

P.E.R.C. NO. 88-123

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-87-181-127
(PART A)

LOCAL UNION NO. 153, OPEIU,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the County of Essex violated the New Jersey Employer-Employee Relations Act when it unilaterally ended supplemental compensation and compensatory time programs for employees represented by Local Union No. 153, OPEIU. The Commission further holds that the remedial order should not require the payment of supplemental compensation to employees discharged between December 31, 1986 and January 31, 1987.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-87-181-127
(PART A)

LOCAL UNION NO. 153, OPEIU,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, Esqs. (Melvin L. Gelade, of counsel)

For the Charging Party, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs. (Bruce D. Leder, of counsel)

DECISION AND ORDER

On January 15, 1987, Local Union No. 153, OPEIU ("Local 153") filed an unfair practice charge against the County of Essex ("County"). On March 11 and 23, 1987, Local 153 amended the charge. The charge, as amended, alleges that the County violated subsections 5.4(a)(1), (3) and (5)^{1/} of the New Jersey

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally discontinued a supplemental compensation program and compensatory time program, dealt directly with unit members, and unilaterally changed the payroll system for unit members.^{2/}

On March 25, 1987, a Complaint and Notice of Hearing issued. The County filed an Answer denying that it changed any term or condition of employment, asserting it had legitimate business justifications, and asserting that Local 153 waived any right to negotiate over the supplemental compensation program and the compensatory time program.

On August 27, 1987, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by November 24, 1987.

On January 21, 1988, the Hearing Examiner issued his report and recommendation. H.E. No. 88-35, 14 NJPER ____ (¶ ____ 1988). He found that the County violated the Act when, without negotiations, it ended the supplemental compensation program and the compensatory time program. He recommended dismissal of all other allegations.

1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by this act, and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Other aspects of the charge were severed for separate proceedings.

The County has filed exceptions and Local 153 has filed a response. Neither party contests the Hearing Examiner's conclusions that certain unfair practices occurred and others did not. Instead the County questions two narrow aspects of the recommended remedial order: (1) the order should have specified that interest was to be computed under subsection (a)(ii) of R. 4:42-11, and (2) the order should not have required payment of supplemental compensation to employees on the payroll as of December 31, 1986, but not as of January 31, 1987.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-8) are accurate. We adopt and incorporate them. In the absence of exceptions, we also adopt his conclusions that the County: (1) violated the Act when it unilaterally ended the supplemental compensation and compensatory time programs, but (2) did not violate the Act in any other regard.

We agree with the County that R. 4:42-11(a)(ii) is the proper citation for computing interest. Our order will so specify.

The County asserts that the order should not require the payment of supplemental compensation to employees discharged between December 31, 1986 and January 31, 1987. The background is this.

Before November 1986, employees received supplemental compensation for a particular year if they were still on the payroll on January 31 of the next year. This supplemental compensation was in the form of FICA bonuses, that is lump sum payments equal to the employees' social security contributions under the Federal Insurance

Contribution Act in the previous year. On November 26, 1986, after losing a re-election bid, County Executive Peter Shapiro advanced the qualifying payroll date for 1986 supplemental compensation to December 31, 1986 from January 31, 1987. On December 31, 1986, the day before taking office, County Executive-elect Nicholas Amato obtained a temporary restraining order from the Honorable Kenneth R. Stein of the Law Division of the Superior Court. This order barred Shapiro from issuing FICA bonuses. The next day Amato fired certain executive employees. These employees will receive supplemental compensation if the December 31, 1986 qualifying date is used, but not if the January 31, 1987 date is used.

The County asserts payment of the supplemental compensation to employees fired before January 31, 1987 is barred by an order issued in Minter v. Essex Cty., Law Div. Dkt. No. L-20009-87E. There five former County employees (each an Assistant County Counsel) sued the County, alleging that their discharges were illegal. The Honorable Paul B. Thompson rejected their claims, holding that they were legally discharged as of January 29, 1987, the date they received written notice of their dismissals. The County then asked Judge Thompson to consider whether the plaintiffs were entitled to FICA benefits; it argued that the former County Executive lacked authority under N.J.S.A. 40A:4-57 to advance the qualifying date to December 31, 1986 since no appropriation for that obligation had been made during fiscal year 1986. Judge Thompson held that the plaintiffs were not entitled to the FICA benefits.

