P.E.R.C. NO. 84-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF VERNON,

Respondent,

-and-

Docket No. CO-83-4-34

DISTRICT 65, U.A.W.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that District 65, UAW filed against the Township of Vernon. The charge had alleged that the Township violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it eliminated its past practice of paying longevity increases. Under all the circumstances of this case, the Commission holds that District 65 did not prove by a preponderance of the evidence that the Township either agreed to continue longevity payments or failed to negotiate before eliminating these payments.

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-and- Docket No. CO-83-4-34

DISTRICT 65, U.A.W.,

Charging Party.

Appearances:
For the Respondent, Dorf & Glickman, Esqs.
(Mark S. Ruderman, of Counsel)

For the Charging Party, Ira Jay Katz, Esq.

DECISION AND ORDER

On July 7, 1982, District 65, U.A.W. ("District 65") filed an unfair practice charge against the Township of Vernon ("Township") with the Public Employment Relations Commission. District 65 alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when it eliminated its past practice of paying salary increases based on the longevity of unit employees.

On October 27, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Township filed

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

a timely Answer in which it admitted a past practice of paying longevity increases, but asserted that this practice had been eliminated in the parties' most recent contract, given the contract's fully-bargained (zipper) clause and the absence of any longevity provision.

On December 13, 1982, Commission Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, presented exhibits, and argued orally. Both parties filed post-hearing briefs by February 14, 1983.

On April 13, 1983, the Hearing Examiner issued his report and recommendations, H.E. No. 83-35, 9 NJPER 257 (¶14118 1983) (copy attached). He concluded that District 65 failed to prove by a preponderance of the evidence that the Township had either agreed to continue longevity pay or had failed to negotiate before eliminating longevity pay. He recommended dismissal of the Complaint.

After receiving an extension of time, District 65 filed Exceptions. It contends that the Hearing Examiner erred in finding that: (1) the parties negotiated over the elimination of longevity; (2) the negotiations history and the zipper clause allowed the Township to unilaterally cease longevity pay; and (3) District 65 withdrew or waived its demand for a longevity pay plan. District 65 further argues that the Hearing Examiner erred in applying a contractual analysis.

In response to the Exceptions, the Township relies on its post-hearing brief.

We have reviewed the record. The following facts appear.

Since 1975, the Township has adopted an ordinance each year fixing the compensation and other economic benefits of its employees. These ordinances have dealt with longevity pay, and, in addition, salaries, vacations, holidays, and sick leave days. The first ordinance provided, in part:

> Each full time permanent employee of the Township shall receive longevity compensation in addition to the salaries established in this ordinance.
>
> [T]he following longevity is set up:

Years of Service	Percentage of Salary
5 years	1%
10 years	2%
15 years	3%
20 years	4%
25 years	5%

In 1976, the Township enacted another salary ordinance with an identical longevity provision. In 1978, the Township enacted another salary ordinance with an identical longevity provision except for a $950 cap on the longevity payments.[2/] In 1979, 1980, and 1981, the Township enacted ordinances under which the longevity policy remained the same.[3/]

2/ The Hearing Examiner erred in finding that this cap was inserted in the 1976, rather than the 1978, ordinance.

3/ These ordinances contained the following provisions on holidays, vacations, and sick leave, as well as salaries. The 1975 ordinance provided that vacations and sick leave would be "...per personnel policy for Civil Service." The 1976 ordinance contained the same provision, but added a paragraph stating that employees would receive "...12 paid holidays as per personnel policy...." The 1978 ordinance contained the same provisions, but added that employees would receive one personal day not counted as a sick day. The 1979 ordinance contained the same provisions, but allowed one personal day to be counted as sick leave and one personal day not deducted from sick leave or vacation time. The 1980 ordinance contained the same provisions as the 1979 ordinance. The 1981 ordinance contained the same provisions as the 1980 ordinance, "unless addition granted as per contract."

