H.E. No. 2011-13

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

In the Matter of

CAMDEN COUNTY AND CAMDEN
COUNTY PROSECUTOR,

Respondent,

-and- Docket No. CO-2009-076

CAMDEN COUNTY ASSISTANT
PROSECUTORS ASSOCIATION,

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss unfair practice charges against the Camden County Prosecutor and County of Camden filed by the Camden County Assistant Prosecutor's Association. The Hearing Examiner finds that the Prosecutor did not violate the Act by charging Association unit members for dental plans, and ending a practice affording the plans at no cost, in view of the clear language the parties negotiated in their successor collective agreement. The Hearing Examiner also finds that the Prosecutor did not repudiate the agreement when it rejected applications for enrollment in a new dental plan, finding that the condition precedent had not been demonstrated.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2011-13

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

In the Matter of

CAMDEN COUNTY AND CAMDEN
COUNTY PROSECUTOR,

Respondent,

-and- Docket No. CO-2009-076

CAMDEN COUNTY ASSISTANT
PROSECUTORS ASSOCIATION,

CHARGING PARTY.

Appearances:

For the Respondent,
Brown and Connery, LLP, attorneys
(William M. Tambussi, of counsel)

For the Charging Party,
Loccke, Correia, Limsky & Bukosky, attorneys
(Merick Limsky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 8, 2008, the Camden County Assistant Prosecutors Association (Association) filed an unfair practice charge with the Public Employment Relations Commission against Camden County and the Camden County Prosecutor (County or Prosecutor). The Association alleges that the County violated sections 5.4a(1), (2), (3), (4), (5), (6) and (7)[1/] of the New

---

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when, on or about August 1, 2008, the County began charging Association members for dental plans that had previously been provided for free, and failed to implement a negotiated agreement to offer unit members an enhanced dental plan.

Procedural Background

The unfair practice charge was accompanied by an application for interim relief. On October 1, 2008, a Commission Designee denied the application, I.R. No. 2009-7, 34 NJPER 295 (¶105 2008), finding that the Association had not shown that it was substantially likely to prevail on the merits or that it would be irreparably harmed. The Association sought reconsideration of the designee's decision and, on November 25, 2008, the Commission granted the request, ordering the County to provide access to the

---

1/ (...continued)
rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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.

improved dental plan. P.E.R.C. No. 2009-27, 34 NJPER 383 (¶124 2008).

On January 2, 2009, the Association filed a motion for compliance and enforcement of the Commission's Order. On May 13, 2009, after a hearing and receipt of additional information, a Commission designee found that the County was in compliance with the Commission's Order. P.E.R.C. No. 2009-62, 35 NJPER 147 (¶53 2009). The charge was then transferred to the Director of Unfair Practices.

On June 9, 2009, the Director issued a Complaint solely on the alleged violations of 5.4a(1) and (5) of the charge. He declined to issue the Complaint on the 5.4a(2), (3), (4), (6) and (7) allegations, finding that no alleged facts supported those allegations. On August 10, 2009, after additional attempts to resolve the issues, the Director assigned the charge to me.

On November 23, 2009, February 8 and 22, 2010 and March 4, 2010, I conducted hearings at which the parties argued orally, examined witnesses and placed documentary evidence into the

record.[2/] Both parties filed post-hearing briefs. The County filed a reply brief.[3/]

Based upon the entire record, I make the following:

Findings of Fact

1. The Association and the Prosecutor are parties to a series of collectively negotiated agreements, the most recent of which was effective from January 1, 2006 through December 31, 2009. The County funds the Prosecutor's office, including salaries and benefits, and has a financial interest in the economic provisions and costs of the office's negotiated agreements (1T50, 2T46-2T47, 3T102). The County administers the payroll, health and dental insurance programs for the Prosecutor's Office (3T20, 3T40-3T42, 3T67).

2. Assistant County Counsel Howard Wilson led the Prosecutor's negotiations team for the 2006-2009 agreement, with some participation by acting Prosecutor Joshua Ottenberg.

