P.E.R.C. NO. 2005-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Respondent,

-and- Docket No. CO-2003-173

KEARNY Council No. 11,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Town of Kearny violated the New Jersey Employer-Employee Relations Act when it inserted language into the contract with Kearny Council 11 that had not been agreed to in negotiations. The Commission orders the Town to remove the inserted language, process grievances without the inclusion of the language, and post a notice of its violation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2005-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Respondent,

-and- Docket No. CO-2003-173

KEARNY COUNCIL NO. 11,

Charging Party.

Appearances:

For the Respondent, Ciffeli & Davey, attorneys
(Kenneth Davie, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys
(Paul L. Kleinbaum, of counsel)

DECISION

On May 10, 2004, the Town of Kearny filed exceptions to a Hearing Examiner's report and recommendations. The Hearing Examiner found that the Town violated its duty to negotiate in good faith under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when

1/ These provisions 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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

its business administrator inserted language into Article XII of the parties' contract without Council 11's knowledge and consent. The Hearing Examiner recommended that the Town be ordered to remove the language from the contract, process grievances without that language, and post a notice of its violation.

The unfair practice charge was filed by Kearny Council No. 11 on January 10, 2003. On June 16, a Complaint and Notice of Hearing issued. On July 20, the Town filed an Answer, asserting that the contract was signed with Council 11's knowledge and consent.

On October 15 and 16, 2003, Hearing Examiner Wendy L. Young conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 25, 2004, the Hearing Examiner issued her report and recommendations. H.E. No. 2004-13, 30 NJPER 152 (¶61 2004). On May 10, the Town filed exceptions. On June 7, the Association filed an answering brief urging adoption of the Hearing Examiner's recommendations.

N.J.S.A. 34:13A-5.3 requires both parties to negotiate in good faith. When an agreement is reached on terms and conditions of employment, it must be embodied in writing and signed. The duty to negotiate in good faith precludes either party from unilaterally inserting language into a final contract absent

negotiations and agreement about that language. This prohibition applies here even if management thought it was simply clarifying existing contract language. It applies even if the added language does not substantively change the meaning of the parties' agreement. The integrity of the negotiations process requires that parties reduce to writing and sign what they agreed to, nothing more and nothing less.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, including her credibility determinations (H.E. at 2-18), with one modification noted below.[2/] We now summarize the key events and specifically respond to the Board's exceptions.

Crossing guards were formerly represented by Teamsters Local 97. In 1999, Council 11 was certified to represent them and it took over the Teamsters contract. Council 11 subsequently entered into a contract with a term of January 1, 2001 through December 31, 2003. That contract is the subject of this dispute.

Article XII, entitled Pension, contains the following language. The underlined language is in dispute:

> 2. Each employee shall be entitled, upon his/her retirement from employment with the Town of Kearny, for payment for unused accumulated sick leave, up to a maximum of forty-five (45) days at the prevailing wage

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2/ The Hearing Examiner found that a personnel technician took home the July 12 draft of the contract. R-1 is the copy she marked up, but it is a different version than the July 12 draft. We modify the facts to reflect that difference.

> rate (as defined in the following example) in effect at the time of such death or retirement, provided such payment is legal under the laws of the State of New Jersey. Accumulated sick days shall be evaluated as the years they were accumulated.
> EXAMPLE:
> 1979-accumulated five (5) days @ $10.00 per day= $50.00
> 1981-accumulated five (5) days @ $15.00 per day= $75.00
> Payment for accumulated sick time upon retirement would be equal to calculated amounts earned each year. In the above
> EXAMPLE, payment would add up to:
> $50.00
> $75.00
> $125.00 payment in full

The wording in paragraph 2 is identical to that in the prior contract except for the underlined language.

The parties had two negotiations sessions before entering into a memorandum of understanding on a salary increase, an insurance co-pay increase, and an extra personnel day. There was no discussion concerning any change to Article XII.

The union's general membership ratified the agreement and the Town Council adopted this resolution:

> The collective bargaining agreement between the Town and the Union is hereby extended for the period of January 1, 2001 to December 31, 2003 and all provisions therein are continued except as stated in the attached agreement.

The attached memorandum of agreement codified the three agreed-upon changes.

The business administrator prepared the first draft contract which was reviewed by Council 11 representatives. There was no change to Article XII.

Council 11 representatives reviewed a draft contract again two days before signing; it did not contain any changes to Article XII. Council 11 representatives did not conduct a word-for-word review of the contract at the signing. The union discovered that the disputed language had been added to the contract after a crossing guard died and a dispute arose over the calculation of accumulated sick leave. A grievance challenging the leave calculation is pending and this litigation will decide whether the underlined language remains in the contract. An arbitrator will then decide the grievance and determine the wage rate to be applied to the accumulated sick leave of the deceased crossing guard.

The Hearing Examiner determined that Council 11 proved that it did not know about, and never agreed to, the disputed addition to Article XII. The Hearing Examiner believed the testimony of Council 11's witnesses and found that testimony consistent with the lack of any documentation to support the Town's assertion that the parties had agreed to add the disputed language. The Hearing Examiner's conclusion was based largely on her assessment of the credibility of both parties' witnesses and we will not disturb credibility determinations absent compelling circumstances not present here. Salem Cty., P.E.R.C. No. 87-122, 13 NJPER 294 (¶18124 1987); Clark Tp., P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980); see also N.J.S.A. 52:14B-10(c) (agency

head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record).

