P.E.R.C. NO. 93-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

HUDSON COUNTY SHERIFF and
COUNTY OF HUDSON,

Respondents,

-and- Docket No. CO-H-92-130

HUDSON COUNTY SHERIFF'S OFFICERS,
PBA LOCAL NO. 334,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Hudson County Sheriff's Officers, PBA Local No. 334 against the Hudson County Sheriff and the County of Hudson. The charge had alleged that the respondents had violated the New Jersey Employer-Employee Relations Act by refusing to pay annual increments after the expiration of a collective negotiations agreement and during negotiations for a successor agreement. The Commission concluded that the charging party did not prove that the employer was obligated to pay automatic step increments after the expiration of the 1988-1991 collective negotiations agreement.

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PBA LOCAL NO. 334,

Charging Party.

Appearances:

For the Respondents, Genova, Burns & Schott, attorneys
(Stephen E. Trimboli, of counsel)

For the Charging Party, Loccke & Correia, P.A., attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On October 29, 1991, Hudson County Sheriff's Officers, PBA Local No. 334 filed an unfair practice charge against the Hudson County Sheriff and the County of Hudson. The charge alleges that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),[1/] by refusing to pay annual increments

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith

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after the expiration of a collective negotiations agreement and during negotiations for a successor agreement.

Interim relief was denied. I.R. No. 92-13, 18 NJPER 106 (¶23051 1991). The Commission designee found that the history of increments for these employees is unclear. Id. at 108. On December 24, 1991, a Complaint and Notice of Hearing issued. On March 2, 1992, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 10, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-2, 18 NJPER 384 (¶23173 1992). He concluded that the dispute involves an alleged breach of contract that must be dismissed under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). In the alternative, he concluded that the expired agreement did not provide for payment of automatic step increments.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due July 23, 1992. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-7). Based on

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Footnote Continued From Previous Page

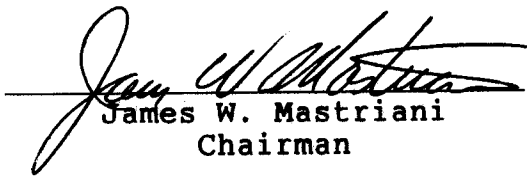
1/ with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

those facts, we hold that the charging party did not prove that the employer was obligated to pay automatic step increments after the expiration of the 1988-1991 collective negotiations agreement. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992

H.E. NO. 93-2

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

In the Matters of

HUDSON COUNTY SHERIFF &
COUNTY OF HUDSON,

Respondents,

-and- Docket No. CO-H-92-130

HUDSON COUNTY SHERIFF'S OFFICERS,
PBA LOCAL NO. 334,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a Complaint where the Charging Party failed to prove that the parties' collective negotiations agreement contained a provision(s) that automatic step increments be paid after their expiration of the agreement on June 30, 1991, and during negotiations for a successor agreement. It was found that the provisions in the agreement with respect to steps and increments failed to establish that there was negotiated an automatic step increment system. In Ocean County Bd/Chosen Freeholders & Ocean County Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341 (¶17130 1986) the Commission found that the "negotiated" agreement provided for "step placement" of each employee for the two years of its term; no language expressed an intention to have all employees receive an automatic increment; and appendix codification of the placement of each employee for the second year suggested that this feature would be unnecessary in a normal salary guide. The Commission emphasized the negotiated rather than automatic nature of step placement in the second year; and, finally, that the salaries at each step were the same for both of the two years. No automatic step increment system having been proven by the Charging Party herein, it was recommended that the Complaint be dismissed.

