P.E.R.C. NO. 89-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY SUPERINTENDENT OF
ELECTIONS AND COMMISSIONER OF
REGISTRATION (KARLA SQUIRE),

Respondent-Public Employer,

-and-

COUNTY OF ESSEX, Docket No. CO-H-87-249

Respondent-Intervenor,

-and-

ESSEX COUNTY EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Essex County Superintendent of Elections violated the New Jersey Employer-Employee Relations Act when it failed to negotiate with the Essex County Employees Association concerning the County of Essex's implementation of a one-week salary holdback. The Commission further finds, however, that the County did not violate the Act because it had a legitimate and substantial business justification in implementing the salary holdback.

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COUNTY OF ESSEX,

Docket No. CO-H-87-249

Respondent-Intervenor,

-and-

ESSEX COUNTY EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent-Public Employer, Cary Edwards, Attorney General (Donna Kelly-Boccher, Deputy Attorney General)

For the Respondent-Intervenor, Apruzzese, McDermott, Mastro & Murphy, Esqs. (Robert T. Clarke, of counsel)

For the Charging Party, James Mahoney, Esq.

DECISION AND ORDER

On March 3, 1987, the Essex County Employees Association ("Association") filed an unfair practice charge against Carla Squire, Essex County Superintendent of Elections and Commissioner of Registration ("Superintendent"). The charge alleges that the Superintendent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),

(2) and (5),[1/] when she unilaterally altered the employees' pay period by a one-week salary holdback.

The Association simultaneously applied for interim relief. A Commission designee granted temporary restraints on that day, but dissolved them on March 13, 1987.

On March 20, 1987, another interim relief hearing was conducted. At that time, the Superintendent moved to have the County of Essex ("County") made a party. The Superintendent contended that the County issued the salary checks and decided to implement the salary holdback. The Commission designee granted this request. The charge was amended to add the County as a respondent.[2/] Following a hearing, the Commission designee granted interim relief ordering both the County and the State to stop the salary holdback.

On April 21 and May 27, 1987, a Complaint and amended Complaint and Notice of Hearing issued. On May 19, 1987, the Superintendent filed her Answer. She denies violating the Act and

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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/ The County's motion to add the State Division of Local Government Services as a respondent was denied.

contends the County implemented the holdback. The County then filed its Answer. It also denies violating the Act. It contends that it is not the public employer of the employees represented by the Association; it had the managerial prerogative to implement the salary holdback, and negotiations on salary holdbacks are preempted by statute.

On June 9, 1987 and January 14, 1988, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On March 31, 1988, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-47, 14 NJPER ___ (¶_____ 1988). He found that the Superintendent violated subsection 5.4(a)(5) by failing to negotiate with the Association on the salary holdback and failing to stop the County from implementing the salary holdback. He found that the County violated subsection 5.4(a)(1) when it implemented the salary holdback without giving the Superintendent and Association sufficient notice to allow them to negotiate over that issue. As a remedy, he recommended that the County rescind the salary holdback and the Superintendent negotiate with the Association concerning the proposed salary holdback.

On May 11, 1988, after receiving an extension of time, the County filed exceptions. It excepts to the Hearing Examiner's factual findings that the Superintendent proposed a salary holdback during the current negotiations and that the County had previously

attempted to negotiate a holdback with the Association. It also contends that the Hearing Examiner erred in his legal conclusion that the County violated the Act in implementing the salary holdback. The County contends it was obligated to do so pursuant to a directive from the Division of Local Government Services. It further contends that we should defer to the Division's interpretation that N.J.S.A. 40A:5-16 mandates the salary holdback and therefore negotiations on this issue is preempted.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-13) are accurate with one exception: the Superintendent did not propose a salary holdback during the 1987 negotiations (TA49; TA94).[3/] We add these facts. In 1981, the County wrote the Superintendent a memorandum stating its plans to institute a salary holdback (RC-9). Dolores Capetola, the County's labor relations director, told the Superintendent in March 1985 that a salary holdback should have been negotiated in the 1984-1986 agreement. Squire gave "her word" that in the next negotiations, a salary holdback would be instituted (TB5-TB6).

We first consider whether the County violated the Act when it implemented the salary holdback. This issue is mandatorily negotiable. E.g. City of Paterson, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd App. Div. Dkt. No. A-1318-79 (2/10/81). The

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3/ Although at one point the union representative suggested she did (TA51), he earlier had said she had not (TA49). In view of the Superintendent's testimony that it was not proposed (TA94), we find that it was not discussed.

Appellate Division has specifically rejected the County's claim that the issue is statutorily preempted. Thus, under our settled law, an employer violates the Act when it unilaterally institutes a salary holdback.

This case raises a new issue since the County is not the employer. All parties have conceded that the Superintendent is the public employer. See In re Cty. of Mercer, 172 N.J. Super. 406 (App. Div. 1980). As the Hearing Examiner correctly concluded, however, we nevertheless have jurisdiction over the County. In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 82-83, 8 NJPER 209 (¶13088 1988), we found that the State, through the Department of Human Services, Division of Public Welfare ("Division") violated subsection 5.4(a)(1) even though it was not the public employer of the charging party. We did so because of the particular manner in which the Division carried out its review of a collective negotiations agreement between the Union County Welfare Board and the Communications Workers of America. Therefore, we concluded that the Division violated subsection 5.4(a)(1) by improperly interfering with the employees' rights under the Act.