The County asserts that this order collaterally estops Local 153 from seeking FICA benefits for employees terminated before January 31, 1987 and prevents the Commission from ordering that remedy since it would be illegal. BASF Wyandotte Corp., 274 NLRB No. 147, 119 LRRM 1035 (1985).

Local 153 argues that collateral estoppel does not apply since it was not a party in Minter; the former County Executive could legally advance the qualifying date given his power to set salaries, and the Freeholders had to appropriate the necessary funds. It relies on Manchester Tp., P.E.R.C. No. ____, 9 NJPER 392 (¶14178 1983) and In re Salaries for Probation Officers of Bergen Cty., 58 N.J. 422 (1971).^{3/}

The County responds that Manchester and Bergen Cty. are distinguishable because they involved funding for negotiated agreements whereas in this case the former County Executive acted without negotiations and before Local 153 had been certified.

We agree with Local 153 that Minter does not collaterally estop it from arguing that the New Jersey Employer-Employee Relations Act requires payment of the FICA bonuses. The parties are not identical. Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984); cf. Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 174 N.J. Super. 554 (App. Div. 1980) (individual employee's petition

^{3/} It also asserts that we should not entertain the County's submission forwarding Judge Thompson's decision on the FICA benefits. We reject this assertion.

with Commissioner of Education does not bar majority representative from arbitrating related contractual grievance). But we also agree with the County that Manchester and Bergen are not dispositive because there the employers had a duty to seek funding for negotiated agreements as part of their overall obligation to negotiate in good faith whereas here advancing the qualification date was unrelated to any negotiations commitments or duties and in fact preceded Local 153's certification as majority representative. Further, one court of competent jurisdiction restrained the payment of the FICA bonuses before the new qualification date took effect and another such court has held that advancing the qualification date was ultra vires. Absent a conflict with our Act's policies and given the courts' holdings, we will not require the County to pay FICA bonuses to employees dismissed before January 31, 1987.

ORDER

The County of Essex 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 unilaterally eliminating the Supplemental Compensation Program and compensatory time benefits of Executive Service II employees represented by Local 153, OPEIU.

2. Refusing to negotiate in good faith with Local 153 concerning terms and conditions of employment of Executive Service II employees, particularly, by unilaterally eliminating the

Supplemental Compensation Program and compensatory time benefits of those employees.

B. Take the following affirmative action:

1. Compensate all Executive Service II employees still represented by Local 153 and still on the payroll as of January 31, 1987 for all moneys to which they were entitled, together with interest as provided in R. 4:42-11(a)(ii), for calendar year 1986 under the terms of the Supplemental Compensation Program.

2. Provide Executive Service II employees a period of thirty days within which to exercise their option to receive a lump sum payment for compensatory time under the terms of the Policy and Procedures Manual of the County of Essex. For those employees who exercise that option, the County will remit the proper payment to employees, together with interest as provided in R. 4:42-11(a)(ii).

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
May 25, 1988
ISSUED: May 26, 1988

NOTICE TO ALL EMPLOYEES**PURSUANT TO**

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally eliminating the Supplemental Compensation Program and compensatory time benefits of Executive Service II employees represented by Local 153, OPEIU.

WE WILL cease and desist from refusing to negotiate in good faith with Local 153 concerning terms and conditions of employment of Executive Service II employees, particularly, by unilaterally eliminating the Supplemental Compensation Program and compensatory time benefits of those employees.

WE WILL compensate all Executive Service II employees still represented by Local 153 and still on the payroll as of January 31, 1987, for all moneys to which they were entitled, together with interest as provided in R. 4:42-11(a)(ii), for calendar year 1986 under the terms of the Supplemental Compensation Program.

WE WILL provide Executive Service II employees a period of thirty days within which to exercise their option to receive a lump sum payment for compensatory time under the terms of the Policy and Procedures Manual of the County of Essex. For those employees who exercise that option, the County will remit the proper payment to employees, together with interest as provided in R. 4:42-11(a)(ii).

Docket No. CO-87-181-127
(Part A)

COUNTY OF ESSEX
(Public Employer)

Dated _____

By _____
(Title)

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

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

H.E. NO. 88-35

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

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-87-181-127
(PART A)

LOCAL UNION NO. 153, OPEIU,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the County of Essex violated subsection 5.4(a)(5), and derivatively subsection 5.4(a)(1), when, unilaterally and without negotiations, the County eliminated supplemental compensation and compensatory time benefits of employees represented by Local 153, OPEIU. The Hearing Examiner recommends that the Commission order restitution of those benefits together with interest.