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. 93-2

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

In the Matters of

HUDSON COUNTY SHERIFF &
COUNTY OF HUDSON,

Respondents,

-and- Docket No. CO-H-92-130

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Appearances:

For the Respondents, Genova, Burns & Schott, Attorneys
(Stephen E. Trimboli, of counsel)

For the Charging Party, Loccke & Correia, Attorneys
(Michael J. Rappa, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 29, 1991, by the Hudson County Sheriff's Officers, PBA Local No. 334 ("Charging Party" or "PBA") alleging that the Hudson County Sheriff and the County of Hudson ("Respondents," "Sheriff" and/or "County") has 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. ("Act"), in that the most recent collective negotiations agreement between the parties expired June 30, 1991, and efforts to negotiate a successor agreement are continuing; unit employees who are not at the top step pay rates "are provided" under the agreement

with an automatic step movement to take place annually on October 1st; the agreement clearly provides that retroactive to October 1, 1988, the step guide shall be implemented for non-superior officers and automatic movement on the steps shall take place annually on October 1st; this automatic step movement language had been "observed by the parties" through October 1, 1991, when the "public employer" unilaterally refused to comply; during September 1991, the "public employer" announced its intention not to pay increments; and it stated further that it will not pay such increments until a successor agreement is executed; all of which which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) of the Act.[1/]

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 December

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

24, 1991.[2/] Pursuant to the Complaint and Notice of Hearing, and following several adjournments, a hearing was held on March 2, 1992, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived (Tr 40) and both parties filed post-hearing briefs by April 24, 1992.[3/]

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

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Hudson County Sheriff and the County of Hudson are joint public employers within the meaning of the Act, as amended, and are subject to its provisions.[4/]

2/ The Director of Unfair Practices held an Interim Relief hearing on November 13, 1991, in this matter and denied the PBA's application, observing at one point that the history of increments for the involved employees was "unclear." [I.R. No. 92-13, 18 NJPER 106, 108 (¶23051 1991].

3/ On May 19th, I concluded that Supplemental Briefs were necessary and these were filed on June 4, 1992.

4/ See Bergen County Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168, 170, 171 (¶15083 1984).

2. The Hudson County Sheriff's Officers, PBA Local No. 334 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. FOP Lodge 36A, B & C ("FOP")[5/] was a party to a collective negotiations agreement with the Sheriff and the County, which provided for automatic salary increments and had been in effect from July 1, 1984 through December 31, 1987. [R-2, p. 2; J-2, Consent Order, p. 3 & Memorandum of Agreement, p. 1. See also, R-1, ¶2].

4. Upon the expiration of the 1984-1987 collective negotiations agreement, the FOP negotiated a successor agreement with the Sheriff only, which was to be effective during the term January 1, 1988 through December 31, 1989 (J-3, ¶1). It also provided for increments in the same manner as had existed in the prior 1984-1987 collective negotiations agreement. However, the Board of Chosen Freeholders refused to adopt or implement this negotiated agreement between the FOP and the Sheriff. [R-1, Certification of Edward Webster, Sheriff, ¶2 and attached Agreement; J-3, ¶2].

5. Following the refusal of the County to adopt or implement the 1988-1989 collective negotiations agreement, supra, the FOP commenced litigation in the Superior Court on June 16, 1988, seeking an order upon the County to implement this agreement. On

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5/ The FOP was displaced by the PBA as the majority representative in May 1991 (Tr 34, 35).

July 28, 1988, the Hudson County Assignment Judge directed the County, the Sheriff and the FOP to seek a voluntary resolution of their dispute by negotiating a mutually accepted salary settlement. [J-3, ¶¶ 3, 4].

6. A voluntary settlement of the Superior Court litigation was reached on September 30, 1988, and on October 3rd this settlement was incorporated into a Consent Order before the Hon. Burrell Ives Humphreys, which was executed on that date (J-2). There was attached to the Consent Order a Memorandum of Agreement, which set forth a complete collective negotiations agreement for the term January 1, 1988 through June 30, 1991, all of which was subject, however, to the parties' good faith recommendation to their principals for ratification. [J-2, Memorandum of Agreement, pp. 1, 5]. The Memorandum of Agreement contained a handwritten Paragraph 10, which provided in full as follows:

> This Agreement constitutes the complete understanding of the undersigned parties. All other proposals and counterproposals shall be deemed as (sic) withdrawn and without effect. No other agreements between the parties shall be deemed enforceable including without limitation the February 2, 1988 memorandum between the Sheriff and FOP Lodge 36A, B & C.

7. The above Memorandum of Agreement subsequently became the Collective Negotiations Agreement between the FOP, the County and the Sheriff, effective during the term January 1, 1988 through June 30, 1991 (J-1; J-3, ¶6).[6/] During the term of the Agreement

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6/ The Agreement (J-1) fails to indicate the date of execution.