The question is whether the County's conduct violated subsection 5.4(a)(1). The standard is set forth in New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee

> in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n.1]

The salary holdback affected the employees' terms and conditions of employment. But applying the standard to this record, we find that the County did not violate the Act. It was under a directive from the Division of Local Government Services to implement the holdback. The County had been notified since 1981 that the Division would not approve its new payroll system without the holdback. Thereafter, it was able to negotiate agreements on salary holdbacks with 31 of the 32 negotiations units. It could not negotiate with the employees represented by the Association. So it requested the Superintendent to negotiate and waited for her to do so. She did not. Only after waiting for years and after being pressed by the Division to do so did the County implement the holdback. Under this case's circumstances, it had a legitimate and substantial business justification to do what it did. We therefore dismiss the Complaint against the County.

We agree, however, that under the circumstances, the Superintendent violated her negotiations obligation. The Hearing Examiner so found and the Superintendent did not except. She knew the County planned to implement the holdback, but did not negotiate the change with the Association. Unfortunately, because the County lawfully implemented the change, we cannot order a return to the

status quo. We do, however, order the Superintendent to negotiate severable and mandatorily negotiable issues arising from that change.

ORDER

The Essex County Superintendent of Elections and Commissioner of Registration is ordered to:

A. Cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Essex County Employees Association over the implementation of a one-week salary holdback.

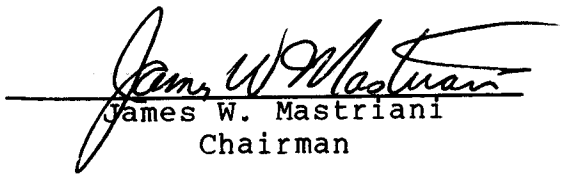
B. Take the following affirmative action:

1. Negotiate with the Association over severable and mandatorily negotiable issues arising from the implementation of the salary holdback.

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

C. The Complaint against the County is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
July 15, 1988
ISSUED: July 18, 1988

H.E. NO. 88-47

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

In the Matter of

ESSEX COUNTY SUPERINTENDENT OF
ELECTIONS AND COMMISSIONER OF
REGISTRATION (KARLA SQUIER),

Respondent-Public Employer,

-and-

COUNTY OF ESSEX, Docket No. CO-H-87-249

Respondent-Intervenor,

-and-

ESSEX COUNTY EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Superintendent of Elections and the County of Essex violated the New Jersey Employer-Employee Relations Act. The Superintendent violated the Act when she failed to negotiate with the Association over the implementation of a one-week salary holdback. The County violated the Act by interfering with the Association's right to negotiate over a salary holdback. The Hearing Examiner further recommended that the County of Essex which pays the Superintendent's expenses, be ordered to cease the implementation of a one-week salary holdback and return the pay schedule, with respect to employees in the unit, to what it had been prior to the change.

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. 88-47

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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ESSEX COUNTY EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent-Public Employer
Cary Edwards, Attorney General of New Jersey
(Donna Kelly-Boccher, D.A.G., of counsel)

For the Respondent-Intervenor
Apruzzese, McDermott, Mastro & Murphy, Esqs.
(Robert T. Clarke, of counsel)

For the Charging Party, James Mahoney, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on March 3, 1987 by Essex County Employees Association (Association) alleging that the Essex County Superintendent of Elections and Commissioner of Registration (Superintendent) violated subsections 5.4(a)(1), (2),

and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Association alleged that during negotiations for a successor agreement the Superintendent unilaterally altered the employees' normal pay period and instituted a one-week salary holdback.

On March 3, 1987 the Association also made application for interim relief and temporary restraints. A Commission designee granted temporary restraints on that day but dissolved them on March 13, 1987. A show cause hearing was held before another Commission designee on March 20, 1987. When the hearing commenced, the Superintendent moved to have the County of Essex (County) made a party to this matter. The Superintendent argued that it was the County who decided to implement a salary holdback, and the County who issued the salary checks. The Association and County opposed the motion, arguing that the County was not the employer of the affected employees. The Commission designee granted the Superintendent's motion and amended the Charge to include the County as a respondent (I.R. Transcript at 13). The County then made a motion to include the State Division of Local Government Services

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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."

(State or Division) as a party to this action because it (County) implemented the holdback pursuant to Division requirements. The Commission Designee denied that motion (I.R. Transcript at 23).

In the interim relief proceeding the Association sought an order restraining the Superintendent from completing the implementation of a one-week salary holdback. The County had already implemented four days of a five-day holdback at that point. The Commission Designee in a bench decision granted that request and ordered the County and State to cease from further implementing a salary holdback. The County did not comply with that order but the Association did not ask the Commission to seek enforcement of the Designee's order. See N.J.A.C. 19:14-10.3.

