P.E.R.C. NO. 99-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-413

IFPTE LOCAL 200,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the New Jersey Turnpike Authority violated the New Jersey Employer-Employee Relations Act when it refused to negotiate with IFPTE Local 200 over the timing of cross-examinations and pre-arbitration confidentiality requirements in sexual harassment cases. The Commission finds that the New Jersey Law Against Discrimination and the public policy against sexual harassment in the workplace do not preclude negotiations over pre-arbitration confidentiality provisions that affect an employee's right to union representation during investigatory interviews. The Commission orders the Authority to negotiate in good faith with IFPTE.

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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In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-413

IFPTE LOCAL 200,

Charging Party.

Appearances:

For the Respondent, Riker, Danzig, Scherer, Hyland & Perretti, attorneys (Laura Lencses McLester, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Nancy I. Oxfeld, of counsel)

DECISION

On June 9, 1997, IFPTE Local 200 filed an unfair practice charge against the New Jersey Turnpike Authority. The charge alleges that the Authority violated 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, after two sessions at which the parties met to agree on a complete sexual harassment investigation procedure, the Authority unilaterally implemented a procedure before the parties had reached impasse. The charge also alleges that the procedure

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1/ These provisions prevent 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit...."

adopted by the Authority does not permit "meaningful cross-examination."

On October 27, 1997, a Complaint and Notice of Hearing issued.

On November 18, 1997, the Authority filed an Answer admitting that it and Local 200 had agreed that an employee accused of sexual harassment would have the right of cross-examination. While it also admitted that it had met with Local 200 in May 1997 to discuss a specific sexual harassment complaint and the procedure for cross-examination, it contended that the charge was "non-negotiable" and should be dismissed.

On March 17, 1998, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On September 14, 1998, the Hearing Examiner recommended that the Commission find that the Authority violated 5.4a(1) and (5) by refusing to negotiate over two items related to the investigation of sexual harassment complaints: the timing of cross-examinations and pre-arbitration confidentiality safeguards. H.E. No. 99-4, 24 NJPER 486 (¶29226 1998).2/ The Hearing Examiner concluded that, under New Jersey Turnpike Auth.

2/ The Hearing Examiner concluded, based on Local 200's opening statement and post-hearing brief, that it sought relief only with respect to these issues. Id. at 489. Local 200 does not except to this conclusion.

v. N.J. Turnpike Supervisors Ass'n, 143 N.J. 185 (1996), these were mandatorily negotiable procedural issues. 24 NJPER at 488. Further, he rejected the Authority's argument that, under the parties' 1995-1999 agreement, it had no obligation to negotiate mid-contract over the timing of cross-examinations or pre-arbitration confidentiality requirements. Id. at 489.[3/] With respect to negotiations over the first issue, the Hearing Examiner found that while the agreement specified that the Authority's procedure for investigating sexual harassment complaints was to be amended to permit cross-examination of "the alleged victim and/or witnesses," nothing in the agreement expressly authorized the Authority to determine when such cross-examinations were to occur. Therefore, he concluded that the Authority was obligated to negotiate over this point. Id. at 488. Similarly, he concluded that the Authority was required to negotiate over pre-arbitration confidentiality requirements because the agreement neither addressed such requirements nor incorporated a separate Authority document establishing such safeguards. Id. at 489.[4/] While the Hearing Examiner stated

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3/ On the other hand, the Hearing Examiner also rejected Local 200's contention that the parties had agreed to re-open negotiations over procedural aspects of sexual harassment investigations. Id. at 487.

4/ If the Authority finds that a unit member is guilty of sexual harassment and the matter proceeds to arbitration, the parties' agreement requires the arbitrator, Local 200 and the accused's attorney to execute a confidentiality agreement.

that an arbitrator might have authority to decide the issues raised by Local 200's charge, he concluded that deferral to arbitration was inappropriate in view of the Authority's position that the subjects were not mandatorily negotiable. Id. at 489 n. 3.

On September 28, 1998, the Authority filed exceptions. It contends that the Hearing Examiner erred in not recognizing that the parties agreed to be bound by the Authority's September 1995 procedures for investigating sexual harassment complaints with one limited amendment pertaining to cross-examination. It maintains that it did not commit an unfair practice by refusing to negotiate mid-contract over subjects covered by the agreement. In addition, it asserts that negotiations over the timing of cross-examinations will prevent it from exercising its prerogative to select individuals to investigate sexual harassment complaints. Finally, it contends that requiring negotiations over confidentiality procedures and the timing of cross-examinations violates the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq.

On October 5, 1998, Local 200 filed an answering brief. It urges us to adopt the Hearing Examiner's recommendations and find that the Authority violated 5.4a(1) and (5).

We have reviewed the record. We adopt the Hearing Examiner's findings of fact (24 NJPER 486-488) as supplemented in this opinion.

