

P.E.R.C. NO. 2007-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY PROSECUTOR,

Respondent,

-and-

Docket No. CO-2005-261

CAMDEN COUNTY ASSISTANT
PROSECUTORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the Camden County Assistant Prosecutors Association on an unfair practice charge it filed against the Camden County Prosecutor. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it repudiated the parties' grievance procedure by failing to implement a grievance determination concerning a contractual salary provision and by repudiating that provision. The Commission also denies the Prosecutor's cross-motion. The Commission holds that the Association has not shown that the Prosecutor repudiated the grievance procedure and that, at this juncture, it cannot discern what the contract means, what the past practice has been, or whether the employer has changed its position on what it is required to do under the contractual salary provision.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Deborah Silverman Katz, County Counsel (Donna M. Whiteside, Assistant County Counsel, on the brief)

For the Charging Party, Loccke, Correia, Schlager, Linsky & Bukosky, attorneys (Michael A. Bukosky, on the briefs)

DECISION

On June 5, 2006, the Camden County Assistant Prosecutors Association moved for summary judgment on its unfair practice charge against the Camden County Prosecutor. The charge, filed on April 11, 2005 and amended on July 28 and August 8, 2005, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5) and (7),^{1/} when it repudiated the parties'

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating
(continued...)

grievance procedure by failing to implement a grievance determination concerning a contractual salary provision and by repudiating that provision. On July 14, the Chairman referred the motion to the full Commission. N.J.A.C. 19:14-4.8.

On September 15, 2005, a Complaint and Notice of Hearing issued. On December 1, the Prosecutor filed his Answer. He denies sustaining the grievance, states that there were no available funds to provide additional compensation for 2004 because certain contractual payments for unused sick and vacation time for retiring unit members had to be accounted for, and states that Assistant Prosecutors received a contractual cost of living adjustment of 4% for 2004.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). What follows are undisputed material facts.

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

The Association and the Prosecutor are parties to a collective negotiations agreement effective from January 1, 2002 through December 31, 2005. Article IV is entitled Salaries. It provides, in relevant part:

- A. Salary increases during the term of this Agreement shall be based upon a pool of dollars as established below and allocated to Assistant Prosecutors and Law Clerks at the discretion of the Prosecutor within statutory limitation. The pool of dollars shall be as follows:
 - 1. Effective pay period 1 of 2002, 3.75% based on the total annual salaries including vacancies as existed on pay period 26 of 2001.
 - 2. Effective pay period 1 of 2003, 4% based on the total annual salaries including vacancies as existed on pay period 26 of 2002.
 - 3. Effective pay period 1 of 2004, 4% based on the total annual salaries including vacancies as existed on pay period 26 of 2003.
 - 4. Effective pay period 1 of 2005, 4% based on the total annual salaries including vacancies as existed on pay period 26 of 2004.
- B. Because the Prosecutor has discretion to distribute vacancy monies, he will enter into a separate agreement with the Assistant Prosecutors Association setting forth the amount of vacancy monies to be distributed.

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- D. In the event of the resignation, retirement, death or other termination of an assistant prosecutor or law clerk, the balance of their salary shall be used by the Prosecutor to fill the vacated position of the assistant prosecutor or law clerk or to hire additional assistant prosecutors or law clerks prior to the end of the last pay period of the calendar year the position is vacated. Any balance of that salary which has not been so used by the Prosecutor shall be distributed to the other assistant prosecutors and law clerks prior to the end of pay period 26 of that year in the Prosecutor's discretion.

Several employees retired during 2004. Before pay period 26 expired, the Prosecutor asked the County Board of Chosen Freeholders to approve salary changes based on vacancy monies created when two assistant prosecutors retired. The County did not process these changes or a later request for additional changes.

On November 29, 2004, the Association filed a grievance requesting that the Prosecutor advise the Freeholders that they are in violation of the contract and direct them to process the salary changes as submitted.

On February 16, 2005, the Prosecutor responded to the grievance. He concluded that the County had not processed the salary changes before the end of the pay period 26 as required by paragraphs A and D. He then wrote:

The past practice has been to distribute the balance of available vacancy monies after

deducting the amount used to fill vacancies. I have been advised by the office administrator for the Camden County Prosecutor's Office that no vacancy funds remain in the prosecutor's budget for FY'04.