In the spring of 1981, District 65 became the majority representative of the Township's clerical employees. The Township and District 65 then commenced negotiations over their first collective agreement. District 65 submitted a draft contract as a basis for negotiations. One proposal asked that each employee receive a $4000 raise. A separate article, entitled longevity, provided:

> A. In addition to salaries, members shall receive longevity as follows:
>
> | | |
> |---|---|
> | 1. Less than five (5) years of continuous service | |
> | 2. From five (5) years to less than ten (10) years of continuous service | 3% |
> | 3. From ten (10) years to less than fifteen (15) years of continuous service | 6% |
> | 4. From fifteen (15) years to less than twenty (20) years of continuous service | 9% |
> | 5. From twenty (20) years to less than twenty-five years of continuous service | 12% |
> | 6. Twenty-five (25) or more years of continuous service | 15% |
>
> The date of payment shall be on the anniversary date of the employee.

Thus, this article sought an increase in the amount of longevity pay. The draft contract also contained articles proposing an increase in the number of vacation days, holidays, and sick leave days as well as the following article, entitled Fully-Bargained Agreement:

> A. This Agreement represents and incorporates the complete and final understanding and settlement by the parties of all bargainable issues which were or could have been the subject of negotiations. 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.4/

At the outset of negotiations, the Township and District 65 negotiators reached an understanding that anything to do with economics would be considered as an entire economic package. Included in this economic package would be the items previously covered by ordinance: salaries, longevity pay, vacation days, holidays, and sick leave days. It was understood that if one level of benefits was up, another level might go down or be eliminated.

Given this understanding, the parties agreed to negotiate first over the non-economic items and certain proposed language changes. The next several meetings were spent discussing these non-economic items and language changes. By the end of September, or early October, 1981, the parties had finished negotiations over "language" changes and turned to economic issues including longevity.

The parties started negotiations over the economic package items. No progress was made until a session on Columbus Day when District 65 withdrew its proposal for an increase in

4/ The preamble of the draft contract similarly stated that the agreement represented "...the complete and final understanding on all bargainable issues between the Township and the Union."

longevity pay. The Township agreed to the withdrawal of this proposal.[5/]

The subject of longevity payments was not reintroduced in subsequent negotiations sessions. Instead, the parties continued to negotiate, and disagree, on the amount of basic salary increases. A Commission mediator was called in to assist with issues which were still "open." According to District 65's lead negotiator, it did not place longevity before the mediator because it believed the parties had an agreement to continue the status quo on that issue. According to the Mayor, the Township informed the mediator that longevity was a part of the economic package which would have to be deleted if the overall salary rate was too high. Longevity was not discussed between the parties at the mediation session.

At a December 18, 1981 mediation session, the parties reached a memorandum of agreement. This agreement provided for three salary increases totalling $2050 per employee over the space of 18 months. The memorandum did not mention longevity payments. However, the memorandum did address certain other issues which had previously been set by ordinance. For example, it stated that employees could not use their two personal days

5/ District 65 asserts that the Township expressly agreed at that session to continue its previous longevity practice. The Hearing Examiner, however, credited the testimony of the Township's Mayor that the Township negotiators merely agreed to the withdrawal of the longevity proposal and never agreed to continue the former longevity policy. We adopt the Hearing Examiner's credibility determination on this finding. We add that the Mayor also testified that when the District 65 negotiators withdrew their proposal concerning longevity pay, they expressly reaffirmed that longevity pay would be discussed as part of the entire economic package. Finally, we note our agreement with District 65 that it never explicitly agreed to withdraw the subject of longevity payments altogether from negotiations, but rather agreed at that time only to withdraw its proposal for an increase.

to extend vacations or holidays and that personal days would not be deducted from sick leave benefits. Holidays, sick leave benefits, and vacation days, however, were not directly discussed during the mediation sessions.

The Township's negotiator then prepared a draft contract based in part on the memorandum of understanding and sent it to District 65's lead negotiator. This draft did not contain any longevity clause. Further, while its table of contents listed articles entitled Holidays and Fully-Bargained Agreement, these clauses were omitted. The draft did contain an article on vacations.