The Hearing Examiner also recommends that the Commission dismiss allegations that the County violated the Act by unilaterally changing the payroll system for employees represented by Local 153. The Hearing Examiner finds that since the prior payroll system was preempted by statute, and because the new system was decided upon prior to certification of Local 153, the totality of the circumstances do not prove a violation of the Act.

The Hearing Examiner also recommends that the Commission dismiss allegations that the County violated the Act by dealing directly with employees represented by Local 153. He finds that the contested action was taken by someone who was not a County representative or agent.

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. 88-35

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

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-87-181-127
(PART A)

LOCAL UNION NO. 153, OPEIU,

Charging Party.

Appearances:

For the Respondent

Apruzzese, McDermott, Mastro & Murphy, Esqs.
(Melvin L. Galade, of counsel)

For the Charging Party

Schneider, Cohen, Solomon, Leder & Montalbano, Esqs.
(Bruce D. Leder, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 15, 1987, March 11 and March 23, 1987, Local Union No. 153, OPEIU (Charging Party or Local 153) filed an Unfair Practice Charge and amended charges with the Public Employment Relations Commission (Commission) alleging that the County of Essex (Respondent or County) violated the New Jersey Employer-Employee Relations Act (Act). The Charging Party alleged that the Respondent unilaterally discontinued a supplemental executive compensation program and a compensatory time policy, dealt directly with unit

members, and unilaterally changed the payroll system for unit members, in violation of subsections 5.4(a)(1), (3) and (5) of the Act.^{1/}

On March 25, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On May 6, 1987, Respondent filed an Answer, denying that it had changed any term and condition of employment, asserting legitimate business justifications for all actions, and asserting that the Charging Party waived any rights it may have had to negotiate over the supplemental executive compensation program and the compensatory time program.

On August 27, 1987, I conducted a hearing in Newark, New Jersey, where the parties had opportunities to examine and cross-examine witnesses, present documentary evidence and argue orally. Both parties filed post-hearing briefs by November 24, 1987.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The County of Essex is an employer within the meaning of the New Jersey Employer-Employee Relations Act.
2. Local Union No. 153 OPEIU is an employee organization within the meaning of the New Jersey Employer-Employee Relations Act.

^{1/} The January 11 and March 23 charges also alleged that the County unlawfully terminated the employment of certain bargaining unit members in retaliation for their exercise of rights under the Act. Those portions of the charges have been severed by agreement of the parties from the instant charges, and have been redocketed as Docket No. CO-87-181-127 (Part B). The severed matters went to a separate hearing before me and will be addressed in a separate recommended report and decision.

3. On December 17, 1986, Local 153 was certified by the Commission as the exclusive representative of all "Executive Service II employees of the County of Essex." These employees had not previously been represented by any employee organization in any collective negotiations unit.

4. The titles included in the Executive Service II category are white collar supervisory employees. They represent the second of two categories in the County Executive Service; the other category includes department and division directors and confidential aides. The Executive Service was created by the County of Essex in 1980 "[i]n order to establish a Professional Management System responsive to the overall organizational needs of the County of Essex..." (Exhibits CP-3 and CP-4; T 29).

5. Terms and conditions of employment for all employees in the Executive Service were established by the County Executive through documents entitled "Standard Operating Policy and Procedures" (SOPP) or "Policy and Procedures." These documents are included in the County's "Policy and Procedures Manual," which "is to be considered binding and is to serve as a reference for supervisory personnel." The Manual was "prepared to explain the policies and procedures in existence at the time of its adoption and is subject to change." (CP-8). In addition to establishing work hours, leave benefits and holidays for Executive Service employees, the SOPP and/or policy and procedures statements in the Manual created two benefits for Executive Service employees which were not

enjoyed by other County employees who were not represented by employee organizations (T 52). These benefits were the Supplemental Executive Compensation Program (supplemental compensation) and compensatory time.

