H.E. NO. 2002-5

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

In the Matter of

COUNTY OF HUDSON AND
HUDSON COUNTY PROSECUTOR,

Respondent,

-and- Docket No. CO-H-2001-117

HUDSON COUNTY PROSECUTORS PBA LOCAL 232,

Charging Party.

Appearances:

For the Respondent,
Scarinci & Hollenbeck, attorneys
(Karen L. Sutcliffe, of counsel)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 2, 2000, Hudson County Prosecutors PBA Local 232 (PBA or Local 232) filed an unfair practice charge against County of Hudson and Hudson County Prosecutor (Employer). The charge alleges that the Employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; specifically subsections 5.4a(1), (5), (6) and (7)[1/] by allegedly

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with,

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failing to fully implement an interest arbitration award issued on April 26, 2000, and by refusing to execute an agreed upon collective negotiations agreement reflective of the arbitrator's award.

On March 13, 2001, a Complaint and Notice of Hearing issued. On March 30, 2001, the Employer filed an Answer, denying that its failure to execute the collective negotiations agreement violates the Act. It also sets forth several affirmative defenses, including the defenses that the agreement as presented by PBA does not fully and accurately reflect the understanding between the parties during negotiations, and that the agreement presented contains a basic mistake, which if left uncorrected, would unjustly enrich Local 232.

On April 23, 2001, I conducted a hearing at which the parties examined witnesses, presented exhibits and stipulated certain facts.[2/] At the hearing, the parties stipulated that the

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1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act.(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ "T" represents the transcript followed by the page number; "C" represents Commission exhibits; "CP" represents PBA Local 232 exhibits; "R" represents the Employer's exhibits; and "J" represents the parties' joint exhibits.

sole issue in this case is whether Local 232 and the Employer agreed to a collective negotiations proposal concerning work-incurred injury leave and if so, what constitutes the agreed-upon terms of the proposal. Based upon my finding on that stipulated issue, I must determine whether the Employer's failure to execute and implement the negotiated agreement violates the Act. The Complaint and Answer were amended at the hearing to reflect the stipulation. Post-hearing briefs were filed on May 21, 2001, at which time the record closed.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. PBA Local 232 is the exclusive representative of a collective negotiations unit of Hudson County prosecutor investigators below the rank of sergeant.

2. The County of Hudson/County Prosecutor is the public employer of the investigators in the recognized negotiations unit.

3. Prior to February 1999, Local 232 and the Employer began negotiations for a successor collective negotiations agreement for the investigators. The previous agreement had expired on December 31, 1998 (T15).

4. PBA's negotiations team for the successor contract included local President, Kevin Wilder, PBA State Delegate John Bigger, PBA Treasurer Kenneth Kolich, PBA Vice President Gerard Dargan, and Local 232 unit members, Christina Webster and Dan Diaz.

Wilder and Bigger were present for most of the negotiations sessions, the subsequent mediation and the interest arbitration proceedings (T31-T32, T62-T63, T78; J-1).

5. The Employer's negotiations team and support members included lead negotiator/attorney, Shauna Brown (T129-T132), County Prosecutor Fred Theemling, and Director of Personnel, Lawrence Henderson. At least four attorneys with the firm of Scarinci & Hollenbeck, including Ms. Brown, were involved at some phase of the negotiations and/or language review of contract proposals for the negotiations at issue here (T120).

6. PBA representative Kevin Wilder testified that Shauna Brown held herself out to Local 232 as the Employer's negotiations representative during negotiations and at the arbitration proceedings (T148-T150). On several occasions, Ms. Brown told Local 232 representatives that she had spoken with Prosecutor Theemling, Director Henderson or others in the County regarding negotiations proposals and agreements. Wilder also testified that Brown frequently consulted with County officials to assure she was proceeding properly and she notified Employer officials of what was occurring in negotiations (T49). There was never a time, that PBA was aware of, when Brown had to rescind an employer proposal she was negotiating because she had exceeded her authority. PBA negotiated with what they believed to be the security that Brown had full authority to negotiate and enter into agreements (T149-T150).

Henderson testified that Brown was the Employer's lead negotiator and had authority to make representations to the PBA during negotiations, subject to the Employer's approval (T106). Further, Employer officials, including Henderson, would meet with Brown prior to negotiation sessions to review "things" within her authority (T106). Henderson was to be kept "in the loop" concerning proposals in negotiations, inasmuch as he is the Employer representative designated to consult with attorneys hired to perform negotiations for the Employer (T129-T130).