The Town asserts in its first exception that Council 11 failed to prove its allegation that the Town surreptitiously changed the contract; in particular, that Council 11 did not meet its burden of presenting clear and convincing evidence that the business administrator willfully and deliberately changed the contract. It contends that Council 11 did not prove that the administrator acted with specific intent to deceive Council 11 and that the Hearing Examiner improperly redefined the Complaint.

We need not determine whether the business administrator added the language with an intent to deceive Council 11 or whether he simply added it to clarify an article he thought needed clarification. The charge alleges that the language was added without agreement and that suffices to allege a violation of the Act. Council 11 proved that the language was added.

The Town's second exception asserts that the Hearing Examiner improperly attributed the word "specific" to the recollections of Council 11 witnesses while at the same time discounting the testimony of the Town's witnesses as general. For example, the Town claims that its witnesses were penalized

for not taking notes at informal meetings during the summer of 2001 yet Council 11 witnesses also took no notes. However, Council 11's witnesses testified and the Hearing Examiner found that there were no meetings and no agreement to modify Article XII. One would not expect notes if there were no such meetings and no such agreement.

As part of its second exception, the Town also asserts that the Hearing Examiner shifted the burden of proof to the Town to prove that the parties negotiated the six words in question, when the burden should be on Council 11 to prove that the parties did not. We conclude that the Hearing Examiner properly placed the burden on Council 11 to prove that the employer's conduct violated its duty to negotiate in good faith by inserting language in the contract that had not been discussed or agreed to.

The Town's third exception asserts that the Hearing Examiner improperly limited the review of the nature and extent of the parties' negotiations. The Town claims that the economic issues were not the sole matters negotiated and that the parties agreed that a number of language issues had to be changed. The Hearing Examiner, in fact, found that a number of corrections were agreed to and incorporated into a final contract. What was not agreed to, however, was a change in Article XII.

As part of that exception, the Town argues that the Hearing Examiner had no basis to find a violation given her statements that any substantive changes in the contract would have had to have been with Council 11's consent yet she was not deciding whether the disputed language makes a substantive difference gave her no basis to find a violation of the Act. We agree with the Hearing Examiner that it is for an arbitrator to decide the import of the accumulated sick leave provision and that the disputed language does not belong in the current contract absent an agreement to place it there.

The Town's final exception is that the Hearing Examiner improperly recommended deleting the language from the agreement, an extraordinary step unsupported by the proofs. We hold that the remedy of deleting the language is both supported by the facts and necessary to remedy the violation of the Town's negotiations obligation.

The Town produced two draft contracts without the disputed change and submitted them to Council 11 for review. Council 11 never saw any other draft with language added to Article XII. Union representatives reviewed the final draft contract word-for-word two days before it was signed, and testified that they found no change to Article XII. The Hearing Examiner credited their testimony, testimony that is consistent with the documentary record. Accordingly, the facts prove that the Town violated is

negotiations obligation by placing language in Article XII. The logical remedy for this violation is to order the Town to remove the disputed language and to process the grievance without inclusion of that language. This remedy appropriately puts the parties back to where they would have been absent the employer's insertion of the language.

ORDER

The Town of Kearny is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by inserting language into the contract with Kearny Council 11 that had not been agreed upon in negotiations.

2. 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, particularly by inserting language into the contract with Kearny Council 11 that had not been agreed upon in negotiations.

2. Take this action:

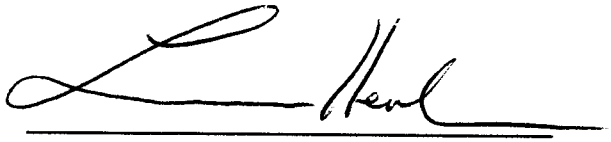
1. Remove the phrase "as defined in the following example" from Article XII of the parties' contract.

2. Process grievances regarding Article XII without the inclusion of that language.

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

4. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz and Watkins voted in favor of this decision. Commissioner Mastriani abstained. Commissioner Sandman abstained from consideration. None opposed.

DATED: August 12, 2004
Trenton, New Jersey
ISSUED: August 13, 2004

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by inserting language into the contract with Kearny Council No. 11 that had not been agreed upon in negotiations.

WE WILL cease and desist from 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, particularly by inserting language into the contract with Kearny Council No. 11 that had not been agreed upon in negotiations.

WE WILL remove the phrase "as defined in the following example" from Article XII of the parties' contract.

WE WILL process grievances regarding Article XII without the inclusion of that language.

CO-2003-173
Docket No.

TOWN OF KEARNY
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E NO. 2004-13

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

In the Matter of

TOWN OF KEARNY,

Respondent,

-and- Docket No. CO-H-2003-173

KEARNY Council No. 11,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Town of Kearny violated N.J.S.A. 5.4a(1) and (5) when it unilaterally inserted language into Article XII of the parties contract without negotiation with Council No. 11. She found that Council No. 11 never agreed to the change in language and cannot, therefore, be bound by the bargain it never made. The Hearing Examiner recommends that the Commission order the Town to remove the language from Article XII and process grievances regarding Article XII absent the inclusion of that language.

