P.E.R.C. NO. 91-102

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN

Respondent,

-and- Docket No. CO-H-90-194

FAIR LAWN SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commmission, dismisses a Complaint against the Borough of Fair Lawn. The Complaint, based on an unfair practice charge filed by the Fair Lawn Superior Officers Association, alleged that the Borough violated the New Jersey Employer-Employee Relations Act when it refused to sign a 1988-89 collective negotiations agreement which includes a preservation of rights clause and a savings clause. The Chairman concludes that the charging party failed to prove that an agreement was reached to include the preservation of rights and savings clauses in the agreements.

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Charging Party.

Appearances:

For the Respondent, DeMaria, Ellis, Hunt & Salsberg, attorneys (Richard Bauch, of counsel)

For the Charging Party, Loccke & Correia, attorneys (Richard D. Loccke, of counsel)

DECISION AND ORDER

On January 8, 1990, the Fair Lawn Superior Officers Association filed an unfair practice charge against the Borough of Fair Lawn. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(6) and (7),[1/] by refusing to sign a 1988-89 collective negotiations agreement which includes a preservation of rights clause and a savings clause.

1/ These subsections prohibit public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On June 22, 1990, a Complaint and Notice of Hearing issued. On July 3, 1990, the Borough filed its Answer denying it violated the Act and asserting that there was no meeting of the minds with respect to all terms and conditions of employment.

On October 25, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 21, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-33, 17 NJPER ___ (¶___ 1991). He found that the charging party failed to prove that the parties had agreed to include those clauses in either the 1988-89 or 1990-91 agreements.

The Hearing Examiner informed the parties that exceptions were due on April 4, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-16) are thorough and accurate. I incorporate them here.

Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that the charging party failed to prove that an agreement was reached to include the preservation of rights and savings clauses in the 1988-89 or 1990-91 agreements. The employer, therefore, did not violate subsection 5.4(a)(6) when it refused to sign an agreement including those clauses.[2/]

2/ The subsection 5.4(a)(7) allegation was withdrawn (T123).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: April 25, 1991
Trenton, New Jersey

H.E. NO. 91-33

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

In the Matter of

BOROUGH OF FAIR LAWN

Respondent,

-and- Docket No. CO-H-90-194

FAIR LAWN SUPERIOR OFFICERS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Borough of Fair Lawn did not violate the New Jersey Employer-Employee Relations Act by refusing to sign a collective agreement with the Fair Lawn Superior Officers Association that included a preservation of rights and a savings clause. The Hearing Examiner found that the SOA failed to prove that the parties had agreed to include those clauses in the contract.

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. 91-33

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

In the Matter of

BOROUGH OF FAIR LAWN

Respondent,

-and- Docket No. CO-H-90-194

FAIR LAWN SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, DeMaria, Ellis, Hunt & Salsberg, Attorneys (Richard Bauch, of Counsel)

For the Charging Party, Loccke & Correia, Attorneys (Richard D. Loccke, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on January 8, 1990 by the Fair Lawn Superior Officers Association (SOA) alleging that the Borough of Fair Lawn (Borough) violated subsections 5.4(a)(6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The SOA alleged the Borough refused to sign a collective agreement covering 1988-89 that included a

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1/ These subsections prohibit public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

preservation of rights clause (Article 6) and a savings clause (Article 38) that the Borough allegedly agreed upon.[2/]. The SOA seeks an order requiring the Borough to sign an agreement including those clauses.

A Complaint and Notice of Hearing (C-1) was issued on June 22, 1990. The Borough filed an Answer (C-2) on July 3, 1990 denying it violated the Act and asserting that the parties did not reach a meeting of the minds regarding those clauses. A hearing was held on October 25, 1990 in Newark, New Jersey.[3/] Both parties filed post-hearing briefs and reply briefs, the last of which was received on February 28, 1991.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The SOA is the majority representative of sergeants, lieutenants and captains employed by the Borough. Exhibit CP-1 is a copy of the SOA's proposed collective agreement for 1990-91 which includes preservation of rights and savings clauses. The language of those clauses in CP-1 was the same in the SOA's proposed 1988-89

2/ In its charge the SOA did not actually allege that the Borough refused to sign the 1988-89 agreement (as opposed to the 1990-91 agreement). However, it did make reference to events in 1989 when SOA officials sought to obtain a signed agreement including Article 38. Article 38 referred to 1988-89 because in 1990-91 the pertinent clause was Article 37, and the efforts in 1989 were to obtain a signed 1988-89 agreement. Thus I believe this charge concerned the signing of a 1988-89 agreement.

