P.E.R.C. NO. 99-110

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and- Docket No. CO-H-97-287

WEST NEW YORK PBA LOCAL NO. 361,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Town of West New York violated the New Jersey Employer-Employee Relations Act when it hired a patrol officer at the top step of the salary guide and with top benefits. West New York PBA Local No. 361 alleges that the Town unilaterally altered the parties' established practice of starting officers with experience at step one of the guide. The Commission concludes that the Town's lawful authority to compensate new police officers was limited by the duty to negotiate before changing the practice regarding initial salary placement. As a remedy, the PBA has requested that the officer be returned to step one of the salary guide. Given the passage of time, a reduction that drastic is inappropriate. In accordance with Commission and NLRB precedent, the Commission directs that the Town, prior to negotiations with the PBA, prospectively conform the officer's salary and benefits to the levels they would be by now had the officer begun employment on step one in August 1996.

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.

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In the Matter of

TOWN OF WEST NEW YORK,

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WEST NEW YORK PBA LOCAL NO. 361,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys (David F. Corrigan, of counsel; Norman R. Jimerson, on the brief)

For the Charging Party, Klatsky & Klatsky, attorneys (Michael A. Bukosky, of counsel)

DECISION

On February 28, 1997, West New York PBA Local No. 361 filed an unfair practice charge against the Town of West New York. The charge alleges that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5) and (7),[1/] when, on or about

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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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this

Footnote Continued on Next Page

August 28, 1996, the Town hired Carlos Betancourt, formerly a sergeant with the Town's abolished park police force, as a patrol officer at the top step of the salary guide and with top benefits. The charge asserts that the Town unilaterally altered the parties' established practice of starting officers with experience at step one of the guide.

On May 15, 1997, a Complaint and Notice of Hearing issued. The Town filed an Answer admitting that Betancourt was placed at the top step, but denying that he was a "new hire." The Answer also raised several affirmative defenses.

On December 23, 1997 and April 1, 1998, respectively, Hearing Examiner Jonathon Roth denied the Town's separate motions for summary judgment and dismissal. On the latter date, the Hearing Examiner also denied, in part, Betancourt's motion to intervene. Betancourt was allowed to submit a brief on a proposed remedy, but he did not do so.

On July 21, 1998, a hearing was conducted. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

1/ Footnote Continued From Previous Page

act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

On January 29, 1999, the Hearing Examiner issued his report and recommendations. H.E. No. 99-16, 25 NJPER 107 (¶30046 1999). He found that the Town's placement of Betancourt at the top step of the salary guide rather than on step one, where other starting officers with experience had been placed, constituted a unilateral change in an established condition of employment and that the charging party had neither acquiesced in nor waived its right to negotiate over the change. He specifically found that a release signed by the Town's counsel and Betancourt purporting to settle a civil lawsuit did not relieve the Town of its statutory obligation to negotiate with the PBA because the PBA neither knew nor approved of it.2/ He concluded that the Town's conduct violated N.J.S.A. 34:13A-5.4a(1) and (5).

The Hearing Examiner rejected the PBA's proposed alternative remedies of directing the Town to: (1) increase the pay and benefits of all officers hired in or around August 1996 to the same level of salary and benefits now being paid to Betancourt; or (2) return Betancourt to step one on the salary guide, pending negotiations. He found the first alternative to be

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2/ After the park police force was disbanded, Betancourt was denied a position with the regular department. He sued, asserting that he had reemployment rights. Minutes before he was sworn in as a West New York officer, Betancourt signed a release purporting to drop his litigation and waive all claims against the Town. The release does not mention salary guide placement.

a windfall to the other employees and the second alternative to be unfair to Betancourt. He instead recommended directing the Town to negotiate with the PBA over a monetary remedy to be paid to the PBA. He suggested that the value to the PBA of the Town's failure to negotiate might be the difference between Betancourt's current salary and benefits and the lesser amount he would have been earning if he had been placed at step one when hired in August 1996. He also proposed that the Town be ordered to restore the practice of placing experienced officers at step one of the guide and that the Town negotiate with the PBA over any proposed change in that practice.

On February 10, 1999, the PBA filed exceptions accepting the Hearing Examiner's findings and conclusions, but requesting a more specific remedy. The PBA asserts that the Town should be ordered to pay compensation in accordance with the formula identified by the Hearing Examiner, rather than have the parties negotiate over compensation with that formula in mind.