Based upon both Wilder's and Henderson's testimony, I find that Brown's authority to enter into a final agreement was limited by input from, and review of tentative agreements by Henderson, Theemling and other Employer officials and that PBA representatives were aware of this limitation.

7. Local 232 presented Prosecutor Theemling with a proposal on work-incurred injury leave in about February 1999 (T63-T64). The work-incurred injury leave proposal provides in pertinent part:

> WORK INCURRED INJURY
>
> A. 1. Where an employee covered under this Agreement suffers a work-incurred injury or disability, the Employer shall continue such employee at full pay, during the continuance of such Employee's inability to work, for a period of up to one (1) year. Said full pay shall be paid in the following manner: During this period of time, all temporary disability benefits accruing under the provisions of the Worker's Compensation Act shall be paid over to the employee. The employer shall pay the employee the difference and the amount of his regular salary (CP-1).

The PBA proposal contains no reference to restricting work-incurred injury leave to one leave for each new injury. That restriction is contained in the parties' previous negotiations agreement and other agreements between the Employer and other law enforcement units (T94-T95, T102; CP-1).

8. Prosecutor Theemling engaged in the initial negotiations and discussions with Local 232 representatives on behalf of the Employer along with the County (T52-T53).

9. Theemling recalls receiving a written two page proposal but he did not read it (T53, T55). Theemling relied on attorney Brown in negotiations "to get the language right," to make sure it was correct and "that the County was comfortable with it" (T57, T60). He was aware that Local 232 was interested in changing language dealing with work-incurred injury leave which was memorialized in the previous collective negotiations agreement. He also knew that Local 232 was seeking a contractual increase in the time an employee absent from work due to a work-incurred injury could remain on leave at full-pay; it was seeking an increase from a maximum of 90 days to 1 year (52 weeks). He also knew that the County would agree to that change (T53-T54).

Theemling knew that the Employer was willing to bring the Local 232 agreement more in line with the other law enforcement unit contracts which included a 52-week leave provisions (T53, T56). He never saw this issue as being a point of contention, never observed the parties looking at the written proposal very closely before the

arbitrator's award had issued and, he recalled that there was very little discussion by the parties regarding the Local 232 proposal (T53, T56-T57). All that Theemling believed Local 232 was seeking was the increase from 90 days to 52 weeks (T53-T54).

10. PBA negotiator Kolich likewise recalled that there was very little discussion of the written proposal and that once the proposal was presented to the Employer there was no back and forth between the parties before he was informed that the proposal had been accepted (T81-T83).

11. PBA negotiator Wilder testified that beyond discussing the proposal briefly with Theemling, there was no bargaining or negotiations over the proposal and if there was any discussion, "it was not much" (T46). Wilder further testified that the "main benefit" sought by the PBA contained in its work-incurred injury proposal was the clause which provided for up to one year paid leave (T47). Wilder also testified on redirect examination that PBA "held back from other proposals" and would have altered its economic package in subsequent interest arbitration, had it not believed the agreement between the parties on work-incurred injury leave was that set forth in the language of CP-1 (T152). I find this testimony to be contradictory to Wilder's previous statement that the main benefit of CP-1 was the increase in leave time. I also find it to be self-serving, lacking in specificity as to PBA's negotiations posture, and insufficient to show that PBA and the Employer intended to omit the restriction on one leave per new injury which existed in the parties' previous contract.

Based upon Theemling's, Kolich's and Wilder's testimony, I find that there were no negotiations or discussions of the specific language of PBA's work-incurred injury proposal and there was no discussion or negotiation dealing with the language of the parties' previous contract which restricts the 52 week leave period to one leave per injury. I find that limited discussion of the one year provision contained in PBA's proposal was a result in large part of the Employer's willingness to agree to the increase in the leave time period.

12. The parties were unable to agree upon numerous economic and non-economic items in negotiations and on February 24, 1999, Local 232 filed a petition to initiate compulsory interest arbitration with the Public Employment Relations Commission. On April 7, 1999 arbitrator Frank Mason was appointed to resolve the parties' dispute. Beginning in May 1999 there were a series of meetings, during which the arbitrator attempted to mediate the dispute (J-1). On October 28 and 29, 1999, a formal arbitration hearing was conducted by Mason (J-1, p. 2).

13. During mediation and at the opening of the formal arbitration hearing, Local 232 again presented Employer representatives Theemling and Brown with its proposal addressing work-incurred injury leave (T40, T53-T54, T56-T57, T63-T64; J-1, p. 3).