H.E NO. 2004-013

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

In the Matter of

TOWN OF KEARNY,

Respondent,

-and- Docket No. CO-H-2003-173

KEARNY Council No. 11,

Charging Party.

Appearances:

For the Respondent,
Ciffeli & Davey, attorneys
(Kenneth Davie, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 10, 2003, Kearny Council No. 11 (Council 11) filed an unfair practice charge (C-1)[1/] against the Town of Kearny. The charge alleges that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

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1/ "C" refers to Commission, "J" refers to joint exhibits, "CP" and "R" refer to charging party's exhibits and respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearing are referred to as "1T" and "2T".

specifically, 5.4a(1) and (5)[2/] by incorporating language into the parties' collective negotiations agreement without the knowledge or consent of Council 11. As a remedy, Council 11 seeks the removal of that language from the parties' agreement.

On June 16, 2003, a Complaint and Notice of Hearing issued (C-1). On July 20, 2003, the Town filed an Answer, denying it violated the Act and setting forth various separate defenses including, specifically, that the parties' contract containing the language in controversy was executed and approved with the knowledge and consent of Council 11 and/or its agents (C-2).

Hearings were held on October 15 and 16, 2003. After two extensions of time, the parties' submitted post-hearing briefs by January 30, 2004 and reply briefs by February 13, 2004. Based upon the entire record, I make the following:

FINDINGS OF FACT

Background/Overview:

1. The Town of Kearny is a public employer within the meaning of the Act. Council 11 represents two separate units of Kearny employees: a wall-to-wall unit of blue and white collar

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2/ These provisions 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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

employees and a smaller, separate, unit consisting of crossing guards (1T 113, 1T139, 1T166, 2T14). Council 11 was certified to represent crossing guards in 1999. Crossing guards were previously represented by Teamsters Local 97 (1T43). It is the crossing guard contract which is at issue in this matter (C-1).

2. Council 11 negotiated the crossing guard's most recent contract with a term of January 1, 2001 through December 31, 2003 (J-1). The previous contract was effective from January 1, 1995 through December 31, 2000; it was negotiated by Local 97 (J-3). In 1999 when Council 11 was certified to represent crossing guards, the Local 97 contract was modified to reflect the change in majority representative. All other provisions of that contract, including the term of the agreement, remained the same (J-3, 1T123).

3. Article XII of the 1995-2000 contract (J-3), entitled Pension, contained the following language in paragraph 2:

> Each employee shall be entitled, upon his/her retirement from employment with the Town of Kearny, for payment for unused accumulated sick leave, up to a maximum of forty-five (45) days at the prevailing wage rate in effect at the time of such death or retirement, provided such payment is legal under the laws of the State of New Jersey. Accumulated sick days shall be evaluated as the years that they were accumulated.
> Example:
> 1979- accumulated-five days @ $10.00 per day = $50.00
> 1981- accumulated-five days @ $15.00 per day = $75.00
> Payment for accumulated sick time upon retirement would be equal to calculated amounts earned each year. In the above example, payment would add up to:
> $50.00
> $75.00

$125.00 payment in full

In the 2001-2003 contract (J-1), Article XII, entitled Pension, at paragraph 2 contains the following language:

> Each employee shall be entitled, upon his/her retirement from employment with the Town of Kearny, for payment for unused accumulated sick leave, up to a maximum of forty-five (45) days at the prevailing wage rate (as defined in the following example)in effect at the time of such death or retirement, provided such payment is legal under the laws of the State of New Jersey. Accumulated sick days shall be evaluated as the years they were accumulated.
>
> EXAMPLE:
>
> 1979-accumulated five (5) days @ $10.00 per day= $50.00
> 1981-accumulated five (5) days @ $15.00 per day= $75.00
>
> Payment for accumulated sick time upon retirement would be equal to calculated amounts earned each year. In the above
>
> EXAMPLE, payment would add up to:
>
> $50.00
> $75.00
> $125.00 payment in full [Emphasis added].

The wording in paragraph 2 is identical to the previous contract (J-3) except for the emphasized language, "as defined in the following example". The examples are the same in both contracts.

4. Council 11 President Kevin Murphy first became aware of the change to Article XII in July 2002 when Lt. Robert Wilson from the Kearny Police Department called him. A crossing guard had died. Wilson had questions about calculating the guard's rate of pay for accumulated sick leave under Article XII. He told Murphy that Personnel Technician Kimberley Bennett instructed him to calculate accumulated sick leave at the rate in

place when it was accumulated, not at the prevailing wage rate in effect at the time of death which would have been a greater amount (1T131-1T132, 1T158, 1T183-1T184).

After speaking to Wilson, Murphy filed a grievance on behalf of the deceased employee regarding the amount owed for accrued sick days because he viewed Bennett's instruction as a change in policy (J-4, 1T88, 1T131-1T134). In preparation for the grievance Murphy reviewed the contract. He then realized he would have a problem with the grievance because of the added language, "as defined in the following example" (1T134). Murphy telephoned Council 11 First Vice President Cynthia O'Donoghue and Crossing Guard Shop Steward Betty Regan who had reviewed drafts of the 2001-2003 crossing guard contract before it was finalized (1T79, 1T88). Neither recalled changes to Article XII (CP-1, 1T82-1T85, 1T134, 1T159).

