue presented in this case.

The Commission, after a careful consideration of the record, briefs, exceptions, and oral argument, accepts the Hearing Examiner's findings of fact and conclusions of law and adopts his Recommended Order. With regard to the numerous exceptions filed by the Board, they will be considered *seriatim*.

Initially, the Board excepts to the admission of parole evidence regarding the intent of the parties that increments would be paid under the 1974-75 agreement, which did not contain specific language granting this benefit.

The records indicate that at a negotiating session held in early December 1974 an agreement was reached on an across-the-board

salary increase and other increases in benefits which were included in the main doby of the written agreement. At this same meeting the parties reached an oral agreement on increment payments. A letter, dated December 13, 1974, was then sent by the Union's representative which confirmed the oral agreement that the employees, in addition to the salary increases contained in the contract, would also receive step increments on their anniversaries. This letter, not having been rejected or disputed by the Board's representatives, constituted, in affect, an addendum to the 1974-1975 agreement in that it added an additional term.

A dispute having arisen over the interpretation of this letter addendum, the Board, which submitted it into evidence, asserted that it memoralized an oral agreement that there would only be this one time increment payment and the establishment of a permanent increment system would be open to further negotiations. The Union's witnesses testified that this letter represented an oral agreement that the established practice of increment payments would continue during the term of the 1974-75 contract, but its future continuation would be subject to negotiations at the expiration of this contract.

The language of this letter addendum is reasonably susceptible to either interpretation. As a result of this ambiguity the Hearing Officer was correct in allowing parole evidence as an aid in detering the true nature of the parties' agreement as

expressed in the letter.[3/]

Next the Board excepts to the Hearing Examiner's footnote comment that the payment of increments during 1974 would amount to a significant financial obligation for the County. Witnesses, who were members of the Board's negotiating team, testified that there did not exist a history of increment payments, but, during the final negotiating session for the 1974-75 contract, they did agree to this one time payment of increments because it would not invoke a substantial amount of money and, therefore, was a reasonable tradeoff in order to complete negotiations. The Hearing Examiner, in considering the contradictory testimony concerning the nature of the 1974-75 agreement, calculated from the County's payroll records, which were submitted into evidence, the total number of $600 increment payments the County would have to pay in 1974 alone. This amounted to $18,000 which, on the County level, could hardly be considered an insignificant sum and was a relevant fact to be considered in evaluating the credibility of the Board's witnesses.

In its third exception the Board asserts that the Hearing Examiner exhibited a certain bias in the statement of facts by setting forth the testimony of the Union's witnesses first and then stating the testimony of the Board's witnesses in juxtaposition, characterizing the testimony of one of the Board's witnesses as

3/ Allen v. Metropolitan Life Insurance Co., 83 N. J. Super. 223 (App. Div. 1964), Teamsters, Local No. 439 and Pittsburgh Steel Company, 196 NLRB 971, 80 LRRM 1211 (1972).

only "claimed", and stating a "non-fact" with regard to the failure of the Board's witness to question the accuracy of the December 13 letter. The Commission finds no evidence of bias in the Hearing Examiner's recitation of the facts. The Hearing Examiner, in his statement of facts, simply summarized the evidence in the order in which it was presented. With regard to the Hearing Examiner's characterization of the testimony of the Board's witness as "claimed", the Commission notes that all of the testimony presented by both parties was summarized by the Hearing Examiner in non-assertive terms. As to the so-called "non-fact", the Commission finds that this witness affirmatively testified that the December 13th letter was not accurate according to his understanding of the oral agreement and yet he did not call this inaccurary to the attention of the Board.

In view of the Union's concession that the increment practice has never been memoralized in a collective negotiations agreement, the Board excepts to the Hearing Examiner's finding that an increment practice was maintained under "past agreements". The collective negotiations agreements for 1972-72 and 1974-75 contain the phrase that "Payment of these annual salaries shall be in accordance with the current practices as existing on the date of the signing of this Agreement." The Union's witness testified that during negotiations for both agreements the Board's representative stated that, while the payment of increments was not provided for in the agreements, the practice would be protected by this clause. This witness further testified that the December 13, 1974 letter referred to the past practice of increments. The

Hearing Examiner, having credited the Union's version of these events,[4/] was correct in stating that an increments practice was maintained by the parties as part of their relationship under the 1973-73 and 1974-75 agreements.

In its next exception the Board argues that it was not necessary for the Union to "agree" to the elimination of this unmemorialized past practice, it being automatically eliminated, as a matter of law, once the topic was discussed during negotiations for both the 1974-75 and 1976-77 agreements but not included in either agreement.[5/]

During negotiations numerous proposals are made for the assumption of various obligations. The items included in the contract represent those obligations which the parties have agreed to assume; while those obligations which were discussed but ultimately omitted from the contract evidences that in the course of negotiations the parties agreed not to assume them. It is this element of agreement upon which the court in Torrington[6/] bases its conclusion that a past practice once discussed but omitted from the contract has been eliminated.

Yet this necessary element of agreement is exactly what is missing from the negotiations for both the 1974-75 and 1975-76

4/ It is for the trier of fact to weigh the evidence and testimony, and the Commission will not normally choose to substitute its second-hand reading of a transcript for the Hearing Examiner's judgment based upon observation of demeanor and the like. In re Long Branch Board of Education, H.E. No. 77-12, 3 NJPER ___ (1977), P.E.R.C. N.. 77-70, 3 NJPER 300 (1977), appeal pending (Docket No. A-4787-76).

5/ Torrington Co. v. Metal Products Workers' Union, 362 F.2d 677 (2nd Circ. 1966).

6/ Torrington Co. v. Metal Products Workers Union, supra, 62 LRRM 2495, at 2499 (1966).

agreements. As previously discussed, the December 13, 1974 letter and the parole evidence admitted in relation to it, clearly evidence that the parties did agree to the continuation of the past practice through the term of the 1974-75 agreement. Concerning negotiation for the 1976-77 agreement, the Union submitted an addendum[7/] into evidence which clearly states that by signing this agreement, which contained no reference to the payment of increments, the Union was not agreeing with the Board's position that it had negotiated away the right to increment payments. Therefore, even assuming that the parties did discuss the question of increments during these negotiations, its omission from the contract does not constitute an elimination of this obligation due to the evidence that there was no agreement on this point.[8/]

Exception was taken that the Hearing Examiner engaged in speculative analysis when he did not credit the Board's version

7/ Although this addendum was not signed by the Board, and; therefore, did not become part of the agreement, it nevertheless evinces that no agreement was reached on the elimination of the increment past practice during negotiations for the 1976-77 agreement.

8/ In Torrington, supra, the employer unilaterally announced prior to negotiations that it was discontinuing an established practice. The Union filed a charge with the NLRB which alleged that the Employer's unilateral change of this established practice constituted an unfair labor practice. Prior to the commencement of negotiations for a new contract the Union dropped this charge and the Board dismissed the complaint. Therefore, the question of whether the employer's actions constituted an unfair practice was never considered.

of events that the Union agreed to the elimination of the increment past practuce during the final negotiating session for the 1974-75 agreement.