We start with the facts and chronology. Negotiations for the 1995-1999 agreement, effective from September 1995 through September 1999, began either in early 1995 or by June 1995. We supplement finding no. 4 to state that both parties had proposals concerning the procedures for investigating and adjudicating sexual harassment complaints (T17-T18). For its part, the Authority wanted to have sexual harassment matters handled separately from the agreement's grievance and disciplinary provisions (T74). Local 200 wanted the right to cross-examine witnesses, including the alleged victim. We add to finding no. 4 that Local 200 also wanted to have all documentation presented to it so that it could mount a fair defense (T18). Local 200 was dissatisfied with the procedure followed by the Authority in a previous sexual harassment case, where the unit member accused of sexual harassment testified before a panel of three department heads but had no opportunity to learn the names of the witnesses, hear their testimony, or cross-examine them. Local 200 eventually agreed to the Authority's proposal for a separate procedure and the Authority eventually agreed to permit cross-examination as part of that procedure.

We add to finding no. 3 that, prior to 1995, there were no written procedures for conducting discrimination/sexual harassment investigations (T71). In September 1995, the Authority's commissioners adopted "Procedures for Investigating and Prosecuting Employee Claims of Unlawful Discrimination and

Sexual Harassment." Local 200 representatives stated that procedures were not discussed during negotiations and that they were not aware of them until 1997, when Authority representatives gave them the September 1995 document. We add to finding no. 5 that Meg Garrity, the Authority's Director of Human Resources and one of its negotiators, also stated that the September 1995 procedures were never discussed in negotiations (T87).5/

The parties signed the 1995-1999 agreement in April 1996. Local 200 president Michael Calleo believed that the parties had agreed to negotiate over certain details -- such as when cross-examinations would take place -- after the agreement was signed. Garrity disagreed, but acknowledged that the timing of cross-examinations was never discussed during successor contract negotiations.

In May 1997, after a Local 200 member was charged with sexual harassment, Calleo contacted Garrity to discuss how, procedurally, the first hearing under the new agreement would unfold. The Authority and Local 200 met twice. During those meetings, the Authority took the position that cross-examination should take place before the EEO officer, who was responsible for interviewing witnesses and making a report to the discrimination

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5/ Garrity also stated that, in October 1995, she received a letter addressed to "my fellow employee" advising that the procedures had been adopted and indicating that a copy could be obtained from the Equal Employment Opportunity (EEO) office.

review committee, which makes a determination on the complaint. Local 200 wanted cross-examination to take place before the committee. At the two meetings, the Authority also stated that it would not provide Local 200 with a copy of the harassment charge until it signed a confidentiality agreement.6/ After two meetings, the Authority's attorney advised Local 200 that it would not agree to negotiate over its sexual harassment policy since that policy was not mandatorily negotiable. This charge followed.

Section 5.3 of the Act provides:

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

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed Ass'n, 78 N.J. 25, 52 (1978); Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). An employer may defeat this

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6/ We add to finding no. 8 that the September 1995 procedures state that an alleged offender will be provided with union representation during an EEO interview only if requested and only if the union representative agrees to sign a confidentiality agreement (R-1). The procedures further state that the alleged offender may be shown the complaint; they do not require that he or she sign a confidentiality agreement (R-1).

claim if it has a managerial prerogative to change or institute the working condition or if it shows that the majority representative has clearly and unequivocally waived its statutory right to negotiate. Passaic Cty.; Elmwood Park. A controlling contract provision may also establish that the parties have already negotiated over an issue and no further negotiations are required. Passaic Cty.

This is not a 5.4a(5) case where a union alleges that an employer has unilaterally changed existing working conditions. Local 200 does not maintain that, in the past, cross-examination took place before the discrimination review committee or that Local 200 representatives could obtain information about charges against a unit member without signing a confidentiality agreement. Nor does it contend that the 1995-1999 contract establishes the procedures and protections it seeks and that the Authority has repudiated that contract.7/ Rather, Local 200 argues, and the Hearing Examiner found, that because the 1995-1999 contract does not address these issues, the Authority was required to negotiate before implementing its own proposals on these subjects. Since this case implicates the nature of the mid-contract duty to negotiate, we discuss that duty before considering the Authority's exceptions.

7/ It is not clear whether Local 200 has a proposal with respect to pre-arbitration confidentiality safeguards: at the hearing, a Local 200 representative stated that he had no problem signing a confidentiality agreement but was concerned with the ramifications of Local 200 signing one if the complainant did not do so.