A Complaint and Notice of Hearing was issued on April 21, 1987 naming the Superintendent as respondent (C-1). An amended Complaint was issued on May 27, 1987 also naming the County as a respondent (C-1A). Both Respondents filed Answers (C-2, C-3). The Superintendent denied violating the Act and argued that it was the County who created and implemented the salary holdback. The County denied violating the Act and argued that it was not the public employer of the affected employees and could not negotiate with the Association; that the subject of a salary holdback was preempted from negotiations by statute; and that the Association waived its right to negotiate.

Hearings were held on June 9, 1987 and January 14, 1988.[2/] The Association and County filed post-hearing briefs, the last of which was received on March 11, 1988.[3/]

Upon the entire record, I make the following:

Findings of Fact

1. For the twenty years prior to 1987 the Superintendent's employees (and most County employees) were paid every other Friday on a "current basis," that is, they were paid on a Friday for a ten-day pay period they were completing that same Friday (TA24). The Superintendent employs approximately 40 people, but the County is actually responsible for paying their salaries (TA67).[4/] The Superintendent is the appointing authority for her employees; she does the hiring, firing, promoting and assignments (TB9). The Superintendent signs the payroll sheets which are given

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2/ The transcripts from the hearings will be referred to as TA and TB respectively.

After June 9, 1987 a second day of hearing was scheduled for July 2, 1987. Pursuant to the Superintendent's request, the hearing for that day was cancelled and the hearing was rescheduled for July 17, 1987. On July 16, 1987 the County requested the hearing be postponed due to the illness of its main witness. The hearing was tentatively rescheduled for October 21 and 22, 1987, but was rescheduled for November 9, 1987. Pursuant to the Charging Party's request, the November hearing was cancelled, and the hearing was rescheduled for January 14, 1988.

3/ The Superintendent did not file a post-hearing brief but relied on her March 13, 1987 submission to the original Commission Designee.

4/ Pursuant to N.J.S.A. 19:31-2 the County is required to pay for the Superintendent's expenses including salaries.

to the County's payroll department for processing. The County's payroll department prepares the paychecks and delivers them to the Superintendent, who is responsible for distributing them to her employees (TA65-TA66, TB15, TB49-TB50).

The paychecks were given to the employees at approximately 11 a.m. (Friday), on the tenth workday in the ten-day pay period but prior to the completion of the tenth day (TA66). The checks were actually prepared and available to department heads, including the Superintendent, by Thursday evening (TB42). In order to make those checks available by that time the Superintendent certified completion of the ten-day work period on the seventh or eighth day of the work period, the Tuesday or Wednesday prior to the Friday distribution of checks (TA66, TA93, TB41-TB42).

Normally, the employees worked the complete pay period including the remainder of the Friday on which they received their checks, thereby completing their work for the pay period. The Superintendent was responsible to make certain that regular checks were not distributed to employees who did not work the complete pay period (TB50). If an employee did not work on the eighth, ninth or tenth day of the pay period, for example, the Superintendent was expected to retrieve or withhold the check, return it to the County payroll department, and a new, but handwritten, check would be issued (TA93, TA96).[5/] It was improper to issue checks to

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5/ Although handwritten checks as a general accounting practice are considered a risky and unwise practice, the County still has the ability to issue such checks (TB38).

employees for more than the time they actually worked. That situation occurred, however, if they left early on Friday after receipt of the checks (TA96). Under those circumstances an employee would be docked at a later time.

Karla Squier became Superintendent on December 24, 1984. She believed that she did not have authority over the method of payment affecting her employees (TA83-TA84), nor that she had the power to prevent a salary holdback (TA84). In January 1987 the Superintendent's employees were given notice (CP-5) that the County was implementing a one-week salary holdback over five pay periods beginning February 2, 1987. The holdback was completed on April 3, 1987, giving the County payroll department five additional days to review the payroll and eliminate errors (TA39-TA41, TA45, TA48, TB43). After the change, paychecks were dated for the Friday following the completion of the pay period the previous Friday; however, paychecks were available after 3 p.m. on the Thursday preceding the actual Friday payday (TA48).

2. In 1977 the Association represented County and Superintendent employees in separate units. The County attempted to negotiate a salary holdback with the Association at that time, but a holdback was not negotiated into the agreement (J-1 1978) which was signed on February 16, 1978 (TA28). In recent years the Association lost its right to continue representing County employees, and now represents only the Superintendent's employees.

In 1981 the County decided to implement a new computerized payroll system. Pursuant to N.J.A.C. 8:30-8.6 the County, by letter of December 19, 1980 (RC-1), sought approval from the State's Department of Community Affairs to implement the new system. By letter of February 4, 1981 (RC-2) the Department's Bureau of Local Management Services responded to RC-1 and explained that there was a problem with the County's system of paying on a current basis, and the Department recommended a one-week salary holdback. The pertinent parts of RC-2 provide:

> I note initially that, according to your letter, present County practice is to pay on a current basis, using an exception reporting system. There is no objection to an exception system in itself, provided that it is properly controlled. The combination, however, of exception reporting with paying currently increases the difficulty of adequate control, especially when the number of employees is large.
>
> Beyond this consideration, we here are concerned that when a supervisor signs an attendance report he is certifying that employee services have been rendered to the County. Obviously this is not the case when payroll calculations are begun early to produce checks for the last day of the pay period. Because of this concern with the time schedule, I cannot recommend approval of the complete payroll operation to the Division Director so long as you are paying on a current basis.
>
> We recommend a one week delay in issuing checks. It is feasible, although perhaps not easy, to effect the transition by delaying the check issue date one additional day on each of five successive pay periods. If you chose to institute a delay, whether by this or some other method it requires extensive planning with emphasis on informing the employees of the change well in advance.