After reviewing the draft contract, District 65's lead negotiator initialed the articles in the draft, but requested additional negotiations over items left out. The parties met at least twice more. In particular, the parties discussed the omission of the proposals concerning holidays and the zipper clause. On February 12, 1982, they reached a final agreement.6/

The final agreement contains specific articles concerning holidays, vacations, and sick leave as well as salaries. These articles provided for the same number of holidays, vacation days, and sick leave days as the Township had previously provided by ordinance and a smaller number than District 65 had proposed. The fully-bargained article (originally proposed by District 65, but later insisted upon by the Township) is included as is the

6/ The Hearing Examiner's finding of fact number 4 is somewhat misleading to the extent it states that negotiations culminated with reaching the memorandum of agreement on December 18, 1981 rather than reaching the final agreement on February 12, 1982.

similar language in the preamble. The contract neither mentions longevity payments nor specifically preserves past practices.7/

On March 15, 1982, the Township amended its ordinance fixing the salaries and other economic benefits for its employees. Paragraph (D) of the ordinance now states: "Longevity per contract." 8/ In June, 1982, the Township denied longevity pay to an employee who expected it under the previous longevity policy. The instant charge ensued.

We first consider the Hearing Examiner's conclusion that District 65 did not prove that the Township negotiators expressly agreed to the continuation of longevity payments. We adopt this conclusion and his findings on that issue.

We next consider the Hearing Examiner's conclusion that the Township satisfied its obligation to negotiate over longevity pay before eliminating it. Under all the particular circumstances of this case, we agree that it did.

7/ During late 1981 and early 1982, the Township also negotiated contracts with employee representatives of its police officers and road department employees. Both contracts contained clauses specifically entitling unit members to longevity payments and slightly modifying the longevity payments previously provided by ordinance.

8/ In addition, paragraph (E) states:

> Vacations & Sick Leaves: According to personnel policy of the Township with the exception of Personal days, one (1) personal day counts as sick leave if necessary, and one (1) personal day not deducted from sick leave or vacation time, unless granted as per contract.

while paragraph (F) states:

> Holidays remain the same, unless addition granted as per contract.

N.J.S.A. 34:13A-5.3 provides, in part: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Thus, even if District 65 cannot prove that the Township agreed to continue longevity payments, it may still prevail if the Township failed to negotiate before eliminating its practice of making longevity payments. To resolve this question, we must consider all the circumstances of a particular case.

In the instant case, the parties were negotiating their first contract against a backdrop of a Township ordinance which had set certain economic benefits such as salaries, longevity pay, holidays, vacations, and sick leave benefits for employees. This first contract was going to replace the ordinance as the primary source of these economic benefits for clerical employees. At the outset of the negotiations, the parties agreed to consider all these economic items as one economic package with the implicit understanding that if one economic benefit was up, another economic benefit would be down or perhaps even eliminated. Initially, District 65 sought substantial increases in all economic items. The Township never refused to discuss longevity pay or any other economic item and accepted District 65's withdrawal of its proposal concerning an increase in longevity pay. The parties reached a memorandum of agreement on December 18, 1981 which gave unit members certain across-the-board salary increases. The Township forwarded a draft contract which specifically

included the salary increases and preserved the same number of vacation days as previously provided. This draft contract did not address longevity payments, holidays, or sick leave days. Significantly, District 65 then requested additional negotiations as a result of which clauses specifically preserving the same number of holidays and sick leave days previously set by ordinance were included in the final contract, but no longevity clause was included. Additionally, the parties incorporated a fully-bargained clause and did not include a past practices clause in the final contract. Under all these circumstances, we are not persuaded by a preponderance of the evidence that the Township failed to negotiate in good faith before eliminating the longevity pay previously set by ordinance. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey
October 19, 1983
ISSUED: October 20, 1983

H. E. No. 83-35

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

In the Matter of

TOWNSHIP OF VERNON,

Respondent,

-and- Docket No. CO-83-4-34

DISTRICT 65, U.A.W.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Township did not violate the New Jersey Employer-Employee Relations Act. The Charging Party failed to prove by a preponderance of the evidence that the Township acted illegally by discontinuing longevity pay. The Hearing Examiner found that the parties negotiated over longevity and the Charging Party subsequently withdrew that proposal. The Charging Party made no effort to include longevity in the written agreement and the Hearing Examiner concluded that the alleged verbal agreement would not supersede or alter the clear language of the written agreement. Finally, the Hearing Examiner held that the zipper clause in the parties' agreement prevented any additional negotiations over longevity during the life of the agreement.

