

P.E.R.C. NO. 92-121

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY JUDICIARY,

Respondent,

-and-

Docket No. CO-H-91-75

PROBATION ASSOCIATION OF NEW JERSEY,
LOCAL 113,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission determines that the Monmouth County Judiciary failed to negotiate in good faith over compensation for two senior probation officers represented by the Probation Association of New Jersey, Local 113.

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PROBATION ASSOCIATION OF NEW JERSEY,
LOCAL 113,

Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Sills, Cummis, Zuckerman, Radin,
Tischman, Epstein & Gross, attorneys
(Mark J. Blunda, of counsel)

DECISION AND RECOMMENDATIONS

On October 9, 1990, the Monmouth County Probation Officer's Association filed an unfair practice charge against the Monmouth County Judiciary. On November 8, the charge was amended by the successor majority representative, the Probation Association of New Jersey, Local 113. The charge, as amended, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (5) and (6),^{1/} by refusing to negotiate over additional

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

compensation for two senior probation officers who allegedly performed the duties of a principal probation officer.

We accepted jurisdiction over the dispute consistent with Passaic Cty. Probation Officers' Ass'n v. Passaic Cty., 73 N.J. 247 (1977) and In re Judges of Passaic Cty., 100 N.J. 352 (1985). On May 14, 1991, a Complaint and Notice of Hearing issued. On August 1, the employer filed an Answer denying it had violated the Act. It asserts that it did not assign duties outside the job titles of the affected employees.

On November 20, 1991, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by January 28, 1992.

On April 14, 1992, the Hearing Examiner issued his report and recommendations. H.E. No. 92-25, 18 NJPER 226 (¶23102 1992). He found that the two senior probation officers performed the duties of a principal probation officer for an extended period and that the

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (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."

employer failed to negotiate with Local 113 over additional compensation for those employees. He recommended that the employer engage in good faith negotiations over compensation for the duties performed.

On April 27, 1992, the employer filed exceptions. It claims that the work performed by the two senior probation officers was not exclusively principal probation officer work; the work was part of the usual duties of senior probation officers; and the duties of a team leader were the same duties that the two senior probation officers had been assigned in the absence or unavailability of the principal probation officer. It also claims that Local 113 could have pursued compensation during successor contract negotiations.

On May 7, 1992, Local 113 filed a reply. It claims that the two senior probation officers were required to perform duties above and beyond the normal responsibilities of a senior probation officer. It further claims that negotiations for the 1991-92 contract did not cover the demand for higher compensation for the period April through August 1990.

We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at 3-11) are undisputed and accurate. We incorporate them here.

On April 5, 1990, a principal probation officer died suddenly. This officer had been a team leader. Two senior probation officers took over most of his responsibilities until

August 1990 when those duties were assumed by other principal probation officers who were also team leaders. Local 113 requested negotiations over additional compensation for the two employees and the employer did not respond. The issue in this case is whether the employer breached its negotiations obligation by failing to respond to Local 113's request.

Additional pay for work performed in a higher title is mandatorily negotiable. See Bor. of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992) and cases cited by Hearing Examiner, slip opinion at 13. The employer claims that the duties performed by the two senior probation officers were those they had performed whenever called upon in the past and were within their title and job description. We recognize that many of the duties of probation officers, senior probation officers and principal probation officers overlap. In the absence of a higher ranking officer, lower ranking officers have assumed the higher level duties temporarily. All the officers work as a team and there are no bright lines demarcating their respective functions.

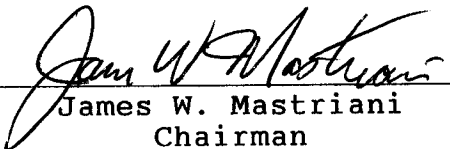
Nevertheless, we agree with the Hearing Examiner that these senior probation officers assumed responsibilities sufficiently different from their normal ones to require the employer to negotiate over additional compensation upon Local 113's request. Over an extended period, they took responsibility to review, correct and sign the work of probation officers and they ensured that all necessary work was performed in a timely manner. We do not decide

that the employees are entitled to additional compensation. That is for the parties to decide through the negotiations process. We simply decide that when Local 113 requested negotiations over this issue, the employer was obligated to negotiate in good faith.