When collective negotiations agreements are reached, they must be reduced to writing. N.J.S.A. 34:13A-5.3. These written agreements set terms and conditions of employment for the life of the contract, unless the parties agree to change them. Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993); Passaic Cty.; State of New Jersey, Dept. of Veterans Affairs and Defense (Menlo Park Soldiers Home), P.E.R.C. No. 89-76, 15 NJPER 90 (¶20040 1989); Elmwood Park. However, there is a duty to negotiate mid-contract as to subjects which were neither discussed in successor contract negotiations nor embodied in contract terms. NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 684 (2d Cir. 1952), enf'g 94 NLRB 1214, 28 LRRM 1162 (1951); see also Wayne Bd. of Ed., P.E.R.C. No. 81-106, 7 NJPER 151 (¶12067 1981)(citing Jacobs and noting that the adjudications under federal law on this issue were helpful in interpreting New Jersey law); Hardin, The Developing Labor Law, pp. 733-737 (3d ed. 1992). Under federal law, a party may waive its right to negotiate mid-contract about a subject where, among other circumstances, it was fully discussed and consciously explored in contract negotiations but was not addressed in the resulting contract. See Jacobs; New York Mirror, 151 NLRB 834, 58 LRRM 1465 (1965). A party may also waive its statutory right to negotiate over a subject through contract language; where such a waiver is claimed, the test applied has been whether the waiver is in "clear and unmistakable language." Hardin, supra, pp. 700-701, citing Ador Corp., 150 NLRB 1658, 58 LRRM 1280 (1965).

Against this backdrop, we consider the Authority's argument that Article V indicates Local 200's agreement to be bound by the Authority's September 1995 procedures. This argument is pertinent only to the obligation to negotiate over confidentiality requirements. The 1995 procedures do not give an alleged offender the right to cross-examine witnesses and thus do not establish procedures that would pertain to Local 200's contractual right in this regard.

Article V states:

> The Authority and the Association agree that matters filed under the Authority's procedure for sexual harassment and/or discrimination complaints shall be separate and apart from this Agreement's Grievance Procedure set forth in Article XIV or the Disciplinary Action procedure set forth in Article XV. The Authority's procedure for Sexual Harassment and/or Discrimination complaints shall be amended to permit cross-examination of the alleged victim and/or witnesses by the Local 200 representatives or the accused's attorney.
>
> The parties agree that if the final decision of the Authority is unsatisfactory to the accused, the Association may submit the matter to binding arbitration. All requests for binding arbitration must be in writing and filed within ten (10) days of the effective date of the Authority's action. The cost of arbitration shall be borne by the losing party. The arbitrator shall determine who is the losing party.
>
> The parties agree to select a panel of three (3) special arbitrators who will serve on a rotating basis in all cases involving sexual harassment. The arbitrator, the Union and the accused's attorney must execute a confidentiality agreement.

> The arbitration appeal shall be on the entire record made at the Authority and the arbitrator's standard for review shall require a finding that the Authority's action was arbitrary, capricious and unreasonable in order to set aside the decision of the Authority.

The Authority argues that since the 1995-1999 agreement was signed in April 1996, the "procedure" referred to in Article V is necessarily the document adopted by the Authority in September 1995. It maintains that agreement to amend the "procedure" to permit cross-examination evidences Local 200's agreement to adopt all other aspects of the document. We disagree.

Preliminarily, the evidence supports the Hearing Examiner's finding that there was no mutual intent to be bound by the Authority's 1995 procedures. The Authority does not challenge the Hearing Examiner's findings that Local 200 representatives were not given copies of the 1995 procedures until 1997 and that Local 200's chief negotiator understood that the "procedure" referred to in Article V was the Authority's pre-1995 method for investigating and deciding sexual harassment complaints -- which Local 200 sought to change in certain respects. Garrity also stated that the 1995 procedures were never discussed in negotiations. Moreover, because negotiations for the 1995-1999 agreement began in June 1995 or earlier, the parties' proposals to change the sexual harassment procedure were necessarily introduced against the backdrop of the pre-September 1995 unwritten

procedures.[8/] In this posture, it is not clear that the term "procedure" refers to the 1995 document.

In any case, the statement that matters filed under the Authority's sexual harassment policy are separate from the agreement's grievance and disciplinary procedures indicates only that those contractual provisions do not pertain to sexual harassment/discrimination complaints: it does not specify what, if any, pre-arbitration confidentiality provisions do govern or give the Authority the right to adopt such provisions unilaterally. Similarly, the fact that the parties had agreed to amend the Authority's procedure to permit cross-examination does not by its terms give the Authority the contractual right to adopt unilaterally other procedures pertaining to the investigation or resolution of sexual harassment complaints. Nor would it indicate that Local 200 agreed to be bound by all other aspects of the Authority's September 1995 procedures. This is particularly so since Article V and the September 1995 procedures differ in at least one other respect: the procedures state that an employee may

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8/ The Authority argues that Local 200 representatives understood that the procedures referred to in the contract were the Authority's September 1995 procedures because, in October 1995, all Authority employees received a letter advising that those procedures had been adopted. But the Hearing Examiner admitted the October 1995 letter described in footnote five only for the purpose of establishing that it was an Authority document that had been sent to Garrity. No testimony was offered that the letter had been sent to all employees (T111-T115).

appeal the Authority's final decision in sexual harassment matters to the Appellate Division, while Article V provides for binding arbitration.

