P.E.R.C. NO. 92-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLINGSWOOD POLICE
OFFICERS ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-17

BOROUGH OF COLLINGSWOOD,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Borough of Collingswood against the Collingswood Police Officers Association. The charge alleges that the Association violated the New Jersey Employer-Employee Relations Act when it refused to execute an alleged agreement. In the absence of exceptions, the Commission adopts the Hearing Examiner's findings of fact and agrees that a complete agreement had not been reached.

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Charging Party.

Appearances:

For the Respondent, Robert T. Zane, III, attorney

For the Charging Party, Wollman and Gazdzinski, attorneys (Eryk A. Gazdzinski, of counsel)

DECISION AND ORDER

On March 26, 1990, the Borough of Collingswood filed an unfair practice charge against the Collingswood Police Officers Association. The Borough alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(b)(4),[1/] when it refused to execute an alleged agreement.

On June 19, 1990, a Complaint and Notice of Hearing issued. On June 29, the Association filed an Answer asserting that the parties had not reached a complete agreement.

1/ This subsection prohibits employee organizations, their representatives or agents from: "(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

On October 26, 1990, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On January 10, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-18, 18 NJPER ___ (¶____ 1992). She found that the parties had not reached a complete agreement. She specifically credited the testimony of the Association's chief negotiator that the Association had turned down the Borough's offer of a 6% increase on a bonus paid to employees who had to work more hours than other employees in the unit.

The Hearing Examiner served her report on the parties and advised them that exceptions, if any, were due January 24, 1992. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-9) are accurate. We adopt and incorporate them. Based on these facts, we agree that a complete agreement had not been reached.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992

H.E. NO. 92-18

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

In the Matter of

COLLINGSWOOD POLICE OFFICERS
ASSOCIATION,

Respondent,

-and-

Docket No. CE-H-90-17

BOROUGH OF COLLINGSWOOD

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Collingswood Police Officers' Association did not violate the New Jersey Employer-Employee Relations Act by refusing to sign a collective agreement with the Borough of Collingswood that included a provision for a 6 percent per year bonus increase. The Hearing Examiner found that the Borough failed to prove that the parties had agreed to include that clause in the contract, or had reached a final agreement of all terms.

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. 92-18

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

In the Matter of

COLLINGSWOOD POLICE OFFICERS
ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-17

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Charging Party.

Appearances:

For the Respondent, Robert T. Zane, III, Esq.

For the Charging Party, Wollman and Gazdzinski, attorneys (Eryk A. Gazdzinski, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 26, 1990, the Borough of Collingswood ("Borough" or "Charging Party") filed unfair practice charges with the Public Employment Relations Commission ("Commission") against the Collingswood Police Officer's Association ("Association", "CPOA" or "Respondent"). The Borough alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection 5.4(b)(4)[1/] by refusing to execute the agreement allegedly reached by the parties in February 1990.

1/ This subsection prohibits public employee organizations, their representatives or agents from: (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

On June 19, 1990 the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1).[2/] On June 29, 1990, the Association filed an Answer (C-2, C-3) generally denying that it violated the Act and arguing it had not signed the agreement because the parties had not reached a complete agreement. At a hearing conducted on October 26, 1990, the parties examined witnesses, presented relevant evidence and argued orally. Briefs were filed by February 14, 1991.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Borough of Collingswood is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Collingswood Police Officer's Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The parties' most recent collective negotiations agreement was effective from January 1, 1988 through December 31, 1989 (J-1).

2/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" and "R" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits. The transcript citation T1 refers to the transcript developed on October 26, 1990, at p. 1.