The County's payroll records are uncontroverted documentary evidence that there did exist a past practice of increment payments which, over a period of time, constituted both a substantial financial benefit for the Union's members and a significant financial burden for the County. Therefore, it is reasonable to conclude that the elimination of this practice would have been a major bone of contention during negotiations. This factor, when considered in conjunction with the other factors discussed by the Hearing Examiner, constitute a substantial factual and analytical basis for the Hearing Examiner's conclusion that the Union did not negotiate away its right to increments during the last negotiating session for the 1974-75 agreement.

In the seventh exception the Board argues that the Hearing Examiner should not have been allowed to use its compliance with an arbitrator's award, which ordered the payment of increments as well as contractual salary increases, as proof that a past practice of increment payments existed. Further, the Board contends that the Hearing Examiner erred in finding that the meaning of contract language concerning salaries was established by the arbitrator's interpretation.

The Commission does not accept the Board's argument that there are significant public policy reasons which dictate against the use of an arbitrator's award as evidence in an unfair practice

case. The purpose of an arbitrator, in interpreting contractual language, is to determine whether the parties have agreed to a particular term and condition of employment for the duration of their agreement. When a subsequent unfair practice charge involves the very same question, it would undermine the function of the arbitrator not to utilize his award in reaching a decision on the charge.[9/]

The arbitrator, in ordering the payment of increments and contractual salary increases, found that there did exist an established practice of increment payments and also noted that paragraph 3.3 of the agreement required the payment of annual salaries in accordance with the current practices existing when the agreement was signed. The arbitrator's award then did establish the meaning of contract language relating to salaries in that he found the past practice of increments to be included within the ambit of paragraph 3.3.

The Board contends that under N.J.S.A. 34:13A-5.3[10/] the Union was required to arbitrate this dispute prior to the institution of any procedures before the Commission. While N.J.S.A. 34:13A-5.3 does provide that contractual grievance procedures

9/ The Commission normally defersto the decision of an arbitrator in an unfair practice proceeding where there is an identity of issues considered. In re State of New Jersey (Stockton State College), H.E. No. 77-5, 12 NJPER 297 (1976) affirmed P.E.R.C. No. 77-31, 3 NJPER 62 (1977).

10/ N.J.S.A. 34:13A-5.3 provides in part that: "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

shall be utilized for any dispute covered by the terms of an agreement; N.J.S.A. 34:13A-5.4 grants the Commission exclusive jurisdiction to hear unfair practice charges. The various sections of a statute must be considered in conjunction as a unitary and harmonious whole so that each provision is given its full effect.[11/] In many instances a possible unfair practice may also involve a grievance over a contractual term. This fact, however, does not deprive the Commission of its jurisdiction to hear unfair practice charges.[12/] In such situations the employee organization has an election; it may either invoke the contractual grievance machinery or file an unfair practice charge with the Commission.[13/] It can also do both. But see note 9 above.

Concerning the question of deferral to arbitration, the Commission has consistently held that it will defer only in those cases where it is apparent that arbitration will provide an adequate forum for the resolution of the dispute.[14/] The parties' contractual

11/ In re State of New Jersey, P.E.R.C. No. 77-14, 2 NJPER 308 (1976) affirmed sub. nom. State v. Council of State College Locals, 153 N.J. Super. 91 (App. Div. 1977).

12/ It should be noted that N.J.S.A. 34:13A-5.3 state, "notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute", (emphasis added), contractual grievance procedures are to be utilized. The use of the phrase "any other statute", clearly evidences that the Legislature's preference for these procedures is not to be considered in relegation to those procedures for the resolution of disputes or controversies provided by the Act itself.

13/ State v. Council of State College Locals, supra.

14/ In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975), In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975), In re Hunterdon County Board of Chosen Freeholders, E.D. No. 76-29, 2 NJPER 97 (1976), In re Borough of Glassboro Board of Education, P.E.R.C. No. 77-12, 2 NJPER 355 (1976), In re State of New Jersey (Stockton State College), supra.

grievance procedure is limited to any controversy relating to the alleged violation of, interpretation or application of any provision of their agreement. Further, there is a 30 day time limitation on the filing of a grievance. The Board has consistently argued that an increment practice was never maintained as part of the parties relationship under past agreements, and the time limitation has long past. Therefore, there is a real question as to whether this grievance would be arbitrable under the contractual grievance procedures. During oral argument[15/] Counsel for the Union stated that the Union was willing to withdraw the unfair practice charge at the prehearing conference and submit the dispute to arbitration provided the Board would agree not to raise the question of arbitrability before the arbitration. The Board, however, would not agree. Under these facts, substantial likelihood that deferral to arbitration would be a futile gesture. Accordingly, the Commission declines to defer.

Next, the Board excepts to the Hearing Examiner's denomination of the December 22, 1975 meeting as a "grievance meeting", when it was in fact a negotiating session for the 1975-76 agreement. In October 1975, a member of the Union was denied his increment. A witness for the Union testified that the denial of this increment was brought to the attention of the Board at the December 22 negotiating session. However, in order to clarify the fact that the topic of increments as an overall contractual benefit was not discussed

15/ Oral argument before the Commission, November 15, 1977, transcript page 9, lines 12 to 23.

during negotiations for the 1975-76 agreement,[16/] this witness stated that the denial of this increment was discussed as an isolated grievance at a "grievance meeting" which was separate and apart from, though contemporaneous with, the negotiating session. The Hearing Examiner merely adopted the witness's characterization of these events.

The Board further contends that the Union's failure to proceed to the next step in the grievance procedure constitutes an acceptance of the Board's position at the December 22 "grievance meeting" that increments had been negotiated away during negotiations for the previous contract. However, the Union did not proceed with the grievance because the employee who had been denied his increment resigned his position, thereby rendering the grievance moot and of no precedential affect.

Citing a New York State court decision,[17/] which reverses six years of N.Y.S. Public Employment Relations Board decisions, the Board, in its eleventh exception, contends that increments cannot be considered part of the status quo in that a salary increase is not a preservation of the then existing terms and conditions of employment but rather is an increase in benefits. The Commission has adopted the generally accepted view in both the public and private sectors that an employer is normally precluded from altering

16/ Although the initial contract proposals presented by the Union did include increments in the salary guide, witnesses for the Union testified that these proposals were never discussed.