3/ The transcript from that hearing will be referred to as "T."

agreement which it seeks to have signed. The Borough refused to sign the SOA's 1988-89 document because it included those clauses, but it has implemented, and is abiding by, all other aspects of the agreement (R-19, T50-T51).[4/]

The preservation of rights clause provides:

> 6.01 The Employer agrees that all benefits, terms and conditions of employment relating to the status of Employees, which benefits, terms and conditions of employment are not specifically set forth in this Memorandum of Agreement, shall be maintained at not less than the highest standards in effect at the time of the commencement of collective bargaining negotiations between the parties leading to the execution of this Memorandum of Agreement.

The Savings clause provides:

> 38.01 or 37.01 It is understood and agreed that if any portion of this Agreement or the application of this Agreement to any person or circumstance shall be invalid, the remainder of this Agreement or the application of such provision to other persons or circumstances shall not be affected thereby.

4/ The cover page of CP-1 shows it to be the parties' 1990-91 collective agreement. It is really an unsigned draft of the proposed agreement. The preservation of rights clause of CP-1 is Article 6, and the savings clause is Article 37. In his opening remarks identifying CP-1, the SOA's attorney explained that CP-1 was the document the SOA sought to have signed by the Borough (T8). Later the SOA's attorney explained that except for economic changes, CP-1 also represented the contract language between the parties for 1988-89 (T82, T83). The savings clause in the 1988-89 agreement, however, was apparently listed as Article 38 (T7, T10) as was the case in CP-2 the PBA's 1988-89 agreement. The 1988-89 SOA agreement had been delivered to the Borough by the SOA in 1988, but was not signed, and CP-1 was the next draft of the agreement the SOA sought to have the Borough sign. (T84) Thus, Articles 6 and 37 of CP-1 also represent the language for Articles 6 and 38 for 1988-89.

> 38.02 or 37.02 If any such provisions are so invalid, the Employer and the Association will meet for the purpose of negotiating changes made necessary by applicable law.

2. The SOA and the Policemen's Benevolent Association (PBA), the majority representative of patrolmen employed by the Borough, have historically engaged in joint, or tandem, negotiations with the Borough for new, but separate, collective agreements (T106).[5/] In early 1976 both units signed two-year agreements (1976-77) with the Borough (PBA -- CP-3)(SOA -- CP-4).[6/] Those agreements contained the same clauses and nearly identical language, but did not contain preservation of rights or savings clauses. Rather, they contained a "Prior Terms, Conditions and Benefits" clause which provided:

> All previous terms, conditions and benefits, not enumerated herein, which were applicable to the members of the police department, shall be continued in full force and effect.

For 1978-79 the SOA and Borough signed a new collective agreement (CP-5) which included sergeants, and included the same

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5/ Sergeant Anthony Serrao, SOA President, testified that negotiations between the SOA and Borough have always been joint or parallel with PBA negotiations with the Borough. Serrao also testified that the SOA received whatever the PBA received. While I credit the testimony regarding joint negotiations, the evidence does not show that the SOA received, in every area, whatever the PBA received.

6/ At that time the sergeants were included in the PBA unit (CP-3).

Prior Terms, Conditions and Benefits clause as in CP-4.[7/] On August 21, 1981 attorney Jack Ballan wrote the following letter (CP-12) to Capt. Richard Palhemus who was a member of the SOA negotiations team that negotiated CP-5.