4. In the Fall of 1989 the Borough and Association began negotiations for a successor agreement to J-1. Negotiations between the Borough and the police superiors, firefighters, and Borough employees' units had been completed. (T13, T43) Mark Lonetto, the Borough Administrator from May 1985 to February 1990, received a list of proposals from the Association in October 1989. (T11, T13, T31)

5. Lonetto and James Vodges, Borough Solicitor, represented the Borough during the negotiations leading to J-1. (T12) Lonetto attended all negotiations sessions for the successor to J-1 until his resignation effective on February 4, 1990. Vodges continued to represent the Borough for the successor negotiations after Lonetto's departure. (T39, T45) Tom Garrity was the Association's chief negotiator and attended all successor negotiations sessions. He was joined by Patrol Officer David Wallace in January 1990. (T143)

6. In past negotiations, once a contract had been negotiated to finality by the negotiating teams, the respective negotiators would obtain ratification of the tentative agreement from the Borough Commissioners and the Association membership. The Association's membership was required to vote to approve any contract. (T35-T36, T112) Typically, the CPOA would notify Lonetto by a phone call that the unit had ratified the tentative agreement. Lonetto would then send a typed copy of the entire agreement to the Association for a final check of completeness and accuracy, and for

their signature on the copy. A copy of the agreement, a salary ordinance, and a draft resolution approving the contract were sent to the Commissioners by Lonetto and Vodges. (T36-37)

7. The most important item on the Association's agenda for the new contract, aside from salary increases, was a differential for extra hours worked caused by the schedule, which they referred to as "shift differential". They continued to press for this until their focus shifted to a bonus increase. (T117, T129-T131) Scheduling in the Collingswood police department has resulted in excess hours worked by certain patrol and superior officers. These officers are assigned to work a cycle of five days on, two days off, five days on, one day off, five days on, two days off. Over the course of 21 days such officers work an extra eight hour shift above and beyond officers assigned to a schedule of five days on, two days off. Over the course of a year such officers work 130 to 135 extra hours. (T150-151)

8. J-1 provided for a "Bonus Payment" as follows:

> "each patrolman working an annual number of 2,190 hours (approximately) shall receive a $200.00 bonus to be paid on December 1, 1988 and a $250.00 bonus to be paid on December 1, 1989." (J-1, p.26)

The CPOA proposed an increase of $100 per year in the bonus for 1990 and 1991. (T38, T116, T152)

9. The parties' initial meeting for a new agreement was on October 6, 1989. The CPOA requested, inter alia, a shift differential for officers who work a longer shift. Lonetto and Vodges stated that they doubted the Commissioners would agree to a

shift differential but agreed to present the proposal to them. The Borough had not agreed to a shift differential in its negotiations with the police superiors. (T16-17, T43-44)

10. A second meeting was held in early November 1989. At this meeting the idea of a schedule change was advanced. This was viewed by both parties as an alternative to a payment for shift differential. There were also discussions about uniform allowance, and salary increase, but the main issue was the "rotation with the clock" schedule.[3/] (T45-46) A third meeting was held in late November 1989 at which the CPOA informed the Borough it was not interested in the rotation-with-the-clock concept. (T48) A second scheduling idea was proposed and considered at this meeting.(T49) At these November meetings, the Borough continued to reject a shift differential. (T112-114)

11. The parties met twice in January 1990. The Borough wanted to conclude negotiations because Lonetto was leaving in early February. It proposed a 6 percent increase in salary for both 1990 and 1991, an increase in clothing allowance, but no increase in the bonus. It also announced that it could not accept the second schedule change that had been proposed. There was no further discussion of schedule changes. (T51-T53) The Association proposed

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3/ Certain officers are required to rotate from a day shift (7 a.m. to 3 p.m.) to a late-night shift (11 p.m. to 7 a.m.), and then to an evening shift (3 p.m. to 11 p.m.).(T115) "Rotation-with-the-clock" alters that rotation to: day to evening to late-night.