For these reasons, we reject the Authority's argument that there is specific contract language containing the issues that Local 200 seeks to negotiate. Similarly, we conclude that Article V does not represent a clear waiver of what we find to be Local 200's right to negotiate mid-contract over pre-arbitration confidentiality and the timing of cross-examinations.

In that vein, the Authority argues that it has no mid-contract obligation to negotiate concerning the timing of cross-examinations or pre-arbitration confidentiality because procedures for investigating and reviewing sexual harassment complaints were discussed in pre-contract negotiations and some provisions on the subject were included in the contract. That circumstance does not, in and of itself, relieve the Authority of the obligation to negotiate over sexual harassment procedures that were not discussed in pre-contract negotiations. See Public Service Co. of Colo., 312 NLRB 69, 144 LRRM 1265 (1993) (fact that employer had bargained on the general topic of subcontracting, and executed a provision prohibiting subcontracting for the purpose of laying off employees, did not relieve it of obligation to negotiate mid-contract over subcontracting for other reasons). There is no evidence that, during negotiations for the 1995-1999 contract, the parties discussed pre-arbitration confidentiality

requirements or the timing of cross-examinations -- or that Local 200 relinquished its right to negotiate over these items in exchange for the provisions it did obtain concerning sexual harassment. Contrast Jacobs (employer's pre-contract rejection of union proposal that it pay the full costs of an insurance plan, coupled with enhancement of substantive aspects of the plan, was a part of the bargain made when the parties negotiated the entire contract; employer not required to negotiate mid-contract over the previously raised union proposal). Because pre-arbitration confidentiality safeguards and the timing of cross-examinations were not discussed during successor contract negotiations and are not addressed in the contract, we find that the Authority had a mid-contract obligation to negotiate over them -- unless precluded by the LAD or absent a managerial prerogative to adopt procedures on these subjects unilaterally.9/

9/ We need not decide whether pre-contract discussions alone would preclude later negotiations. See Hardin, at 735 (noting that some courts have so held, while others have been reluctant to hold that one party loses a right merely by talking it over with another); compare Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 54 LRRM 2785 (6th Cir. 1963), cert. den., 351 U.S. 950 (1956) (if a right or benefit for which union desires to bargain during contract term is one that could be acquired only by virtue of a collective bargaining agreement, and proposal for such benefit was pressed and rejected during bargaining, failure to include such right or benefit necessarily results in failure to acquire it) with Resorts Int'l Hotel Casino v. NLRB, 996 F.2d 1553, ___ LRRM ___ (3d Cir. 1993) (union did not waive its statutory right to obtain identity of witnesses who complained about unit members' job performance; although it had unsuccessfully proposed contract language to that effect, it did not consciously relinquish the right).

We turn now to the Authority's contentions that negotiations over confidentiality procedures and the timing of cross-examinations would violate LAD requirements and significantly interfere with its managerial prerogative to select the individual responsible for investigating discrimination complaints.

Under the LAD and Executive Order No. 88, a public employer has a duty to enact and enforce policies and procedures to eliminate sexual harassment discrimination in the workplace. New Jersey Turnpike Auth., 143 N.J. at 197; see also Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 538 (1997); Lehrmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1996). An employer may be liable for sexual harassment committed by its employees if it fails to take "effective remedial measures" -- as gauged by the outcome of an investigation as well as its timeliness, thoroughness and attitude toward the allegedly harassed employee. Payton, 148 N.J. at 537. At the same time, the Court has also held that the obligations imposed by the LAD are not undermined by a collective negotiations agreement requiring fair disciplinary procedures for employees accused of sexual harassment. New Jersey Turnpike Auth., 143 N.J. at 198.

The Authority maintains that an effective complaint and investigation process requires that any cross-examination by an accused employee be conducted before the EEO officer who makes a

probable cause determination: otherwise, the EEO officer will waste time and be unable to investigate a complaint promptly. Local 200 counters that the Authority's ability to conduct a timely investigation would not be jeopardized by the additional time -- in days or hours -- that might be required if cross-examination were to take place before the discrimination review committee.10/ We agree with Local 200.

Nothing in the LAD addresses whether an employee accused of sexual harassment has a right to cross-examine witnesses and nothing in the LAD precludes any such contractual right from being exercised before the body that makes a determination on a complaint. Cf. New Jersey Turnpike Auth., 143 N.J. at 189 (LAD does not compel an accused employee to forego an arbitral forum contesting discipline). Cross-examination is typically undertaken at the adjudicatory stage of a proceeding and the Authority's procedure for its other employees does not provide for cross-examination at the investigative stage. In this posture, we do not believe that the procedure Local 200 proposes violates the LAD or undermines the Authority's ability, consistent with the

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10/ The Authority's September 1995 procedures state that the review committee will evaluate the written EEO report on a de novo basis. The procedures appear to permit, but not require, testimony before the committee. The effect of Local 200's proposal would be to require such testimony at that stage. Local 200's proposal would not necessarily preclude cross-examination at an earlier stage if the Authority believed it helpful as well.

LAD, to conduct timely investigations of sexual harassment and discrimination complaints.