Subsequently, at a weekly meeting with Town Business Administrator Joseph D'Arco, Murphy asked about the change in Article XII language. D'Arco instructed Bennett to look into it (1T89, 1T97, 1T105-1T106, 1T135, 1T160, 1T186-1T187, 2T45-2T46).

A couple of weeks later, at another weekly meeting with Council 11, D'Arco advised Murphy that as far as he knew, the added language was in the contract when it was given to Council 11 for review and signature (2T47). Murphy told D'Arco that he

"blew it" by not reading the contract again when he signed it (1T161).

Negotiations in Spring for the 2001-2003 Contract

5. In the spring of 2001, after completing negotiations for the blue and white collar unit, Murphy approached D'Arco to begin negotiations for the crossing guard contract (1T113, 1T139, 2T17).[3/] Although D'Arco offered to handle negotiations formally (with counsel present), he had no preference. Murphy and D'Arco agreed to proceed informally (without counsel).

D'Arco negotiated on behalf of the Town with the assistance of Bennett (1T165, 1T167, 2T19-2T20). D'Arco was hired by Kearny in 2001 as business administrator and was responsible for the Town's day-to-day operations, including contract negotiations, budget preparations and personnel matters as well as establishing policy through the governing body (R-3, 2T11, 2T13). D'Arco came to Kearny with thirty-five (35) years experience in municipal government, specifically twenty-five (25) years as a Town Administrator/City Manager for various municipalities (2T12). His previous experience included contract negotiations (2T14). As a negotiator he understood that contracts can only be modified by agreement, memorialized in writing and signed by the parties (2T48).

3/ In the past the crossing guard contract was "piggy-backed" onto the contract negotiated for the blue and white collar unit (1T98).

Since 1996 Bennett, as personnel technician, was responsible for health benefits, workers compensation and various personnel matters. She was involved with contract negotiations and was familiar with the contracts for both Council 11 units (1T165-1T166).

Council 11 was represented by Murphy, Regan and Crossing Guard Carol Targett (1T32, 1T44, 1T57-1T58, 1T113-1T114). Murphy held various offices in the union including shop steward, trustee, vice-president and president. He had been involved with negotiating Council 11's blue and white collar agreement (1T137-1T138). Regan had been a shop steward since 1995 and was on the negotiations committee for the 1995-2000 contract (1T43). Targett never previously held union office. This was her first time on a negotiations committee (1T65-1T66).

6. Before formal negotiations began, D'Arco told Murphy that he would be offering the crossing guards the same 3.8% salary increase and $5.00 insurance co-pay that was offered and agreed to by the blue and white collar unit. The most important issue for Council 11 was salary and for the Town prescription co-pay (1T114, 1T146-1T147, 2T19).

At a union luncheon meeting, Murphy brought D'Arco's initial proposals back to Regan, Targett and Crossing Guard Carol Manley. They rejected the terms of the offer because the co-pay increase represented a far greater increase (300%) for the crossing guards

than for the blue and white collar employees (1T68-1T69, 1T114-1T115). They discussed, however, accepting the co-pay increase in exchange for an extra personal day (1T115, 2T49).

7. There were only two negotiation sessions that spring before the parties reached an understanding (J-2, 1T44-1T45, 1T113-1T114, 1T139, 1T142-1T143, 2T19, 2T49).

At the first negotiations session, D'Arco told Council 11 that the contract language needed a lot of work. D'Arco was informed that the 1995-2000 contract was the old Teamsters contract which was adopted by Council 11 when it became majority representative for the crossing guards in 1999 (2T20-2T21, 2T51). D'Arco discussed with Murphy keeping the contract open for editing "as we go along for the next three years." (2T51). The parties have, from time to time, agreed to superficial language changes since the execution of the current contract (2T51-2T52). These changes have been signed off on by the Town and Council 11 (2T104).

D'Arco also explained at the first session that he preferred to negotiate and execute a final contract and then introduce salary ordinances (2T20). It was explained to him that the practice in Kearny was to introduce the salary ordinance immediately after the parties reached agreement and then to draft the contract (1T21).

At the first negotiations session, both sides agreed to the 3.8% salary increase (1T116). The parties also agreed to an extra personal day in exchange for the co-pay increase. There was some discussion regarding obsolete language in the contract but there was no discussion concerning any change to Article XII (1T116-1T117, 1T194, 2T75, 1T205).

8. The second negotiations session took place a couple of days later. Council 11 confirmed that after meeting with the crossing guards, the terms discussed at the first session were acceptable. Agreement was reached (J-2). The only other item discussed was the preparation of a draft contract by D'Arco (1T119).

The general membership ratified the agreement reached by the parties on May 25, 2001 (J-2). On June 12, 2001 the Town Council adopted a resolution approving the 2001-2003 agreement. The Resolution contained the following language:

> The collective bargaining agreement between the Town and the Union is hereby extended for the period of January 1, 2001 to December 31, 2003 and all provisions therein are continued except as stated in the attached agreement. (J-2)

The attached memorandum of agreement codified three changes to the terms and conditions of employment from the 1995-2000 contract: salary increases ranging from 2.5% to 3.8% over the three year contract term; one additional personal day; and an

amendment to Article XI, Section 4 to reflect the increase in co-pay to $5.00 per prescription (J-2, 1T140)[4/].