6. Effective September 1, 1982, the County assumed responsibility for Federal Insurance Contribution Act (F.I.C.A.) payments for all Executive Service employees (Exhibit CP-7). On June 11, 1984, the policy was named "Supplemental Executive Compensation Program" and changed to provide a lump sum payment in February of each year for the preceding calendar year, provided that the Executive Service employee continued on the payroll through January 31 of the succeeding year (CP-8). In 1985 and 1986, the County issued addenda to this policy, specifically listing the exact disbursements under the "Supplemental Executive Compensation Program"; the payment schedules reflected increases in the amount of income upon which F.I.C.A. payments were made by employees (CP-9 and 10). On November 26, 1986, the County Executive issued a policy and procedures statement which modified the Supplemental Executive Compensation Program. The statement changed the date for qualifying for the lump sum payment to December 31 of the year for which the payment is made. The County Executive also added a proration feature to the policy (CP-11).

7. On November 3, 1986, Nicholas Amato defeated incumbent Peter Shapiro in the County Executive election. On January 1, 1987, Amato assumed the duties of County Executive. On January 5, 1987,

Amato issued a policy and procedures statement: "Effective January 1, 1987, the County of Essex will discontinue the Supplemental Executive Compensation Program for Executive I and II employees." The parties stipulated that this action was taken without negotiations with Local 153 (CP-12; T 12).

8. Effective July 1, 1982, Executive Service II members became eligible for compensatory time if "ordered by their department director, in writing, to work at their work location beyond their normal work schedule...." Compensatory time was granted at the rate of one hour for every hour of eligible time. Eligible time for Executive Service II employees was defined as any hours after the 40th hour of work, notwithstanding their normal work week of 35 hours. The policy also stated: "Any Category II Executive Service member covered under this policy may at his/her option, receive a cash payment in lieu of compensatory time, based upon his/her hourly rate of pay not to exceed \$3500.00 in cash payment for any one calendar year" (Exhibits CP-5 and 7). On January 8, 1987, County Executive Amato issued the following policy and procedure statement: "Effective January 1, 1987, the Compensation Time Policy for Executive Service I and II employees shall be discontinued." The parties stipulated that this action was taken without negotiations with Local 153 (CP-13; T 12).

9. Since at least May 1, 1980, all County employees were paid biweekly on Fridays for the two-week period immediately preceding and including the paycheck date--a "current basis" method

of payroll dissemination (Exhibit CP-14). As early as February 1981, and continuing through 1986, the County and the State of New Jersey (Department of Community Affairs) discussed and corresponded about the propriety of a current basis payroll dissemination system. The nature of these contacts, together with advice from Arthur Young & Company, an accounting firm engaged by the County, was that the current basis system was not consistent with N.J.S.A. 40A:5-16. That statute requires that moneys paid out by a local governing body require "a certification of some officer or duly designated employee of a local unit having knowledge of the fact that the goods have been received by and services rendered to the local unit." Since the current basis system could not guarantee that all employees who received paychecks on alternate Fridays did in fact work the last days of those pay periods, State officials directed the County to "proceed to implement the pay holdback mechanism for all County employees." The correspondence makes clear that the State's Division of Local Government Services of the Department of Community Affairs would not approve a new computerized payroll system for the County of Essex unless a five-day pay holdback was enacted by the County (Exhibits R-2, 3, 4, 5, 6, 7, 8 and 9).

10. During 1986, the County negotiated with its collective negotiations units to change the payroll system from a current basis to a five-day holdback system. By letter of August 11, 1986, the First Assistant County Administrator informed the State Division of

Local Government Services that such negotiations had been "successfully completed" and that the holdback system would be commenced in January, 1987 (Exhibit R-4; T 57-62).^{2/} On the pay stubs of paychecks issued on November 21, 1986, the County notified all of its employees: "WE PLAN TO BEGIN THE PROCESS OF HOLDBACK ON 1/16/87 - DETAILS WILL FOLLOW." On January 12 and February 26, 1987, the County informed department and division heads, constitutional officers and judiciary of the revised 1987 payroll schedule which provided for the five-day holdback to be spread over five payroll periods. These individuals were instructed to inform their employees of the new procedures (Exhibits CP-16 and 17).

11. During December 1986, Nicholas R. Amato was the Essex County Executive-Elect. On stationery bearing that title, Amato sent out two form letters to certain County employees. The first batch, mailed December 5th, was issued to certain employees whom he considered to be members of the management team of the County. In those letters, Amato solicited resignations effective January 1, 1987, and requested to receive such resignations by December 15,

^{2/} It appears that one organized group of County employees may not have agreed to the holdback and have litigated that dispute with the County (T 58-59). I also take administrative notice of an unfair practice complaint (Docket No. CO-87-249) before Commission Hearing Examiner Arnold H. Zudick alleging that the Superintendent of Elections and/or the County of Essex violated the Act by the unilateral implementation of the payroll holdback system. Neither of those matters are before me; without knowledge of the facts of those cases, I cannot conclude that those matters are relevant to this case.