The employer's willingness to enter into negotiations over a contract effective January 1, 1991 did not fulfill its negotiations obligation for a claim covering an earlier period. While Local 113 might have been able to raise the issue in contract negotiations, it was not obligated to do so.^{2/}

Having found that the employer failed to negotiate in good faith over compensation for the two senior probation officers, we recommend that it engage in such negotiations within 30 days. Because of our advisory jurisdiction over matters involving the Judiciary, we do not issue an order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 25, 1992
Trenton, New Jersey
ISSUED: June 26, 1992

^{2/} There is no evidence that Local 113 abandoned its claim for retroactive compensation when it withdrew its successor contract proposal guaranteeing higher compensation for employees working in higher titles.

H.E. NO. 92-25

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

In the Matter of

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Respondent,

-and-

Docket No. CO-H-91-75

PROBATION ASSOCIATION OF N.J.,
LOCAL 113,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Monmouth County Judiciary violated subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act by failing to negotiate with the Probation Association of New Jersey over additional compensation for two senior probation officers who performed the duties of a principal probation officer for an extended period. The Hearing Examiner recommended the Judiciary engage in negotiations with the Association over the compensation issue.

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.

STATE OF NEW JERSEY
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Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Stephan M. Schwartz, D.A.G.)

For the Charging Party, Sills, Cummis, Zuckerman, Radin,
Tischman, Epstein & Gross, attorneys
(Mark J. Blunda, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public
Employment Relations Commission (Commission) on October 9, 1990 and
amended on November 8, 1990 by Probation Association of New Jersey,
Local 113 (Association) alleging the Monmouth County Judiciary
(Judiciary) violated subsections 5.4(a)(1), (3), (5) and (6) of the
New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et
seq. (Act).^{1/} In the original charge the Association alleged the
Judiciary violated the Act by making senior probation officers

^{1/} These subsections prohibit public employers, their
representatives or agents from: "(1) Interfering with,

George Christie and Leigh Ann Grauer perform duties of a principal probation officer (PPO) without additional compensation or negotiations. In the amended charge the Association repeated the original allegation and also alleged that the Judiciary: 1) required probation officers (PO) and senior probation officers (Sr.PO) to perform higher title duties without additional compensation; and 2) refused the Association's demand to negotiate over additional compensation for employees required to perform higher title duties.

A Complaint and Notice of Hearing (C-1) issued on May 14, 1991. The Judiciary filed an Answer (C-2) on August 1, 1991 denying it violated the Act. It asserted it had a legitimate business justification for its actions, and asserted it did not assign duties to the affected employees which were outside their job titles.

A hearing was held on November 20, 1991 in Trenton, New Jersey.^{2/} The parties filed post-hearing briefs, the last of which was received on January 28, 1992.

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restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (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."

2/ The transcript will be referred to as "T."

Based upon the entire record I make the following:

Findings of Fact

1. George Christie and Leigh Ann Grauer are Senior Probation Officers employed by the Judiciary. In early 1990 they were assigned to the Criminal Case Management Division of the Probation Department, and were on a team headed by team leader Eugene Westrick, a Principal Probation Officer primarily responsible for reviewing jail (5-A) public defender reports (T19-T21).

In early March 1990 Westrick retired and was replaced as team leader by Principal Probation Officer Eugene Webster. Webster died suddenly on April 5, 1990 and his duties were immediately assumed by Christie and Grauer. They performed their normal duties, and split Webster's duties without receiving additional compensation, until August 1990 when Webster's duties were assumed by other PPO team leaders, Tom McKnight, Kathy Davidson and Bob Crippen (T28-T29).

2. The Criminal Case Management Division of the Probation Department included criminal case manager William Mack, assistant criminal case manager Richard Kulaszewski, office manager and PPO Tom McKnight, and team leaders Westrick/Webster responsible for jail (5-A) public defender reports, PPO Kathleen Davidson responsible for budget matters, and PPO Bob Crippen responsible for bail (5-A) reports. (T15, T19-T20).