14. On October 28, 1999, the first day of the formal arbitration hearing, PBA counsel Richard Loccke, stated for the

record in that proceeding that the parties had "previously read, agreed to the work injury of the PBA which has been resolved at earlier meeting. That's for a person in the line of duty to be covered up to a period of one full year of full compensation" (emphasis added)(T66 PBA witness Bigger reading from p. 13 of arbitration transcript).[3/]

15. Employer attorney Brown confirmed on the arbitration record that, "As Richard indicated, the County did agree and was willing to continue the agreement in the work-incurred injury language that was proposed by the union" (T66, T67; PBA witness Bigger reading from p. 15 of arbitration transcript). Brown had received the PBA Local 232 document prior to October 28 and thus had been afforded an opportunity to review the language of CP-1 prior to her on-the-record statement before the arbitrator (T41).

16. Henderson testified that at the time of the arbitration, he, like Theemling, believed (based on representations from Theemling and possibly from Ms. Brown (T117-T118)), that the only issue PBA had been seeking to negotiate was an extension of time an employee could be placed on work-incurred injury leave from 90 days to 52 weeks (T95, T97, T102, T107, T114). Henderson knew that the Employer would agree to the 52 week language (T114, T118).

3/ No transcript of the arbitration hearing was placed in the record here by either party; however, portions of the transcript were read into the record at the instant proceeding without objection. I credit the testimony of both parties' witnesses as to what was contained in the arbitration transcript.

Henderson did not know if the language of CP-1 was the same as any other proposal which may have been presented by PBA on the work-incurred injury leave (T116-T118).

17. Henderson further testified that if Brown had agreed to the language in CP-1 without presenting it to him, she made a mistake (T123) and that what she had orally discussed with him as constituting PBA's proposal dealt only with extending the time for leave to 52 weeks (T132). According to Henderson, Brown had authority to agree to the 52 week provision, nothing further (T137).

Henderson's testimony that he believed the PBA was seeking, and the parties were agreeing to an extension of time to 52 weeks, is credible and is consistent with the exchange between the Employer's counsel and PBA counsel at the arbitration hearing (ff. 14, 15).

18. Attorney Brown did not testify at the unfair practice hearing. No witnesses for the Employer contradicted PBA witness testimony as to what occurred during mediation or the formal arbitration hearing. Nor was there testimony which contradicted that Theemling and Brown had been provided with the PBA proposal several times. PBA witnesses also testified that other than the language contained in CP-1 in this proceeding, there was never any other proposal provided to the Employer's negotiations representatives. Based upon this uncontradicted testimony, I find that the language of CP-1 is the only negotiations proposal presented by PBA and it is the identical proposal referred to in the

transcript of the arbitration proceedings and incorporated by reference in Arbitrator Mason's award.

19. The arbitrator acknowledged acceptance of the parties' tentative, unexecuted accord on the work-incurred injury leave proposal and ordered that it be incorporated into the parties' agreement, along with all other agreements reached by the parties during negotiations (J-1, p. 3, p. 24). The language of the proposal was not read into the interest arbitration record, nor was the proposal itself attached to the award.

20. Local 232 representative Wilder did not initial the disputed proposal during the arbitration proceeding because he believed it was unnecessary in light of the fact that the parties' agreement to the proposal had been read into the record during the arbitration hearing (T153-T154). Based upon the foregoing testimony describing the exchange between the parties, and particularly between their attorneys at the arbitration hearing, I find that both parties believed at the arbitration that they were agreeing, and did agree to an extension of time for work-related injury leave to 52 weeks/1 year as contained in CP-1.

21. On April 26, 2000, Arbitrator Mason issued his award (J-1, p. 24).

22. After the issuance of the arbitrator's award, the Employer requested clarification of several items in the award. This clarification request did not include the work-incurred injury language (C-1 attachments #1, #5). The Employer accepted the clarifications of Arbitrator Mason.

23. The law firm representing PBA prepared a draft agreement of the contract terms (T34).

24. In correspondence dated July 25, 2000 to PBA counsel, the Employer's counsel raised several alleged discrepancies between the PBA draft agreement and prior agreements and/or the arbitrator's award. In that correspondence, counsel noted that the Employer wanted "more time to review the draft with regard to work-incurred injury and assure that it reflected what was agreed to during the hearing" [arbitration hearing](C-1, Attachment 7).