1986 at his transition team office. The letter also invited expressions of interest in serving in Amato's future administration (CP-20). The second batch, mailed December 17, was issued to employees occupying temporary or provisional civil service titles. Amato requested their resignations effective January 17, 1987, to be received at his transition team office by January 10. The letter also invited those interested in continuing employment in Essex County government to forward resumes to the transition team office (CP-19). The parties stipulated that no negotiations took place with Local 153 prior to the issuance of CP-19 and 20 (T 12), and that many employees in the unit represented by Local 153, as well as Executive Service I employees, received one of the two letters (T 11-12).

ANALYSIS

I. Supplemental Compensation/Compensatory Time Issues^{3/}

The parties do not dispute that in January, 1987, the County unilaterally eliminated preexisting supplemental compensation and compensatory time benefits previously enjoyed by Executive Service II employees. The compensatory time benefit had been constant since 1982, while the supplemental compensation benefit, which also began in 1982, had been substantially unchanged since June, 1984 (see Findings of Fact Numbers 6, 7 and 8).

^{3/} While the County states in its brief at page 8 that the "comp" time issue was "not litigated," I reject this contention. See CP-5, 7 and 13, and T 16 and 18.

Both supplemental compensation and compensatory time are employee compensation issues and thus mandatorily negotiable subjects under the Act. See, e.g. Bd. of Ed. of Englewood v. Englewood Teachers, 64 N.J. 1 (1973) and Bd. of Ed. of Bor. of Oakland and Oakland Teachers Ass'n, P.E.R.C. No. 82-125, 8 NJPER 378 (¶13172 1982), aff'd. App. Div. Dkt. No. A-4975-81T3 (6/20/83). While the County was under no obligation to negotiate these subjects with Executive Service II employees when they were unorganized, the certification of Local 153 in December 1986 as employee representative of those employees created a negotiations relationship between the County and Local 153. Accordingly, after the certification, the County could not unilaterally change mandatorily negotiable terms and conditions of employment for Executive Service II employees; instead, it had an obligation to negotiate any changes in the status quo with Local 153. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1975); and Camden Housing Authority, P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987).

Conceding this obligation, the County nonetheless argues that it did not have to negotiate the changes in the supplemental compensation and compensatory time policies because those policies, by the terms of the Policy and Procedure Manual, were "subject to change" (Finding of Fact No. 5). Since the supplemental compensation benefit had been previously changed by the County (Finding of Fact No. 6), and the compensatory time policy could have

been similarly altered at any time, the County argues that the status quo for Executive Service II employees after certification of Local 153 included the right of the County to unilaterally change compensation policies previously established in the Policy and Procedure Manual.^{4/}

This argument must be rejected. As unorganized employees, Executive Service II employees had their terms and conditions of employment set unilaterally by the County, from 1980 through most of 1986. There is no doubt that the County, as well as any public employer of unorganized employees, had such authority, with or without the "subject to change" language of the Policy and Procedure Manual. However, once the employees chose to be represented by Local 153 as their exclusive representative under the Act, an important change occurred. The very essence of the Act is that public employees have the right to choose (or decline to choose) an employee organization to be their exclusive representative in an appropriate unit "for collective negotiation concerning the terms and conditions of employment of the employees in such unit."

N.J.S.A. 34:13A-5.3. When an employee organization is certified by the Commission to represent a unit of employees, the employer must cease the unilateral creation of and changes in terms and conditions

^{4/} The County does not argue, nor does the record suggest, that supplemental compensation and compensatory time payments paid to Executive Service II employees from 1982 through 1985 were conditioned upon exemplary performance or were limited in application. Compare, Cty. of Middlesex, P.E.R.C. No. 87-96, 13 NJPER 146 (¶18064 1987).

of employment. Other terms and conditions of employment must then be established through collective negotiations. The starting point for such negotiations must be the status quo existing at the time of the election^{5/} or at least the status quo at the time of certification. Camden Housing Authority. Where the status quo permits the employer discretion in granting increases, "[w]hat is required is a maintenance of preexisting practices, i.e. the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." Oneita Knitting Mills, 205 NLRB No. 76, 83 LRRM 1670, 1671 (1973).