Murphy had asked that the payment not be made when the Council Resolution and Salary Ordinance was passed in June 2001 but be held over the summer when the crossing guards were collecting unemployment so that there would be no problems with the unemployment checks. The retroactive salary increases were paid to the crossing guards when they returned in September 2001 (J-2, R-2, 1T130, 1T143-1T144).

Reviewing Contract Drafts in Summer 2001:

9. The first draft contract was prepared by D'Arco on or about July 12, 2001. D'Arco gave Murphy the draft for review (CP-1, 1T121, 1T149). Murphy in turn gave the draft to O'Donoghue for review and comparison with the 1995-2000 contract. She had not been involved in the negotiations for the 2001-2003 crossing guard contract but had experience as an officer with Council 11 for fifteen (15) years (J-3, CP-1, 1T79, 1T121, 1T124, 1T149).

After a few weeks, when Murphy had not heard from O'Donoghue, he contacted her. She explained that she had misplaced the draft and had not yet done the review. Although embarrassed, Murphy called D'Arco to request another copy of the

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4/ The salary increases and co-pays were the same as the blue and white collars contract. Only the extra personal day was different (1T98-1T99, 1T141).

draft for review. D'Arco printed out another copy. At the same time, Murphy also asked Regan to review the draft with another crossing guard (CP-1, 1T36, 1T125, 1T150, 2T60, 2T120).

10. Regan and Targett reviewed the draft by having one read from the expired contract while the other wrote notes on the draft when they found mistakes (J-3, CP-1, 1T36, 1T52, 1T62-1T63, 1T70). When comparing the previous contract with the draft, they found no change to Article XII. Specifically, the language "as defined in the following example" was not in Article XII of the draft they reviewed (1T63). When the review was completed, they returned the draft to Murphy who then gave it to D'Arco for revision as per the suggested changes (1T63, 1T126).

11. While Regan and Targett were conducting their review, O'Donoghue located her misplaced draft and undertook her own review comparing the draft to the previous contract (CP-1, J-3, 1T82-1T83,1T96, 1T126). She made notes on the draft when she identified changes or mistakes (CP-1, 1T83, 1T100). She identified changes to Article VI, entitled Wages, and Article XI, entitled Hospital and Medical Life Insurance. O'Donoghue noticed no changes to Article XII. Specifically, Article XII in her draft did not contain the language "as defined in the following example" (CP-1, 1T84-1T86, 1T90).

When O'Donoghue completed her review, she gave the draft back to Murphy (CP-1, 1T87). Murphy compared the two changes

suggested by O'Donoghue with the changes suggested by Regan and Targett. He noted that O'Donoghue's suggestions were the same, so he gave her back her draft copy to keep for her records (CP-1, 1T126).

12. While O'Donoghue, Regan and Targett were conducting a review of the first draft on behalf of Council 11, Bennett took the July 12 draft home and reviewed it for D'Arco (R-1, 1T172, 1T196). She made notations on the draft identifying typographical or grammatical errors as well as inconsistencies in contract language which did not accurately reflect current benefits (1T197-1T202). For instance, Bennett suggested adding the words "on a voluntary basis" to Article V, entitled Pay Treatment for Extended Illness, to reflect that crossing guards have an option to enroll in the short term disability plan; it is not mandatory (1T175, 1T197). Bennett made no changes to Article XII (1T178, 1T203). She returned her marked up draft to D'Arco who then made his own notations on Bennett's draft (R-1). Specifically, D'Arco marked Bennett's notations "OK" in several, but not all, places, crossed out other phrases and added the phrase "as defined in the preceeding [sic] example"[5/] to Article XII (R-1, 2T28-2T36).

5/ See Fact No. 13 for D'Arco explanation of language change from draft to final contract - e.g. "preceeding" [sic] to "following".

13. The parties disagree as to whether any formal or informal meetings or discussions took place during the summer of 2001 regarding changes in contract language. Both Bennett and D'Arco testified generally that the changes noted in their draft (R-1) were discussed with Council 11 at summer meeting(s) and subsequently incorporated into the final draft given to Regan, Targett and Murphy for review and/or signature in September 2001 (J-1, R-1, 1T179, 1T196, 1T199-1T200, 1T203, 1T214, 2T28, 2T40). Their testimony, however, was inconsistent and vague. Neither D'Arco nor Bennett had specific recollections of the number of meetings, when they took place or who was present (1T196, 1T199-1T200, 1T204-1T205, 2T28, 2T41, 2T61-2T62, 2T64, 2T94-2T95). They took no notes at the meetings and could not otherwise corroborate their testimony regarding the meetings (1T205, 1T208, 2T7, 2T51). In particular, when Bennett was asked whether the insertion of "as defined in the following example" in Article XII was discussed with Council 11 she responded:

> A. I don't know.
>
> Q. Certainly you don't recall that taking place at any of these meetings that you say took place, do you?
>
> A. The changes in the wording, "no". (1T205)

Additionally, when D'Arco was asked to explain why his draft language in R-1, "as defined in the preceeding [sic] example", was different from the wording in the final version of the

contract in J-1, "as defined in the following example", he testified that Council 11 suggested the use of the word "following" instead of "preceeding [sic]" at a summer meeting (2T37). D'Arco, however, made no note of this revision to his copy of R-1 during or after the meeting nor did Council 11 initial its approval of the change in R-1 or in any other document (1T211, 2T68-2T69).[6/]

In other testimony, when asked if he had a specific recollection of what took place at one of the "summer meetings" with Council 11 to discuss a contractual language change to Article IX, entitled Vacation,, D'Arco replied "No, I can only go by my practice" (2T67). Also, in describing the summer of 2001 and the preparation of the final version of the contract, D'Arco responded "[T]here were so many interactions, you know, formal and informal in nature, that it does get confusing..." (2T41).