On February 19, 1999, the Town filed exceptions urging dismissal of the Complaint. The Town asserts that the need to settle the civil lawsuit entitled it to negotiate individually with Betancourt and that the Hearing Examiner failed to consider the entire record. It also characterizes the case as presenting a contract interpretation dispute which, pursuant to State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), is outside our unfair practice jurisdiction.

The Town also excepts to the denial of Betancourt's request to intervene. Finally, it states that if we conclude that the Town violated the Act, the proposed remedy must be altered. Specific modifications are suggested.

On March 2, 1999, the PBA filed a response to the Town's exceptions. It asserts that: (1) any settlement of litigation does not relieve the Town of its obligation to negotiate over changes in terms and conditions of employment; (2) the Town lacks standing to except to the Hearing Examiner's intervention ruling and any challenge to that ruling is moot; (3) the Hearing Examiner properly considered the facts; (4) the Hearing Examiner correctly concluded that the Town unlawfully changed working conditions without negotiations; and (5) the Town's objections to the proposed remedy are without merit.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's accurate findings of fact (H.E. at 3-8). We reject the Town's exception to finding no. 3. Betancourt worked as a "police officer" in the park force from 1982 to 1993. The term "police officer" can encompass both ranks (patrol officer and sergeant) Betancourt held on the park police force. The Hearing Examiner used it in that context. Even assuming that the terms "sergeant" and "police officer" are mutually exclusive, the alleged error is insignificant. Betancourt's prior rank played no part in his salary guide placement and, as the PBA's unit includes only officers ranked below sergeant, there is only one salary schedule.

We reject the exception regarding Betancourt's intervention. It is true that a remedial order could affect Betancourt's interests in this case and we have allowed employees to intervene on remedy issues to protect their interests in such contexts. See Bloomfield Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. den. 121 N.J. 633 (1990); cf. Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282, 283 (¶25143 1994). The Hearing Examiner allowed such remedial intervention in this case. But Betancourt had no right to participate on the liability question of whether the Town violated its duty to negotiate with the PBA.

The evidence shows that the compensation paid to Betancourt deviated from a consistent practice of starting all new officers at step one irrespective of their experience as sworn law enforcement officers. Although Betancourt had more experience (13.5 years in law enforcement, including 10 years on the park force) than other new hires, other long-term police officers (five years and ten years experience) all started at step one. That practice included paying step one salaries to officers who had served with the Town's park police force. The Town did not notify the PBA of this change or negotiate prior to its implementation. Because the Act requires negotiations before changes in working conditions are established, a willingness to negotiate following implementation is not a defense.

The Town's Human Services argument misconstrues the nature of its action. The negotiated salaries were not changed

nor was Betancourt paid a salary not found on that guide. The amount of prior-service credit given an experienced public employee on beginning employment in a new position is itself a term and condition of employment. See Middlesex Cty. Prosecutor, P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990), aff'd 255 N.J. Super. 333 (App. Div. 1992) (credit for prior governmental service mandatorily negotiable); Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986)(statute providing that teacher's initial placement on salary guide shall be by agreement between teacher and Board must yield to negotiated agreement which set credit for prior service). The PBA is not claiming that the employer was contractually obligated to place Betancourt at step one. Rather it is contesting a change in an established practice that the Town had to negotiate before placing him at step six.

The Town cites no authority to support its claim that the purported settlement of Betancourt's lawsuit trumps the step one placement practice. The Hearing Examiner concluded that the Town's justification was incompatible with the principle of exclusive representation. His conclusion accords with both the state and federal rulings cited in his report. See D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990); Lullo v. Int'l. Ass'n of Firefighters, Local 1066, 55 N.J. 409 (1970); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); see also Leonardis v. Burns Int'l Security Services Inc., 808 F. Supp. 1165 (D. N.J. 1992)(since contract provision for reimbursement of legal costs

was a condition of employment for all workers, individual employees could not enforce separate agreements regarding reimbursement rights).