Alternatively, the County argues that it cannot be required to continue to pay supplemental compensation and compensatory time benefits to Executive Service II employees, because payment would "place [Executive Service II employees] in a position superior to that of their unrepresented colleagues [i.e. Executive Service I employees, for whom the supplemental compensation and compensatory

^{5/} Citing McCormick Longmeadow Stone, 159 NLRB 1237, 1242, 62 LRRM 1185 (1966), the County argues that its "obligation is to either grant or withhold a benefit based upon [the] employer's traditional practice and economic considerations 'unrelated to union organization.'" This standard, which also reflects Commission policy (see Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER _____ (¶ _____ 1987)), applies only in the election objection context. Once an election is conducted and certification of the representative is pending or issued, the standards of NLRB v. Katz, Galloway and Camden Housing Authority apply.

time benefits were eliminated by the County effective January 1, 1987]. Thus the status quo would be altered and not maintained." County Brief, page 8.

This argument turns the Act on its head and must also be rejected. The status quo to which newly organized employees are entitled as they enter collective negotiations with their employers bears no relationship to terms and conditions of employment for unorganized employees or employees in other negotiations units. That non-unit employees later receive improved or reduced benefits is simply of no legal moment to employees represented by a certified negotiations representative. Instead, employees represented by a newly certified representative are entitled to the status quo, no better and no worse, until such time as a collective agreement is negotiated. Camden Housing Authority.

Accordingly, I recommend that the Commission find that the County of Essex violated subsection 5.4(a)(5) and, derivatively, 5.4(a)(1) of the Act when, effective January 1, 1987, it unilaterally eliminated the supplemental compensation and compensatory time policies with respect to employees represented by Local 153. The appropriate remedy is for the Commission to order the County to compensate unit employees for all moneys to which they were entitled, together with interest as provided in R. 4:42-11, for calendar year 1986 under the terms of the supplemental compensation and compensatory time policies in effect immediately prior to the unilateral elimination of these programs by orders of the County

Executive in January 1987.^{6/} Since the payment component of the compensatory time benefit is at the option of the employee, Local 153 unit members should have thirty days from the issuance of the Commission's order to exercise that option, after which such option should be deemed waived for calendar year 1986.

II. Payroll System Issue

The parties agree that the County unilaterally implemented a change in the payroll system for employees represented by Local 153.

The County does not dispute that dates and timing for payment of public employees are generally negotiable terms and conditions of employment. See, e.g. Ewing Tp. Bd. of Ed., P.E.R.C. No. 81-85, 7 NJPER 89 (¶12035 1981) and Tp. of W. Orange, P.E.R.C. No. 84-30, 9 NJPER 602 (¶14255 1983). However, the County argues that the payroll holdback system did not have to be negotiated with

^{6/} As a consequence of this order, the County would have to make supplemental compensation payments to all Local 153 unit employees who were on the County payroll on December 31, 1986. The December 31 date represents a unilateral change by order of County Executive Shapiro on November 26, 1986 (CP-11) from the prior qualifying date of January 31 of the succeeding year. While this change was made after the filing of the petition for certification and the scheduling of a Commission election, I find that Local 153 has no statutory obligation to object to unilateral changes in terms and conditions of employment which benefit employees it represents, nor can the failure to object under those circumstances be deemed a waiver of Local 153's right to object to subsequent adverse unilateral changes in the same benefit. See Hunterdon County Freeholders Bd., P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986) and Hunterdon County Freeholders Bd., P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), app. pending, App. Div. Dkt. No. A-5558-86T8.

Local 153 because the new system "had been decided upon and was ready for implementation prior to November 1986" (Brief at p. 11). In addition, the County argues that retention of the "current basis" system is preempted by N.J.S.A. 40A:5-16. See, generally, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 79-81 (1978).

I find that both of these arguments are persuasive. First, under the totality of the circumstances (see Finding of Fact Nos. 9 and 10), the County has demonstrated that it decided to change the payroll system long before Local 153 petitioned for the Executive Service II unit. While the decision had not been implemented prior to the petition, Executive Service II employees (as well as all other County employees) were notified of the imminent change on November 21, 1986, more than two weeks before the Commission election. Viewed together with record evidence of the County's good faith negotiations with established exclusive representatives throughout 1986, the facts do not support a finding that subsection 5.4(a)(5) of the Act was violated.