October 1st was used as the date for determining the level of salaries to be paid to the several groups of employees through the use of various factors, which will be discussed under Analysis, infra (see J-1, Art. II, Salaries, pp. 4-7).

8. About two months after instituting the Superior Court litigation, supra, the FOP filed an Unfair Practice Charge with the Commission, naming the Sheriff and the County as Respondents, which was docketed on September 1, 1988 (CO-89-67). [CP-1 & CP-2]. The FOP alleged as a violation of the Act that the Respondents had failed to implement the automatic salary increment provisions of the parties' 1984-1987 collective negotiations agreement. At an Interim Relief hearing on September 20, 1988, the parties entered into a settlement, which provided for payment of the salary step increments due, retroactive to January 1, 1988, with a waiver of interest by the FOP and the withdrawal of its Unfair Practice Charge with prejudice (R-4, p. 4). The formal withdrawal of the Charge filed by the FOP was approved on November 1, 1988 (R-5).

9. Subsequent to the implementation of the 1988-1991 (J-1, supra) FOP Agreement, a dispute arose between the parties as to the salaries to be paid to three former County Corrections Officers, who had transferred to the Office of the Sheriff. The FOP instituted legal proceedings against the County and the Sheriff, claiming that they had violated the October 3, 1988 Consent Order of Judge Humphreys (J-2, supra). The parties agreed to submit the dispute to interest arbitration and Jeffrey B. Tener was appointed

as the Interest Arbitrator on November 15, 1989. [R-2, pp. 1-4]. The Arbitrator held a hearing on January 9, 1990 and issued his award on February 6, 1990. Among the submissions before him were four pages of salary calculations received from counsel for the FOP (R-3). These pages of calculations were described as "Base Salary Increases" without reference to automatic step increments. The Interest Arbitrator created a "special salary guide" for the three officers during the period January 1, 1988 through November 1, 1990. [R-2, pp. 16, 17].7/

10. The current PBA President, Thomas Columbo, testified that he "received a raise every October of each year..." (Tr 20). As of October 1, 1991, he received no "raise, no step increment..." (Tr 21). However, the Police Academy trainees received a step increment on December 11, 1991, coincident with the date of their graduation from the Academy on December 11th. [See J-1, p. 6; Tr 21-23].

11. Columbo also stated that prior to the current contract (J-1) the increments had been received on January 1st of each year. i.e., under the 1984-1987 contract (Tr 24).

ANALYSIS

The Parties' Positions On The Issue

I.

7/ A collateral issue was salary payments for four officers who were promoted to Sergeant in May 1988 (R-2, pp. 15, 17, 18).

According to the Charging Party, Article II, Section 1, ¶C, p. 4, of J-1, which provides "For Employees Hired Prior to October 1, 1988" that "...retroactive to October 1, 1988, the following Step Guide shall be implemented for non-superior officers and automatic movement on the Steps shall take place on October 1 of each year...," is the touchstone provision in the recently expired agreement. It clearly establishes that "automatic" increments shall be paid annually on October 1st. The Charging Party also claims that each year since the effective date of the agreement, step movement compensation has been paid to entitled employees and this continued until October 1, 1991, which was after the expiration of the agreement and during the period of successor negotiations.

The Charging Party recites the relevant negotiations history as previously found in Findings of Fact Nos. 2-7, supra, adding, however, a reference to J-1, Article II, Section 2, p. 6. This Section, governing employees hired on or after October 1, 1988, states: "Employees hired on or after October 1, 1988 shall be paid according to the following incremental step guide, automatic movement on which shall occur on October 1st of each year..."

In its Supplemental Brief of June 4th, the Charging Party addressed the Respondents' earlier contention that J-1 contained no provision for salary adjustments for any officer subsequent to October 1, 1990. It pointed out that Article II, Section 1, ¶C, pp. 4, 5 sets forth seven alphabetical Steps, A through G, providing a salary range beginning with $16,000 and concluding with $31,000 per

annum. This is followed by an "Implementation" provision for employees hired prior to October 1, 1988.