17/ Board of Coop. Ed. Serv., Rockland Cty. v. NYS PERB, 41 N.Y. 2d 753, 10 PER 13 7010 (1977).

the status quo under an expired agreement while engaged in collective negotiations for a successor agreement.[18/] The status quo has been found to include the payment of incremental salary increases under a previously existing salary schedule.[19/] Further, the Commission has stated that those terms and conditions of employment currently in effect must be maintained regardless of whether those terms are derived from a contract or some other source.[20/]

The Commission has adopted the Hearing Examiner's finding that the established practice of increment payments was continued through the term of the 1974-75 agreement; the County paid increments to those employees who qualified for them during this period. Thus, the payment of increments constituted a term and condition of employment under which the parties have been operating and, therefore, was an element of the status quo. It cannot be disputed that any employee who completed an additional year of service during the winter or spring of 1976 would be entitled to an increment on his anniversary date under the established practice in effect at the expiration of the 1974-75 agreement. The Board's unilateral decision not to pay these increments was a negation of this benefit. Accordingly, there was an alteration of the status

18/ In re Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975) appeal dism. as moot, (App. Div. Docket No. A-8-75) pet. for cert. den. 70 N.J. 150 (1976).

19/ In re Galloway Township Board of Education, P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev. on other grounds, 149 N.J. Super. 352 (App. Div. 1977); In re Union County Regional High School Bd. of Ed., P.E.R.C. No. 78-27, 3 NJPER ___ (1977), appeal pending Appellate Division Docket No.A-1552-77.

20/ In re Galloway Township Board of Education, supra; In re Burlington Cty. Board of Ed., H.E. No. 76-12, 2 NJPER 201, affirmed P.E.R.C No. 77-4, 2 NJPER 256 (1976).

of the status quo. The policemen were no longer being paid pursuant to the existing established practice.

In its next two exceptions the Board contends that it should not have been found guilty of refusing to negotiate in good faith where the Union precluded any meaningful negotiations by consciously choosing not to bring up the subject of increments at negotiating sessions when it knew the subject was in dispute. By this action it is argued that the Union waived its right to claim that the Board did not negotiate in good faith. The Board obviously misunderstands the nature of its unfair practice. In October 1975 and again in March 1976 the Board, without prior notification and negotiations, unilaterally determined not to pay increments. This action constituted a refusal to negotiate in good faith complete in itself.[21/]

Concerning the Union's failure to discuss the dispute over increments at negotiating sessions held subsequent to the Board's unilateral action, the Commission concludes that the Union was justified in not attempting to negotiate the subject, leaving its resolution to the Commission under an unfair practice charge. The Act requires that both parties negotiate in good faith. When an employer has clearly evidenced his bad faith by unilaterally altering a term and condition of employment, the employee organization,

21/ Following the decision in NLRB v. Katz, 369 U.S. 763, 50 LRRM 2177 (1962), the Commission has held that a public employer's unilateral alteration of a term and condition of employment during the course of collective negotiations constitutes a *per se* violation of the duty to negotiate. In re Piscataway Township Board of Ed., supra; In re Cliffside Park Board of Ed., P.E.R.C. No. 77-2, 2 NJPER 252 (1976).

provided it has filed an unfair practice charge with the Commission, is relieved of its obligation to negotiate further on the particular subject as long as the employer, by failing to reinstitute the status quo, demonstrates his continued bad faith.[22/] Such conduct by an employer negates the possibility of any meaningful negotiations on the subject. Requiring the employee organization to negotiate under such conditions would place it in an untenable position by allowing the employer to benefit from his unfair practice through the improved negotiating leverage he has obtained as a result of his unilateral withdrawal of a then existing benefit. Such a result would undermine the unfair practice provisions of the Act and the requirement of good faith negotiations as a method for insuring labor peace.

In its fourteenth exception the Board contends that, under the decision in Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n. of Ed. Secs., 149 N.J. Super. 346 (App. Div. 1977), certif. granted 75 N.J. 29 (1977), the Commission lacks the authority to order the relief of back pay. The Commission does not accept that reading of Galloway. The court held only that the Commission cannot order back pay for services which have not been rendered. This is not the situation in the present case where the police officers have

22/ Cf. NLRB v. Express Publishing Co., 128 F.2d 690, 10 LRRM 717 (1942); Matter of Times Publishing Co., 72 NLRB 676, 19 LRRM 1199 (1947); Superior Engraving Co. v. NLRB, 183 F.2d 783, 26 LRRM 2534 (1950); In re Lower Township Board of Education, P.E.R.C. No. 78-32, 3 NJPER ___ (1977).

been denied increment payments as additional compensation for the hours of service which they have already performed.

Next, the Board excepts to the remedy requiring it to restore the increment system conjunctively with an order to negotiate the matter; contending that the system, once restored, cannot be negotiated away as long as the Union refuses to reach agreement on this matter. The rationale behind the Commission's requirement that the Board restore the status quo has already been adequately discussed. Further, if the issue of increments is negotiated to the point of impasse, the Commission has recognized that under certain situations a public employer may unilaterally institute a term and condition of employment.[23/]

The Commission does not understand the Board's exception to the inclusion of the "traffic unit" in the Hearing Examiner's recommended order. The Hearing Examiner found that as of the 1974-75 agreement, the parties added the Traffic Signal System Supervisor to the unit. In any event, the order states that the increment practice is to be reinstituted as to those employees in the unit who qualified under the practice as it existed prior to the Board's unilateral action.

In its final exception the Board, citing Galloway Township Bd. of Ed. v. Galloway Township Ed. Ass'n., 149 N.J. Super. 352 (App. Div. 1977), argues that the issues in this case have been rendered moot due to the signing of a negotiated agreement for

23/ In re City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977).

1976-77.

The decision in Galloway is clearly distinguishable from the present facts. In Galloway the Association charged that the Board had violated N.J.S.A. 34:13A-5.4(a)(5) by withholding payment of teachers' increments according to a previously existing, but expired, salary schedule during negotiations for a successor agreement. The Court held that this issue was rendered moot due to the Board's subsequent compliance with the affirmative relief ordered by the Commission through the signing of a collective negotiations agreement which provided for the retroactive payment of increments.

The present issue is whether the Union negotiated away the past practice of increments during negotiations for the 1974-75 or 1976-77 agreement. As previously discussed, the mere signing of these agreements, absent increment provisions, does not resolve this issue. Nor has the signing of these agreements resolved the issue of whether those officers, who have arrived at their anniversaries during the interim period, are entitled to increments. This instant decision will affect the salaries of the employees and will determine whether this particular term and condition of employment exists as an aspect of the parties' relationship. Accordingly, the questions in this case are not deprived of practical significance, nor are they purely academic and abstract in nature.

ORDER

Accordingly, for the reasons set forth above, it is HEREBY ORDERED, that the Board shall:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act by unilaterally altering terms and conditions of employment of its patrolmen, detectives, photographers and Traffic Signal Supervisor during the course of collective negotiations with the Hudson County PBA Local 51.

B. Take the following affirmative action which is necessary to effectuate the policies of the Act:

1. During the course of collective negotiations with the Hudson County PBA Local 51 concerning an incremental system, pay retroactively to March 1, 1976 to those of its employees in the above described unit on the payroll as of December 13, 1974 the regular increments due them under the practice as it existed prior to the Respondent's unilateral alteration.