The team headed by Westrick/Webster included Christie and Grauer and four to eight probation officers (T22, T30). Prior to

April 5, 1990 Christie and Grauer were responsible for normal senior probation officer duties which included: conducting presentence investigations (PSI's) and preparing PSI reports which were presented to Webster; preparing pretrial intervention (PTI) reports which were presented to Webster, then to Kulaszewski; conducting 5-A public defender investigations and preparing reports for Webster concerning defendants' requests for public defender representation; assigning PO's and arranging for and assisting in the preparation of 5-A applications at the jail, in the courtroom and at the case management office front desk; and filling in for -- or assuming duties of -- the team leader in his/her absence, or even in his/her presence but unavailability. (T22-T28, T61, T72-T73, T87-T88, T90-T91). The latter team leader duties that Christie and/or Grauer occasionally assumed included: reviewing and signing jail 5-A reports, PSI reports and PTI reports; ensuring that public defenders were appointed where required; and obtaining and distributing rap sheets (T28, T72-T75, T87-T88, T97, T111-T112). There was no evidence that Christie or Grauer or any other Sr.PO ever performed PPO duties consistently, or for an extended time period.

The duties that Westrick/Webster performed as PPO team leader included distributing PSI cases assigned by Crippen; reviewing and signing jail 5-A reports, PSI and PTI reports; ensuring the appointment of public defenders where required; obtaining and distributing rap sheets, and researching or completing special projects. He was also required to answer complaints of --

or correct -- reports he had signed. (T83, T85, T92-T93, T107). The team leader received from 12 to 24 PSI's per week which took approximately 20 minutes each to review; ten PTI's a week which took from ten to 30 minutes each to review; and, approximately 40 5-A reports which took a few minutes each to review (T31-T32, T40-T41, T48, T78, T85-T86).

3. Upon Webster's death Christie and Grauer immediately assumed (and divided) nearly all of Webster's duties in addition to performing their Sr.PO duties (T28-T30, T33, T74). No one actually assigned them to perform Webster's duties during April through August 1990, they assumed those duties automatically since they were the only Sr.PO's on the team (T38-T39, T75, T76, T110, T142).

While they assumed most of Webster's duties, Christie and Grauer were not assigned special projects, nor during April--August 1990 did Mack assign them to answer complaints of -- or correct -- reports they had signed (T43-T44, T107-T109, T117). During that time period Christie's and Grauer's Sr.PO duties and case loads were not actually reduced (T30, T33, T59, T69, T74, T155-T157), but they did make an adjustment in their own duties. Prior to April 5, 1990 Christie and Grauer were occasionally assigned to interview walk-ins for 5-A bail or public defender requests, but between April and August 1990 they assigned those duties to PO team members (T61, T65-T66, T75). They also assigned some of their own 5-A report duties to PO's during that time (T74-T75). But in exchange, Christie and Grauer assumed more responsibility over the PO's. They

had to make certain the PO's reports were timely; they reviewed PO work and made corrections thereto; returned reports to PO's for correction; and assigned PO's to 5-A duties (T61-T66, T74-T75).

Christie's and Grauer's PPO workload during April through August 1990, as compared to their occasional PPO assignments, was more consistent and more extensive than at any other time.

4. Within a week of Webster's death Mack had a passing conversation with Christie who told him (Mack) that he (Christie) and Grauer would look after the team. Christie said nothing about their increased duties or responsibilities (T100, T109-T110, T118-T119). On April 23, 1990 Webster's PPO position was posted but not filled (CP-2A).

On May 25, 1990 Christie and Grauer filed a grievance (CP-2A) with the assistance of Local 32, Office and Professional Employees Union (OPEIU), then their majority representative, alleging they were performing their Sr.PO duties as well as the PPO duties, and were performing the PPO duties without compensation.^{3/} They also alleged that Webster's position should have been filled by May 21, 1990. They presented the grievance to PPO's Tom McKnight and Kathy Davidson who held the first-step meeting that day. They filed the grievance with McKnight and Davidson, rather than Mack, because McKnight was office manager and

^{3/} Although Christie and Grauer held classified titles, and felt that the PPO duties were out of title work, they did not file a complaint with the State Department of Personnel (T56-T57).