> I assume that your negotiations with the Borough will be conducted shortly. We all know that a written contract was not executed with the superior officers. A verbal agreement was honored that was generally consistent with the other police who did have a contract.
>
> If you are in need of any information to corroborate the legal and moral obligations of the Borough for the years 1980 and 1981, please contact me.

Based on CP-12 I find there was no signed SOA agreement for 1980-81, but that the Borough generally applied to the SOA the terms and conditions of employment that existed at that time from the PBA agreement. The PBA's 1980-81 agreement, however, was not offered as evidence in this case, thus there was no showing what if any preservation of rights or savings clause language existed at that time.

3. After CP-5, and throughout the 1980's, there were no other signed SOA collective agreements (T56). The PBA agreements were signed during the 1980's and they contained the same general language as the unsigned SOA agreements (T46-T47, T58). During the 1980's the SOA members looked to the signed PBA agreements for

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7/ CP-5 was a conformed, not a signed, collective agreement. It was offered as a signed agreement, and the Borough did not produce evidence to the contrary (T35-T42). Thus, I accept CP-5 as a conformed copy of the signed agreement.

guidance or direction in dealing with their terms and conditions of employment (T45-T47, T58).

4. During negotiations for 1984-85 the SOA and PBA engaged in parallel negotiations with the Borough. The Borough sought the deletion of a preservation of rights clause from the proposed agreements (T86). Those negotiations eventually reached impasse and the SOA and PBA filed separate petitions for interest arbitration. A combined arbitration proceeding was held on April 10, 1984 and an award (CP-6) issued on September 19, 1984.

As noted in CP-6 the award applied to both units. It said:

> At the hearing the parties stipulated that the substance of this DECISION and AWARD shall apply to both police units in the Borough, the Patrol unit and the Superiors unit. Accordingly, this DECISION and AWARD is applicable to both of the above units.

In its non-economic demands for 1984-85 the Borough sought the deletion of the preservation of rights clause from the "current agreement," presumably the PBA agreement that expired December 31, 1983, since no SOA agreement had been signed since CP-5. The interest arbitrator rejected that demand and held: "Preservation of Rights: no change from the prior contract." But since neither the PBA's 1984-85, nor its predecessor agreement, was offered for evidence there was no showing what preservation of rights language existed at that time, and no showing that a savings clause existed at that time.

The SOA and PBA also engaged in interest arbitration with the Borough for 1986-87. The parties again stipulated that the

award would apply to both the SOA and PBA. The award (CP-7) issued on November 13, 1986. It provided that: "Except as awarded herein, all terms and provisions of the 1984-85 agreement shall remain in full force and effect." There was no specific reference to a preservation of rights or savings clause. The PBA's 1986-87 agreement was not offered for evidence thus there was no showing what preservation of rights language existed for 1986-87, nor what, if any, savings clause language existed at that time.

5. The Borough apparently signed a 1986-87 agreement with the PBA, but not with the SOA. The SOA had forwarded a draft of its 1986-87 agreement to the Borough's attorney, but by letter of May 13, 1987 (R-7) the Borough's attorney requested a meeting to clarify certain language.[8/] On July 16, 1987 (R-8) Capt. Freitag, a member of the SOA's unit, asked Borough Manager Garger for the status of the SOA's (1986-87) agreement, and why it had not been signed. Garger responded on July 17, 1987 (R-9) indicating that the parties' attorneys were discussing the matter.

On July 31, 1987 (R-10) the SOA's attorney asked the Borough's attorney why the SOA agreement (for 1986-87) had not been signed. The Borough's attorney responded on August 3, 1987 (R-11) suggesting a meeting between them.

On October 7, 1987 the Borough had its first negotiations session with the PBA and SOA for 1988-89 collective agreements

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8/ The SOA did not offer as evidence its draft of the 1986-87 agreement.

(R-14). The PBA and SOA negotiated together for 1988-89 agreements and jointly submitted a proposal for 1988-89 (CP-8) which made no reference to a preservation of rights or savings clause (T18). Some discussion was also held that day regarding the SOA's draft of the 1986-87 agreement.