Belleville holds that individual pacts purporting to establish initial salary guide placement are invalid because only the majority representative is authorized to negotiate and make agreements concerning any proposed changes in the working conditions of employees in its negotiations unit. See also Buena Reg. School Dist., P.E.R.C. No. 93-97, 19 NJPER 246 (¶24121 1993)(agreement under which tenured administrator would transfer into guidance counselor job and retain present salary in exchange for Board's dropping of disciplinary charges did not bar arbitration of grievance asserting administrator must be paid according to negotiated salary guide). Any promise to Betancourt concerning the salary he would receive on appointment to the regular police department was invalid given the existing practice regarding credit for prior service in law enforcement.3/

A municipality must act within its lawful authority when it enters into agreements to settle litigation. See Carlin v. Newark, 36 N.J. Super. 74 (Law. Div. 1955); Edelstein v. Asbury

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3/ Paying Betancourt at step six was not a necessary component of a remedy for any alleged political retaliation. If Betancourt had not settled his lawsuit and had ultimately prevailed, he would have been entitled to be placed in the same position as he would have enjoyed absent the alleged retaliation. Presumably that would have meant putting him on the police force and starting him, like any other experienced new hire, at step one.

Park, 51 N.J. Super. 368 (App. Div. 1958). Cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) (agreement on subject that is beyond authority of public employer may not be enforced). The Town's lawful authority to compensate new police officers was limited by the duty to negotiate imposed by section 5.3 before changing the practice regarding initial salary placement. No agreement or promise addressing Betancourt's working conditions could supersede the PBA's exclusive right to negotiate over the terms and conditions of employment of the officers it represents.

Usually, the appropriate remedy for an unlawful unilateral change in a term and condition of employment is a directive to restore the status quo before the change, to negotiate with the majority representative before making any future change, and to make whole any employees who lost wages or benefits as a consequence of the change. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1,7 (1978). We will order the Town to restore the status quo before the change and to negotiate before making any future change. But this is not a case where employees lost wages or benefits as a result of the change. Since the other unit members were paid their appropriate levels of compensation and benefits, they do not need to be made whole. And there is no basis in our law or precedents for directing the employer either to pay the PBA a set amount or negotiate over paying the PBA for the violation.

We next consider the specific issue of what adjustment, if any, should be made to Betancourt's salary. Some unilateral changes involve increases in wages or benefits. See NLRB v. Katz, 369 U.S. 736 (1962); Camden Cty. Cf. In re Bridgewater Tp. 95 N.J. 235 (1984). When those actions are taken in derogation of an employer's obligation to negotiate, the National Labor Relations Board has ordered rescission of the more favorable benefit where that remedy is requested by the majority representative. See Hardin, The Developing Labor Law, 1946 (3d ed. 1992); Great Western Broadcasting, 139 NLRB 93, 51 LRRM 1266 (1962).

One of the remedies proposed by the PBA was to return Betancourt to step one of the salary guide. Given the passage of time, a reduction that drastic is inappropriate. Instead, in accordance with our precedent and NLRB precedent, we will direct that the Town, prior to negotiations with the PBA, prospectively conform Betancourt's salary and benefits to the levels they would be by now had Betancourt begun employment at step one in August 1996. See Camden Cty., 20 NJPER at 284. Absent a request by the PBA, we do not consider recoupment of any salary or benefits already provided to Betancourt.

ORDER

The Town of West New York is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the

Act, particularly by unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

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 unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

B. Take this action:

1. Restore the practice of starting new police officers with regular police experience at step one of the salary guide.

2. Negotiate in good faith with West New York PBA Local No. 361 over possible changes to the practice of placing new police officers with regular police experience at step one of the salary guide.

3. Prospectively conform the salary and benefits paid to Carlos Betancourt to the level they would be had Betancourt begun employment with the Town's regular police department at step one of the negotiated guide.

4. 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.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: June 22, 1999
Trenton, New Jersey
ISSUED: June 23, 1999

H.E. NO. 99-16

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

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and- Docket No. CO-H-97-287

WEST NEW YORK PBA LOCAL NO. 361,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Town of West New York violated 5.4a(1) and (5) of the Act by unilaterally changing a practice of placing new police officers with experience at step one of the salary guide. The Hearing Examiner rejected several defenses, including the defense that a private settlement agreement on a civil action obviated the duty to negotiate.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-16

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

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and- Docket No. CO-H-97-287

WEST NEW YORK PBA LOCAL NO. 361,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys (David F. Corrigan, of counsel; Norman R. Jimerson, on the brief)

For the Charging Party, Klatsky & Klatsky, attorneys (Michael A. Bukosky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 28, 1997, West New York PBA Local No. 361 filed an unfair practice charge against the Town of West New York. The charge alleges that on or about August 28, 1996, the Town hired Carlos Betancourt as a patrol officer at "...top pay, top benefits, top seniority and [provided] certain other benefits which newly-hired officers have not received before." The Town allegedly refused to negotiate over these benefits "...before establishing this new policy and practice...", thereby violating

5.4a(1), (3), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The charge also notes that the parties are negotiating a successor to their 1992-94 collective agreement.