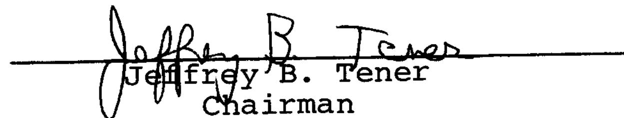
2. Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and all other records necessary to determine which individual officers are entitled to receive increments due under the terms of this Order.

3. Post immediately, in plain sight, at the offices of the Hudson County Board of Chosen Freeholders and at the location or locations where employees of the Hudson County Police Department report for duty or daily assignment, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Public Employment Relations Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period

of at least sixty (60) consecutive days thereafter including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices will not be altered, defaced or covered by any other material.

4. Notify the Chairman, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.24/

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hurwitz and Parcells voted for this decision. Commissioners Hartnett and Hipp were not present.

DATED: Trenton, New Jersey
January 19, 1978
ISSUED: January 24, 1978

24/ Two portions of the Hearing Examiner's recommended order have been eliminated because we do not believe that they are necessary to adequately remedy this matter.

"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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the Act by unilaterally altering terms and conditions of employment of its patrolmen, detectives, photographers, and Traffic Signal Supervisor during the course of collective negotiations with the Hudson County PBA Local 51.

WE WIL during the course of collective negotiations with the Hudson County PBA Local 51 concerning an incremental system, pay retroactively to March 1, 1976 to those of its employees in the above described unit on the payroll as of December 13, 1974, the regular increments due them under the practice as it existed prior to the Respondent's unilateral alteration.

HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS
(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

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

In the Matter of

HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-76-241-36

HUDSON COUNTY P.B.A. LOCAL 51,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The Complaint alleges that the Respondent unilaterally terminated regular longevity increments to its patrolmen during negotiations for a successor labor agreement with the Charging Party, their exclusive bargaining agent, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).

The Hearing Examiner dismisses a Respondent contention that the Charging Party had earlier agreed to delete the increments during the second year of a 1974-75 agreement. He finds that the Respondent's unilateral withholding of the benefit while negotiations were under way for a 1976-77 agreement constitutes a unilateral alteration of the status quo of terms and conditions of employment. In accord with the Commission's Piscataway doctrine he concludes that the Respondent has engaged in an illegal refusal to negotiate in violation of N.J.S.A. 34:13A-5.4(a)(5) which also necessarily restrained employees in the exercise of their rights under the Act in violation of N.J.S.A. 34:13A-5.4(a)(1).

The Hearing Examiner recommends that the Commission order the Respondent to cease and desist from such activity; upon request, negotiate with the Charging Party concerning an incremental system for the employees in the affected negotiating unit and during the course of such negotiations, pay retroactively to those of its employees the increment denied them as a consequence of Respondent's unilateral alteration of the practice. The Examiner also recommends that the Respondent post appropriate notices, supplied by the Commission, advising its employees of its corrective actions; and to notify the Commission in writing of the steps taken to comply with its order.

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.

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Appearances:
For the Respondent, Murray, Meagher & Granello, Esqs.
(John Meagher, Of Counsel and James P. Granello, On the Brief)

For the Charging Party, Bruce Fox, Esq. and Schneider, Cohen & Solomon, Esqs.
(David Solomon, Of Counsel and Martin List, On the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (The "Commission") on March 15, 1976 by the Hudson County P.B.A. Local 51, ("Charging Party" or "PBA") alleging that the Hudson County Board of Chosen Freeholders ("County" or "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1, et. seq. (the "Act"), in that the County, unilaterally and without prior notification to the PBA as their exclusive bargaining agent, failed to provide certain named members of the Respondent Police Department as of March 1, 1976, with their regular increments after their first and third years of employment as had been previously accorded them under a long standing practice, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/ The County's action is claimed to have re-

1/ These subsections prohibit 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.
(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."

sulted in a change in procedure, eliminating maximum salary and establishing different salary levels for the affected employees.

The charge was processed pursuant to the Commission's rules and it appearing to the Commission's Director of Unfair Practice Proceedings that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 22, 1976. In its Answer the Respondent denied commission of the unfair practices alleged.

Pursuant to the Complaint and Notice of Hearing a plenary hearing was held before the undersigned on December 17, 1976 and April 22, 1977. At the outset, the Charging Party was granted leave, without objection, to amend the Complaint to add to the class of employees it claimed were denied their regular increments, subject to the additional names of employees being placed on the record through the introduction in evidence of County payroll records during the course of the hearing. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce relevant evidence.

Briefs were submitted by the Respondent and Charging Party on June 2 and June 8, 1977 respectively, and have been carefully considered.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

The Alleged Unfair Practices

For a period of some years, commencing sometime prior to 1972 when recognition was voluntarily granted by the County, up to the present, the PBA has represented as exclusive majority representative for collective negotiations, all patrolmen, detectives and photographers employed by the County, [2/] but excluding lieutenants, captains, inspectors, deputy chiefs, police chiefs, other superior officers and all other employees.

2/ The parties stipulated and I find that the County is a public employer and the PBA is an employee organization both within the meaning of the Act. As of the 1974-75 agreement, the parties added Traffic Signal System Supervisor to the recognized unit.

The Charging Party conceded that the practice of providing unit employees with regular increments after the first and third years of employment had never been memorialized in a collective negotiation agreement between the parties. However, it maintained that the practice was long standing and had been recognized and its retention confirmed at the close of negotiations for both the 1972-73 and 1974-75 agreements.

With respect to the history of the practice, official county payroll records introduced into evidence show the receipt by county patrolmen, of $600 increases in salary effective on their first and third year anniversary dates of employment as early as 1971 and continuing into 1975.[3/] Until late 1974, the forms prepared by the County authorizing the payments of the increments characterized the increases as "Longevity pay, as per union agreement." Phyllis Harvey, head clerk of the County Police Department for twenty-four years and responsible for maintaining all of its official financial records testified for the Charging Party. She stated that she prepared the forms to be executed by the County officials authorizing these payments predicated upon a "past contractual practice," although the original basis for their receipt in prior years were resolutions adopted by the County Board of Chosen Freeholders. Mrs. Harvey also maintained a running summary of dates of effective appointment of members of the force, upon which she noted the payments of increments as they became due and were made by the County.

Patrolman Thomas Cross also testified without contradiction that when hired by the Police Department in June, 1973, he was informed by Captain Nealon, head of personnel, that he would receive, in addition to any salary increases negotiated under the collective agreement, an incremental raise at the completion of his first year and a final one raising him to maximum level at the end of his third year. Detective William Klod, a member of the PBA negotiating committee, also confirmed the existence of the practice.

During the 1972 negotiations which resulted in the 1972-73 agreement,

3/ The practice for the year 1975, disputed by the Respondent, will be discussed at a later point in this Report.