25. Henderson reviewed the arbitration award shortly after it issued and believed that the reference therein to the work-incurred injury leave referred to the 52 week/1 year agreement (T137-T138). He did not see the actual language of PBA's proposal until the beginning of 2001, after which he called the problem to Theemling's and the PBA's attention, noting that the PBA's language was objectionable (T97, T107, T133-T134).

26. Prosecutor Theemling recalled that sometime in early 2001, he became aware of a possible "loophole" in the work-incurred injury language "dealing with someone being out on the same injury twice" (T58-T59). He concluded that the Employer's representatives "wanted to correct that" (T58-T59).

27. PBA Local 232 representatives first learned of the Employer's problem with the work-incurred injury language in March 2001 (T44, T72).

28. At the time of the unfair practice hearing in this matter, the Employer had implemented all other articles of the agreement, except those resolved at hearing concerning direct deposit of paychecks and tuition reimbursement (T26, T28). However, the Employer continued to refuse to execute the negotiations agreement or implement the PBA work-incurred injury leave provision.[4/]

ANALYSIS

N.J.S.A. 34:13A-5.3 provides that employers and employee representatives shall meet and negotiate in good faith concerning terms and conditions of employment, and that, "...when an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed...." N.J.S.A. 34:13A-5.4a(6) provides that a refusal to reduce a negotiated agreement to writing and to sign it constitutes a violation of the Act.

The only term at issue here is that proposed by PBA regarding work-incurred injury leave. The Employer has refused to execute the final draft of the parties' agreement because as drafted by PBA, the work-incurred injury leave proposal omits language contained in PBA's most recently expired contract which restricts employees to one leave of absence per each new injury.

4/ Employer witness and management specialist Howard Moore testified candidly that he had no input in any of the PBA negotiations relevant to this dispute and that he knew nothing about the PBA's work-incurred injury leave proposal. I have not relied on Mr. Moore's testimony in any regard.

Local 232 asserts that the Employer agreed to the PBA proposal at the October 1999 interest arbitration on this contract, that it is thereby bound by its agreement to the specific work-incurred injury leave language proffered in the PBA proposal, and that therefore the Employer's refusal to execute the contract violates 5.4a(1), (5), (6) and (7) of the Act.

The Employer's defense is that it never intended to agree, nor did it agree to exclude the one leave per injury language of the previous contract.

Local 232 has the burden of proving its allegation by a preponderance of the evidence. N.J.A.C. 19:14-6.8. To do that, Local 232 "...must establish that the contract language [it prepared] incorporated the parties' agreement." Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983)("Jersey City"). Thus, to succeed on its claim, Local 232 must prove that there was an agreement on the work-incurred injury proposal, and that that agreement is accurately reflected in the language Local 232 prepared for the Employer's signature.

My initial inquiry must focus on whether the parties reached an agreement on the work-related injury clause as prepared by PBA. There is no evidence in this record to show that the Employer or Local 232 ever initialed or signed the proposed work-incurred injury document presented by Local 232 during negotiations, at mediation, or during the formal interest arbitration.

Local 232 relies on the arbitrator's reference to the leave provision in the April 2000 arbitration award as evidence that the parties did in fact agree to the PBA proposal. I have carefully reviewed the award. It states:

> WORK INCURRED INJURY
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> This represented an acknowledgment of acceptance of the tentative accord reached by the parties but which had not been executed by them. The award also directs that:
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> F. All elements of the prior Agreement not inconsistent with this award are to remain in effect and all other agreements reached during these negotiations including specifically the work-incurred injury concept agreed to at this hearing are to be incorporated as well (emphasis added) (J-1, p. 3, p. 24).

The disputed language of the unexecuted clause is not set forth in the award, nor is the PBA two-page proposal attached to the award. Additionally, the arbitrator specifically notes that the agreement on this article is tentative and unsigned. PBA witness, Kevin Wilder testified that he did not believe it was necessary to sign or initial the leave proposal document because the Employer had agreed to the proposal on the record at the arbitration. I find that the arbitrator's references to an "accord" and a "concept" in the arbitration award, even when coupled with Wilder's testimony, is not dispositive of exactly what language the Employer agreed to in the PBA's proposal, or that the Employer specifically agreed to omit the restrictive language of the parties' previous agreement.

Thus, I must look beyond the arbitration award and the language of the PBA proposal to determine the intent of the parties and whether they reached the particular agreement asserted by Local 232.