On October 15, 1987 (R-12) the Borough's attorney notified the SOA's attorney of the concerns the Borough had with the SOA 1986-87 draft agreement. R-12 indicated in pertinent part that the Borough would not agree to the preservation of rights or savings clauses. The Borough further explained in R-12 that the SOA contract language would not necessarily be the same as the PBA's.

> Please bear in mind that while the Borough has always treated the Superior officers similarly to the PBA members, and has always agreed to provide them with the same benefit increases from year to year, it was never the Borough's position to allow the PBA contract language to form the basis of the SOA's; we have done so here, as a matter of expedience, in those areas where we feel it will not negatively affect the Borough's rights.

There was no evidence that the Borough ever signed the SOA's 1986-87 agreement, or that the SOA took further action regarding that agreement.

6. Two more negotiation sessions were held between the Borough and PBA and SOA for 1988-89 in January 1988 (R-14). No agreement was reached. On February 4, 1988 the SOA's attorney sent the Commission a letter and petition for interest arbitration (R-14) for 1988-89. The petition noted there had been three negotiation sessions: October 7, 1987, January 12 and 26, 1988, and that the

termination of the "current agreement" (the 1986-87 agreement which had never been signed) had been December 31, 1987. Attached to the petition was a list of the issues in dispute, but it did not specifically list the preservation of rights or savings clauses.[9/]

On February 10, 1988 (R-15) the Borough's attorney responded to the SOA's petition and informed the Commission that there were additional items in dispute including the preservation of rights and savings clauses.

Apparently sometime in April 1988 the Borough reached agreement or a tentative agreement with the PBA, but not the SOA, for 1988-89. There was no evidence of interest arbitration for the PBA for 1988-89, and no evidence that the SOA's interest arbitration petition for 1988-89 resulted in an arbitration award. The SOA's proposed preservation of rights and savings clause language for 1988-89 was the same as that agreed upon between the PBA and Borough in CP-2. (T89-T90). On May 2, 1988 (R-16) the SOA/PBA attorney asked the Borough's attorney to prepare two new contracts for 1988-89, one for each labor organization. On May 3, 1988 (R-17) the Borough's attorney notified the SOA/PBA attorney that the PBA agreement would be sent out shortly. He raised questions, however, about the SOA's agreement, and referred the SOA attorney to R-12 wherein concerns were raised over the 1986-87 SOA contract draft

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9/ The SOA petition did list as a non-economic issue "Rights of Employees," but no evidence was offered to define that language. There was no showing that a PBA interest arbitration petition was filed at the same time.

particularly concerning the preservation of rights and savings clauses. He said:

> With respect to the SOA contract, kindly review my letter to you dated October 15, 1987 (copy attached), wherein we expressed our concerns with a prior draft contract prepared by you (which was exactly the same as the PBA contract). Since October, we have not received any form of response from you whatsoever. May we assume that you have no problem with our concerns? If so, I will be pleased to make up a draft agreement.

The Borough (and PBA) subsequently signed the PBA's 1988-89 collective agreement (CP-2), but the Borough did not sign the SOA's 1988-89 agreement. (T49).

7. Anthony Serrao was a member of the PBA's negotiations team that negotiated CP-2 beginning in late 1987 (T88-T89). Sometime in late 1988 Serrao was promoted to sergeant thus becoming a member of the SOA unit. By September 1989 he had become president of the SOA (T87-T88). As SOA president he became chairman of its negotiations committee and began, in September 1989, preparing for negotiations for a 1990-91 agreement. At that point he searched for a copy of the SOA's 1988-89 agreement, but could not find a signed copy (T90). Serrao asked the Borough Manager about a signed SOA agreement, and the manager told him there was a problem with the preservation of rights and savings clause language. Other than the Borough's agreement to Articles 6 and 38 with the PBA in CP-2, the SOA offered no evidence that the Borough had agreed to Articles 6 and 38 for the SOA prior to September 1989.