2/ The transcript for the hearings February 8 and 22, 2010 and March 4, 2010 are referred to as "1T-" through "3T-", respectively. Commission exhibits are referred to as "C-", Charging Party's exhibits are referred to as "CP-", and Respondent's exhibits are referred to as "R-".

3/ The hearing was delayed due to unforeseen personal reasons and a pre-hearing Motion seeking disqualification of Charging Party's attorney who was also a witness (Transcript from the hearing on November 23, 2009; R-1, R-2). By letter dated December 4, 2009, the Charging Party substituted a non-witness attorney.

Ottenberg signed the agreement (1T6, 1T56, 2T4, 2T29, 2T33, 3T65-3T66; R-7).

3. Attorney Michael Bukosky led the Association's team, with participation by the Association's executive committee (1T4-1T5, 1T49, 1T67-1T68).

4. The parties' negotiations began in 2005; there were several meetings in late 2005 and 2006 and then negotiations stalled (3T68). In 2007, negotiations resumed, and with the aid of a mediator, the parties signed a Memorandum of Agreement (MOA) on October 17, 2007 (3T73-3T75). The MOA was not placed into the record.

The next day, October 18, 2007, the County Board of Chosen Freeholders ratified the terms of the MOA and authorized county officials to execute an agreement pursuant to the MOA's terms (3T73-3T74; R-14).

5. The subject of dental benefits was raised at the initial negotiations session, but dental benefits were not discussed in the course of negotiations or mediation, or added to the MOA (3T73, 3T75-3T78).[4/]

4/ Greg Perr, the vice president of the Association testified that at some point between 2005 and 2007, he and Ottenberg discussed and agreed about the addition of a particular dental plan to those that were available to the assistant prosecutors, but neither told Wilson or Bukosky to add the topic to negotiations or to the MOA. The Freeholders did not ratify any provision concerning the addition of dental plans to the contract, and, accordingly, this conversation (continued...)

Prior to the negotiations and execution of the 2006-2009 agreement, the assistant prosecutors could select one of two dental plans - Delta 1 or Kernan plan - at no cost to each member (1T8). Additionally at this time, there was also a plan available at a cost to managerial, non-union employees called delta 2 which provided enhanced benefits. Delta 2 was not available to the Association's members.

6. On October 24, 2007, Bukosky sent Wilson a draft agreement that had been prepared by Greg Perr (1T49, 1T51, 2T47-2T48, 2T65-2T66, 3T76; R-3). The agreement provided at paragraph M on page 16:

> All dental plans available to other County employees/units shall be open to members of the Association. [R-3, pg. 16]

7. Wilson was surprised at paragraph M because dental benefits had not been discussed during negotiations or made part of the MOA (3T75, 3T78; R-13). Wilson wrote on the margin: "where did this come from?" (3T77; R-3). He also objected to the language because it neither referred to who would pay for the dental plans, nor limited the dental plans available to assistant prosecutors to those available to employees of the Prosecutor's Office (1T51-1T53, 2T48, 3T78). Further, Wilson, at this point,

---

4/ (...continued)
was not part of the negotiations (1T13-1T14, 1T53-1T54, 1T56, 2T7, 2T33, 3T104, 3T111-3T112). Accordingly, this conversation was not part of negotiations. It is, therefore, not material to my decision.

was unaware that any dental plans administered by the County were offered to the Association (3T75).

8. On about December 7, 2007, Wilson and Bukosky conversed by phone about the draft (2T67, 3T77-3T783; R-12).

Wilson told Bukosky that he could not agree to paragraph M as written, because it opened up all county dental plans, but that he could agree to make available to the assistant prosecutors those plans already in place in the Prosecutor's Office (2T50-2T51, 3T78-3T80). Wilson did not like the fact that the parties had not discussed anything in connection with dental plans, but based on conversations with Bukosky after Wilson saw the first draft of the contract, he knew Bukosky wanted to get the dental article done. Wilson would agree to it as long as there would be no cost to the County for any dental plan (3T108). Wilson also told Bukosky, that he could not subject the County to paying any amount for the assistant prosecutors' dental benefits (3T78-3T80, R-4; R-5).[5/]

5/ Bukosky testified that he did not remember Wilson telling him this but I credit Wilson's testimony because Wilson's recall of the conversation and emails was clearer and more specific than Bukosky's recollection (2T81-2T82). Bukosky could not support the assertion that there were references to the dental plans in other portions of the agreement (2T81). Further, since there could be added costs to the County for the addition of the "new" plan, and this was arising at the eleventh hour, I infer that Wilson was very concerned about new costs and would have told Bukosky. Finally, Bukosky's second version of the paragraph shows that he knew of Wilson's cost concerns (R-6). Bukosky

(continued...)