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. 83-35

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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TOWNSHIP OF VERNON,

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DISTRICT 65, U.A.W.,

Charging Party.

Appearances:

For the Respondent, Dorf and Glickman, Esqs.
(Mark S. Ruderman, of Counsel)

For the Charging Party, Ira Jay Katz, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 7, 1982, by District 65, U.A.W. ("Charging Party") alleging that the Township of Vernon ("Township") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party has alleged that the Township failed and refused to give longevity pay in accordance with past practice which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. 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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative."

The Charging Party asserted that the parties had negotiated a collective agreement at which time they verbally agreed to continue the prior practice regarding longevity pay. The Township, however, argued that the Charging Party had dropped its request for longevity pay during negotiations, and subsequently signed an agreement which did not include longevity pay.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 27, 1982, and a hearing was held on December 13, 1982, in Newark, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs which were received on February 14, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and, after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

Findings of Fact

1. The Township of Vernon is a public employer within the meaning of the Act and is subject to its provisions.

2. District 65, U.A.W., is a public employee representative within the meaning of the Act and is subject to its provisions.

3. Beginning in at least 1975 the Township, by ordinance, established a longevity policy as well as a vacation and holiday policy which was applied to the titles currently represented by the Charging Party but who were then unrepresented. 2/ The Township thereafter, reaffirmed, by ordinance, the longevity policy as well as the vacation and holiday benefits for years 1976-1981. (Exhibit CP-1).

4. In mid-1981 the Charging Party became the majority representative for the Township's clerical employees, and the parties commenced negotiations which culminated in the signing of a Memorandum of Agreement on December 18, 1981 (Exhibit C-2). That Memorandum was silent as to longevity, nor did it list a specific past practice, holiday or vacation clause. At the start of negotiations the Charging Party presented its proposals (Exhibit J-2) which included a longevity clause, holiday and vacation clauses, and a fully bargained (zipper) clause. There was no specific past practice clause included in their proposals. During negotiations the parties did specifically negotiate concerning longevity and the Township's negotiators rejected the Charging Party's longevity clause and indicated that they wished to treat longevity as part of a total economic package (Transcript "T" pp. 27, 112-113). The Charging Party subsequently withdrew its longevity proposal.

2/ The longevity policy read as follows:

> Longevity: Each full time permanent employee of the Township shall receive longevity compensation, in addition to the salary as established in this ordinance. Longevity percentage set up as follows:
>
> | Years of Service | Per Cent of Salary |
> |---|---|
> | 5 years | 1% |
> | 10 years | 2% |
> | 15 years | 3% |
> | 20 years | 4% |
> | 25 years | 5% [up to $950]* |
>
> *The bracketed words were added in 1976.

5. Subsequent to signing the Memorandum of Agreement the Township's attorney/negotiator drafted a typed collective agreement (Exhibit R-3) based upon what he believed had been negotiated between the parties and forwarded that document to the Charging Party's negotiator, Thomas Acosta, by letter dated January 13, 1982 (Exhibit R-4) asking him to review the draft. Mr. Acosta reviewed the entire draft as evidenced by his initials on every substantive page of the draft. However, as a result of his review Mr. Acosta requested additional negotiations which were subsequently conducted between the parties in early February 1982 and resulted in the signing of the final collective agreement between the parties (Exhibit J-1) dated February 12, 1982 (T p. 76).

Exhibit R-3 contained a table of contents which listed among many items, vacations, holidays, and the fully bargained agreement pages. However, the holiday and fully bargained clauses were actually missing from the body of R-3. In addition, longevity and past practice were neither listed in the table of contents nor contained in the body of R-3. Exhibit J-1, the final agreement, does contain the vacation, holiday and fully bargained clauses, but does not contain a longevity or past practice clause.

6. In addition to reaching a collective agreement with the Charging Party, the Township reached collective agreements with the PBA (Exhibit R-1) and the road department employees (Exhibit R-2) in late 1981 or early 1982. Both Exhibits R-1 and R-2 contain longevity clauses. At a Township Committee Meeting on March 15, 1982, the Township formally adopted the salary and economic benefits for all

of its employees covered by Exhibits J-1, R-1 and R-2. The ordinance adopted longevity "per contract." (Exhibit CP-1).