On September 7, 1989 Serrao sent Borough Manager Garger a letter (R-2) seeking to resolve the savings clause language and giving the Borough ten days to respond before filing an unfair practice charge regarding the 1988-89 agreement. By memo of the same date (R-3), Garger responded to R-2 informing Serrao that: the Borough negotiating committee was willing to discuss any language problems and the Borough had given its position on the preservation of rights and savings clause language and was awaiting the SOA's response. Although Serrao initially believed there had been an agreement between the Borough and SOA, after sending R-2 and receiving R-3 Serrao admitted there had been no agreement over Articles 6 and 38 of the SOA's 1988-89 agreement (T99-T102).

8. On September 14, 1989 the Borough met with representatives of the SOA and PBA to begin negotiations for 1990-91 agreements (R-3). At that meeting the SOA and PBA submitted a joint proposal (CP-9/R-6) which made no reference to Articles 6 and 38. Attached to CP-9 was a sheet listing additional items for the SOA unit (R-6) which also made no reference to Articles 6 or 38.[10/]

10/ There is some confusion in the record as to when CP-9/R-6 was submitted but I find it occurred before September 28, 1989 (R-4, CP-13). Serrao testified that he believed CP-9/R-6 was submitted in October 1989, but he wasn't sure (T108). I find he was mistaken. A letter from Borough Manager Garger to Serrao dated September 28, 1989 (R-4) made reference to separate demands by the two units during contract negotiations. A letter by the PBA president to Garger dated October 3, 1989 (CP-13) also referred to the proposals and to

Footnote Continued on Next Page

This was the first time that the joint SOA/PBA proposals that were submitted as a package included a separate list of items for one unit (T108).

On September 27, 1989 the SOA's attorney sent the Borough's attorney a letter (R-18) asking for the Borough's position on Articles 6 and 38 of the SOA's 1988-89 agreement. The SOA indicated it sought the inclusion of those clauses. The Borough's attorney responded to R-18 on October 23, 1989 (R-19) rejecting those articles, but offering a counterproposal for Article 6, and offering to accept the first paragraph of Article 38.

But during the time between R-18 and R-19, the union presidents communicated with Garger. On September 28, 1989 (R-4), Garger, in response to CP-9/R-6 notified Serrao that since the SOA and PBA made separate contract demands (on September 14, 1989) the Borough was seeking separate negotiations with each group. He also asked Serrao to respond to R-3. On or before October 3, 1989, Serrao, by R-5, responded to R-4 and R-3. He indicated that the SOA did not intend to negotiate separately from the PBA, it was only seeking to get its 1988-89 contract resolved and signed. Also in response to R-4, PBA president John Ietto notified Garger (CP-13)

10/ Footnote Continued From Previous Page

R-4. Exhibits R-4 and CP-13 only make sense if the CP-9/R-6 proposal was submitted prior thereto, and since R-3 referred to the proposals and to a negotiations session scheduled for September 14, I find that CP-9/R-6 was submitted during that session.

that: CP-9 were the proposals for both the PBA and SOA, R-6 was not a separate demand, but additional proposals for the SOA; and that the PBA and SOA would continue to negotiate together.

9. In early October, as well as on October 26, December 7 and 21, 1989, the SOA and PBA met with the Borough in negotiation sessions for a 1990-91 agreement, but the SOA also used those meetings as an opportunity to seek a resolution of the problems regarding its unsigned 1988-89 agreement (T47, T59-T60, T63-T64). On or before the October 26 meeting the Borough submitted its proposals for 1990-92 agreements for both the SOA and PBA (R-1), which included the elimination of Articles 6 and 38. (T76-T77, T81).[11/]

Apparently at the first October meeting the SOA and Borough agreed to refer the matter of the SOA's 1988-89 agreement to their respective attorneys with the hope that they would arrive at a tentative agreement which would be brought back to the parties (T51, T63-T65). But at the October 26 meeting there was a disagreement between the SOA and Borough over what procedure the parties agreed to in dealing with the SOA's 1988-89 agreement (T51, T65). No tentative agreement was presented by the parties' attorneys at the October 26 meeting (T67).