9. On January 2, 2008, Bukosky sent Wilson an updated agreement that contained a revised paragraph M:

> All dental plans administered by the County will be made available to other county employees/units shall be open to members of the Association, the costs of same will be payable by each member. [R-6]

10. Wilson received this revised language, and found it confusing (2T80-2T82, 3T81, 3T83-3T84). He counter-proposed:

> Any dental plan administered by the County and available to other employees of the Prosecutor's Office shall be available to members of the Association, the cost of which shall be payable by the member. [R-12]

This language was accepted and incorporated verbatim in the final agreement, R-7.

11. On January 22, 2008, Association Vice President Greg Perr was advised there was a problem with the dental language, and on January 25, 2008, Perr received a call from Ottenberg advising that Wilson had sent a contract with two handwritten changes (1T101-1T102; R-12, page 8-9).

12. On January 29, 2008, Ottenberg asked the Association's executive committee for feedback on paragraph M (2T6; R-12, pg. 15). Ottenberg did not think that paragraph M reflected what was

---

5/ (...continued)
testified that there was no dispute and no need to include a reference in the contract to the effect that the existing dental plans were free (2T81).

currently in place regarding the two existing plans, but believed that the Association and Wilson agreed the paragraph was exclusive of those plans. So he did not attempt to change it (2T6, 2T15-2T16, 3T112, 3T124).

The Association's executive committee discussed the new language, and contacted Bukosky to confirm what it meant (R-12, pg. 9, 1T108-1T109). This was the only time the Association discussed the dental insurance benefit together (1T108-1T109). No one on the executive committee contacted Wilson directly (1T109-1T110). Notes of the meeting recorded by the executive committee's secretary do not reflect Bukosky's alleged statement concerning the no-cost dental plans (1T111; R-12). At this meeting, no one raised the possibility of changes to the two existing dental plans (1T111).

13. At the group's urging, Bukosky contacted Wilson. Bukosky testified that Wilson and he agreed that the two existing plans (Kernan and Delta 1) would remain at no cost to the unit (2T60). Wilson disputes this and asserts that he did not even know that there were two free plans in January 2008 (3T106). Wilson did not receive any other feedback from the Association about the last version of paragraph M (3T124-3T125; R-12). I credit Wilson.

Bukosky admitted that neither he nor Wilson knew the name of the Delta 2 plan, and Bukosky's recall of other conversations,

meetings and the like was not as sharp as Wilson's (2T51-2T53, 2T66, 2T55). Bukosky was under pressure from the Association to complete the agreement and appears to have sought Wilson's oral assurance rather than revise the paragraph again (2T51-2T53). Wilson was clear that his objective was to avoid having the County pay for any dental plans (3t114).

14. Ottenberg and Perr signed the revised collective negotiations agreement, accepting Wilson's wording of paragraph M (1T34, 3T112; R-7).

15. Soon thereafter, several assistant prosecutors attempted to enroll in Delta 2, the new plan, but were told by the County insurance office that they had to wait until the annual open enrollment period in July (1T20, 1T112).

16. On July 21, 2008, the Association's executive committee members received an email indicating that effective immediately, Association members were going to have to begin paying for Delta 1 and Kernan through payroll deductions (1T21, 1T74; R-8).

17. On July 22, 2008, however, they received a letter and open enrollment form stating that Delta Dental 1 and Kernan were free, and Delta 2 was available for $10.00 per pay to unclassified and managerial employees (1T21; R-9). Perr contacted Bukosky to have him contact Wilson to find out why they had received the two conflicting letters (1T21-1T22).