On May 15, 1997, a Complaint and Notice of Hearing issued.

On June 2, 1997, the Town filed an Answer admitting that Betancourt was provided the disputed benefits but denying that he was a "new hire." The Town also asserted several defenses, including the defense that the Complaint, if true, merely alleges a breach of the parties' collective agreement.

On October 31, 1997, the Town filed a Motion for Summary Judgment with the Commission. The motion was referred to me for decision. On December 23, 1997, I issued a letter denying the motion. On January 16, 1998, the Town filed a Motion to Dismiss, arguing that the Complaint should be dismissed because the dispute primarily concerned an interpretation of the parties' agreement and not an unfair practice, citing State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

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

On or about March 1, 1998, Betancourt filed a Motion to Intervene, pursuant to N.J.A.C. 19:14-5.1. Betancourt also filed an unfair practice charge against West New York PBA Local No. 361 (CI-98-65), which was later deemed withdrawn.

On April 1, 1998, I issued a letter denying both the Town's Motion to Dismiss and Betancourt's Motion to Intervene. I allowed Betancourt the option to file a brief on a proposed remedy in the event that the Town's conduct would be found to have violated the Act.

On July 21, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits. The Town filed a post-hearing brief on October 30, 1998.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Town of West New York is a public employer within the meaning of the Act. West New York PBA Local No. 361 is a public employee representative within the meaning of the Act and represents police officers and detectives below the rank of sergeant (C-3).2/

2. Article XI (Wages and Pensions) of the applicable 1992-94 collective agreement provides in a pertinent portion:

2/ "C" represents Commission exhibits; "T" represents the transcript, followed by the page number; "R" represents Respondent exhibits.

Section 1. The wage scale of the employees covered by this Agreement shall be increased as follows:

Patrolmen	1/1/92	3/1/92	5/1/92	7/15/93
Step 1 (1st year of service)	$23,773	$23,773	$23,773	$24,973
Step 2 (2nd year of service)	$27,778	$27,778	$27,778	$29,178
Step 3 (3rd year of service)	$32,700	$32,700	$32,700	$34.325
Step 4 (4th year of service)	$34,700	$34,700	$35,741	$37,541
Step 5 (5th year of service)	$36,700	$37,801	$38,935	$40,885
Step 6 (6th year of service)	$39,280	$40,455	$41,670	$43,770

Article VIII (Vacations and Vacation Pay) provides in a pertinent part;

Section 1(b) - All employees hired on or after January 1, 1988 shall receive vacation leave as follows:

During 1st year of service	10 working days
During 2nd year of service	20 working days
During 3rd year of service and each year thereafter	31 working days

Article XXV (Grievance Procedure) provides a multi-step grievance procedure ending in binding arbitration (C-3).

3. From late 1982 until January 29, 1993, Carlos Betancourt was employed as a police officer by the West New York park police department (T85; R-3(d)).

4. In July 1992, the State Attorney General wrote to the Town that "...it was no longer feasible...to maintain two police departments and that the park police department should be discontinued" (R-1). The letter also advises, "Inasmuch as the employment of some park police members would be terminated for economic reasons, their appointment as regular police officers could be achieved without undergoing civil service procedures as permitted by N.J.S.A. 40A:14-180" (R-1).

On November 25, 1992, the Town passed an ordinance abolishing the park police department (R-2). Betancourt and another officer, Joaquin Martinez, were the only "regular" officers employed by the park police department when it was abolished; all other officers were "specials" (T96).

5. Betancourt applied to the Town police department but was not accepted (T91). After being laid off from his sergeant position at the park police, Betancourt was hired as a patrol officer by the City of East Orange in April 1993 (R-3a; T91). He was employed there until August 26, 1996.

6. In early 1995, Betancourt advised the State Department of Personnel (which had earlier determined that Betancourt was entitled to placement on the State-wide police officer reemployment list under N.J.S.A. 40:A14-180) that he wished to return to West New York as a police officer (R-3(d)).