By memorandum of September 4, 1981 (RC-9), the County's Controller, Michael Cortese, notified County department and division

heads, constitutional officers and judiciary that the State had not approved the new payroll system because the County paid employees on a current basis, and it informed them that the County, therefore, intended to implement a two-week salary holdback. The County, however, did not implement a holdback at that time. In February 1984 the County requested additional time to comply with RC-2, and by letter of March 9, 1984 (RC-3), the State Division of Local Government Services approved the request and continued to allow the County to issue paychecks on a current basis. But the Division also reminded the County that "For an unqualified and full approval it's required that pay computations not be initiated before the end of the pay period covered."

On August 1, 1984 the County asked the Division of Local Government Services whether one group of employees might be exempted from the holdback requirement (TB58). By letter of August 6, 1984 (RC-4) the Division responded that for full approval of its new payroll system a holdback had to apply to all "County" employees. The Division explained that the County's method of payment did not comply with statute.

The pertinent part of RC-4 provides:

> For full and unqualified approval of the computerized payroll system under the New Jersey Administrative Code 5:30-8.6, it is required that the holdback be applied uniformly to all County employees.
>
> The use of the old method of paying current presents too many opportunities for error. A mixed or bifurcated system would perpetuate this weakness, while adding administrative complications. Good management requires a holdback period; that is, that

> the payroll operation not start in advance of the close of the pay period and that a sufficient amount of time be allowed for carrying out, and for controlling, each stage of the operation.

N.J.S.A. 40A:5-16 states, in part:

> The governing body of any local unit shall not pay out any of its moneys ...
>
> b. unless it carries a certification of some officer or duly designated employee of the local unit having knowledge of the facts that the goods have been received by, or the services rendered to, the local unit.

Whenever a supervisor signs an attendance report for a group of employees, he or she is certifying that the employee services have been rendered to the County. This should not be done in advance of the end of the pay period, nor should pay computations, which are dependent on the attendance reports for input, be initiated in advance of the end of the pay period.

On March 19, 1985 the Association and Superintendent reached a new collective agreement (J-1). That agreement was retroactive to January 1, 1984 and effective through December 31, 1986 and did not provide for a salary holdback. Since no holdback was agreed upon in J-1, the County waited for that agreement to expire before implementing the holdback (TB6-TB7).

On August 11, 1986 (RC-5) the County requested another extension of its current basis payroll system, but informed the Division that it would begin implementing the holdback in January 1987. On August 21, 1986 (RC-6) the Division granted the extension but emphasized that the extension was only to allow the County to complete its arrangements for implementing a holdback. The pertinent part of RC-6 provided:

> The payroll system, supplied by Cyborg Systems and run by the County Data Processing Department, was initially approved for use with specific County units and then, conditionally, for all Essex County employees. While arrangements for making scheduling corrections are being completed, the existing practice of giving out paychecks on a current basis may be continued. This timing aspect of the operation is specifically set apart and excluded from the approval of the computer procedures. For an unqualified and full approval it is required that pay computation not be initiated before the end of the pay period covered.

3. In September 1986 Daniel Fortunato, an official of the Association, learned that a salary holdback was to be implemented in 1987. That information prompted him to send a letter to the Superintendent on September 26, 1986 (CP-1) requesting negotiations for 1987 (TA30). That same day, Fortunato (in CP-2) sent the Superintendent a list of the items he sought to negotiate, and requested the Superintendent's assurance that there would be no changes in terms and conditions of employment during negotiations (TA31-TA32). The Superintendent received those documents that day and acknowledged their receipt (CP-3).

In late November 1986, all employees receiving payroll checks issued by the County, including the Superintendent's employees, received notice via their payroll check stubs that a salary holdback would begin on January 16, 1987 (TA60). After receiving that notice Fortunato told a County official that the Association did not agree to a holdback, but because the Association did not believe that the County was the employer of the affected

employees, he made no demand to negotiate with the County over the holdback (TA59, TA61, TB8, TB13).[6/]

In December 1986, Fortunato asked the Superintendent whether the holdback would apply to her employees, and she responded that after talking to a County official, the holdback would probably not apply to her employees (TA34, TA68). The Superintendent proposed a salary holdback during the negotiations for a new agreement, but the Association did not agree to that proposal (TA32-TA33, TA51).

The holdback was not implemented on January 16, 1987, but on that date the employees paycheck stubs (CP-5) included a notice that the holdback would begin on February 2, 1987. On January 16, Fortunato sent the Superintendent a letter (CP-4) requesting that she reassure him that the holdback would not apply to her employees. Fortunato spoke with the Superintendent after CP-4 was sent and the Superintendent indicated that she was unable to stop the holdback (TA36). She had telephoned a County official and tried to prevent the County from implementing a change but she was not successful (TA37).

The holdback implementation began on February 2, 1987 without negotiations with the Association by either the

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6/ The Association, however, would not object to the County sitting in with the Superintendent to negotiate over a salary holdback (TA62).