language changes to five articles. These changes were facially acceptable to the Borough and all but one were settled by early February, pending CPOA approval of the final wording.(T54-T57) The discussion about the shift differential was only briefly discussed; the Borough flatly rejected it and stated that the CPOA could file for arbitration if they continued to want a shift differential. (T118-119) Another alternative to shift differential, that of a percentage increase in the bonus, was discussed. Initially, the demand for a bonus increase was distinct from the shift differential but as negotiations progressed the bonus increase became viewed as an alternative to the shift differential.(T117, T129-T131) Vodges and Lonetto were negative about any bonus increases but they agreed to take the idea to the Commissioners. (T51)

12. A final meeting was held on February 9, 1990. Both parties believed that the only issues remaining open at the end of this meeting were whether the Borough would offer and the Association would accept a 6 percent increase per year on the bonus, and whether a doctor's note would be required after 2 or 3 consecutive sick days. The other issues, salary increases, clothing allowance increases and language changes, were ready to be presented to the principals for ratification or rejection. (T59, T119, T152) There was no discussion of the shift differential. (T60)

13. The Association's membership met on February 12, 1990. Garrity presented the Borough's offer, including the wording changes, salary increases, and bonus increase of 6 percent per

year. The offer was accepted only in part; the membership voted to reject the 6 percent bonus and directed Garrity to demand a minimum 10 percent bonus increase. (T120, T132-T133, T149, T161-T163)

14. On February 12th Garrity telephoned Vodges to inform him about the vote. No one else witnessed or participated in the conversation. Garrity informed Vodges that the 6 percent salary increases were acceptable with the membership and that they had tentatively agreed to the wording changes pending viewing the final wording. Garrity also informed Vodges of the officers' rejection of a 6 percent increase in the bonus and their counterproposal for a minimum 10 percent bonus increase. (T110-T111, T120) At the end of the phone conversation Garrity believed that negotiations were still open and he next expected to receive a copy of the exact wording changes. (T111, T120, T138-139)

15. During the February 12th call Vodges asked Garrity if the 6 percent increase was acceptable to the membership. He meant the 6 percent on the bonus and when Garrity said "its okay with the guys" Vodges assumed Garrity meant the Association had then ratified all terms of the parties' contract.[4/] (T68, T71-72, T104-105)

16. Vodges then prepared and sent a copy of the alleged agreement with a cover letter dated February 28, 1990 (C-4). The cover letter states:

4/ Garrity's testimony was forthright and direct and he had a clear recollection of the conversation. Vodges' recollection was less precise than Garrity's, and together with all other testimony I credit Garrity's recollection of the conversation.

> Enclosed please find the original and two (2) copies of the agreement which I have prepared, reflecting the agreement reached between the parties. If same meets with the approval of your organization, please sign the original and one copy and transmit same to Mr. Law" (C-4)

Consistent with his belief that a final agreement had been reached, Vodges prepared and sent a salary ordinance and resolution, informed the Commissioners that an agreement had been reached, and recommended they ratify it. The Borough ratified the agreement by passing a resolution authorizing the Mayor to execute the contract. A salary award was also introduced and passed on March 5, 1990. (T66-T68, T71) The salary ordinance was introduced quickly to avoid any further delay to the officers' receipt of their increases. (T68, T110) Garrity received C-4 on March 2, 1990. (T122)

17. Garrity resigned as president of the CPOA because of his schedule and for personal reasons on or around February 12, 1990, before receiving the contract from Vodges. (T136-137, T143) Wallace assumed the negotiations responsibility. (T136,T143) The CPOA hired an attorney on about February 20, 1990. (T157)

No one from the Association contacted Vodges after the February 12th call or after receiving the contract on March 2, 1990. (T67-68) Wallace did not contact Vodges about the outstanding counterproposal because he knew the Association was hiring an attorney. The membership agreed that members would not contact the Borough further because their new attorney would be in contact with Vodges. (T125, T138) Later in March or early April Vodges called Wallace to ask what happened with the contract and was told there

was no contract, and that the Association had hired an attorney. (T156-T157)

ANALYSIS

The Borough has alleged that the Association violated 5.4(b)(4) when it refused to sign an agreement, including a provision for 6 percent per year increases on the bonus payment. The Association's defense is that there was no agreement on that item. The evidence shows that the membership specifically voted not to ratify the 6 percent bonus increase term of the tentative agreement and that it notified the Borough of this rejection. The Borough alleges that its solicitor was told that the membership had ratified the entire agreement by a telephone call from the Association's president on February 12, 1990, and that, therefore, it is entitled to rely upon that representation and have the contract executed by the Association.