Attorney David Solomon represented the PBA and Attorney Robert Murray was the main spokesman for the County. During the negotiations the issue of increments was not raised by either party. However, according to Solomon, a Charging Party witness, when he and Detective Klod appeared at Murray's office in Elizabeth for the contract signing after its preparation by Murray, the subject of increments came up in the following manner. Solomon, who had been representing the PBA for the first time in negotiations, had earlier attended the PBA ratification meeting where the salary increases, under the agreement, as well as the two increments provided pursuant to the practice were presented to the membership in order to provide the members with their actual salaries during its term dependent upon their years of service.

According to Solomon, the meeting was held the morning of the day that the Board of Freeholders were to meet to consider adoption of the contract by resolution. Solomon, whose attention was drawn to the matter by a PBA committee member, raised the contract's failure to spell out actual salary levels. Murray replied that rather than having his secretary retype the page, since everyone understood that the employees were entitled to increments, why not leave the agreement "as is" containing the across-the-board increases and there would be no problems. Murray further advised the PBA not to worry, that the practice concerning increments was clear and the clause in the contract (Art. III, par. 3.3) providing in pertinent part that "Payment of these annual salaries shall be in accordance with the current practices as existing on the date of the signing of this agreement..." provided protection for continuing the past practice of providing the increments.

The contract was signed and in fact there were no problems. The men continued to receive their increments for the 1972-73 contract term.

Solomon also represented the PBA in the 1974-75 contract negotiations. Robert Murray again represented the County. Throughout that set of contract negotiations again there was no mention of changing the practice of granting incre-

ments although agreement was not reached until after completion of mediation and fact finding under the Commission's Impasse Procedures.

An agreement on the 1974-75 contract was eventually reached during a meeting held in the office of the Hudson County Personnel Director, Raymond A. Kierce in late November or early December 1974. After the parties had agreed on what the across-the-board salary increases would be and whatever other benefits and increases would be received by the PBA, Solomon testified he then stated that "this time" the salary steps should be set forth specifically in the contract the way they would be received by the members. As related by Solomon, Murray then indicated that the PBA had given up the increments during the course of the negotiations. Solomon reminded Murray that it was PBA 109, the employee organization that represented the County corrections officers, which had negotiated away their increments; PBA 51 had never discussed or negotiated increments with the County and obviously Murray was confusing the two locals.

Murray then called Solomon out into the hall and told him that he, Murray, was supposed to get back all the increments from all the groups. Solomon indicated that this was an important issue and the PBA would never sign a contract or never agree to give up increments. As testified by Solomon, Murray then said, "Listen this thing has to be wrapped up..all right, we'll continue the increments for the duration of this contract, and again you'll be protected by that same language that talks about current practices; but you'll agree that the question of increments can be open for negotiations for the next contract."

Solomon then responded, "Mr. Murray, any terms and conditions of employment that you wish to propose to us for negotiations, we'll negotiate on just like any terms and conditions of employment that we propose for negotiations, certainly we expect to negotiate on it; and if you propose to negotiate on increments in 1976, then we'll have to negotiate with you on that subject. It's part of salary."

Based upon this understanding, Murray and Solomon returned to Kierce's office and the contract terms were finally settled. The contract executed on

December 12, 1974, was made effective from January 1, 1974 to December 31, 1975. Like its predecessor, this contract did not contain specific language about the increments.[4/] It merely mentioned the two agreed upon across-the-board salary increases - $600 on January 1, 1974 and $750 on January 1, 1975. The day following the signing, on December 13, 1974, in response to Murray's request made during their early December meeting Solomon sent a letter to Murray confirming their understanding regarding increments so as to avoid confusion in the future. Solomon stated:

> "This will confirm the agreement reached between the County of Hudson and the P.B.A. Local 51 Negotiating Committee to the effect that all men who are presently on the payroll will receive in addition to their raise, the step increment to which they are entitled on their anniversary. Of course, men who are presently on top grade will receive only the negotiated increases.
>
> This is to further confirm that at the expiration of the Contract, all items are again open for negotiating including the increment system."

On December 17, 1974 Murray forwarded a copy of Solomon's letter to Personnel Director Kierce for his information.

It is undisputed that the increments were given to the eligible members of the unit in 1974. Moreover, in 1975, pursuant to an arbitrator's award dated June 16, 1975 which specifically recognized the practice of awarding increments, [5/]

4/ Inasmuch as the record makes clear that the salary provision of the 1974-75 agreement, lacking any reference to increments, did not fully set forth the salary levels for the employees during its term, Solomon's testimony regarding his conversation and understanding reached with Murray is admissable and may be relied upon, if credited, to clarify the intent of the parties to the agreement. See, with respect to the applicability of the parole evidence rule, Flintkote Co. v. Textile Workers Union of America, 243 F. Supp. 205 (D.C. N.J. 1965); Allen V. Metropolitan Life Ins. Co., 83 N.J. Super 223, 199 A. 2d 254 (App. Div.), rev. on other grds., 44 N.J. 294, 208 A. 2d 638 (1964).

5/ After a hearing held on May 19, 1975 Arbitrator Joseph F. Wildebush had awarded increments as well as contractual salary increases to two employees who had commenced employment effective January 4, 1974, rejecting a County Claim that because the claimants were not on the payroll as of January 1, 1974, they were not entitled to the raise. The Arbitrator noted, inter alia, that Paragraph 3.3 requiring payment of annual salaries in accordance with the current practices existing on the date of the signing of the agreement, referred to by the PBA, supported his award, inasmuch as the practices show that there are no different rates of pay. With regard to increments, the Arbitrator found "Police also get increments of $600 from their hiring date until they reach their maximum salary in four years." Award, at page 2.

the County voluntarily complied and granted first year increments to two members of the bargaining unit who were to have received them on January 4, 1975. Then on October 25, 1975, after negotiations had already commenced for a successor agreement, the County failed to pay patrolman John M. Coffey his first year increment.

According to Solomon, at the next negotiating session for a 1976-77 contract, probably held on December 22, 1975, he notified the representative of the County that one of the members of the unit was denied his normal increment and was told that he was not entitled to it; that the increments were given up in the last contract negotiations. Solomon stated that this was not the case, that increments were specifically preserved in his discussions with Murray at the signing of the 1974-75 contract and also alluded to the Aribtrator's award which had recognized the practice of providing increments. Attorney John Meagher, law partner of Robert Murray who was representing the County on these negotiations instead of Murray, indicated that looking through the 1974-75 contract he saw nothing that would protect the increments or provide for them. Solomon then related to Meagher the discussion he had held with Murray which had led to their oral agreement supplemental to the written contract for 1974-75. He also indicated to Meagher that if he goes back as far as the 1972-73 contract, he still would not see any provision for increments, yet they had been paid. Meagher responded that he would discuss this with Murray and get back to Solomon on the issue. Solomon was not contacted again on this matter. Solomon testified that he did not believe the issue was ever discussed again in the 1976-77 contract negotiations but admitted that he was not present at two or three negotiation sessions.