Christie believed that McKnight, not Mack, was their immediate supervisor (T33-T38, T76). They never directly complained to Mack about workload increase (T114-T116).

McKnight and Davidson told Christie and Grauer that they would continue the PPO duties for only a short time, a couple of weeks (T34, T76). The first-step answer on CP-2A indicated that Christie and Grauer were filling the PPO position without extra compensation, but that the position would be posted again by May 30, 1990.

Shortly after the first-step meeting Mack met with McKnight, Davidson, and Crippen regarding Christie's and Grauer's grievance. Mack was told about their complaint, informed Trial Court Administrator William Carpenter, and discussed with Carpenter filling the position. Mack also told Carpenter that he had asked Crippen to cut back on assignments to Christie and Grauer, but he didn't follow up on that direction (T112-T116). Christie's and Grauer's Sr.PO work was not reduced (T155-T157).^{4/}

On June 1, 1990 the OPEIU union steward processed Christie's and Grauer's grievance to the second-step level before Mack. The grievants appealed to Mack, explaining that they were not

^{4/} Although Mack thought Christie's and Grauer's Sr.PO work load was reduced during April to August 1990 (T113-T114), the employees were certain it had not been reduced (T155-T157). Since it was Crippen, not Mack, who normally handled assignments to the Sr.PO's, and since Crippen was not offered to rebut Christie and Grauer, or corroborate Mack, I credit Christie and Grauer and find their Sr.PO workload was not reduced.

compensated for performing PPO duties, and they thought the position should have been filled and should have been reposted. The grievants wanted to be compensated for the time they performed the PPO duties, and relieved of the extra duty or compensated for continued work. On June 6, 1990 (CP-2B), Mack notified the union steward that he could not resolve the grievance and it should proceed to the next step.

On June 8, 1990 (CP-2C), the union steward notified Assignment Judge Alvin Milberg that the grievance was being submitted to him at the third step. On June 20, 1990 (CP-2D), Judge Milberg delegated Assistant Trial Court Administrator Joseph Barba to conduct the third-step grievance hearing. On July 2, 1990 (CP-2E), Barba notified Christie and Grauer that the third-step hearing was scheduled for July 17, 1990. The hearing was held that day, and on August 10, 1990 (CP-2F) Barba issued his findings. He denied the grievance holding that no additional compensation was justified because there was no showing that Christie and Grauer were working out of title.

5. In August 1990 Webster's team leader PPO duties were removed from Christie and Grauer and divided amongst the other PPO team leaders, McKnight, Davidson and Crippen (T29).^{5/}

^{5/} In September 1990 the Judiciary appointed Cary Clayton as Principal Probation Officer team leader to replace Webster (T29).

On August 14, 1990, Judge Milberg was notified (C-1C) by the OPEIU that it was no longer interested in representing the probation officers. Subsequently, the Association became the majority representative of the officers. The Charge was filed on October 9, 1990. By letter of October 26, 1990 (C-1D), to Acting Assignment Judge McGann and Chief of Labor Relations Josephson, the Association requested negotiations for a new collective agreement,^{6/} and specifically requested negotiations concerning additional compensation for Christie and Grauer for their PPO work between April and August 1990.

Trial Court Administrator Carpenter received C-1D on or about November 2, 1990. He never responded to that letter. The Judiciary was about to engage in negotiations with the Association for a new collective agreement and Carpenter did not want to negotiate over an issue that was under litigation. (T143-T144). The Judiciary did not engage in negotiations with the Association over additional compensation for Christie's and Grauer's April-August PPO work.

Subsequent to November 2, Carpenter received the Association's initial contract proposals (R-2) for a new agreement (T144-T145). The Association proposed that the new agreement take effect January 1, 1991, and it sought a new clause concerning out-of-title work which said:

^{6/} The OPEIU hold over agreement in existence in October 1990 was expiring on December 31, 1990.