By contrast, Murphy, Targett and Regan testified consistently that, with the exception of the O'Donoghue and Regan/Targett draft reviews in July and September, there were no

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6/ D'Arco's answer to Interrogatories propounded by Charging Party during discovery were also inconsistent with his testimony (CP-3, 2T81-2T83). In his answers to Interrogatories, D'Arco wrote that R-1 notations were made only by him. His testimony, corroborated by Bennett, however, confirmed that they both made the notations in R-1. When asked on cross examination to explain the inconsistency, D'Arco responded that he told his attorney the correct answer but he (D'Arco) did not verify that the Interrogatory answer was correct before signing it (2T82).

meetings, formal or informal, or discussions concerning language changes or other contract revisions before the final version of the contract was executed by Regan and Murphy in September.[7/] Specifically, they testified that there was no discussion about, or approval of, the language, "as defined in the following example", inserted in Article XII (CP-1, R-1, J-1, 1T49-1T50, 1T60-1T61 1T146, 2T109, 2T115-2T116). I credit their testimony. It was more reliable than Bennett's and D'Arco's on these points.

Regan does not work during the summer and, therefore, would have reason to remember returning over the summer to discuss or meet about the contract. She specifically recalled not returning (2T106-2T107, 2T115-2T116). Additionally, Murphy recalled that he returned approximately two weeks after July 12 to get another copy of the first contract draft because O'Donoghue had misplaced her copy. Murphy specifically recalls that he had no substantive discussions with D'Arco over contract changes at that time (2T120). Murphy remembers this encounter because he was embarrassed to ask D'Arco for another copy. Murphy was on

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7/ O'Donoghue's testimony on cross examination was confusing regarding whether there were negotiations during the summer about language changes (1T94-1T95). Her testimony, however, was consistent that she proof read the draft with the previous contract and noted revisions. There was no change to Article XII in her draft review. Since she was not a member of the negotiations team and her only participation in the process was to review the first contract draft, her testimony does not corroborate D'Arco or Bennett as to whether there were negotiations sessions during the summer (1T78-1T79,1T90,1T100, CP-1).

vacation from August 10 through August 26, 2001 and did not return to meet with D'Arco or anyone to discuss changes to the contract (2T108, 2T120). I credit Regan and Murphy's testimony.

Based on the foregoing, I find that there was no discussion before or after execution of the June 12, 2001 agreement (J-2) regarding changes to Article XII. Additionally, there is no credible evidence to support that negotiations sessions, informal or formal, took place with Council 11 during the summer of 2001 that could have resulted in the insertion of the phrase "as defined by the following example" in Article XII. Whether there were negotiations sessions or not, the disputed language was not in the contract drafts reviewed by O'Donoghue, Regan or Targett during the summer of 2001.

Execution of the 2001-2003 Contract

14. In September 2001, sometime after the beginning of the school year, D'Arco contacted Murphy to confirm that the changes Regan and Targett suggested were made and the contract was ready to be signed. Murphy indicated that Council 11 wanted one more opportunity to review the contract word-for-word with the previous contract. D'Arco agreed and gave Regan and Targett the opportunity to review the contract during working hours (1T127).

Thereafter, Bennett gave Regan and Targett the contract for a second and final review in municipal council chambers. The review was conducted in the same manner as the first review with

Regan reading the previous contract while Targett made any corrections on the new agreement (J-3, 1T38, 1T74). The draft contained no language changes to Article XII. It was identical to the previous contract (1T38-1T39). Specifically, the words "as defined in the following example" were not in Article XII of the final draft they reviewed (1T64). There were, however, a couple of minor changes, such as misspellings, picked up by Regan and Targett (1T128-1T129). When Regan and Targett finished their review they returned the contract and draft with their suggested changes to Bennett for final revision (1T40, 1T74). Regan and Targett then returned to work (2T107).