Based on my review of the facts presented, including my reading and interpretation for the Assistant Prosecutors Collective Bargaining Agreement . . . and my review of how the contractual provisions at issue here have been interpreted in the past, I find that the Grievance is in part, sustained insofar as Article IV, Paragraphs A, B, C and D . . . reflect the intent of the parties to distribute available vacancy monies. As previously referenced, no vacancy funds remain in the prosecutor's budget for FY'04. Accordingly, that portion of the grievance which seeks distribution of vacancy monies from the Camden County Prosecutor's Office FY'04 budget is denied based upon a lack of available FY'04 funds.

The Association argues that the denial of a grievance due to a desire not to pay amounts to a repudiation of the grievance procedure, as well as a repudiation of the contract itself. It contends that the Prosecutor's Office is not precluded from paying the salary benefit simply due to the County's resistance or a lack of funding. It contends that the Prosecutor, not the County, is the public employer and has authority to enter into binding agreements over salaries; if Freeholder approval is needed, the Prosecutor would be obligated to seek that approval; and if funding is inadequate, the Prosecutor may apply to the Assignment Judge of the Superior Court for an order directing the Freeholders to fund increased expenditures under N.J.S.A. 2A:158-

7. The Prosecutor has not responded to this aspect of the Association's motion.

N.J.S.A. 34:13A-5.3 requires a public employer to negotiate over terms and conditions of employment. It also requires that agreements over employment conditions be reduced to writing. N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for an employer to refuse to negotiate in good faith. We will find a violation of these requirements if an employer repudiates a contract clause. Camden Cty. Prosecutor, P.E.R.C. No. 2006-24, 31 NJPER 322 (¶128 2005); Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995). A claim of repudiation is most clearly shown when an employer abrogates a clause based on an asserted but mistaken belief that it is outside the scope of negotiations. A claim of repudiation may also be supported by showing that a contract clause is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. But a mere breach of contract does not warrant exercising our unfair practice jurisdiction and will not be found to be a refusal to negotiate in good faith. Id. Instead, a party must use arbitral or judicial avenues to assert such contract claims. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148 (¶15191 1984).

We deny summary judgment on the claim that the Prosecutor repudiated the grievance procedure by refusing to comply with his own resolution of the Association's grievance asserting that paragraphs A and D had been violated. This is not a case where an employer refused to implement an award after its designated representative upheld an award. See, e.g., Borough of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003). Instead, this is a case where the employer considered the grievance and denied the requested relief. An employer that has denied relief does not repudiate the grievance procedure when it continues to deny relief.

We next consider the underlying dispute over the application of paragraph D. In its motion, the Association seeks judgment in its favor on its claim that the employer repudiated the provision. In its cross-motion, the employer seeks judgment in its favor on the limited issue of the interpretation of paragraph D, which deals with the employer's alleged obligation to redistribute the balance of unused salaries to the remaining Assistant Prosecutors and Law Clerks at the end of the calendar year. As to these competing claims, we cannot definitively discern at this juncture what the contract means, what the past practice has been, or whether the employer has changed its position on what it is required to do under that provision. Accordingly, we must deny the motion and cross-motion. The

Association may seek to prove at hearing that the Prosecutor repudiated the provision and the Prosecutor may defend by seeking to prove that it complied.

_____ Finally, as to paragraph A, in its brief in opposition to the cross-motion and in further support of its own motion for summary judgment, the Association states that even if we deny it summary judgment under paragraph D, we should grant it summary judgment under paragraph A. Although it appears that both parties agree that the total amount of all vacancies is to be added back in to determine the pool of dollars to use to calculate the annual 4% raise, unless and until the vacancy money under paragraph D is calculated and added back, each individual's base salary for calculating the 4% raises is not final. Thus, because the parties' dispute under paragraph D is not resolved, we deny partial summary judgment as to paragraph A.

ORDER

The motion for summary judgment and cross-motion for summary judgment are denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner DiNardo was not present.

ISSUED: November 21, 2006

Trenton, New Jersey