No officer shall be required to work outside his/her Civil Service title. Any officer performing the duties of a higher title shall be paid the salary of the higher title.

The out-of-title clause was withdrawn prior to the signing of a memorandum of agreement (T146-T147), and that language did not appear in the new 1991-92 collective agreement (R-1) which was signed on March 28, 1991.^{7/}

R-1 was effective January 1, 1991. It was not intended to cover the April-August 1990 period wherein Christie and Grauer performed PPO duties. While negotiating for R-1 there were no negotiations over extra compensation for Christie's and Grauer's 1990 PPO work. There was no agreement in the memorandum of agreement or R-1 that this charge would be withdrawn once R-1 became effective (T148-T152).

6. The Senior Probation Officer job description (J-1) contains a broad description of duties and responsibilities. The definition section provides that a Senior Probation Officer may be designated in charge of a section or division and do related work.

^{7/} On redirect examination Carpenter denied refusing to negotiate in good faith regarding C-1D, the Association's letter of October 26, 1990 (T153). But there were two demands to negotiate in C-1D. The first for negotiations for a new collective agreement, the second for negotiations over additional compensation for Christie's and Grauer's April-August PPO work. The Judiciary obviously met the first demand which resulted in negotiations leading to R-1. But I find that it did not engage in negotiations over the Association's second demand in C-1D, extra compensation for Christie and Grauer. Thus, I only partially credit Carpenter's testimony that he did not refuse to negotiate regarding C-1D.

Examples of work show that a Senior Probation Officer might be directed to assume full responsibility for the activities of an organizational unit or specialized program.

ANALYSIS

This case came before the Commission as a matter of comity pursuant to the policies enunciated in Passaic Cty. Probation Officers Ass'n v. Passaic Cty., 73 N.J. 247 (1977); In re Judges of Passaic Cty., 100 N.J. 352 (1985); and CWA Local 1044 v. The Honorable Chief Justice, 118 N.J. 495 (1990).

Although the Association alleged violations of 5.4(a)(1), (3), (5) and (6) of the Act, it did not present facts or proof of an independent (a)(1) violation, it did not show that Christie, Grauer, or any other employee(s) was discriminated against because of the exercise of protected activity, and it did not show that the Judiciary refused to reduce a negotiated agreement to writing or refused to sign such agreement. Therefore I recommend any independent (a)(1), and the (a)(3) and (a)(6) allegations be dismissed.

The issue here is limited to whether the Judiciary violated 5.4(a)(5) and derivatively (a)(1) of the Act by failing to negotiate with the Association over additional compensation for Christie's and Grauer's April through August 1990 PPO work. This case does not challenge the Judiciary's right to assign work, does not question whether Sr.PO's were responsible for occasionally performing PPO work, and does not require a determination that Christie and Grauer

were working "out-of-title." That is for the Department of Personnel (DOP) to determine. This case simply raises the question of whether the Association was entitled to negotiate over additional compensation for two Senior Probation Officers who performed the duties of a higher title, Principal Probation Officer, for an extended time period. I find that it was.

There is no dispute that Christie and Grauer in particular, and Senior Probation Officers in general, occasionally assume or are assigned the higher level duties of a Principal Probation Officer. There is also no dispute that the broad language in J-1 indicates that Sr.PO's may be assigned PPO level duties. But there is no evidence that Christie and Grauer, or any other Sr.PO, has ever been required or expected to perform PPO duties for an extended time period. Here they were.