Approximately two days later[8/], Murphy picked up Regan at 1:00 p.m. from her crossing guard post and returned with her to D'Arco's office to sign the contract. D'Arco reviewed the changes that Regan and Targett had suggested after their draft review a couple of days before. There was no mention of any

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8/ Bennett's recollection was that the review and signing took place on the same day but her testimony was vague (1T206-1T207, 1T216). I do not credit Bennett's testimony. Additionally, D'Arco's recollection regarding the execution of the contract was clouded by his busy meeting schedule. He had no precise recollection (2T43-2T44). By contrast Murphy's and Regan's recollections were specific and consistent. Regan and Targett were given time-off during the working day to conduct the final contract review which took place in council chambers. They then returned to work (2T107-2T108, 2T113). Murphy recalls picking Regan up a couple of days later from her crossing guard post at 1:00 p.m. to go to D'Arco's office to sign the contract (1T128, 2T117, 2T121). Regan confirmed this recollection (2T107).

changes to Article XII. Satisfied that the suggested changes were made, Murphy and Regan signed the contract. Neither conducted a word-for-word review of the contract before signing on that day (J-1, 1T40-1T42, 1T128-1T129, 1T136-1T137, 1T161-1T162, 2T116-2T117, 2T122). Murphy felt that since Regan and Targett had reviewed the contract word-for-word a couple of days before and Regan was satisfied with the changes D'Arco showed her, it was not necessary to review the contract again (1T136, 2T122). The signed contract was given to Bennett who sent Council 11 a copy a few days later (J-1, 1T42). Neither Murphy nor Regan took a copy with them that day (1T129). In hindsight, Murphy viewed his decision as a mistake not to conduct a word-for-word contract review in D'Arco's office before signing (1T136-1T137).

ANALYSIS

The issue is whether the Town violated the Act by inserting language into the crossing guard contract which was not the subject of negotiation or agreed to by the parties. The disputed language, contained in Article XII of the contract, concerns the rate of compensation for accumulated sick leave upon an employee's death or retirement. The interpretation of Article XII is not at issue in this case. It is the subject of grievance arbitration. At issue here is whether the contract should be

corrected by removing the language "as defined in the following example".

Council 11 contends that since compensation for accumulated sick leave is a mandatorily negotiable subject, the Town was obligated to negotiate before changing the level of compensation for sick leave upon death or retirement. It asserts that no change to Article XII was negotiated between the parties. The language added to Article XII without its consent, therefore, should be removed. It asserts that the Town may not benefit by a bargain it never made with Council 11.

The Town denies it made any changes to the contract without Council 11's knowledge or consent. Specifically, it counters that Council 11 knew and agreed to the insertion of the phrase, "as defined in the following example", added to Article XII. The Town contends Council 11 cannot be excused from the unintended consequences of the bargain it negotiated; contracts are not reformed for mistakes. In the alternative, the Town contends that even if Council 11 did not negotiate or agree to the added language, it was discoverable by Council 11 in their draft reviews. Finally, it asserts that the added language makes no substantive or material change to Article XII and is ministerial in nature. Therefore, even if the change was made without negotiation or agreement, it does not implicate a violation of the Act.

N.J.S.A. 34:13A-5.3 provides that "when an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." The purpose of the written agreement is to memorialize those terms and conditions of employment which the parties agreed to in negotiations.

Ordinarily, the Commission is reluctant to set aside an agreement which is clear on its face. A party seeking such relief must establish by "clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what the parties intended." Hillside Bd. Of Ed., P.E.R.C. No. 89-57, 15 NJPER 13, 14 (¶20004 1988).

In Hillside, the Commission, citing J. Calamari and J. Perillo, Contracts, 2d ed., §9-31 at 312 (1978), wrote:

> Contracts are not reformed for mistakes; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of mistake. They will, however, rewrite a writing which does not express the bargain.

Here, Council 11 seeks to reform its contract to remove language which was not negotiated or agreed to by the parties. The evidence supports this position. The language change was not part of the parties' negotiations or consented to by Council 11 whether the disputed language in Article XII was added after the

final draft review two days before the signing in D'Arco's office or whether it was added by D'Arco and/or Bennett after the signing as part of a continuing effort to clean up contract language. The change to Article XII was simply not the bargain agreed to by the parties and, therefore, falls into the exception permitting reformation of the contract.

The facts specifically demonstrate that there was no discussion of any change to Article XII in the two negotiation sessions leading to the Memorandum of Agreement signed by the parties in June 2001. The memorandum codified three changes to the terms and conditions of employment: salary increases, an extra personal day and an increase in prescription co-pay. All other provisions remained in effect unchanged, including Article XII. Although certain typographical and grammatical errors were corrected by Kim Bennett in her draft review for D'Arco and subsequently incorporated into the final contract, none involved changes to Article XII. The only indication that a language change to Article XII was contemplated were notes in D'Arco's own handwriting on his working draft. There is no evidence that D'Arco's notes were discussed with Council 11, incorporated in the contract drafts reviewed by Council 11 or that Council 11 subsequently approved the addition of the language in dispute.

If the added language was in the final contract given to Council 11 President Murphy and union member Regan for signature,

it was there without their knowledge. Having conducted a word-for-word review of the contract two days previously and noting no change to Article XII, Murphy and Regan had no reason to do a word-for-word review again in D'Arco's office before signing the contract, especially when D'Arco highlighted the specific changes which were made to the contract as a result of their review a couple of days before. None of the changes highlighted by D'Arco's comments prior to signing noted any language change to Article XII. Even though Murphy admitted that in retrospect he made a mistake by not reviewing the contract word-for-word once again when he signed it in D'Arco's office, this admission is not a bar to reformation.