18. On July 28, 2008 at 11:00 a.m. in the Prosecutor's office, Bukosky, Perr, Assistant Prosecutor Mellits, Assistant Prosecutor Gilfert, Assistant Prosecutor Kelly Testa and Wilson met (1T22, 1T36).

19. Perr showed Wilson the July 21 email he had received stating that the County would begin payroll deductions on August 1, 2008 for Delta 1 and Kernan (1T24). He also showed Wilson the July 22 open enrollment letter indicating that the Delta 1 and Kernan plans were free to assistant prosecutors (1T24-1T25; R-9). The committee members were upset and concerned, especially about the imminent payroll deductions (1T25).

20. It appeared to Perr that Wilson had no idea why the unit would be charged through payroll deductions for the previously free plans (1T25). Perr also thought that Wilson agreed with him and the committee, that the assistant prosecutors were eligible for Delta 2. Wilson stated that he was going to take care of this problem (1T25-1T26).

However, Wilson did not agree with the Association's interpretation of the paragraph or their position (2T32-2T33; R-10). Wilson stated that this must be a mistake and that he would look into it with the insurance department. I infer that he meant the issuance of two apparently conflicting documents from the County was the "mistake" he was referring to and not that he agreed with the Association generally. Wilson testified,

and I credit his testimony, that he did not tell the assistant prosecutors that he would get their free benefits back or that monies deducted for dental benefits would be replaced (3T115, 3T116-3T119; R-12).

21. On July 17, 2008, Ottenberg wrote:

> Despite the language of the contract, everyone's recollection is that this was only supposed to apply to the second Delta Dental plan that was available. It was not supposed to affect the other dental plans in existence. . . [R-10].

Ottenberg agreed with the Association's view that the language meant that the two dental plans were to remain at no cost, and the unit members were to have Delta 2 available at a per person cost of $10.00 per pay for 24 pays a year (1T32-1T34, 2T7-2T9; CP-3; R-10). However, both Perr and Ottenberg admitted on cross-examination that the wording of paragraph M does not refer to any particular dental plan nor does it say that there will be any no-cost plan (1T71, 2T14, 2T40-2T41; R-7, R-10). Further, Ottenberg acknowledged that he had only a minimal familiarity with the County's health or dental plans and that he was unaware of the exchanges of language and conversations between Bukosky and Wilson (2T35, 2T37).

22. Between 20 and 30 assistant prosecutors attempted to enroll in Delta 2 in July 2008 (1T40).

23. As of the open enrollment period in 2008, the other employees of the Prosecutor's Office, who had enrolled in Delta 2, were ineligible for it and the plan was discontinued. Thus, the plan was not available to the members of the Association, and their applications were not accepted (R-7).

24. After the July 28, 2008 meeting with Wilson, though further attempts were made to clarify and change the payroll deductions for Delta 1 and Kernan, the County began and continues to deduct money for Delta 1 and Kernan and has refused to give unit members access to Delta 2 (1T42).

Analysis

The issues in this case are whether the County unilaterally altered an established practice when it began deducting contributions for dental plans from the Camden County Assistant Prosecutors in August 2008, and failed to implement a provision making available an enhanced dental plan to the assistant prosecutors by rejecting their applications for enrollment in the plan. The evidence demonstrates that for years prior to 2008, the assistant prosecutors could select one of two dental plans that were provided at no cost but the execution of the 2006-2009 agreement gave the County the right to charge the Association members for any dental plan they selected. Further, the dental plan language in the new agreement established two conditions for access to the enhanced dental plan previously available only to

managerial employees, and the Association did not show that the conditions had been met. Thus, I recommend that when the members' applications for the plan were rejected, the County did not repudiate the agreement. I recommend the charge be dismissed.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing employment conditions:

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

Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25, 48 (1978); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 332 (1989); Middletown Tp., P.E.R.C. No. 98-077, 24 NJPER 28 (¶29016 1998), aff'd. 334 N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000) ("Middletown").