The issue presented by this charge is whether the parties had reached a legally enforceable agreement. The Association did not sign the agreement drafted by James Vodges which purportedly represented the terms agreed to by the Borough and CPOA. For the reasons stated below I find that they had not reached an agreement.

The Commission has held that its jurisdiction in allegations of refusal to sign negotiated agreements a contract charges is limited to determining whether an agreement has been reached and whether a party refused to sign that agreement. Borough

of Fair Lawn, P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117 13 NJPER 282, 283 (¶18118 1987); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

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

But here the Borough did not produce any writing showing that the Association agreed to any terms and conditions. The Borough relies on the testimony to prove both the formation of a contract and its specific terms. C-4, Exhibit B, the alleged contract, was not even prepared until after the Borough alleges it had reached an agreement with the CPOA. In keeping with their past procedures, the record reveals that that document would not become the contract until the Association had ratified the final wording of orally agreed-upon language changes. Here, there was no writing

memorializing the parties' tentative terms or conditions prior to the drafting of C-4, Exhibit B.[5/]

The Borough knew that the CPOA membership was required to ratify terms agreed to by the negotiators and that the Association could reject wording that it did not approve. On February 9, 1990 the negotiators, Vodges and Garrity, agreed to take proposed terms back to back to their respective principals for ratification. I found that the Association membership rejected the Borough's offer of 6 percent per year increase on the negotiated bonus. Therefore, I conclude that the Association did not agree to the terms of the bonus as alleged by the Borough.

Further, I credited Garrity's testimony about the phone conversation on February 12, 1990, in which the Borough alleges the contract was formed. I conclude that Garrity told Vodges that the members had approved the 6 percent salary increase, but had rejected the 6 percent per year bonus increase and demanded at least 10 percent. I find that Vodges, honestly but mistakenly, believed that the Association had approved the only remaining unresolved term and that an agreement was concluded. Even if Garrity's version of that conversation was not accurate, however, the Borough acted at its peril in failing to get a tentative written agreement or memorandum of agreement which could have been initialed. Parol evidence cannot be the basis for finding that a contract was formed, where one party's conduct evidences a clear intent not to be bound.

5/ CP-1 and CP-2 are written evidence of the Association's position and do not represent the parties' "agreement".

In those cases where parties had divergent intentions about the substantive terms of an alleged agreement, the Commission has found no violation of the Act because the parties did not reach agreement or have a meeting of the minds.[6/] Applying that standard here, I find that no legally enforceable agreement was ever reached. The Association specifically rejected the bonus increase offered by the Borough in its February 12th ratification meeting.[7/]

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

Recommendation

I recommend the Complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: January 10, 1992
Trenton, New Jersey

6/ Numerous (a)(6) and (b)(4) allegations have been dismissed where neither apparent authority nor ratification occurred. In these cases, the Commission concluded that no agreement was ever reached. See, e.g., Lower Twp. Bd. of Ed., P.E.R.C. No. 78-32, 4 NJPER 25 (¶4013 1977); Borough of Matawan, P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986); and Passaic Valley Water Comm., P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984). Cf., Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983) and Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986) which concern post-ratification disputes as to the terms of the parties' agreements.

7/ This recommended decision, should the Commission adopt it, does not disturb the parties' undisputed terms. Either party may demand further negotiations solely on the bonus increase issue; may demand negotiations on all other issues, or the parties may negotiate some combination of the above. The parties are also free to merge negotiations for the period 1990-91 into their current negotiations or to present unresolved issues (ie., the bonus increase) to an interest arbitrator.