No unfair labor practice charge was filed on behalf of Officer Coffey who resigned from the department after he was denied his first year increment in October, 1975. However, in March, 1976 when a group of officers were denied their normal third year increments, the present charge was filed.

According to Solomon's testimony, other than the discussion of increments at the October, 1975 negotiating session for the 1976-77 contract regarding Officer

Coffey, there was never any further discussion relating to increments in negotiations. Solomon had specifically advised the PBA negotiating committee not to bring up the subject of increments in negotiations but rather to file the charge which is the subject of this Report, alleging the unilateral change in terms and conditions of employment by refusing to pay the increments. Moreover, Solomon further testified that the County never brought up the subject of increments at any of the 1976-77 negotiating sessions, nor was there any mention of increments by the PBA. That issue was specifically reserved for the unfair practice hearing.

The parties are presently operating under a Memorandum of Agreement prepared by Murray's office which extends the 1974-75 agreement between the County and the PBA from January 1, 1976 through December 31, 1977. In an addendum attached to the Memorandum of Agreement the PBA specifically preserves its rights to pursue the instant charge, noting, in part, that the signing of the memorandum "shall not constitute a waiver by the Hudson County PBA Local 51 to its position with the litigation currently pending before the Public Employment Relations Commission concerning increments."

Robert Murray's testimony with respect to the sequence of events just described and the conversations between himself and David Solomon on these occasions differs markedly from Solomon's. Murray testified that he represented the Hudson County Board of Chosen Freeholders as Special Labor Counsel, and Chief Negotiator for the 1972-73 and 1974-75 contract negotiations with the PBA. While he recalled a meeting in his office with PBA representatives, including Solomon, to review the final draft of the 1972-73 agreement prior to its signing, he did not recall any discussion with Solomon on the subject of increments. Furthermore, Murray stated that prior to the hallway discussion with Solomon at the close of the 1974-75 negotiating sessions he "was not aware that there was any question of

increments or that any of the men would get an increment." 6/ Murray also noted his recollection that in 1972 all meetings of the Board of Freeholders were held in the morning. Consequently, he could not have been motivated by any desire to submit an agreement to the Freeholders for approval that very afternoon in 1972 when the contract was signed as Solomon had implied.

Murray testified that he participated in the negotiations for the 1974-75 contract along with Raymond Kierce, Personnel Director for Hudson County. He stated that the subject of increments did not come up at all during negotiations except at the very last meeting in December, 1974. At that meeting, the County made its last offer to the PBA and its Committee caucused to review the offer. Then "for the very first time" Solomon came back into Kierce's office, where the negotiations were being conducted, and asked whether in addition to the County's offer of a $600 across-the-board raise in 1974 and a similar $750 raise in 1975 the men would get their increments. Murray stated his response was negative, that the County did not have increments and that was something that the County did not offer in their proposal.

According to Murray, Solomon indicated that there were only a few men involved who would receive the increments and that the issue was important to them. Solomon was asked to step out of the room and Murray conferred in private with Kierce. During this time, Personnel Director Kierce checked certain payroll records in order to verify the number of employees who would be affected by the increments and the amount of money involved.

Murray stated that since the sum of money to be paid was very small, no more than $6000, and recognizing that the County had settled with every other bargaining unit in the County of Hudson, he placed a value on reaching a settlement with PBA 51. As it appeared that the contract would not be signed without it,

6/ This testimony is at variance with that of another Respondent witness, Personnel Director Kierce, who swore that at the conclusion of the 1974-75 negotiations, Murray responded to Solomon's demand to place the salary levels including increments in the contract with the statement, _inter, alia,_ that "the increment program is out."

Murray concluded that the County would, on a one time basis only, go along with Solomon's proposal for this small group of men, for this additional sum of money.

He then asked Solomon to step back in at which point he told him that the County would pay the increment to this handful of men who were involved in 1974. 7/ Murray testified that he made it very clear that this concession was not going to be considered a reinstitution of the increment program. It was on a one time basis only.

During the hearing, the County introduced Solomon's letter dated December 13, 1974, which Murray interpreted as memorializing their oral agreement that as far as the future was concerned, it would be up to the parties to negotiate increments and it was the understanding that this adjustment applied to only a handful of men who were involved at that time in 1974. As far as the next round of negotiations for a 1976 contract was concerned, the County indicated to the PBA that it could bring up anything it wanted to bring up, including the increment system.

At the hearing, Murray was asked if it was his understanding that by paying these eight or nine officers an increment for 1974 it represented the first time in the history of the department that they were going to receive increments and on a one time only basis. Murray testified that the consideration he gave to the proposal was that it was limited to resolving the contract. He testified that he was not aware of any prior history relating to increments and it did not enter into his consideration.

The Respondent maintains that increments were a main contention of the PBA in the 1976 negotiating sessions and were raised by it at every negotiation

7/ Contrary to Murray's understanding of the County's limited financial obligations for increments in 1974, County records show that since January 1, 1974, the effective date of the new agreement, until December, 1974, the County had already paid out in increments, more than ten thousand dollars, representing $600.00 to each of eight employees who completed their first year on March 1 and nine who completed their year on June 7. Furthermore, in December, 1974, alone, the County would pay out another $7800 representing increments to seven employees who were scheduled to and did receive their third year increments effective December 23 and six others who completed their third year and received increments effective December 21.

meeting. As to the addendum to the 1976-77 memorandum agreement in which the PBA sought to foreclose waiver of its rights to receive increments, the Respondent maintains that it was offered, but never accepted by the County. Therefore, it did not constitute an agreement by Hudson County to preserve that issue. However, when questioned whether the addendum accurately reflected an agreement between the parties that the question concerning increments would be reserved for the Commission to make a determination for the 1976-77 contract, Raymond Kierce responded in the affirmative.

Kierce testified for the County that he advised Murray in December, 1974, after Solomon had raised the payment of increments in 1974-75 and while Solomon was out of the room. He placed a limited dollar value on the payments in 1974, and also informed Murray there would be none in 1975. At the time Kierce was unaware that patrolman Coffey would be completing his first year of employment on October 25, 1975. While Kierce, like Murray, disclaimed any knowledge of the increment program until Solomon brought it up at the December, 1974 meeting, he also testified that his department advised the Police Chief to inform the bookkeeper to grant increments for those employees who were due them in 1974, so he could furnish them directly to Mrs. Harvey to prepare the personnel action forms.

As earlier noted, in 1974 prior to December, 17 employees had already received such increments. Kierce also failed to raise any question with Murray or any County official as to the accuracy of Solomon's December 13, 1974 letter which he had received from Murray in which Solomon recited the agreement that all men presently on the payroll would receive the step increment on their anniversary and that at the contract's expiration, all items including increment are again open for negotiating.