On May 1, 1995, Betancourt and J. Martinez (who also unsuccessfully applied to the Town police department), filed a civil action in the Superior Court of Hudson County (Docket No. Hud-1-3685-95) (R-4). The complaint alleged that the officers were denied employment because of wrongful political retribution by the Mayor (R-4).

7. In August 1995 and on August 30, 1996, the Department of Personnel issued two inconsistent decisions concerning Betancourt. In the first decision, the Department found that Betancourt was entitled to placement on the police sergeant and

police officer reemployment lists for the Town. In the second decision (issued two days after Betancourt was sworn in as a Town police officer), the Department Director of Human Resource Management found that Betancourt was not entitled to placement on the reemployment lists (R-3(d)). The decision nonetheless recommended Betancourt's appointment on "equitable grounds."3/

8. In early 1996, Betancourt and Town labor counsel engaged in settlement discussions of the civil action (T93; T105). Betancourt acknowledged, "Certain things were knocked off the table [i.e., back pay and attorney fees]; I had to make certain compromises so top pay was included and vacation time" (T94). On August 28, 1996, about thirty minutes before he was sworn in as a Town police officer, Betancourt signed a release, surrendering his civil action (T114; R-5). The release does not provide any hint of Betancourt's salary and benefits.

At no time during settlement discussions was the PBA informed about Betancourt's salary and benefits. Betancourt is not a PBA member (T58).

3/ R-3(d) is a Merit System Board "Final Administrative Action" in the Matter of Carlos Betancourt and Joaquin Martinez issued 3/16/98. I take administrative notice of facts set forth in the decision. The Order states in a pertinent part, "It is further ordered that based on equitable grounds and the facts of this case, Mr. Betancourt's August 28, 1996 appointment from a police officer special reemployment list should be approved in accordance with N.J.A.C. 4A:1-1.2(c) rule relaxation procedures."

9. Kevin Williams is a Town of West New York police officer and was president of and chief negotiator for PBA Local No. 361 from June 1996 to June 1998 (T26). During the interest arbitration process, Williams learned that Betancourt had been recently hired, and was started at "top base pay and top vacation" (T28, T30). No evidence indicates that the PBA participated in such decisions (T69-T70). Williams understood that the Town invariably hired experienced police officers at step one on the guide (T31; T32).

Williams promptly complained to West New York Public Safety Commissioner Sal Vega, who replied that he was "ordered to pay [Betancourt] that salary and benefits by the courts" (T32). Williams also told his membership about Betancourt's salary and benefits and those with a few years' experience, "sort of hit the ceiling" (T38). Williams talked with Vega "numerous times" about Betancourt's placement, to no avail (T32).

10. West New York police officer Ray Semararo was first employed as a regular officer by the park police department in 1980 and was promoted to sergeant in 1982 (T86). On March 29, 1985, he was hired by the Town police department at step one (T40).

Nitin Daniel was first employed as a regular officer of the park police department for about two years before he was hired at step one by the Town police department (T43; T88).

An officer Jininez was first employed as a regular officer of the park police department for about two and one-half

years before he was hired at step one by the Town police department (T44; T88).

Officer John Alvarez was first employed as a regular officer of the park police department for about three years before he was hired in 1991 on step one by the Town police department (T45; T57; T88-T89).

Officer Carlos Irimia was first employed as a regular officer of the park police department for about two years and then as an officer with New Jersey Transit before he was hired at step one by the Town police department (T48).

All of these officers (except Irimia) were hired by the Town police department before the park police department was abolished (T53). Other experienced officers hired at step one were either special officers with the park police department or were employed for years by the County police department or the County Sheriff (T42-T47; T87-T89). For example, Officer Teddy Martinez was an officer with the (now abolished) Hudson County police department for about ten years before he was hired by the Town at step one in January 1997 (T46; T52). The evidence shows that before August 28, 1996, the Town hired experienced officers at step one on the guide.

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and

conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

To prove a violation of this section, a charging party must show that a working condition was changed or instituted without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25, 52 (1978); Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). An employer may defeat this claim if it has a managerial prerogative to change or institute the working condition or if it shows that the majority representative has clearly and unequivocally waived its statutory right to negotiate. Passaic Cty.; Elmwood Park. A controlling contract provision may also establish that the parties have already negotiated over an issue and no further negotiations are required. Passaic Cty.