7. The critical facts regarding the longevity negotiations shows at most that the Charging Party withdrew its longevity proposal because it apparently believed that the prior longevity policy would be continued, though not in written form. However, the facts also show that the Township did not agree to continue the prior longevity policy, and that J-1 was signed absent the inclusion of, or agreement over, longevity.

In support of the Charging Party's position Acosta testified that he was willing to accept the Township's longevity practice and that he removed the longevity proposal from the table because the Township (allegedly) agreed to retain the existing longevity policy (T pp. 32, 39). Acosta also testified that the Township's attorney/negotiator indicated it was "okay" to accept the Township's existing longevity policy, however, Acosta admitted that Exhibits J-1, R-3 and C-2 were silent as to longevity. (T pp. 33-34). Acosta further indicated that those documents did not include longevity only because he thought that there had already been an agreement on that issue.

Sandra VanDyke, a negotiator for the Charging Party, also testified that she thought that the Township agreed to continue its longevity policy. (T pp. 88, 98). However, VanDyke freely admitted that the Charging Party did not realize that longevity was absent from the contract and that it (the Charging Party) was careless in that regard. (T pp. 100, 102).

In contrast to the Charging Party's negotiators, the Township's negotiators, Nicholas Roseto and Eric Yantz, clearly testified that they never agreed to continue the Township's former longevity policy. Rather, they indicated that they agreed to the withdrawal of the Charging Party's longevity proposal in order to address the economic package as a whole. (T pp. 112-114, 137). They testified that it was not a mistake that longevity was excluded from the contract, but rather, that the Township deliberately intended to eliminate longevity in order to increase wages. (T pp. 129, 134, 141).

Issue

Did The Township Violate The Act By Discontinuing Longevity Pay?

Discussion and Analysis

The Longevity Clause

Based upon the above facts the undersigned finds that the Township did not violate the Act. In order to establish such a violation the Charging Party had the burden of proving by a preponderance of the evidence that the parties had actually agreed to a longevity clause or that the Township failed to negotiate over longevity. The Charging Party simply failed to meet that burden of proof. The most that the Charging Party established is that its negotiators "thought" they had reached an agreement with the Township regarding longevity. The undersigned concluded, however, that despite negotiating over longevity, no meeting of the minds or agreement took place on that issue.

The only conflicting testimony regarding the longevity

issue was that Acosta and VanDyke alleged that the Township's attorney/negotiator and Committeeman Roseto agreed to accept the previous longevity policy. Roseto denied agreeing to any longevity pay.

The undersigned adopts the Township's version of what occurred regarding the longevity negotiations and specifically credits the testimony of Roseto and Yantz that the Township did not agree to include longevity in the agreement and that in fact longevity was (intentionally or unintentionally) withdrawn. 3/

The Charging Party's testimony and subsequent action (or inaction) with respect to longevity are inconsistent. The Charging Party had presented the Township with a proposal for longevity, holidays, and vacations, all of which concerned past practice bene-

3/ The undersigned notes that Acosta's and VanDyke's testimony regarding what the Township's attorney/negotiator and Committeeman Roseto allegedly said concerning longevity is unclear. Acosta never actually testified that the attorney/negotiator Mr. Ruderman, or Mr. Roseto,said he would agree to the status quo longevity policy. Rather, Acosta merely stated that Ruderman and Roseto said "okay" to his (Acosta's) own statement that he (Acosta) would withdraw the longevity proposal and accept the current longevity practice. (T pp. 32, 34, 35) VanDyke's testimony on that issue is similar. She testified that Ruderman said "all right" to Acosta's statement about withdrawing longevity and accepting the status quo. (T pp. 88-89).

Roseto did not deny that he or Ruderman said "okay" or "all right," but he testified that those remarks were only in response to Acosta's withdrawal of the longevity proposal. He testified that he never agreed to continue the status quo longevity policy. (T pp. 113-114).

The undersigned credits Roseto's testimony that he agreed to the withdrawal of the longevity proposal and never agreed to continue the former longevity policy.