According to the Charging Party, this provision for "Implementation" of the increasing annual salary steps rebuts the contention of the Respondents that the agreement did not provide for automatic annual increments since employees move laterally along their steps (see Respondents' Main Brief, p. 7).[8/]

II.

The Respondents have advanced two arguments in support of the dismissal of the PBA's Unfair Practice Charge with respect to Section 5.4(a)(5).[9/]

First, the Respondents argue that the Charging Party's Section 5.4(a)(5) allegation is at most a good faith dispute over an "unclear salary provision..." Thus, its claimed violation is

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8/ The Charging Party in its Main Brief, as well as in its Supplemental Brief, also argues that the Respondents acknowledged their obligation to pay automatic increments when they granted trainee graduates of the Police Academy step increments on December 11, 1991, while at the same time denying step increments to other employees in the unit (see Finding of Fact No. 10).

9/ The Hearing Examiner concurs with the Respondents' contention that the Charging Party has failed to adduce any evidence which would support its allegations that Sections 5.4(a)(2), (3) or (7) of the Act have been violated. Dismissal of these allegations will be recommended hereinafter. Additionally, there has been no proof of an independent Section 5.4(a)(1) violation by the Respondents and a like recommendation of dismissal will be made as to this subsection of the Act. The sole issue is whether or not the Respondents have violated Section 5.4(a)(5) and, if so found, then a derivative Section 5.4(a)(1) violation would follow.

nothing more than a mere breach of contract, which must be dismissed under New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). See also, Boro of Freehold, P.E.R.C. No. 85-66, 11 NJPER 36 (¶16109 1984); adopting H.E. No. 85-15, 10 NJPER 607 (¶15285 1984). [See Respondents' Main Brief, pp. 17-21 and Supplemental Brief, pp. 2, 3].

Second, the Respondents contend that the collective negotiations agreement at issue (J-1) does not require the payment of automatic step increases and, thus, any claimed payment could not have survived the expiration of the agreement on June 30, 1991. The supporting reasons are set forth under eight points in the Respondents' Main Brief (pp. 23-36) and are summarized in brief as follows: [see Respondents' Supplemental Brief, pp. 3-14]: (1) J-1 contains no express language establishing the existence of an incremental system; (2) placement upon the disputed salary guides is not based upon seniority or years of service as would be the case under an automatic system; (3) the Tener Award reinforces the Respondents' position; (4) J-1 contains provisions which would be unnecessary if the agreement provided for automatic step increments; (5) there exists no history of paying Sheriff's Officers automatic step increments beyond the expiration of the agreement; (6) J-1 fails to contain any across-the-board increases separate from the alleged increments; (7) the alleged automatic step increments show no consistency between steps; and (8) the failure of the parties to have included within J-1 the automatic step increment from the

1988-1989 agreement with the Sheriff (R-1) is "strong evidence" that there was no agreement to include an automatic step increment system in J-1.

* * * *

The Respondents Properly Refused Payment Of The Automatic Step Increments Claimed To Be Due And Did Not, Therefore, Violate Section 5.4(a)(5) Of The Act.

I.

Human Services

The Commission's 1984 decision in Human Services, supra, ended many years of confusion as to when an unfair practice charge presented a true refusal to negotiate in good faith within the meaning of Section 5.4(a)(5) of the Act as opposed to those instances where the unfair practice charge presented a mere breach of contract claim. The Commission concluded that the latter cases should be resolved, if possible, under the parties' negotiated grievance procedures. In an attempt to clarify the demarcation between the two situations, the Commission provided several examples of instances in which it would "entertain unfair practice proceedings under Section 5.4(a)(5)."

1. Repudiation of an established term and condition of employment: This is most clearly illustrated by an employer's decision to abrogate a contract clause based upon its belief that the clause is outside of the scope of negotiations. An unfair practice proceeding would be entertained to determine whether or not the employer has already repudiated a contract clause based on its

belief that the clause is non-negotiable or, alternatively, where the employer has raised a scope of negotiations defense to a contract claim. As a corollary, a claim of repudiation might also be supported by a contract clause "...that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause..." (10 NJPER at 423). (Emphasis supplied).[10/]

2. Specific indicia of bad faith: It is here required that such indicia of bad faith be "...over and above a mere breach of contract..." (10 NJPER at 423).