Initial placement on the salary guide is mandatorily negotiable. In general, an employer cannot set a new employee's starting salary without first negotiating with the majority representative. Belleville Bd. of Ed., 209 N.J.Super. 93 (App. Div. 1986); Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998) mot. to reinstate app. granted, app. pending App. Div. Dkt. No. A-2351-97T5; Stanhope Bor. Bd. of

Ed., P.E.R.C. No.. 90-81, 16 NJPER 178 (¶21076 1990); Gloucester Tp., P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986); See also Middlesex Cty. Pros., P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990), aff'd 155 N.J.Super. 333 (App. Div. 1992) (credit for prior governmental service mandatorily negotiable).

The PBA claims that an existing working condition--starting experienced officers at step one on the salary guide--was changed unilaterally in August, 1996 when Betancourt was hired at step six with maximum vacation benefits. The evidence supports the PBA's contention; regular (as opposed to "special") officers with two to five years of police experience with the Town park police department were all started at step one on the Town police department guide. Regular officers with at least three years of police experience, including experience at other law enforcement employers (i.e., the County Sheriff, County police and New Jersey Transit police) were also started at step one on the Town police department guide.

The Town has not presented contrary evidence. In its Answer, the Town asserted that Betancourt was not a "new hire," implying that he had previous Town police employee experience. In its brief, the Town argues that other experienced officers were "rookies" compared to Betancourt. The latter argument is a concession to the evidence that other Town police officers were also former park police officers. They too were not "new hires."

Betancourt was a park police officer for at least twice the number of years as anyone else was before being hired by the Town

police department. While this fact lends superficial support to the "rookies" argument, it does not explain why a five-year park police officer (Semararo) was started at step one on the Town police salary guide and a ten-year park police officer (Betancourt) was started at step six. Nor does it explain why an officer with ten years of police experience (T. Martinez) was started at step one and an officer with a total of thirteen and one half years of police experience (Betancourt) was started at step six. Settlement of litigation, rather than "experience," explains Betancourt's initial placement at step six.4/

I am persuaded that the evidence defining an existing working condition in this case is at least as compelling as that which defined the same type of working condition (i.e., initial placement on the salary guide) in Middletown Tp. (police officers with academy training and one year in a municipal department were placed on step three of the salary guide). Betancourt's starting at step six with all attendant benefits is the only deviation of the Town's apparent policy of starting experienced officers at step one.

The Town asserts that the Complaint "consists of a mere contactual dispute... [over] Article XI of the agreement" and should be dismissed under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

4/ I see no relevant legal significance to the fact that Betancourt was hired after the park police department was abolished.

I disagree. Unlike the charges filed in Human Services, the PBA nowhere alleges that the Town abrogated a contractual right. I have discussed that the PBA has alleged and shown a unilateral change of an existing working condition. Such changes implicate Section 5.3's duty to negotiate over proposed modifications. See Middletown Tp.

Assuming that the gravamen of the case is a dispute over Article XI, I believe that the expiration of the 1992-94 agreement and the parties' subsequent participation in interest arbitration "...indicates that the policies of our Act, rather than a mere breach of contract claim may be at stake." Human Services at 10 NJPER 423. Citing Galloway Tp. Bd. of Ed., the Commission wrote at footnote 13 in Human Services:

> [T]he unilateral alteration of a prevailing term and condition of employment during the course of collective negotiations constitutes a refusal to negotiate in good faith [federal citation omitted]. Thus, the statutory policy upholding the status quo during the delicate period of successor contract negotiations warrants unfair practice proceedings on claims that an employer has unilaterally altered a term and condition of employment set in the expired predecessor contract.
> [10 NJPER 426]

Under all the circumstances, I reject the Town's Human Services defense.

The Town also contends that the PBA waived its right to negotiate over initial salary guide placement because it never participated in such decisions. A waiver will be found if the employee representative has expressly agreed to a provision

authorizing a change or impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J.Super 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987); Middletown Tp.

No facts suggest a waiver. The Commission rejected an identical "acquiescence" argument in Middletown Tp. There, as here, an existing employment condition, unwritten but defined by its constancy, was unilaterally changed. In both cases, unfair practice charges were filed, putting each employer "on notice that if it deviated from the practice, as that practice concerned employees with the requisite experience, the union would challenge the [employer's] action." Middletown Tp. at 24 NJPER 30.

Finally, the Town asserts that the Commission has no authority to vacate the settlement agreement with Betancourt. In general, settlement agreements to a lawsuit can be vacated only by clear and convincing proof of fraud or other compelling circumstances. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990); Pascarella v. Bruck, 190 N.J.Super. 118 (App. Div. 1983), certif. den. 94 N.J. 600 (1983).