As the Commission noted in Jersey City, our Supreme Court has set forth standards for reviewing intentions of contracting parties:

> A number of interpretative devices have been used to discover the parties' intent. These include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage and the interpretation placed on the disputed provision by the parties' conduct. Several of these tools may be available in any given situation--some leading to conflicting results. But the weighing and consideration in the last analysis should lead to what is considered to be the parties' understanding.... Kearny PBA Local #21 v. Twp. of Kearny, 81 N.J. 208, 221-222 (1979).

It is undisputed here that there was very little, if any, discussion of the Local 232 work-injury leave proposal as a whole. Witnesses for both parties testified that any discussion with their own teams or between the parties focused on increasing the time an employee could be absent on work-incurred injury leave from a maximum of 90 days to 52 weeks/1 year. This extension of time was important to PBA and was essentially unopposed by the Employer's representatives. Based on the parties' limited discussions, the Employer's representatives believed that the change of the work injury provision from the expired agreement in these negotiations concerned an increase in the leave period from 90 days to 52 weeks.

Moreover, PBA attorney Loccke asserted at the arbitration hearing that the parties had agreed to the work-incurred injury of the PBA at an earlier meeting, and Loccke described that agreement as allowing a person injured in the line of duty to be covered up to a period of one full year of full compensation (T66).

Immediately after Loccke made his statement, Employer attorney Brown responded that as Loccke had indicated, the "County did agree and was willing to continue the agreement in the work-incurred injury language that was proposed by the union" (T66). The most reasonable interpretation of Brown's response following on the heels of Loccke's specific reference to the period of coverage up to a full year is that the Employer intended to agree to the 52 week/1 year provision.[5/]

I find this to be particularly true, given the significant amount of testimony that there was very little discussion concerning the contents of the actual document presented by PBA, that there was no contentiousness over the proposal, that the Employer knew throughout negotiations that PBA wanted to increase the injury leave time period to 52 weeks, and that the Employer was willing to do so.

On the other hand, the record is devoid of evidence that the parties negotiated to exclude or delete the provision contained in

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5/ I have previously found that Brown's authority to enter into a final agreement was limited. However, her authority, whether real or apparent, is not the determinative issue in this case. The controlling issue is what the parties intended and did or did not ultimately agree to with regard to the PBA work-incurred injury language.

their previous contract restricting the length of time an employee could be out on work-incurred injury leave to one leave per new injury. Given this lack of evidence, I cannot rely on the language of the PBA written proposal (CP-1) by itself to conclude that the parties reached a mutual agreement to exclude the one leave per new injury restriction. Considering the admitted inclusion of restrictive language concerning one leave per injury in previous PBA contracts with the Employer, and the same restrictive language in contracts between the Employer and other law enforcement units, I find insufficient evidence that the Employer intended to agree to the omission of that restriction in the contract at issue here. Therefore, based upon all of the evidence in the record, I find that the PBA proposal does not accurately reflect what the parties discussed and agreed to other than their agreement to extended the period for work-incurred injury leave to a maximum of 52 weeks/1 year paid leave. I find that the parties did not reach a meeting of the minds or an agreement to omit language contained in previous negotiations agreements which restricted the leave period to one leave for each new injury.

CONCLUSIONS

Based upon the foregoing, I conclude that the PBA has not proved the first part of the 5.4a(6) standard. PBA has not proved by a preponderance of the evidence that the parties reached an agreement which would change the status quo to exclude the one-leave per new

injury restriction contained in the parties' previous collective negotiations agreement. It follows that the PBA has failed to demonstrate that the Employer refused to sign a negotiated agreement in violation of 34:13A-5.4a(6). PBA is entitled to seek a signed agreement which expands the time period for work-incurred injury leave to one year, along with language which restricts that period to one leave for each new injury.[6/]

RECOMMENDATION

I recommend that the Complaint be dismissed in its entirety.

Susan L. Stahl
Hearing Examiner

DATED: October 26, 2001
Trenton, New Jersey

6/ Regarding the 5.4a(1), (5) and (7) allegations in the charge, there is no evidence that the Employer violated Commission rules or regulations in violation of 5.4a(7) or that the Employer's conduct interfered with employees rights or constituted bad faith negotiations in violation of 5.4a(1) or (5). By not finding sufficient evidence of a violation of 5.4a(5), I am constrained to note that I find it disturbing that the Employer's conduct during negotiations, mediation and arbitration created much of the confusion which led to this complaint. The less-than attentive manner in which the Employer's supervisors and professional labor relations specialists, including numerous attorneys, conducted negotiations in this case is troubling and, in my view, showed a lack of deference to the negotiations process itself.