Superintendent or County (TA70, TB16).[7/] After the holdback began the Superintendent took no further action to prevent its implementation (TA70). On February 25, 1987 (RC-7), the County again requested from the Division of Local Government Services an extension of time to implement the holdback. On March 13, 1987 (RC-8), the Division granted another extension and included language nearly identical to the language in RC-6 cited above.

On March 20, 1987, the Commission Designee restrained the County from completing the implementation of the salary holdback. By that day the County had implemented four of the five holdback days. If the order had been complied with a salary check should have issued on April 2, 1987. In an attempt to comply with that order, the Superintendent, by letter of April 2, 1987 (CP-6), requested that the County release her checks that day, but the checks were not released by the County until April 3, 1987, which completed the implementation of the one-week salary holdback.

4. Dolores Capetola, the County's Director of Labor Relations, negotiates all County collective agreements, and participates in negotiations on behalf of the Essex County Sheriff, Essex County Prosecutor, and the Essex County Judges, all of whom are separate public employers like the Superintendent. There are 32 negotiations units in Essex County (including units of County, Sheriff, Prosecutor, Judicial, and Superintendent employees), and

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7/ The County withheld implementation of the holdback until J-1 expired (TB6-TB7).

Capetola has participated in all but the Superintendent's negotiations (TB3-TB5). A salary holdback provision was negotiated into the collective agreements of the remaining 31 units (TB5).

5. Article 4 of J-1 (1978) provides:

> Except as otherwise provided, all rights, privileges and benefits which employees referred to herein have heretofore enjoyed shall continue under the terms of this agreement. The personnel policies and personnel regulation currently in effect shall continue to be applicable to all employees except as otherwise expressly provided herein.

Article 25 of J-1 (1978) provides:

> The parties agree that upon request, negotiations for a new agreement may be initiated no more than ninety (90) days prior to the expiration of this agreement. During the term of negotiations for a new agreement and until execution thereof, all terms and conditions set forth in this agreement shall remain in effect, until the signing of a new agreement and until execution thereof.

Analysis

Salary Holdback Negotiability

The Commission has held that salary holdbacks are mandatorily negotiable. College of Medicine and Dentistry of New Jersey, P.E.R.C. No. 77-35, 3 NJPER 70 (1977)(CMDNJ); City of Paterson, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd App. Div. Dkt. A-1318-79 (2/10/81)(Paterson); Lawrence Tp. School Bd., P.E.R.C. No. 81-69, 7 NJPER 13 (¶12005 1980)(Lawrence); Tp. of West Orange, P.E.R.C. No. 84-30, 9 NJPER 602 (¶14255 1983)(W. Orange). The Commission has also held that the timing of salary payments, and day of pay, are mandatorily negotiable. Garfield Public Schools Bd.Ed., P.E.R.C. No. 80-67, 5 NJPER 542 (¶10279 1979); Ewing Tp.

Bd.Ed., P.E.R.C. No. 81-85, 7 NJPER 89 (¶12035 1981); Lawrence; West Orange.

In CMDNJ the College unilaterally implemented a five-day salary holdback relying upon its interpretation of N.J.S.A. 52:14-15.[8/] The Commission, however, found that the statute did not preempt negotiations over salary holdbacks.

In Paterson the City sought to unilaterally implement a one-week salary holdback in reliance upon its interpretation of N.J.S.A. 40A:5-16 which it believed required such a holdback and made the matter non-negotiable.[9/] The Commission held that 40A:5-16 did not apply to salaries in view of N.J.S.A. 40A:5-19

8/ N.J.S.A. 52:14-15 provides:

> Except as otherwise specifically provided by law, all officers and employees paid by the State shall be paid their salaries or compensation biweekly in a biweekly amount; provided, however, the State Treasurer and the Director of the Division of Budget and Accounting shall fix the time of payments in the biweekly amount so that payments will commence biweekly when there shall have been developed an interval of not more than 9 working days between the last day of the biweekly period for which the salary or compensation has been earned and the date of payment.

9/ N.J.S.A. 40:5-16 provides:

> The governing body of any local unit shall not pay out any of its moneys.
>
> a. unless the person claiming or receiving the same shall first present a detailed bill of items or demand, specifying particularly how the bill or demand is made up, with the certification of the party claiming payment that it is correct. The governing body may, by resolution, require an

Footnote Continued on Next Page

which provided for payment of salaries and wages.[10/] The Commission then held that 40A:5-19 did not preempt negotiations over salary holdbacks. The Appellate Division agreed with the Commission's statutory interpretations and held:

> We reject the City's contention that N.J.S.A. 40A:5-16 mandates the salary holdbacks. We agree with PERC's conclusion that this statute "most reasonably would seem to be intended for the purchase of goods or services" from other than City employees. We also agree with PERC that the general authority granted by N.J.S.A. 40A:5-19 to pay salaries and wages does not preempt the holdback from the scope of collective negotiations. This is not "a specific statute or regulation setting or controlling a particular term or condition of employment...[Emphasis in original]." State v. State Supervisory Employees Association, 78 N.J. 81 (1978).
>
> App. Div. Dkt. No. A-1318-79.