Although Acosta also testified that the "Township" indicated it had no problem with longevity (T p. 32), the undersigned did not credit that testimony partly because it was too broad and not attributed to a particular Township negotiator, and partly because that statement, even if true, is not indicative of an actual agreement on longevity.

fits which the employees enjoyed prior to being represented. This was obviously an attempt by the Charging Party to memorialize those prior benefits into a formal collective agreement. When Exhibit R-3 was prepared, however, it only contained holidays and vacations in the table of contents, and not longevity. Although the holiday clause did not appear in R-3, it did appear in J-1 along with vacations. Longevity, however, never appeared in any form in C-2, R-3 or J-1. The Charging Party made no effort to have longevity included in R-3 or J-1 which it probably would have if an agreement had actually been reached on that item. The Charging Party's explanation for not including longevity in J-1 was because it thought it had a verbal agreement on that issue. The undersigned does not credit that explanation.

The very purpose of a written collective agreement is to memorialize in writing those terms and conditions of employment agreed upon in negotiations. If the Charging Party believed it really had an agreement on longevity it would have, or at the very least should have, sought to include that item in R-3 or at least in J-1 as it did with holidays and vacations. Its failure to do so supports the Township's position that no such agreement existed. Acosta, an experienced negotiator, reviewed and initialed R-3 and had to be aware that longevity was not included in that document.

The undersigned believes that the Township's position as to longevity is more tenable and more consistent. Longevity was not a mutually agreed upon item -- and it was in fact withdrawn from negotiations -- consequently it did not appear in R-3 or J-1

which inevitably resulted in the Township passing an ordinance adopting longevity per contract. (Exhibit CP-1) The Township's treatment of longevity in Exhibit CP-1, therefore, is consistent with its argument that longevity was removed from the table in order to address economic issues as a package. The Charging Party's agreement or acquiescence in not including longevity in R-3 or J-1 is inconsistent with its attempt to obtain a longevity clause and to memorialize past practice articles in the contract. Consequently, the undersigned finds that the parties did negotiate over longevity pay but that the Township never agreed to continue its longevity clause, and, in fact, that the Charging Party, whether intentionally or unintentionally, did withdraw longevity from negotiations altogether.

The Written Collective Agreement

Having already found that the parties did negotiate over longevity but reached no agreement over that issue resulting in the withdrawal of longevity from negotiations, no violation of the Act was committed and the Complaint should be dismissed. But there are two additional reasons for dismissal of the instant Complaint.

First, general contract law principles indicate that parol evidence of a contract interpretation which is unexpressed in an agreement and which alters the clear terms of an agreement cannot be relied upon to contradict or add to the agreement. 4/ In the instant matter the collective agreement was signed by both

4/ "When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, either parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 3 Corbin §573.

parties and is clear on its face. It does not contain a longevity clause nor a past practice clause. The Charging Party cannot achieve in this unfair practice charge what it failed to achieve in negotiations.

The Commission has considered similar issues in the past. In In re Delaware Valley Reg. Bd/Ed, P.E.R.C. No. 81-77, 7 NJPER 34 (¶12014 1980), a labor organization violated the Act by failing to take certain actions in compliance with a negotiated agreement. The labor organization relied upon prior practice to justify its actions, but the Commission held that evidence of prior practice could not be considered to contradict or alter the clear terms of a written agreement. 5/

In In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981), the charging party union presented witnesses who testified to a contract interpretation which was unexpressed in the agreement. In that case the union reviewed the agreement before signing same and the Hearing Examiner and Commission found that the union's attempt to alter or contradict the clear terms of the agreement could not be relied upon.

A similar result is required herein. The Charging Party thoroughly reviewed R-3 and J-1 and made no effort to include longevity in the written agreement prior to signing that agreement.

5/ The Hearing Examiner in In re Delaware Valley, supra, stated in his own decision, In re Delaware Valley Reg. Bd/Ed, H.E. No. 81-14, 6 NJPER 540, 541 (¶11274 1980), that:

> As a general principle, evidence of circumstances outside of, or extrinsic to, the language of a contract is admissible for the purpose of interpreting the writing but not for the purpose of changing it. "So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant." Atlantic Northern Airlines, Inc. v. Schwinne, 12 N.J. 293 (1953) 6 NJPER at 541.