In Middletown, the Commission identified three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2) cases where an existing working condition is changed and neither party claims an express or an implied right to prevent or impose that change; and (3) cases where the employer alleges that the

representative has waived any right to negotiate, by expressly or impliedly giving the employer a right to impose a change.

This case is the third type: an employment condition has been changed but the County alleges that the change was expressly authorized in the parties' new agreement. The Association argues that the language of paragraph M in the 2006-2009 agreement is ambiguous in that "costs" could mean that Association members have to assume the full cost of premiums or pay the same as other prosecutor's office employees pay (Charging Party's post-hearing Brief at page 20).

In construing a contract, terms must be read in accordance with their plain meaning. Paragraph M requires unit members to bear the costs of the dental plans available to them, once the conditions are met - that the plan be administered by the County and available to other employees of the prosecutor's office. The argument that the clause violates a contrary past practice is without merit. The word "any" is comprehensive, covering all eligible plans including the former no cost plans.

In City of Paterson, P.E.R.C. No. 2005-057, 31 NJPER 25 (¶25 2005), the City instituted a new policy prohibiting employees from accumulating compensatory time beyond a certain level and requiring them to use the time by December 31 of the year in which it was accrued. The unions grieved the policy and filed unfair practice charges, alleging a breach of contract arising

out of the same facts as alleged in the unfair practice charges. An arbitrator ruled for the unions. The arbitrator's award was subsequently vacated and the Order was upheld by the Appellate Division.

The Commission, granting summary judgment for the City, held that once the appellate court had determined that the parties' agreement authorized the unilateral action, summary judgment was required. The court interpreted the contractual language permitting employees to request the use of compensatory time as authorizing the unilateral action. The court noted that any right the employees may have enjoyed before the effective date of the agreement in respect of the use and accumulation of compensatory time was "specifically abridged and modified" by the compensatory time language. The same principle applies here, the execution of the new agreement modifies the past practice.[6/] See, Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd. NJPER Supp.2d 172 (¶152 App. Div. 1987), certif. den. 108 N.J. 198 (1987) (contract can afford a complete defense to an unfair practice charge alleging that employer violated statutory duty to negotiate).

Where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by

---

6/ An exception to the principle is found in cases where there is a mutual mistake of intention as to the new language. That exception is not present in the matter before me.

ending a past practice granting more generous benefits and by returning to the benefit level set by the contract. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991)(No violation where Board required secretaries to work the hours provided for in the contract, despite practice of reducing hours during holidays and recess periods.) and Borough of Franklin, D.U.P. No. 99-6, 25 NJPER 69 (¶30026 1998)(No Complaint issued where employer reduced disability benefit from 100% to 66 2/3% of weekly earnings as set by contract).

I do not agree that there is an ambiguity in paragraph M, and, thus, I did not rely on the parole or extrinsic evidence to explain the parties' intentions or apparent purpose. This is not a case of unilateral mistake, because I believe that the Association and Prosecutor Ottenberg properly questioned whether the language Wilson had counter proposed captured their intention. But the Association failed to follow through and counter propose language that would have preserved their existing plans. The record contains no explanation as to why the issue only came up after the MOA was ratified by the Freeholder Board.

The Association also did not prove that the County violated the agreement when it denied Association members' applications

for enrollment in Delta 2. No evidence in the record showed that the plan was available to other employees in the prosecutor's office at the time they filed applications. Interpretations about whether an employer has properly applied a term, such as paragraph M, are the exclusive province of the parties' negotiated grievance and arbitration procedures. I take administrative notice of the finding in an earlier compliance phase of this charge that no employees of the prosecutor's office were receiving Delta 2 as of that hearing.

Conclusions of Law

I Recommend the Commission find that the County Prosecutor did not violate section 5.4a(1) or (5) of the Act by charging assistant prosecutors for dental benefits in 2008 because the parties' collective agreement authorized it to do so. Further, I recommend that the Commission find that the County did not repudiate the agreement when it denied the applications of Association unit members for enrollment in a dental plan where the parties' agreement contained a condition precedent that was not proven to have been fulfilled.

I recommend that the charge be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

DATED: May 31, 2011
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 10, 2011.