Finally, Kierce, who claimed the PBA kept raising the issue of increments in the 1976 negotiations, also admitted toward the end of 1975 the PBA complained at meetings which he and County Attorney Meagher attended that the County had unilaterally changed the increment program. While he did not recall whether the PBA

advised it would file charges he did recall the PBA spokesmen say they were going to grieve the matter.

Analysis

The record adequately supports the finding that the County and PBA had maintained in effect as part of their relationship under past agreements, including the 1972-73 and 1974-75, an increment practice for employees. That practice was maintained without question during 1972-73. With respect to 1974-75, I do not credit the County's version of the events that the PBA agreed at the very last negotiation session to a renunciation of the benefits provided its members under the practice, at least for 1975. It is highly unlikely that the PBA would have agreed to the abandonment of an established increment practice, [8] certainly not without a quid pro quo, and surely not without the issue having been raised in mediation and submitted to fact finding. [9] If there was to have been a termination of the increment program in 1975 by joint agreement that would certainly have been set forth explicitly in the contract or some other document.

Solomon's letter of December 13, 1974 to Murray, offered by the County in support of its position, not only fails to support the County but rather tends to support the PBA's position that increments were to be granted during the full term of the 1974-75 contract. In the first paragraph, reference is made to "all men who are presently on the payroll" as recipients of the step increment and the second paragraph makes clear that "at the expiration of the contract," the increment system would be a negotiable item. It is noteworthy that although Solomon's letter did not correspond to Murray's interpretation of his understanding with Solomon regarding payment of increments, neither Murray nor Kierce, to whom the letter was referred, disputed its accuracy in memorializing the understanding reached.

8/ In 1976, the record shows that in addition to the eight employees who failed to receive third year increments on March 1, nine others completed their third year on June 7, 1976 and six more completed their third year December 21. Thus, 23 employees were eligible for increments in 1976 had the County continued the practice.

9/ The record contains no evidence that increments were dealt with by the mediator or raised before the fact finder.

I am also unwilling to conclude that the County's Special Labor Counsel, Robert Murray, was not aware of the longstanding practice of granting increments to the members of the PBA and regarded the agreement to give increments in 1974 as merely a "one shot" concession to "wrap things up." Increments were a substantial cost factor which involved payouts often several times during a calendar year. [10/] The County's substantial payments to employees in 1974 belies Murray's contention that the agreement was confined to a limited, one time payment. As a sophisticated practitioner and labor negotiator, Murray must have known that the practice of granting such increments was not a novel or unprecedented practice. Furthermore, as Kierce's testimony makes clear, in corroboration of Solomon's, one of Murray's objectives in the negotiations was to terminate increments, to remove them from the cost picture entirely. Murray's attempt to do so, admittedly at the last meeting of the parties for the 1974-75 agreement, in December, 1974, was doomed to failure, given the PBA's unwillingness to agree to their revocation under such circumstances and the pressures to reach agreement at that time, almost 12 months after the effective date, whether or not the Board of Freeholders were meeting later that same day.

Moreover, the actions of the County in 1975 do not comport with what they claimed the 1974-75 oral agreement provided. Rather than refusing to pay any increments in 1975, the County voluntarily complied with the Arbitrator's Award dated June 16, 1975, and patrolmen Lynch and Rivchin had their salaries increased accordingly. Such increases included their normal first year increments which became due and payable on January 4, 1975. In accordance with standard arbitration law, the meaning of the contract language as to salaries was established by the Arbitrator's interpretation, and would govern the subject in future dealings

10/ For instance in calendar year 1974, first year increments were paid to eight officers on March 1, at $600 per man for a total of $4800; again on June 7, nine officers received increments totaling $5400; on December 21, six officers received increments totaling $3600; and on December 23, five officers received third year increments for a total of $3000.

between the parties. 11/

It is noteworthy that the Arbitrator found at page 2 of his Award that "police also get increments of $600 from their hiring date until they reach their maximum salary in four years." If the County believed that this statement was inaccurate and that the increment system was abolished for 1975, it failed to contest this finding by either withholding payment (both men received their first year increments) or by seeking to vacate, correct or modify the award (no application to the court was made). See N.J.S.A. 2A:24-7,24-8.

When patrolman Coffey was denied his first year increment in October, 1975, negotiations for the 1976-77 contract were already underway. The PBA was not required to arbitrate this matter and there was no waiver by it not doing so. Rather, the PBA brought the denial to the attention of the County at a December 22, 1975 negotiation session as a "grievance meeting" concerning a violation of the 1974-75 contract and not as a subject of negotiations. Other than this instance, there appear to have been no further discussions concerning increments at the 1976-77 negotiating table, Kierce's general, unspecified testimony to the contrary notwithstanding. After Coffey's resignation and after further unilateral withholding of increments after the contract had expired, the PBA was warranted in seeking vendication before the Commission by the filing of the instant charge.

In The Matter of Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975), appeal dism. as moot, __ N.J. Super ___, (App. Div. 1976), pet. for cert. den. ___ Sup. Ct. ___ (1976), the Commission adopted the generally accepted principle of both public and private sector labor relations that the unilateral alteration of terms and conditions of employment during the course of collective negotiations constitutes an illegal refusal to negotiate. 12/ Lack of good faith

11/ See, e.g. Standard Oil Development Co. Emp. Union v. Esso Research and Engineering Co., 38 N.J. Super 293 (App. Div. 1956), 118 A. 2d 712 and Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers of America, Local 15, AFL-CIO, 242 F. Supp. 606 (D.C. N.J. 1965).

12/ See NLRB v. Katz, 369 U.S. 736, 50 LRRM 2117 (1962) where the Supreme Court held that an employer's unilateral change in terms or conditions of employment which were the subject of negotiations is a circumvention of the duty to negotiate and thereby constitutes a violation of the bargaining duty under the comparable federal statute.

may reasonably be inferred since the alteration of a particular term or condition of employment in and of itself contradicts the concept of collective negotiations. The "Piscataway" doctrine was recently accorded judicial approval in Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc.of Ed. Secs., P.E.R.C. No. 76-31 (1976), aff'd in part, rev'd in part, 149 N.J. Super 346 (App. Div. 1977), pet. for cert. granted, Sup. Ct. Docket No. 1300819.

Since increments had been provided since at least 1972 and were to be continued through the 1974-75 contract term, they constituted part of the status quo of terms and conditions of employment and the County was precluded from altering this status quo while engaged in collective negotiations. 13/ The practice was not required to be incorporated in the parties' agreement for it to have become a term or condition of employment of the employees affected. As made clear in Galloway Township Board of Education, supra, at page 6 of its Decision and Order, "the Commission is attempting to maintain 'those terms and conditions of employment in effect' regardless of whether those terms are derived from a contract or some other source." In accord: Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976).