9/ Footnote Continued From Previous Page

affidavit in lieu of the said certification, and the clerk or disbursing officer of the local unit may take such affidavit without cost, and

b. unless it carried a certification of some officer or duly designated employee of the local unit having knowledge of the facts that the goods have been received by, or the services rendered to, the local unit.

10/ N.J.S.A. 40A:5-19 provides:

The governing body of any local unit may provide by ordinance for the manner in which and the time at which salaries, wages or other compensation for services shall be paid, and prescribe the form and manner in which checks upon the treasury shall be drawn and signed for that purpose.

The local unit may, by resolution, provide for the bi-weekly payment of the salaries, wages and compensation of officers and employees, both elective and appointive.

The Commission relied upon the same analysis again in West Orange.[11/]

In its post-hearing brief the County recognized that in Paterson the Commission held that 40A:5-16 did not preempt negotiations regarding a salary holdback, yet it argued that the Commission should reconsider its decision. The County maintained that since the Division of Local Government Services interprets 40A:5-16 as applying to salaries and requiring a holdback, that the Commission should defer to that interpretation. The County argued that the Division of Local Government Services is the agency primarily responsible for regulating and interpreting that statute.

The County's argument lacks merit. First, the Commission has the authority and jurisdiction, as in Paterson, to interpret statutes relied upon by respondents as defenses to unfair practice charges. See Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316-317 (1979); N.J. Dept. of Human Services, P.E.R.C. No. 82-83, 8 NJPER 209, 213 (¶13088 1982)(N.J. Dept. Human Services). The facts here are virtually the same as those in Paterson with respect to the holdback issue; thus, the Commission's interpretation of 40A:5-16 and 40A:5-19 in that case is applicable

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11/ In Lawrence the Board argued that it violated the New Jersey Constitution, Art. VIII, Sec. 111, Para. 2 and 3, to pay employees at or before the end of a pay period. The Commission rejected that argument and held that the payment of money for compensation, as opposed to a gift or a loan, did not violate the intent of Art. VIII.

here. Although the Division of Local Government Services might interpret that statute differently, the Commission is not obligated to follow a different interpretation. Second, in arguing that 40A:5-16 applies to salaries and preempts negotiations on salary holdbacks, the County appears to disregard the Appellate Division's affirmance of the Commission's Paterson decision. The Appellate Division specifically found that 40A:5-19, and not 40A:5-16, applies to salaries, and that 40A:5-19 does not preempt negotiations over salary holdbacks. To the extent the Division of Local Government Services' interpretation of 40A:5-16 or 40A:5-19 differs from the Appellate Division's, it is unenforceable. The County, like the Commission, is obligated to follow the Appellate Division's interpretation of the statute.

Third, the County negotiated with all of its (and the Sheriff's, prosecutor's and judiciary's) units over the salary holdback prior to its implementation. That action negates the County's assertion here that holdbacks were not negotiable.

Thus, I find that neither 40A:5-16 nor 40A:5-19 preempts negotiations over the implementation of salary holdbacks.

The Public Employer

The Superintendent is the only public employer of the employees involved in this matter; there is no joint employer relationship with the County. The Superintendent is the appointing authority of her employees, and controls all of the indicia of a public employer except the payment of salaries. Pursuant to N.J.S.A

19:31-2, the County Treasurer is required to pay the expenses incurred by the Superintendent,[12/] but the County's payment of those salaries does not create a joint employer relationship. In Mercer County Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), the Commission held, and the Appellate Division affirmed, 172 N.J. Super. 406 (App. Div. 1980), a finding that the Superintendent, not the County, was the public employer despite the County's responsibility to pay salaries. The Court held:

> We attach no importance to the fact that the county maintains the personnel records of the employees, nor is the fact that the county pays the salaries determinative of the identity of the employer. Id. at 410.[13/]

Although, the Superintendent was the only public employer of the affected employees, she was not the only public employer who, through the exercise of authority, could affect the rights reserved to the Association under the Act. The County was not entitled to exercise its authority in such a way that it would interfere with and restrain the Association in the exercise of its

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12/ N.J.S.A. 19:31-2 provides in pertinent part:

> Subject to the limitations set forth in chapter 32 of this Title as hereby amended all necessary expenses incurred, as and when certified and approved by the commissioner of registration in counties having a superintendent of elections, and by the county board in all other counties, shall be paid by the county treasurer of the county.

13/ See also, Ocean County, P.E.R.C. No. 78-49, 4 NJPER 92 (¶4042 1978), aff'd App. Div. Dkt. No. A-2419-77 (3/14/79).

rights. The Commission may take jurisdiction over any public employer in order to prevent violations of the Act. N.J. Dept. Human Services, 8 NJPER at 214.

The Merits

The propriety of the County's decision to implement a salary holdback is not the issue here. The County had a legitimate basis for changing to a holdback system. The issue here is whether the holdback was negotiable, and if so, with whom, the County and/or the Superintendent?