We reach a similar conclusion with respect to negotiations over pre-arbitration confidentiality requirements. Our Supreme Court has held that confidentiality is an important component of any policy designed to maximize the reporting of alleged sexual harassment and to ensure the accuracy of investigations into such allegations. Payton, 148 N.J. at 541; cf. In re Seaman, 133 N.J. 67, 75 (1993). But neither Payton nor the LAD mandates particular procedures for providing for confidentiality or require that a confidentiality agreement be signed before a union representative can be informed of the charges against a unit member. And Local 200 does not appear to oppose the principle that sexual harassment investigations should have some confidentiality safeguards. Its representative has stated that it was simply concerned with the ramifications of Local 200's signing an agreement if the complainant did not do so. Moreover, the confidentiality provisions that the Authority seeks to implement are intertwined with an employee's right to have union representation at an investigatory interview where, in some cases, the employee may have reasonable grounds to believe that discipline will result. See UMDNJ and CIR, 144 N.J. 511 (1996). We therefore agree with the Hearing Examiner that in seeking to negotiate over pre-arbitration confidentiality requirements, Local 200 is seeking to negotiate over an issue of

fair procedures for employees accused of sexual harassment. New Jersey Turnpike Auth., 143 N.J. at 198. For these reasons, we find that the LAD and the public policy against sexual harassment in the workplace do not preclude negotiations over pre-arbitration confidentiality provisions that affect an employee's right to union representation during investigatory interviews.

Finally, we reject the Authority's contention that negotiations over the timing of cross-examinations will undermine its right to select who will investigate a sexual harassment complaint. The Authority's EEO officers conduct sexual harassment and discrimination investigations. Local 200 acknowledges that the Authority has the right to select the individual who will investigate a complaint. Absent a more explicit argument by the Authority, we do not see how negotiations over the timing of cross-examinations would interfere with that right.

For all these reasons, we accept the Hearing Examiner's recommendation and find that the Authority violated 5.4a(1) and 5.4a(5) when it refused to negotiate over the timing of cross-examinations and pre-arbitration confidentiality requirements in sexual harassment cases.

ORDER

The New Jersey Turnpike Authority is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with IFPTE Local 200 concerning the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

2. Refusing to negotiate in good faith with IFPTE Local 200 concerning terms and conditions of employment, including the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

B. Take this action:

1. Negotiate with IFPTE Local 200 before establishing the timing of cross-examinations and pre-arbitral confidentiality safeguards.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately and 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. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration.

DATED: December 17, 1998
Trenton, New Jersey
ISSUED: December 18, 1998

NOTICE TO 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:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with IFPTE Local 200 concerning the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

WE WILL cease and desist from refusing to negotiate in good faith with IFPTE Local 200 concerning terms and conditions of employment, including the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

WE WILL negotiate with IFPTE Local 200 before establishing the timing of cross-examinations and pre-arbitral confidentiality safeguards.

Docket No. CO-H-97-413 NEW JERSEY TURNPIKE AUTHORITY
(Public Employer)

Date: _____ By: _____

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 Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 99-4

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-413

IFPTE LOCAL 200

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Authority violated its duty to negotiate by unilaterally implementing new rules concerning the timing of cross-examination(s) and pre-arbitral confidentiality safeguards in its sexual harassment investigation procedures.

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. 99-4

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

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-and- Docket No. CO-H-97-413

IFPTE LOCAL 200

Charging Party.

Appearances:

For the Respondent,
Riker, Danzig, Sherer, Hyland & Perretti, attorneys
(Laura Lencses McLester, of counsel)

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Nancy Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 9, 1997, IFPTE Local 200 filed an unfair practice charge against the New Jersey Turnpike Authority. The charge alleges that on May 30, 1997, the Authority unilaterally implemented a sexual harassment policy which does not permit "meaningful cross-examination." Preceding the implementation, the parties met twice for the alleged purpose of "agree[ing] upon a complete sexual harassment investigation procedure." The charge alleges that the parties had not reached "impasse" before implementation. The Authority's actions allegedly violate 5.4a(1)

and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On October 27, 1997, a Complaint and Notice of Hearing issued.

On November 18, 1997, the Authority filed an Answer, admitting to have agreed to "a right to cross-examination" in sexual harassment complaint cases. It also admitted meeting with Local 200 in May 1997 to discuss a specific sexual harassment complaint and the procedure for cross-examination. It contends that the "charge" is "non-negotiable."

On March 17, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by June 30, 1998.

Based on the record, I make the following:

FINDINGS OF FACT

1. The New Jersey Turnpike Authority is a public employer within the meaning of the Act. IFPTE Local 200 is a public employee representative within the meaning of the Act and represents supervisors in the maintenance and tolls departments.