3. Vindication of the policies of the Act: An unfair practice proceeding will be entertained where the charge indicates that the policies of the Act, rather than a mere breach of contract, "...may be at stake..." (10 NJPER at 423).

* * * *

The Respondents take explicit note of that part of the Commission's decision in Human Services where it is stated that an employer "...which agrees to specific grievance procedures for the resolution of contractual disputes, and which is willing to abide by

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10/ See also, Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-14, 17 NJPER 408 (¶22194 1991)[no repudiation]; Tp. of Barnegat, D.U.P. No. 91-19, 17 NJPER 172 (¶22071 1991)[no repudiation - employer relied upon contract]; N.J. Dept. of Human Services, D.U.P. No. 91-12, 16 NJPER 579 (¶21254 1990)[employer relied on contract]; and Passaic Cty. Reg. Bd. of Ed., D.U.P. No. 89-5, 15 NJPER 54 (¶20019 1988)[good faith contract dispute - no claim that employer repudiated a contract term].

those negotiated procedures does not 'refuse to negotiate in good faith' simply because its interpretation of an unclear contract clause may ultimately prove to be mistaken..." 10 NJPER at 422 (Emphasis supplied).

Under its Human Services argument, the Respondents have also cited Boro of Freehold, supra, where I recommended dismissal of a charge concerning the Borough's alleged failure to pay a salary step increase to a group of employees. That decision was based upon the conclusion that the dispute centered on the interpretation of the salary provision within the agreement and was, thus, essentially a breach of contract dispute. The agreement there provided for the resolution of disputes under the contractual grievance procedure.

From the holdings of the two decisions above the Respondents contend, and I agree, that the provisions of Article II of J-1 are susceptible to a finding of a good faith dispute as to what the parties intended with respect to increment payments after June 30, 1991. Therefore, the facts as found appear to fall within the ambit of Human Services that there can be no refusal to negotiate in good faith under Section 5.4(a)(5) simply because of a contractual dispute over the interpretation to be placed upon an "unclear contract clause" even though the employer may ultimately prove to be mistaken. Any such mistake should properly be resolved by the instant parties' submission of the matter to an arbitrator under the negotiated grievance procedure contained in J-1, Article IX. This, however, has not occurred.

I am not alone in having accepted the argument of the Respondents that the salary provisions of Article II of J-1 are less than clear since Commission designee Gerber, following an interim relief hearing on November 13, 1991 in this matter, stated at one point that the history of increments for the employees involved was "unclear" (18 NJPER at 108).

Finally, the PBA has made no serious claim that the Respondents have repudiated the disputed provisions in Article II of J-1. Further, none of the proofs adduced on this record could support a contention that the Respondents have repudiated Article II within the meaning of Human Services. Thus, once again, a dispute over the interpretation over an "unclear contract clause" does not arise to a refusal to negotiate in good faith (Id. at 422).

Therefore, on the basis of Human Services and its progeny, I must recommend dismissal of the Complaint.

* * * *

II.

The Parties' Agreement Fails To Provide For Payment Of Automatic Step Increments

Assuming arguendo that the Commission does not concur with the recommended dismissal of the Complaint on the basis of Human Services, I will now decide the issue on the merits: whether or not Article II of J-1, "Salaries," obligated the Respondents to make payment of automatic step increments following the expiration date of the agreement on June 30, 1991. This question will be decided under relevant Commission precedent.

Although the parties agreed to the inclusion of six separate and detailed salary guides in Article II of J-1, it appears that the negotiated language failed to obligate the Respondents to continue the payment of automatic step increments beyond the expiration date of June 30, 1991. First, it is well settled that if the parties' contractual agreement (J-1) obligated the Respondents to make automatic step payments after the expiration of the agreement, then this obligation would be enforceable during negotiations for a successor agreement: see Galloway Tp. Bd/Ed v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); In re Union County Reg. H.S. Bd/Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1977); Hudson County Bd/Chosen Freeholders v. Hudson County PBA Local No. 51, App. Div. Docket No. A-2444-77 (4/9/79), aff'g P.E.R.C. No. 78-48, 4 NJPER 87 (¶14041 1978); Rutgers, The State University v. Rutgers University College Teachers Assn., App. Div. Docket No. A-1572-79 (4/1/81), aff'g P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979); In re City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981) interim order enforced and leave to appeal denied, App. Div. Docket No. AM-1037-80T3 (7/15/81); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981) and Newark Public Library, I.R. No. 84-9, 10 NJPER 321 (¶15154 1984).