11/ It is not clear from the record when R-1 was submitted to the SOA and PBA. There was testimony about an early October negotiations session (T63-T64), and I am not certain whether R-1 was submitted to the unions at that time. I am therefore assuming it was submitted on or before the October 26 meeting.

On November 5, 1989 the SOA's attorney wrote to the Borough's attorney (R-20) explaining he was told that the Borough's attorney had been authorized to seek a settlement of the SOA's 1988-89 agreement. The SOA's attorney sought to arrange a date to confer with the Borough's attorney. On November 13, 1989 (R-21) the Borough's attorney responded to R-20, notified the SOA's attorney he did not have authority to settle the contract, and explained that since the SOA did not accept the Borough's counterproposal in R-19, the Borough's original position had not changed. The Borough's attorney did not have the authority to settle all SOA terms and conditions of employment, nor the authority to bind the Borough by his own actions (T133). On November 20, 1989 Capt. Freitag, a member of the SOA's negotiations team, wrote to Garger (R-13) informing him he thought the parties' attorneys were meeting regarding Articles 6 and 38 for the 1988-89 SOA agreement, but asking him to clarify the meaning of R-21. No evidence was presented showing any response to R-13.

Both Freitag and Serrao were on the SOA's negotiations team that attended the October and December 1989 meetings. Freitag testified in part that he thought the SOA's 1988-89 contract had been agreed upon (T59), and that during the December 1989 meetings the Borough's attorney told the SOA they would get the same contract that existed for the PBA (T72-T73). Serrao also testified in part that he thought there had been an agreement on the SOA's 1988-89 contract, and that Borough officials said they agreed to and would sign the SOA's draft of that agreement (T95, T100).

But I do not credit Freitag's or Serrao's above testimony to prove the parties reached an agreement on Articles 6 and 38 for 1988-89 because their other testimony was contradictory. Freitag also testified that no agreement was reached on December 7 over Articles 6 and 38 (T68-T69), he could not recall which meeting the Borough's attorney allegedly made a remark about those clauses (T72-T73), and he acknowledged that there was nothing in writing to indicate that the SOA would get the same contract as the PBA (T79). Serrao also testified that although Borough officials said they would sign the 1988-89 agreement he knew they were waiting to confer with their attorney (T95, T97), he knew from R-2 and R-3 in September 1989 that there was a dispute over the wording of the SOA's 1988-89 agreement, and he acknowledged no agreement was reached on Articles 6 and 38 (T98-T102). I credit their latter testimony and find that the SOA and Borough never reached an agreement on Articles 6 and 38 for 1988-89. No memorandum of agreement or some other writing was presented showing that the Borough had agreed to Articles 6 and 38 with the SOA, no conclusive testimony was offered that the Borough agreed to or ratified those clauses prior to the October and December 1989 meetings, no agreement was reached on those clauses during the October and December meetings, no reliable evidence was presented showing that because the Borough agreed to Articles 6 and 38 for the PBA, that it also agreed to those clauses for the SOA, and no interest arbitration award was produced for 1988-89 mandating the inclusion of those clauses in an agreement.

10. The SOA and PBA and the Borough did not reach an agreement for 1990-91 during the negotiations in October and December 1989. The SOA and PBA filed separate petitions for interest arbitration on January 8, 1990 (IA-90-90 and IA-90-91), and the Borough filed issue definition petitions on January 19, 1990 (ID-90-3 and ID-90-4). The Borough filed its brief for both ID petitions (CP-10) on or about January 24, 1990.

Interest arbitration sessions were held on March 6 and April 2, 1990 for the consolidated IA petitions, and an award (CP-11) was issued on June 29, 1990 covering both the SOA and PBA. No issue regarding Articles 6 and 37 was raised during that arbitration and CP-11 did not address those Articles (T31). There was no showing that Articles 6 and 37 of CP-1 were agreed upon for either unit before or after CP-11. As of the close of the record there was no evidence that the parties had reached an agreement on Articles 6 and 37 for either unit for 1990-91.