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. (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. On or about April 1, 1996, the parties signed a collective agreement extending from September 25, 1995 to September 19, 1999 (T70; C-3).[2/]

Article V (Non-discrimination) states:

> The Authority and the Association recognize the Constitutional equality of each and every Employee, and agrees that no Employee shall be discriminated against in the course of his or her employment with this Authority by reason of age, sex, color, creed, nationality, political affiliation and Association activity, disability, marital status and veterans status. The Authority and the Association agree that matters filed under the Authority's procedure for sexual harassment and/or discrimination complaints shall be separate and apart from this Agreement's Grievance Procedure set forth in Article XIV or the Disciplinary Action procedure set forth in Article XV. The Authority's procedure for Sexual Harassment and/or Discrimination complaints shall be amended to permit cross examination of the alleged victim and/or witnesses by the Local 200 representatives or the accused's attorney.
>
> The parties agree that if the final decision of the Authority is unsatisfactory to the accused, the Association may submit the matter to binding arbitration. All requests for binding arbitration must be in writing and filed within ten (10) days of the effective date of the Authority's action. The cost of arbitration shall be borne by the losing party. The arbitrator shall determine who is the losing party.
>
> The parties agree to select a panel of three (3) special arbitrators who will serve on a rotating basis in all cases involving sexual harassment. The arbitrator, the Union and the accused's attorney must execute a confidentiality agreement.

2/ "T" represents the transcript, followed by the page number; "C" represents Commission exhibits; "R" represents Respondent exhibits.

> The arbitration appeal shall be on the entire record made at the Authority and the arbitrator's standard for review shall require a finding that the Authority's action was arbitrary, capricious and unreasonable in order to set aside the decision of the Authority.

Article XIV (Grievance Procedure) provides a two step grievance procedure ending in binding arbitration. A "grievance" is defined as "any cause or complaint arising between the parties with reference to a term or condition of employment."

Article XV (Disciplinary Action) states that employees violating "rules, regulations and procedures" in "personnel policy and in manuals" shall be subject to disciplinary action. "Minor discipline" and "administrative discipline" are described, both providing for hearings and finally, binding arbitration.

Article XIX (Mutual Cooperation) states that "the parties agree to resolve problems arising from differences through the Grievance and Disciplinary Action procedures...and further agree to meet and discuss in good faith all matters giving rise to a dispute on the application of this Agreement."

3. Several years ago the Authority investigated an employee's sexual harassment complaint. The "procedure" was that the Authority EEO officer conducted an investigation and filed a written report to a "sexual harassment advisory committee." Its recommendation was forwarded to the Authority Executive Director who in turn reviewed, perhaps modified and ultimately conveyed a report to the Authority commissioners, who voted to accept (or reject) the report (T20; T70-T71).

Local 200 disapproved of the "procedure" because the accused employee had no opportunity to know the names of witnesses, or hear their testimonies (T21). Nor could the accused employee cross-examine anyone.

4. The parties negotiated their 1995-99 agreement for many months before signing it on April 1, 1996 (T21; T70). Negotiations started in either early 1995 or by June 1995, according to union and employer negotiators, respectively (T21-T22; T70). Negotiations over Article V were extensive and occurred at a "number of meetings" (T74; T75). Local 200 primarily wanted the right to cross-examine all witnesses, including the victim. The Authority initially resisted the demand, and eventually yielded, insisting that the victim be subject to cross-examination once only and that the investigation be kept confidential (T18-T19). Local 200 negotiators never complained of any ambiguity in Article V before signing the agreement (T76-T77).

5. Michael Calleo is president of Local 200 and was one of several members of the union negotiations team. When asked on direct examination about negotiations over Article V, he testified:

> Well, they agreed to the right to cross-examin[ation] of witnesses, and what we did not put into writing was procedures as to how things would take place, and the discussion lead to that being handled at a later date. [T19]

On cross-examination, Calleo testified that he "understood" that "procedures and selection of a panel [of arbitrators in sexual harassment cases] were to be done at a later date" (T26). He

conceded that the "procedure" was not the "immediate concern at that point" (T19). When asked to name the Authority representative(s) agreeing to the proposal, Calleo testified, "To the best of my recollection, it would have been Ron Tobia or Meg Garrity" (T31). Tobia, Authority counsel, and Garrity, Authority Director of Human Resources, were the principal negotiators for the Authority (T17).

Garrity testified that Authority negotiators did not agree to "reopen" negotiations on Article V (T77; T80). She conceded, "the thing we talked about and we did not obviously select it that night, was the panel of arbitrators" (T77). Garrity specifically denied that the Authority agreed to negotiate any other issue about Article V in the future (T78). She also denied that the parties negotiated about when in the procedure the cross-examination would occur (T91).

IFPTE Local 200 offered no document (such as handwritten notes) to corroborate that it reserved or agreed with the Authority to reserve until some later date (i.e., after the agreement was signed on April 1, 1996) negotiations over the "procedure", as that term is used colloquially by Calleo or as it is used in the final sentence of the first paragraph in Article V. Calleo's testimony on this disputed fact was not explicit until prodded by counsel on direct examination (T19-T20). His memory was vague about which Authority representative agreed to negotiate procedures in the future. Even if his testimony was explicit, it was equally rebutted by Garrity. Accordingly, I do not find that the parties agreed in

negotiations to negotiate "procedures" after the agreement was executed.