However, the Charging Party has the burden of proving that there was a "meeting of the minds" between the FOP and the Respondents in the negotiating of J-1 and that they, in fact, had "...agreed upon an incremental system requiring the automatic

payment of increments as an existing term or condition of employment at the time the contract expired..." Ocean County Bd/Chosen Freeholders & Ocean County Sheriff ("Ocean County"), P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986).[11/] See also, Monmouth County Sheriff & Bd/Chosen Freeholders, I.R. No. 91-13, 17 NJPER 179, 180 (¶22077 1991).

If the Charging Party herein fails to meet the burden as defined in Ocean County then, necessarily, the Respondents will be relieved of any obligation to make payment of automatic increments during negotiations for a successor agreement. Ocean County was such a case and, since it bears a marked resemblance to the facts presented in the case at bar, it will bear close examination.

I refer again to the decision of Commission Designee Gerber in the instant proceeding.[12/] While it is true that I am not constrained to follow any of the findings or conclusions reached by him at the interim relief stage, I do find his discussion most pertinent. For example, it will be recalled that I have already made reference to the fact that he used the term "unclear" in describing the history of increments for the employees involved. He stated that while several of the salary guides are consistent:

11/ See Mt. Olive Bd/Ed, P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983) and Jersey City Bd/Ed, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983) regarding the necessity of examining the totality of circumstances in order to determine whether there was a "meeting of the minds" as to any given provision in a contractual agreement.

12/ See footnote 2, supra.

> ...overall they are confusing and lack a consistent structure. Some refer to annual increments, some don't, most do not relate to years of service. Nor is there a consistent uniform movement to a top salary within a given number of years. Although salary schedule II does refer to payment of increments, it does not relate the steps on the guide to years in service and the salaries are not consistent with guide I.C. The lack of consistency in the salary structure, the lack of a history on increments and the lack of a distinction between an annual increment increase and a negotiated salary increase prevents me from stating that the PBA has a substantial likelihood of success in prevailing at a plenary hearing... (18 NJPER at 108).

I note first that the Respondents concede that if the language at pages 4 and 5 of the 1988-89 FOP/Sheriff agreement (R-1) had been carried over into the 1988-91 FOP agreement (J-1), then the parties would have "...created an incremental system..." (Respondents' Main Brief, p. 24). However, such an "incremental system" language was not agreed to by the Respondents when they entered into J-1 with the FOP and, thus, the PBA herein can draw no aid or assistance from this fact.

While I give little credence to the Respondents' argument that J-1 lacks "...a single reference to salary adjustments occurring subsequent to the expiration of the agreement...,"[13/] I do find significant the fact that Article II of J-1 makes no reference to any relationship between step placement and years of

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13/ Even if I were to accord weight to the PBA's argument that the Respondents acknowledged their obligation to pay all employees an increment on October 1, 1991, by reason of the fact that they subsequently paid an increment to the graduates of the Police Academy on December 11, 1991, this would not change the result herein.

service. Article II appears to contain only a series of negotiated increases over the term of the agreement. [See Respondents' Main Brief, p. 23]. A like situation was presented in Ocean County where the Commission concluded that the "wording and features" in the salary article did not "suggest" the existence of an automatic incremental pattern because the parties had: (1) "negotiated and agreed" on step placement for each of two years; and (2) none of the language expressed an intention "...to have all employees receive automatic increments..." [12 NJPER at 348].