I have already found that the salary holdback was negotiable. The correspondence from the Division of Local Government Services to the County does not change that result. Those letters (RC-2, RC-3, RC-4, RC-6 and RC-8) merely required the County to have a County-wide holdback system in place in order for the Division to approve the County's new payroll system. Those letters did not set any particular time for the County to implement the holdback. In fact, the Division consistently granted extensions of time to the County, and the County had the new system in effect for several years but still paid employees on a current basis. There was no particular need for the County to implement the holdback beginning in February 1987; it could have waited an additional month or two to allow the Superintendent to negotiate the issue with the Association.

Since the holdback was negotiable, and since the actions of both the Superintendent and the County interfered with the

Association's right to negotiate over the salary holdback prior to its implementation, both the Superintendent and County violated the Act. The Superintendent violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act by failing to negotiate with the Association over the holdback, and by failing to take reasonable action to stop the County from implementing the holdback with respect to her employees represented by the Association. The County violated Subsection 5.4(a)(1) of the Act by taking action that interfered with the Association's right to engage in meaningful negotiations with the Superintendent over the salary holdback prior to its implementation.

The Superintendent's defense to its "failure to negotiate over the holdback" is that it had no control over the payment of salaries. That defense lacks merit. N.J.S.A. 19:31-2 merely requires the County to pay the Superintendent's necessary expenses once the Superintendent certifies and approves those expenses. Nothing in that statute authorizes the County to unilaterally decide when those payments should be made or to set the day of pay for the Superintendent's employees. Although the County may have general control over the issuance of pay checks, it is incumbent upon the Superintendent, as the public employer of her employees, to make certain that the checks are issued consistent with the terms and conditions of employment that have been established with the Association.

N.J.S.A. 40A:5-19 does authorize a governing body to pass ordinances setting the time of payment, but the Commission and Appellate Division in Paterson held that that statute did not preempt negotiations over salary holdbacks. Thus, there was no statutory basis for the County to unilaterally set the time of payment for the Superintendent's expenses. It is for the Superintendent, through negotiations with the Association, to set the time of payment affecting her employees. When the County unilaterally began implementing a change in the time of payment affecting the Superintendent's employees, it was incumbent upon the Superintendent to take legal action, if necessary, to prevent the County from further implementing the change until she had the opportunity to negotiate with the Association over that issue.

The right to negotiate here belongs to the Association. That right cannot be expunged merely because the Superintendent must rely on the County to pay her expenses. The record shows that other than a telephone discussion with the County's Director of Labor Relations, the Superintendent took no action to prevent the County from implementing a change in the time of payment for her employees. That action (or inaction) was insufficient and the result incompatible with her negotiations obligation.

The County's primary defense to its having "interfered" with the Association's rights is that it is not the public employer of the employees represented by the Association. That defense also lacks merit. In N.J. Dept. Human Services the Commission held that the State of New Jersey violated subsection 5.4(a)(1) of the Act

even though it was not the public employer of the employees involved in that case.

There the Communications Workers of America (CWA) represented a unit of employees employed by the Union County Welfare Board (Board). All parties stipulated that the Board, not the State, was the public employer of the affected employees. The CWA and the Board negotiated terms and conditions of employment for a new contract and memorialized them into a memorandum of agreement. Despite CWA's assertion that the Board had the authority to implement the agreement, the Board would not do so without approval from the State's Division of Public Welfare (Division). Pursuant to state statute, the Division had the right to review the parties' agreement.

The Division reviewed the agreement and objected to a number of items. The CWA and Board then met and agreed to changes in the agreement which they believed would remedy the Division's objections. The Division, however, would not approve the changes, and subsequently even made its objections more onerous. The Board and CWA met again to try to negotiate a settlement, but could not reach agreement in light of the Division's actions.

The Commission held that, pursuant to the Act, it had the jurisdiction to prevent any public employer's interference with the rights guaranteed by the Act even though the particular public employer was not the employer of the affected employees. The Commission held in pertinent part that:

As the quoted portion of N.J.S.A. 34:13A-5.4(c) indicates, PERC has the "exclusive power...to prevent anyone's engaging in any unfair practice listed in subsections a. and b." When "it is charged that anyone has engaged or is engaging in any such unfair practice," the Commission has the authority to adjudicate the alleged violation.

N.J.S.A. 34:13A-3(c) defines the term "employer" as utilized in the Act and provides that:

> This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

In addition, N.J.S.A. 34:13A-3(d) defines the term "employee" and expressly provides that it "shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise." N.J.S.A. 34:13A-5.4(a)(1), the subsection the State is alleged to have violated, is not limited, either expressly or by implication, to the employees of a particular employer.

The above literal reading of the text of our Act complements a common sense reading of its underlying purposes. Our Supreme Court has emphasized that the Act is remedial legislation which should be construed in order to permit the Commission to discharge its statutory responsibilities. Galloway Township Board of Education v. Galloway Township Ass'n of Education Secretaries, 78 N.J. 1, 4 NJPER 4162 (1978). Foremost among the purposes which the Act endorses and our Commission seeks to foster is the substitution of productive and peaceful collective negotiations for the instability and potential economic and public waste which accompany labor strife. N.J.S.A. 34:13A-2. The Commission's power to prevent anyone's engaging in unfair practices is to be utilized to foster this goal. Thus, when it can be established that a party, even one not technically the employer of the employees in question, engaged in conduct which frustrates that goal, or has caused the employer to engage in such conduct, the Commission's power to prevent violations of the Act must include jurisdiction over that party. 8 NJPER at 213-214 (footnotes omitted).