I will now discuss two other defenses Respondent raised in its brief, i.e., (1) that increments were a subject of negotiations for the 1976-77 contract, thus reinforcing the County's contention that the PBA waived its right in negotiations for the 1974-75 to automatic increments and (2) that the County desired to reach agreement on a successor agreement and therefore negotiated in good faith.

The Respondent maintains that increments were brought up by the PBA at every negotiating session for 1976-77. This is strongly denied by the Charging Party which maintains that at no time were increments discussed. Since members of the PBA, with the exception of Coffey, had received their increments in 1974-75,

13/ The Commission has held that salary increments are a term and condition of employment. See Galloway Twp. Bd. of Ed. v. Galloway Twp. Education Assn., P.E.R.C. No. 76-32, rev'd on other grounds, 149, N.J. Super 352 (App. Div. 1977); East Brunswick Bd. of Ed. and East Brunswick Administrators Assn., P.E.R.C. No. 77-6, 2 NJPER 279 (1976).

it is doubtful that the PBA would have sought to raise the increments in negotiations. Rather, if the issue were to be raised at all it would appear to be the County who would seek to raise it in order to attempt to negotiate increments away from the PBA. However, the County stated that its negotiators never raised the issue since they interpreted the 1974-75 oral agreement as providing that the PBA had the right to bring up whatever they wanted in negotiations, including the increment system. Furthermore, even if the PBA has raised the unilateral denial of increments at the 1976-77 sessions, that fact, alone, fails to support the County's case. It is clear that the County unilaterally discontinued the increment to patrolman Coffey before ever notifying the PBA or negotiating as to the subject matter. It continued to deny increments as of March 1, 1976, without having notified the PBA of its intended continued denial or negotiated the subject. And clearly no genuine impasse was ever reached on increments, although there is some evidence in the record that the parties utilized the Commission's impasse procedures for 1976-77 on other subject matters. Thus, the County can not assert that it was justified in implementing a unilateral withdrawal of increments, see In The Matter of City of Jersey City, P.E.R.C. No. 77-58 (1977). Neither can the County claim a waiver in the absence of evidence of a specific waiver of the subject, and in light of the PBA's specific reservation of rights it formally attached to the 1976-77 memorandum of understanding.

The fact that the County negotiated with the PBA on all other matters and genuinely desired to reach an agreement is not an issue here. Even in the absence of evidence of a pattern of bad faith in its negotiating posture, the County's unilateral alteration of the terms and conditions during negotiations for a successor agreement was and is inconsistent with its obligation to collectively negotiate the same subject matter and must be found violative of its negotiating obligation. When the County unilaterally chose to deny increments to those police officers in March, 1976 it violated N.J.S.A. 34:13A-5.4(5) and (1).

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following recommended:

Conclusions of Law

1. By abolishing the increment practice commencing on March 1, 1976, thereby unilaterally altering the status quo with respect to terms and conditions of employment of certain of its employees during the course of collective negotiations, the Respondent, Hudson County Board of Chosen Freeholders, has engaged in and is engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(5).

2. The Respondent's improper conduct, although not apparently motivated by any specific anti-union animus, necessarily has had a restraining influence and attendant coercive effect upon the free exercise of the rights of the affected members of the unit represented by Hudson County PBA Local 51 guaranteed to them by the Act, and the said Respondent has thus engaged in and is engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

The Remedy

Having found that the Respondent has engaged in, and is engaging in unfair practices within the meaning of N.J.S.A.34:13A-5.4(a)(5) and (1), I will recommend that Respondent cease and desist therefrom and take certain affirmative action. As I find that the officers who were scheduled to receive their regular and normal increments in 1976 and 1977 under the established practice would have received them but for the unlawful conduct in which Respondent has engaged, affirmatively, I shall recommend that the increments be paid to those officers who were eligible to receive their first and third year increments in calendar years 1976-1977. 14/

I shall also recommend that the Respondent be ordered to restore the increment system subject to further collective negotiations between the parties.

14/ In Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc. of Ed. Secs., P.E.R.C. No. 76-31 (1976), aff'd. in part, rev'd. in part, 149 N.J. Super 346 (App. Div. 1977), pet. for cert. granted, Sup. Ct. Docket No. 1300819, the Court voided the Commission's order requiring the employer to make payment to employees whose hours were unilaterally reduced in violation of the employer's negotiation obligation under the Act. The Court voided such payments as ultra vires because made for services not rendered. In the instant matter, the police were denied their proper salary for a time actually worked.

Recommended Order

Upon the basis of the foregoing recommended Findings of Fact, Conclusions of Law, and Remedy it is recommended that the Respondent, Hudson County Board of Chosen Freeholders, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act.

(b) Refusing to negotiate collectively in good faith with the Hudson County PBA Local 51, as the majority representative of all patrolmen, detectives, photographers and Traffic Signal Supv. concerning terms and conditions of employment of such employees.

(c) Unilaterally altering terms and conditions of employment of its aforesaid employees during the course of collective negotiations with the Hudson County PBA Local 51.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

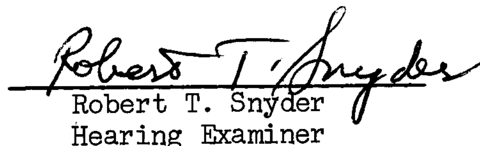
(a) Upon request, negotiate collectively in good faith with the Hudson County PBA Local 51 concerning an increment system for the employees in the above described negotiating unit.

(b) During the course of collective negotiations with the Hudson County PBA Local 51 concerning an incremental system, pay retroactively to March 1, 1976 to those of its employees in the above described unit on the payroll as of December 13, 1974 the regular increments due them under the practice as it existed prior to the Respondent's unilateral alteration.

(c) Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and all other records necessary to determine which individual officers are entitled to receive increments due under the terms of this Order.

(d) Post immediately, in plain sight, at the offices of the Hudson County Board of Chosen Freeholders and at the location or locations where employees of the Hudson County Police Department report for duty or daily assignment, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter including all places where notices to its employees are customarily posted. Resonable steps shall be taken by Respondent to insure that such notices will not be altered, defaced or covered by any other material.

(e) Notify the Chairman, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.



DATED: Newark, New Jersey
August 31, 1977

Robert T. Snyder
Hearing Examiner

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.

WE WILL NOT refuse to negotiate collectively in good faith with the Hudson County PBA Local 51 as the majority representative of patrolmen, detectives, photographers and Traffic Signal System Supervisor concerning an increment system for such employees.

WE WILL NOT unilaterally alter terms and conditions of employment of our aforesaid employees during the course of collective negotiations with the Hudson County PBA Local 51.

WE WILL, upon request, negotiate collectively in good faith with the Hudson County PBA Local 51 concerning an increment system for the employees within the above described unit.

WE WILL, during the course of collective negotiations with the Hudson County PBA Local 51 pay our employees, retroactively, increments due them pursuant to the 1976-77 incremental schedule.

HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS

(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780