I do find that the parties agreed to discuss in the future the selection of a panel of arbitrators that would preside over sexual harassment cases.

6. In September 1995, the Authority Commissioners approved a "new set of procedures for the reporting and administration of discrimination and sexual harassment complaints" (R-2; R-1). The enumerated forty-five paragraph procedure provides the "alleged offender" with "union representation" but nowhere provides a right to cross-examination. It also has several paragraphs devoted to confidentiality (R-1).

On October 23, 1995, Garrity received a memorandum (addressed to "fellow employee") from Acting Executive Director Edward Gross advising that the "procedures" were approved and that any employee wishing to learn about them may contact the EEO officer (R-2; T111).

7. No Authority representative testified that the promulgated sexual harassment procedures were given to any Local 200 representative during negotiations (T87). No Local 200 representative received or knew about the "procedures" before the collective agreement was signed on April 1, 1996 (T28-T29; T39; T101-T102).

Calleo testified that his understanding of the "procedure" -- as the word is used in Article V -- was based entirely on the

experience of litigating a prior sexual harassment complaint (T37; see finding no. 3). In light of the fact that no Local 200 representative knew about the promulgated procedures, I credit Calleo's testimony.

8. Sometime after April 1, 1996, a Turnpike toll plaza supervisor (and member of the Local 200 unit) was charged with sexual harassment. Calleo phoned Garrity to discuss how the hearing would unfold (T22).

On May 6, 1997, the parties met to discuss procedural issues about the upcoming hearing and the meaning of Article V (T22; T79). Attending for Local 200 was President Calleo, and representatives Joseph Guarino and Conrad Vuocolo, and counsel Sanford Oxfeld, who also represented the accused employee (T44). Attending for the Authority was Garrity and counsel James Anelli (T22; T46).

In general, the parties discussed procedural matters, such as the names of potential hearing officers, discovery and preferences for the panel of arbitrators (T23). The Authority refused to provide a copy of the harassment charge unless Local 200 signed a confidentiality agreement. Nor was the Authority inclined to allow cross-examination unless Local 200 produced its list of witnesses (T46-T47). Oxfeld disputed the existence of a "confidentiality" policy and inquired whether the complainant had to sign such an agreement (T48-T49). He also criticized both parties for not establishing when in the procedure cross-examination would

occur (T48; T97). Oxfeld had not participated in collective negotiations (T44-T45).

Oxfeld advocated that cross-examination should be conducted directly before the panel determining if "harassment" had occurred (T23; T51). The Authority maintained that cross-examination should take place before the assigned investigator, whose report is forwarded to the panel (T51-T52; T85).

Authority counsel Anelli suggested that the parties might negotiate over who would be on the panel as a way of circumventing the issue (T52). Anelli stated that Acting Executive Director Gross would have to approve the suggestion (T53). Later, Gross did not approve the suggestion.

9. Around May 20, 1997, the participants met again (T54). For the first time, Calleo was given the "procedures for investigating and prosecuting employee claims of unlawful discrimination and sexual harassment" (T54; T36; R-1). In reviewing the "procedures" at the meeting, Oxfeld commented that it stated nothing about cross-examination and a panel of arbitrators (T55).

Oxfeld also criticized the absence of a "just cause" provision for cases concerning sexual harassment (T56). Garrity replied that that matter was discussed in negotiations and that the parties agreed that the sexual harassment policy was in lieu of a disciplinary grievance procedure ending in arbitration (T57; T74).

10. On May 28, 1997, Authority counsel Anelli wrote a letter to Local 200 counsel Oxfeld advising that the Authority "will

not agree to negotiate its sexual harassment policy since such matters are clearly non-negotiable" (R-3). Anelli further advised that a copy of the charges against the unit member would be forwarded if a "stipulation of confidentiality" was signed by Local 200 and the charged employee.

ANALYSIS

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 working conditions:

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

See also, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). Among the subjects an employer must negotiate are "grievance and disciplinary review procedures" which in turn "...shall be utilized for any dispute covered by the terms of such agreement."

In a 1996 case between these parties, our Supreme Court held that,

> Negotiation of disciplinary procedures, including binding arbitration for the imposition of discipline based on claims of sexual harassment is specifically authorized as a negotiable subject and does not impinge on or implicate an inherent managerial prerogative. [N.J. Tpk. Auth. and N.J. Tpk. Supvs. Ass'n, 143 N.J. 185, 205 (1996)]

The Court approvingly cited an earlier decision which recognized that a public employer may "contractually agree to abide by principles of procedural fairness...when determining an accused employee's guilt or innocence." Id at 143 N.J. 193-194, citing Cty. Coll. of Morris Staff Ass'n v. Morris Cty. Coll., 100 N.J. 383 (1985).