In the instant case, the salaries in Article II are not based upon seniority or years of service. For example, the step placement of employees hired prior to October 1, 1988 is based upon the salaries earned as of December 31, 1987. But, in the case of employees hired after October 1, 1988, Section 2 provides for initial placement by the Sheriff "...in his discretion..." (J-1, p. 7). As the Respondents contend, and I agree, the intervention of the Sheriff, exercising his discretion, appears to be a device negotiated by the parties rather than a contract provision consistent with an automatic increment system. It is important to note here that the Commission in Ocean County recognized the significance of the payment of increments on anniversary dates where the steps were based upon years of experience.

Further, the Commission in Ocean County also attached significance to the fact that an appendix codified the placement of each employee for the second year of the agreement. It stated that

such a feature would presumably be unnecessary "...in a normal salary guide and appears to emphasize the negotiated, rather than automatic, nature of step placement in the second year..." (12 NJPER at 348) (Emphasis supplied).

There also appears to be "unnecessary" language in Article II of J-1 herein. For example, Section 1, ¶'s A-F [J-1, pp. 4-6] spells out in the minutest detail the various salaries by steps, using either numerical or alphabetical designations, for the several classifications of Sheriff's Officers. I find that such a detailed delineation of step adjustments would be unnecessary under a true system of automatic step increments. The Ocean County decision supports this conclusion.[14/]

Consider further the matter of possible inconsistent treatment of employees under the six guides in Article II, "Salaries." For example, those employees governed by Section 1, ¶D are limited by the caveat "sole and exclusive guide" to salaries which begin as of December 31, 1987, and continue through November 1, 1990. If a traditional automatic increment system had been negotiated by the FOP, how could this category of employees ever be entitled to automatic step increments after the expiration of J-1 on

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14/ In having concluded that Section 2 of J-1 contains "unnecessary" language, which is inconsistent with a true automatic increment system, I have attached little or no weight to the argument of the Respondents that Section 2, ¶A contains numbered Steps 1 through 8 as opposed to ¶C, which employs lettered Steps A through G (see Respondents' Main Brief, pp. 28, 29).

June 30, 1991? It would appear disparate to contend that all other employees in the negotiations unit were entitled to increments after June 30th, pursuant to the five remaining salary guides in Article II but not those in Section 1, ¶D. This gives me considerable pause as to the consequences of accepting the argument of the Charging Party that the FOP had negotiated an automatic step increment system when J-1 became effective on January 1, 1988.

One additional factor that militates against a conclusion that the parties negotiated an automatic step increment system is the absence of any across-the-board increases during the several years of the contract term. This was noted as a factor in Ocean County (12 NJPER at 348). See also, County of Middlesex, I.R. No. 87-2, 12 NJPER 662, 664 (¶17250 1986). Just as there can be no doubt that Article II of J-1 contains the complete monetary package of wage and salary increases for the term of the agreement, it cannot be contended that Article II or any other Article of J-1 provided for an across-the-board wage or salary increase.

I also note that another indicia of whether or not an automatic increment system may be found to have existed under an expired agreement, is the consistency in the level of salary increases among the various steps: Ocean County, I.R. No. 84-14, 10 NJPER 398, 399 (¶15184 1984) and County of Middlesex, 12 NJPER at 664, supra. An examination of the six salary guides in Article II discloses that there is no consistency, either in the amount received by employees at each individual step adjustment or in the amounts received in moving from one step to another. Nor is there any consistency in the dates on which adjustments are to be paid.

This lack of consistency also appears in the post-hearing submission to Arbitrator Tener by the FOP where several pages of salary calculations were described as "Base Salary Increases." There was no reference to automatic step increments and, therefore, Tener created in his award a "special salary guide" for three of the individuals involved in that arbitration proceeding (R-2, pp. 16, 17; R-3).

* * * *

Based on the foregoing, I find and conclude that under either the Human Services defense or under a substantive analysis of the provisions of Article II of the parties' collective negotiations agreement (J-1) the Charging Party has failed to prove that its predecessor negotiated an automatic step increment system with the Respondents within the meaning of Commission precedent.

CONCLUSION OF LAW

The Respondents did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) or (7) by its failure to have made payment of the automatic step increments claimed to be due, following the expiration of the parties' collective negotiations agreement on June 30, 1991.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: July 10, 1992
Trenton, New Jersey