ANALYSIS

The Borough did not violate the Act by refusing to sign an SOA contract for 1988-89 (or 1990-91) that included a preservation of rights and a savings clause. Assuming, without deciding, that the Charge was timely filed, the SOA did not prove that it and the Borough agreed to the inclusion of those clauses in a 1988-89 agreement.[12/] In addition, there was no interest arbitration

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12/ Nor, for that matter, did the SOA prove that it and the Borough agreed to those clauses for CP-1, their proposed 1990-91 agreement.

award for 1988-89 that compelled the inclusion of those clauses in the SOA's 1988-89 agreement.[13/]

In its post-hearing brief and reply brief the SOA argued that based upon negotiations history, moral obligations, CP-12, CP-5, CP-6, and CP-7, that the preservation of rights and savings clause language has survived intact and must therefore be included in its 1988-89 agreement. It also argued that the Borough is attempting to "remove" the disputed clauses. Those arguments lack merit. The SOA has failed to distinguish between what terms and conditions of employment exist, or might exist, as part of the status quo when there is no signed collective agreement in effect, versus whether the parties have agreed to memorialize specific terms and conditions of employment in their collective agreement. The SOA vigorously argued that: arbitration awards CP-6 and CP-7 prevented a [unilateral] change from the preservation of rights and savings clause language; the language has survived intact and not been modified by a subsequent arbitration proceeding; and the Borough has no right to modify the language. But those arguments do not focus on the issue in this case.

13/ In its post-hearing brief (at 15) the SOA referred to a 1988-89 interest arbitration and that that alleged arbitration did not include the disputed clauses nor were they mentioned in that award. The SOA is either mistaken or did not present evidence of such an award. Three arbitration awards were presented in this case. CP-6 covering 1984-85, CP-7 covering 1986-87, and CP-11 covering 1990-91. No evidence of a 1988-89 arbitration was presented. The SOA might be referring to CP-11 since that award did not include or mention the disputed clauses. In either case, there was no arbitration award for 1988-89 that ordered the inclusion of Articles 6 and 38 in an SOA agreement.

Here the parties did not agree on whether to include Articles 6 and 38 in a 1988-89 agreement. That does not mean that those clauses are not part of the parties' status quo terms and conditions of employment during the time no collective agreement is in effect. But that is not the issue in this case. It is unnecessary for me to decide here what terms and conditions of employment exist, or existed, during the status quo period because even if those clauses are part of the status quo, that is not proof that the parties agreed to include those clauses in a 1988-89 contract. The Borough had the right to seek modification or elimination of those clauses during negotiations (R-19) and to reach impasse over those clauses. Despite their failure to reach agreement, there was no (a)(5) charge here, and no allegation or evidence of a change, unilateral modification in or "removal" of, preexisting terms and conditions of employment.

This case only concerns an (a)(6) allegation. That is, whether the Borough refused to sign a 1988-89 agreement. The Commission has held that its jurisdiction in (a)(6) matters is limited to determining whether an agreement has been reached, and whether a party refused to sign that agreement. Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282, 283 (¶18118 1987); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

In order to determine whether an agreement has been reached we must first discover the intent of the parties. The Supreme Court

in Kearny P.B.A. Local #21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979) listed a number of interpretative devices that have been used to discover the parties' intent. They included consideration of: the particular clauses; circumstances leading up to the creation of the contract; and review of the parties' conduct regarding the disputed provisions. In addition, in Jersey City Bd. of Ed. the Commission explained that the intent of the parties, as clearly expressed in writing, is the controlling factor, thus it concluded that the starting point in determining what the parties agreed to was an examination of their memorandum of agreement. Id. at 21.