That agreement is clear on its face, longevity is not included. The Charging Party's alleged oral agreement to continue longevity pay cannot surpass, alter, or survive the actual written agreement.

Second, contrary to the Charging Party's position, the parties' fully bargained clause does bar longevity from the existing agreement. The fully bargained clause, Article XXII, provides as follows:

> A. This Agreement represents and incorporates the complete and final understanding and settlement by the parties of all bargainable issues which were or could have been the subject of negotiations. 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.

The Charging Party asserted in its post-hearing brief that the Township unilaterally discontinued and changed an established past practice of giving longevity pay without negotiations. In addition, it asserted that it never waived its right to bargain over longevity. Finally, the Charging Party concluded that the fully bargained clause did not contain a clear and unmistakable waiver of its right to negotiate longevity pay. In support of its position the Charging Party relied upon numerous private sector decisions [6/] as well as three Commission decisions. [7/] In In re

6/ N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962); Convol-Ohio Inc., 202 NLRB 85, 82 LRRM 170 (1973); Southern Materials Co., 198 NLRB 257, 80 LRRM 1606 (1972); Rockwell Int'l Corp., 260 NLRB No. 153, 109 LRRM 1366 (1982); and N.L. Industries, Inc., 220 NLRB 41, 90 LRRM 1479 (1975), enf'd 536 F.2d 786 (8th Cir. 1976).

7/ In re Deptford Bd/Ed, P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980); In re State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); and In re Bound Brook Bd/Ed, P.E.R.C. No. 82-22, 7 NJPER 508 (¶12226 1981).

State of New Jersey, supra, and In re Deptford Bd/Ed, supra, the Commission adopted NLRB modifications of the clear and unequivocal waiver test which is applied to zipper clauses. The Commission in Deptford adopted the Hearing Examiner's citation of the following NLRB test:

> The NLRB has stated that in determining the existence of a waiver of statutory rights prescribing bargaining responsibilities the NLRB will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized, as an "integration" [to determine the applicability of the parol evidence rule]. In re Deptford Bd/Ed, H.E. No. 81-13, at p. 6, 6 NJPER 538 (¶11273 1980).

In general, that test is applied where an employer unilaterally and without negotiations sets or changes a term and condition of employment under the assumption that the union waived its right to negotiate over a particular issue because of the wording of a zipper clause. The undersigned acknowledges that if the Township herein unilaterally eliminated longevity pay in reliance upon a waiver by the Charging Party because of the wording of the instant zipper clause, then the undersigned would be required to determine whether the instant clause operated as a waiver. However, the Charging Party's argument that the Township unilaterally and without negotiations eliminated longevity is factually incorrect, consequently, this is not a traditional waiver issue and the clear and unmistakable waiver test need not be applied.

The undersigned agreed with the Charging Party that it

did not "waive" the right to negotiate longevity. In fact, the undersigned has already determined that the parties did negotiate longevity and that longevity was withdrawn. This is not a situation such as in Deptford where a public employer unilaterally changed or established terms and conditions of employment without negotiations in reliance upon a zipper clause.

Rather, this is a situation where the Employer did negotiate terms and conditions and reached a written agreement encompassing those terms and conditions. The Charging Party agreed to and signed that agreement and it did not include longevity. The Township is merely asserting that having negotiated longevity, the same having been withdrawn, and a written agreement reached which does not include longevity, the fully bargained clause must operate to prevent the Charging Party from now attempting to negotiate over longevity during the life of the agreement.

The undersigned agrees. The first sentence of Article XXII indicates that:

> [T]his Agreement...incorporates the complete and final understanding...by the parties of all bargainable issues which were or could have been the subject of negotiations. (Emphasis added)

Longevity was a subject of negotiations and did not appear in the final agreement. Any mistake or carelessness is attributable to the Charging Party, not the Township. If the Charging Party thought it had a verbal agreement on longevity it should have attempted to place that item in the written agreement. The written agreement must take precedence over any alleged verbal agreement, and Article XXII forecloses any further negotiations on that issue during the life of the agreement.

Accordingly, the undersigned will recommend dismissal of the Charge in its entirety.

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

Conclusions of Law

The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) by discontinuing longevity pay.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

Dated: April 13, 1983
Trenton, New Jersey