I do not believe that any Commission decision has considered the effect of an individual settlement agreement upon a public employer's duty to negotiate collectively. The Commission has found that an employer violates the Act by unilaterally

increasing a unit employee's salary. Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994).

The Town has the managerial prerogative to hire Betancourt. See City of Atlantic City, P.E.R.C. No. 97-132, 23 NJPER 339 (¶28154 1997). But the individually negotiated placement on the salary guide together with attendant benefits are really terms and conditions of employment which by statute must be collectively negotiated "before they are established." Section 5.3. As such, the Town's action also violates the exclusivity principle in Section 5.3. D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990); Lullo v. Int'l. Ass'n. of Firefighters, Local 1066, 55 N.J. 409 (1970); City of Newark and FOP Lodge No. 12 and Newark PBA Local #3, P.E.R.C. No. 96-53, 22 NJPER 67 (¶27030 1996), aff'd 23 NJPER 34 (¶28022 App. Div. 1996).

The Commission often considers federal precedent in unfair practice cases. Lullo. Exclusivity is federal precedent incorporated into our Act. In J.I. Case Co. v. NLRB, 321 U.S. 332, 14 LRRM 501 (1944), the U.S. Supreme Court narrowly held that employers and employees could not maintain individual agreements providing an employee less than what would be provided under the collective bargaining agreement. The Court also expressed a concern which applies to this case:

> [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost breaking down some

> other standard thought to be for the welfare of the group and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. [14 LRRM 504-505]

The Town's private settlement agreement with Betancourt does not obviate its duty to negotiate terms and conditions of employment with the PBA. Accordingly, I recommend that the Town of West New York violated 5.4a(1) and 5.4a(5) of the Act.5/

REMEDY

The PBA requests that the Town be ordered to pay all officers hired in or around August, 1996 the same level of salary and benefits being paid to Betancourt. The second and alternately proposed remedy is that the Town return Betancourt to step one on the salary guide, pending negotiations.

I reject both proposals. The first is a mere windfall to unit employees. The second is burdensome to Betancourt.

In 1995, Betancourt filed a civil action seeking vindication of certain personal rights (which were not collectively negotiated or which otherwise existed as terms and conditions of employment). His August, 1996 settlement agreement with the Town represents the value of those rights. It would be burdensome for Betancourt to renegotiate the settlement agreement so that it

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5/ No facts show that the Town violated 5.4a(3) and (7) of the Act. I dismiss those allegations.

maintains its current economic value while returning him to step one on the guide as of August, 1996.

The Town's duty was to negotiate but not necessarily to agree. That duty has an economic value. Perhaps the value is the difference between Betancourt's current salary and benefits and those he would be receiving if he had started on step one of the guide in August, 1996. In any event, I order the Town to negotiate with the PBA compensation for unilaterally placing Betancourt at step six of the guide in August, 1996.

RECOMMENDED ORDER

The Town of West New York is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

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 unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

B. Take this action:

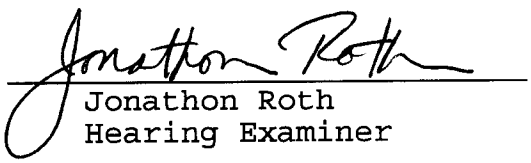
1. Restore the practice of starting new police officers with regular police experience at step one of the salary guide.

2. Negotiate in good faith with West New York PBA Local No. 361 over possible changes to the practice of placing new police officers with regular police experience at step one of the salary guide.

3. Negotiate in good faith with West New York PBA Local No. 361 over compensation for unilaterally placing Carlos Betancourt at step six of the salary guide in August, 1996.

4. 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.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Jonathon Roth
Hearing Examiner

Dated: January 29, 1999
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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

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 unilaterally changing a practice of placing new police officers with regular police experience at step one of the salary guide.

WE WILL restore the practice of starting new police officers with regular police experience at step one of the salary guide.

WE WILL negotiate in good faith with West New York PBA Local No. 361 over possible changes to the practice of placing new police officers with regular police experience at step one of the salary guide.

WE WILL negotiate in good faith with West New York PBA Local No. 361 over compensation for unilaterally placing Carlos Betancourt at step six of the salary guide in August, 1996.

Docket No. CO-H-97-287 Town of West New York
(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"

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