The Act requires that contract negotiations be conducted in good faith by all parties. Good faith negotiations, whether conducted formally or informally, presuppose an exchange of proposals and a conscious acceptance, rejection or counter to all offers. Both sides are entitled to the benefit of the negotiated bargain. When D'Arco undertook the task of reducing the negotiated agreement to writing, it was implicit that he would make changes reflected by the parties' memorandum of understanding. Any other substantive changes would have to be with the consent and knowledge of Council 11. Here, there was no negotiation of the language added to Article XII and, therefore, the language must be removed.

Respondent asserts that contracts are not reformed for mistake. It characterizes Council 11 President Murphy's failure to read the contract on the day it was signed in D'Arco's office a "mistake". It contends that Murphy himself admitted it was a mistake not to read the contract again that day. In support of its contention, Respondent relies on Hillside, supra. Its reliance is misplaced.

In Hillside, the Commission found no violation where the Board refused to execute a contract containing language granting employees a paid lunch period. The language did not reflect the parties' agreement that the workday would remain the same with eight hours of work including an unpaid lunch. It was the result of the parties' mutual mistake - "[T]he Board's intent is undisputed. The Association's intent was proved." Hillside at 14. The Commission found that "[H]armonious labor relations would not be served by enforcing contract language that conflicts with both parties' intent." Hillside at 14.[9/]

9/ Charging Party's reliance on Steelworkers v. Johnston Industries, 120 LRRM 2695 (E.D. Mich. 1984) is also misplaced. There the parties negotiated and reached an agreement for bilateral termination of the pension plan. When the employer subsequently inserted language for unilateral termination by the employer into the final contract which was then signed by the union, the Court reformed the contract to reflect the actual bargain reached. Here, there was no bargain or agreement on the change to Article XII.

Here, unlike Hillside, there is no mutual mistake. The evidence supports that the language change was not negotiated or agreed to by the parties. Although Respondent intended to add the language in question to Article XII, Council 11 never agreed to the change and cannot, therefore, be bound by the bargain it never made.

Similarly, Respondent's reliance on Moorestown Tp. Bd. of Ed., P.E.R.C. No. 94-120, 20 NJPER 280 (¶25142 1994) is inapposite. In Moorestown, the parties memorandum of understanding and final contract language were identical on the issue of teachers' arrival and departure times. The Commission found the union violated the Act when it refused to execute the collective negotiations agreement containing this change. It rejected the union's contention that it misunderstood the consequences of the change. The union could not avoid the contract because of its unilateral mistake. Such is not the case here.

In this case, the memorandum of agreement does not reflect the change to Article XII contained in the contract. Council 11 is not asserting that it signed the contract agreeing to and knowing of the language change, but not understanding the consequences of the language change on the rate of pay for accumulated sick leave. It contends the bargain was never made.

Next, Respondent contends Charging Party is barred from recovery because even if it had not negotiated or agreed to the language change, it could have discovered the change by exercising due diligence in its draft reviews. This argument is unsupported by the record. Council 11 undertook two word-for-word draft reviews. No change to Article XII language appeared in the drafts it reviewed. Due diligence did not necessitate a third word-for-word review in D'Arco's office when the contract was executed because D'Arco specifically pointed out the changes his staff made between the last review two days before and the final contract. He did not point out any change to Article XII. Having verified that the changes from its last review were made, Council 11 relied on D'Arco's assertions and inferred that all other contract language remained the same. A third review was not necessary.

Finally, Respondent's contention that the added language - "as defined in the following example" - makes no substantive change to the contract and, therefore, does not warrant reformation of the contract is irrelevant. I am not deciding whether the language makes a substantive difference or not, and Respondent's comparison of the change to Article XII with other typographical or grammatical changes it made in other sections of the contract which do not affect the substance of the contract lacks merit. The change to Article XII cannot be characterized

as ministerial; thus without evidence of agreement to make the change, the language cannot be inserted unilaterally and must be removed.

Based on the foregoing, I find that Respondent violated 5.4a(5) and derivatively a(1) of the Act when it unilaterally inserted language into Article XII of the parties' contract without negotiation with Kearny Council 11.

CONCLUSION OF LAW

The Town violated section 5.4a(1) and (5) of the Act when it unilaterally inserted the phrase "as defined in the following example" into Article XII of the parties' contract without negotiation with Council 11.

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the Town of Kearny cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by inserting language into Article XII of the parties' contract, specifically the phrase "as defined in the following example", without the knowledge or consent of Kearny Council 11 and without negotiating the change.

2. 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 by

inserting language into Article XII of the parties' contract without negotiating the change with Kearny Council 11.

B. That the Town take the following action:

1. Remove the phrase "as defined in the following example" from Article XII of the parties' contract.

2. Process grievances regarding Article XII without the inclusion of that language.

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

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

Wendy L. Young
Hearing Examiner

Dated: March 25, 2004
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the Act, particularly by inserting language into Article XII of the parties' contract, specifically the phrase "as defined in the following example", without the knowledge or consent of Kearny Council No. 11 and without negotiating the change.

WE WILL NOT refuse 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 by inserting language into Article XII of the parties' contract without negotiating the change with Kearny Council No. 11.

WE WILL immediately remove the phrase "as defined in the following example" from Article XII of the parties' contract.

WE WILL process grievances regarding Article XII absent the inclusion of that language.

Docket No. CO-H-2003-173

Town of Kearny
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"