Further, I agree that N.J.S.A. 40A:5-16 preempts the retention of the "current basis" payroll system by the County. The statute (see Finding of Fact No. 9) precludes payment of moneys by local governing bodies without knowledge, evidenced by certification of a designated officer or employee, that the services were actually rendered to that governing body. Since paychecks in a "current basis" system are computed, printed and apparently issued to employees prior to completion of the entire work period covered by

the paychecks, a "current basis" system necessarily runs afoul of N.J.S.A. 40A:5-16.

While the preemptive effect of the statute would not normally preclude negotiations over the successor payroll system, I believe that the totality of the circumstances, reviewed above, do not support a violation of the Act. Accordingly, I recommend that the Commission dismiss that portion of the complaint concerning the unilateral change of the payroll system.

III. Direct Dealing Issue

The parties do not dispute that in December, 1986, County Executive-Elect Amato sent letters to certain employees represented by Local 153 which concerned their tenures of employment. Nor do the parties dispute that such conduct, if rendered by an authorized representative or agent of the County, might violate subsection 5.4(a)(5) of the Act; employers must negotiate with exclusive representatives, rather than deal directly with employees, concerning terms and conditions of employment. See, generally, Lullo v. Int. Ass'n of Fire Fighters, 55 N.J. 409/426 (1970), and Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984).

The County argues that it did not violate its duty to negotiate in good faith by sending the letters, because the author of the letters was not an employer, agent or representative of the employee within the meaning of subsections 3(c) and 5.4(a) of the Act. The County argues that when he sent the letters, Amato was County Executive-Elect, but he did not represent the County nor was he authorized by the County to act on its behalf. Further, the

County maintains that there is no record evidence of later ratification of the letters by the County, or of any post-January 1, 1987 actions which might constitute direct dealing.

The County's arguments are supported by the record. There is no evidence that the County Executive-Elect was authorized by the County to act on its behalf, and there is no evidence that Amato, as County Executive, ever dealt with employees directly in violation of the Act. Accordingly, I recommend that the Commission dismiss that portion of the Complaint that alleges improper direct dealing by the County.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the County of Essex:

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 unilaterally and without collective negotiations, eliminating the Supplemental Executive Compensation Program and compensatory time benefits of Executive Service II employees represented by Local 153, OPEIU.

2. Refusing to negotiate in good faith with Local 153 concerning terms and conditions of employment of Executive Service II employees, particularly, by unilaterally and without collective negotiations, eliminating the Supplemental Executive Compensation Program and compensatory time benefits of those employees.

B. Take the following affirmative action:

1. Compensate all Executive Service II employees represented by Local 153 for all moneys to which they were entitled, together with interest as provided in R. 4:42-11, for calendar year 1986 under the terms of the Supplemental Executive Compensation Program.

2. Provide Executive Service II employees a period of thirty days within which to exercise their option to receive a lump sum payment for compensatory time under the terms of the Policy and Procedures Manual of the County of Essex. For those employees who exercise that option, the County will remit the proper payment to employees, together with interest as provided in R. 4:42-11.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

I further recommend that the Commission ORDER that the remainder of the complaint be dismissed.



Mark A. Rosenbaum
Hearing Examiner

Dated: January 21, 1988
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally and without collective negotiations, eliminating the Supplemental Executive Compensation Program and compensatory time benefits of Executive Service II employees represented by Local 153, OPEIU.

WE WILL NOT refuse to negotiate in good faith with Local 153 concerning terms and conditions of employment of Executive Service II employees, particularly, by unilaterally and without collective negotiations, eliminating the Supplemental Executive Compensation Program and compensatory time benefits of those employees.

WE WILL compensate all Executive Service II employees represented by Local 153 for all moneys to which they were entitled, together with interest as provided in R. 4:42-11, for calendar year 1986 under the terms of the Supplemental Executive Compensation Program.

WE WILL provide Executive Service II employees a period of thirty days within which to exercise their option to receive a lump sum payment for compensatory time under the terms of the Policy and Procedures Manual of the County of Essex. For those employees who exercise that option, we will remit the proper payment to employees, together with interest as provided in R. 4:42-11.

Docket No. CO-87-181-127
(PART A)

COUNTY OF ESSEX
(Public Employer)

Dated _____

By _____
(Title)

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

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