The Commission concluded that the State (Division) violated 5.4(a)(1) of the Act by exercising its authority in a manner that interfered with the employees'right to negotiate an agreement with the Board. The Commission also found that the Board violated 5.4(a)(6)[14/] and derivatively 5.4(a)(1) of the Act by not signing the agreement that had been reached with the CWA. The Commission, however, did not find that the Board violated 5.4(a)(5) of the Act because it negotiated in good faith with the CWA.

N.J. Department of Human Services is applicable here. The County had negotiated over the implementation of a salary holdback with all of its units. It knew that the issue was negotiable and it knew that the Superintendent had not negotiated over that topic with the Association. The County was not under a mandate to implement the holdback at any particular time. It could have implemented the holdback one month or several months later. Instead, the County began the holdback implementation without giving the Superintendent and Association sufficient pre-implementation notice to allow them to negotiate over that issue. As a result, the County violated the Act by interfering with the Association's right to negotiate over a salary holdback prior to its implementation.

14/ This subsection prohibits public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

In addition to its statutory and public employer defenses, the County argued that the Association made no demand to negotiate with it, and thereby waived its right to negotiate with the County over the salary holdback. That argument lacks merit too. Since the County was not the employer there was no reason for the Association to demand that it negotiate. But even if the County was the employer or joint employer, the argument would be rejected because there was no requirement on the Association to demand negotiations. Public employers are not allowed to change existing terms and conditions of employment prior to negotiating with the majority representative. See Tp. of Pemberton, P.E.R.C. No. 87-127, 13 NJPER 322 (¶18133 1987). The burden was on the Superintendent to engage in negotiations with the Association over the holdback prior to its implementation, and to take action to prevent the County from implementing the holdback prior to such negotiations. The burden on the County was to take no action interfering with the Association's right to negotiate over the holdback.

While the Board in N.J. Dept. of Human Services did not violate 5.4(a)(5) of the Act, the Superintendent here did. The Superintendent had approximately two weeks from the time she learned that the holdback implementation would begin to the time it actually began. While that was not sufficient time or notice for meaningful negotiations with the Association over a holdback, it was sufficient time for the Superintendent to demand that the County delay its implementation of the holdback, or sufficient time to take legal

action to force a delay in implementing the holdback. The Superintendent did neither, and her inaction, even though she did not believe that she had control over the matter, still violated the Act.

The 5.4(a)(2) Allegation

There was no showing that the Superintendent or County took any action that dominated or interfered with the administration of the Association's unit. Thus, that allegation should be dismissed.

Remedy

In Paterson the Commission ordered the City to rescind the holdback and pay the employees on a current basis while negotiating over a change in the time of payment. The result here must be the same. In order to properly effectuate the remedy, the County must rescind the holdback with respect to the Superintendent's employees represented by the Association. The holdback may be rescinded by reversing the process used to implement the holdback, or by paying the affected employees a lump sum for the one-week holdback. Then the County must pay the affected employees on a current basis as it did prior to February 1987 (with a Friday morning payday) pending the completion of negotiations between the Superintendent and

Association over the proposed implementation of a salary holdback.15/

Based upon the above analysis I make the following:

Recommended Order

I recommend that the Commission ORDER:

A. That the County cease and desist from: interfering with, restraining or coercing employees employed by the Superintendent in the exercise of the rights guaranteed to them by the Act by interfering with the negotiations between the Superintendent and the Association by implementing a one-week salary holdback affecting the Superintendent's employees.

B. That the Superintendent cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the implementation of a one-week salary holdback.

C. That the County take the following affirmative action:

15/ I am not deciding whether the County should issue hand checks or change its payroll system to issue regular checks on a current basis. That is for the County to decide.

Although this remedy may pose a temporary hardship on the County, I find that such hardship is outweighed by the finality of the injury to the Association and the negotiations process if the remedy is not applied. Woodstown-Pilesgrove Bd.Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980).

1) Rescind the salary holdback that was implemented affecting the Superintendent's employees represented by the Association.

2) Pay the salary of the Superintendent's employees represented by the Association on a current basis as they had been paid prior to February 1987, on Friday mornings before the close of the pay period.

D. That the Superintendent take the following affirmative action:

1) Negotiate with the Association over the proposed implementation of a salary holdback for employees in its negotiations unit.

2. 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.

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

E. That the 5.4(a)(2) allegation be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: March 31, 1988
Trenton, New Jersey

Appendix "A"

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:

The Superintendent WILL:

1. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the implementation of a one-week salary holdback.

2. Negotiate with the Association over the proposed implementation of a salary holdback for employees in its negotiations unit.

The County WILL:

1. Cease and desist from interfering with, restraining or coercing employees employed by the Superintendent in the exercise of the rights guaranteed to them by the Act, particularly by implementing a one-week salary holdback regarding the Superintendent's employees represented by the Association.

2. Rescind the salary holdback affecting the Superintendent's employees represented by the Association, and pay those employees on a current basis as they had been paid prior to February 1987, on Friday mornings before the close of the pay period.

Docket No. CO-H-87-249 SUPERINTENDENT OF ELECTIONS
(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.