Two months after N.J. Tpk. Auth. issued, these parties signed a collective agreement with a provision (in Article V) "permitting cross-examination of the alleged victim and/or witnesses by the Local 200 representatives or the accused's attorney" in sexual harassment matters. The Authority thus met a statutory obligation.

Written collective agreements set terms and conditions of employment for the life of the contract, unless the parties mutually agree to change them. Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993); Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990). The evidence on this record does not prove that the Authority agreed to reopen negotiations over the timing of a "cross-examination."

Local 200 argues nonetheless, that since the parties did not specifically negotiate when cross-examination occurs in sexual harassment cases, the Authority has the duty to do so after the agreement was signed. Local 200 also argues that the Authority has the same duty to negotiate over confidentiality safeguards preceding arbitration of sexual harassment charges. In support of this

argument, Local 200 cites the axiom that the duty to negotiate "extends beyond the period of contract negotiation and applies to labor-management relations during the term of the agreement." NLRB v. ACME Industrial Co., 385 U.S. 432, 436 (1967); see also, Galloway Tp. Bd. of Ed.

A public employer may violate its negotiations obligation by implementing a new rule concerning a term and condition of employment without first negotiating to impasse or having a contractual defense. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). A union must prove (1) a change (2) in a term and condition of employment (3) without negotiations. The employer defeats such a claim if it has a managerial prerogative or contractual right to make the change.

The evidence shows that the right to cross-examine first existed when the Authority and Local 200 signed their collective agreement on April 1, 1996. Just when that right could be invoked was not negotiated. By the end of May 1997, the Authority insisted that cross-examination be conducted before its investigator and promptly declared the whole policy "non-negotiable", a defense repeated in its post-hearing brief. The same declaration applied to pre-arbitral confidentiality issues.

I disagree with the Authority. The timing of a cross-examination is within the ambit of mandatorily negotiable procedural protections affordable to employees accused of sexual harassment. N.J. Tpk. Auth. Nothing in the contract "expressly and

specifically" authorizes the Authority to unilaterally determine when such cross-examinations occur. See Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

Accordingly, I recommend that the Authority violated 5.4a(5) and (1) of the Act by refusing to negotiate to impasse over the timing of cross-examinations of "the alleged victim and/or witnesses" in sexual harassment cases.3/

For the same reasons, I also recommend that the Authority violated 5.4a(5) and (1) by refusing to negotiate to impasse over "confidentiality" safeguards in the investigation of sexual harassment cases before arbitration. Although the Authority's approved "procedures" (see finding #6) include several provisions on confidentiality, they were not provided to Local 200 until May 1997, more than one year after the collective agreement was signed. These provisions cannot bind Local 200; it agreed only to the provision in Article V requiring confidentiality at arbitration.

I concede that Local 200's charge is suseptible to a reading that the entire set of procedures for sexual harassment investigations was unilaterally implemented. The facts are consistent with such a reading. But considering Local 200's opening

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3/ Article V of the agreement refers to both "cross-examination" and to "confidentiality agreement." An arbitrator may very well have the contractual authority to decide the issues raised by Local 200's charge. But in view of the Authority's insistence that these subjects are "non-negotiable", I believe that this case cannot be deferred to arbitration. N.J. Dept. of Human Serv., P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

remarks at hearing, its presentation of testimony (omitting specific references to any of the procedure's 45 paragraphs) and its post-hearing brief, I believe that Local 200 is seeking redress only on the matters of cross-examination and confidentiality. I limit my findings, accordingly.

RECOMMENDATION

I recommend that the Commission find that the New Jersey Turnpike Authority violated 5.4a(5) and (1) of the Act by refusing to negotiate to impasse over the timing of cross-examination(s) and over confidentiality matters before arbitration in sexual harassment cases.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Respondent Authority cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with IFPTE Local 200 concerning the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

2. Refusing to negotiate in good faith with IFPTE Local 200 concerning terms and conditions of employment, including the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

B. That the Authority take the following affirmative action:

1. Negotiate with IFPTE Local 200 upon demand over procedural matters concerning the sexual harassment investigation procedures (not included in the current collective agreement) including the timing of cross-examination(s) and pre-arbitral confidentiality safeguards.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately and 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. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

Jonathon Roth
Hearing Examiner

DATED: September 14, 1998
Trenton, New Jersey

RECOMMENDED

NOTICE TO 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:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with IFPTE Local 200 concerning the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

WE WILL NOT refuse to negotiate in good faith with IFPTE Local 200 concerning terms and conditions of employment, including the timing of cross-examinations and pre-arbitral confidentiality safeguards in sexual harassment investigation procedures.

WE WILL negotiate with IFPTE Local 200 upon demand over procedural matters concerning the sexual harassment investigation procedures (not included in the current collective agreement) including the timing of cross-examination(s) and pre-arbitral confidentiality safeguards.

Docket No. CO-H-97-413

New Jersey Turnpike Authority
(Public Employer)

Date: _____ By: _____

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 Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"