But here the SOA did not produce a memorandum of agreement, or any other writing, showing that the Borough agreed to include those clauses in a 1988-89 agreement. Neither the clauses themselves, nor CP-12 or CP-2, nor any other document, demonstrate any evidence of agreement with the SOA over those clauses for 1988-89. In fact, a review of the circumstances and parties' conduct shows that the Borough and SOA have consistently been unable to agree on those clauses throughout the 1980's. Merely because those clauses, or similar clauses, were ordered to be included in the 1984-85 and 1986-87 agreements by CP-6 and CP-7, respectively, is not proof that the parties agreed upon their inclusion in 1988-89. Similarly, the mere fact the SOA and PBA negotiated together and the Borough agreed to include those clauses in the PBA's contract is not proof that it agreed to those clauses with the SOA.

The SOA offered no reliable evidence that the Borough agreed to those clauses prior to September 1989, and the only evidence it offered of an agreement on those clauses in the fall of 1989 was part of Serrao's and Freitag's testimony. But I did not credit that testimony because their other testimony was contradictory, the Borough's attorney had no authority to bind the Borough even if he voiced some agreement, and the Borough never ratified those clauses.

This case can be considered a "no meeting of the minds" case. In such cases the parties have agreed on specific language but disagree on what it means or how it applies; the parties admit they agreed on some language but disagree on the actual language, and have no writing of the language; or the parties negotiated over a particular topic, have no written agreement, and left the negotiations with different positions on whether an agreement was reached on that topic. See for example: North Caldwell Bd. of Ed., P.E.R.C. No. 90-92, 16 NJPER 261 (¶21110 1990); Trenton Bd. of Ed., P.E.R.C. No. 88-49, 13 NJPER 848 (¶18327 1987); Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986); Borough of Matawan., P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986).

At best, this case could be compared to the third example. The SOA argued that the Borough agreed to Articles 6 and 38. But the SOA offered no evidence that an agreement was reached on the disputed clauses during negotiations prior to the fall of 1989, and its evidence of an agreement in October or December 1989 was wholly inadequate.

Thus, the SOA failed to prove the first part of the a(6) standard. It did not prove that an agreement was reached for 1988-89 including Articles 6 and 38. Furthermore, since the SOA did not establish that the Borough would, or has, refused to sign a 1988-89 or 1990-91 agreement absent those clauses, I cannot find that the Borough violated the Act.[14/]

The SOA's reliance on Borough of Clayton, P.E.R.C. No. 88-99, 14 NJPER 325 (¶19119 1988) is misplaced. That case involved an (a)(5) and (6) allegation, and the Commission found the employer unlawfully refused to sign an agreement containing the same medical clause as contained in the predecessor agreement when it unilaterally changed the medical payment practice. In that case the medical clause had been in the predecessor agreement, the parties engaged in interest arbitration, and the arbitration award did not modify that clause.

Here there was no (a)(5) allegation, and no evidence of a modification or change in any term and condition of employment. The SOA did not offer the 1984-85 or 1986-87 agreements to establish what preservation of rights language existed at that time or what, if any, savings clause language existed at that time. Most important, however, was that there was no evidence of an interest arbitration award for 1988-89, thus no requirement on the inclusions for that agreement. Absent an interest arbitration award (or an

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14/ The SOA is entitled to seek a signed agreement absent the disputed clauses.

award affecting those clauses), the content of the SOA's 1988-89 (and 1990-91) contract had to be determined by agreement of the parties. There was no agreement to include Articles 6 and 38.[15/]

Accordingly, based upon the above facts and analysis, I make the following:

Recommendation

I recommend the Complaint be dismissed.[16/]

Arnold H. Zudick
Hearing Examiner

Dated: March 21, 1989
Trenton, New Jersey

15/ Regarding the a(7) allegation in the Charge, there was no evidence that the Borough violated any Commission rule or regulation.

16/ To the extent the Charge and Complaint was meant to cover 1990-91 as well as 1988-89, the findings, analysis and recommendation are the same. The 1990-91 arbitration award did not address Articles 6 an 37, thus there is insufficient basis to require the Borough to sign CP-1 as is.

This decision does not mean that the language in Articles 6 and 38 (or 37) is no longer part of the parties' status quo terms and conditions of employment assuming it has been part of those terms and conditions of employment.