There are two lines of cases that can be used to analyze this case. In the first line of cases, the Commission has held that where a position becomes vacant, whether by RIF, discharge, retirement, resignation or reorganization, and the work formerly performed by the person holding that position is distributed amongst the remaining employee(s) holding the same position, and there is no increase in hours or loss of break time, no severable compensation claim arises that would require negotiations. Newark Bd. of Ed., P.E.R.C. No. 92-94, 18 NJPER ____ (¶____ 1992); Long Branch Bd. of Ed., P.E.R.C. No. 91-91, 17 NJPER 243 (¶22110 1991); Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 87-137, 13 NJPER 360 (¶18148

1987), recon. den. P.E.R.C. No. 87-163, 13 NJPER 589 (¶18220 1987); Old Bridge Bd. of Ed., P.E.R.C. No. 86-113, 12 NJPER 360 (¶17136 1986), aff'd App. Div. Dkt. No. A-4429-85T6 (3/25/87), cert. den. 108 N.J. 665 (1987); Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983).

In the second line of cases, the Commission has held that additional pay for work performed in a higher rank is mandatorily negotiable. Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992); Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), app. pending App. Div. Dkt. No. A-1434-91T2; So. Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); City of Paterson, P.E.R.C. No. 84-113, 10 NJPER 257 (¶15123 1984); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); Kearny PBA Local No. 21 v. Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd App. Div. Dkt. No. A-1617-79 (12/18/81).^{8/}

Though somewhat of a hybrid, this case is more similar to the Rutherford line of cases. While the evidence does not show that Christie and Grauer were required to work longer hours, or that they had never before performed the work in question, it also did not

8/ See also Tp. of Edison, P.E.R.C. No. 86-9, 11 NJPER 455 (¶16160 1985); and compare East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986), aff'd App. Div. Dkt. No. A-1551-86T8 (12/18/87), certif. den. 111 N.J. 600 (1988).

show that they had performed PPO duties on a consistent basis for an extended time period. The Newark line of cases would apply to the remaining PPO's, but not to Christie and Grauer.

In August, the Judiciary assigned Webster's PPO duties to the remaining PPO team leaders. If those team leaders had sought negotiations for additional compensation for performing Webster's duties, the Newark line of cases would apply. They were employees holding the same title as Webster and required to perform the same level of duties. They were merely performing more of the same duties until a new PPO was hired.

That does not apply to Christie and Grauer. By performing Webster's duties consistently for four to five months they were not merely performing more of their own level of duties. They were, in fact, performing a higher level of duties significantly beyond the time they were normally performed by Sr.PO's. By performing the duties of a higher rank or level for an extended period, the affected employees were entitled to negotiate over additional compensation through their majority representative consistent with Rutherford, et al.

The Judiciary's argument that Christie and Grauer were not working out-of-title, and that it did not want to negotiate over an issue under litigation, are not sufficient defenses to refuse to respond to C-1D. This case is not about working out-of-title in the DOP sense. The Sr.PO's duties include the occasional assignment of PPO duties. But here the Sr.PO's were performing the higher level

PPO duties on a consistent and extended basis and are entitled to seek additional compensation through negotiations. Regarding the litigation concern, the mere fact that the compensation issue was subject to litigation does not mean the Judiciary could not resolve a labor relations dispute through the negotiations process where it would not impinge on managerial prerogatives. The negotiations process is the ideal way to resolve such labor relations disputes.

The Judiciary's reliance on the negotiations leading to R-1, and the content of R-1, is also an insufficient defense to its failure to negotiate over compensation. The R-1 language and negotiations leading thereto did not cover -- nor were they intended to cover -- the merits of this charge, or the events prior to January 1, 1991, the effective date of R-1. They may, however, cover similar events that arise subsequent to January 1, 1991.

This case does not challenge the Judiciary's right to assign or require Senior Probation Officers to substitute for or assume the duties of a Principal Probation Officer in an extended absence.^{9/} It merely challenges its refusal to negotiate over

^{9/} In its attachment to the Charge the Association asked the Commission to enter an Order restraining the Judiciary from requiring members of its negotiations unit from performing higher titled duties until compensation has been negotiated. Putting aside whether the Commission could or would "enter" such an order, the request seeks an inappropriate result. This case does not concern assignment. It concerns compensation. The Judiciary has the managerial prerogative to assign Senior Probation Officers to perform Principal

compensation. Such negotiations will not significantly interfere with, nor do they adversely affect, the determination of governmental/judicial policy. Local 195, IFPTE v. State; City of Elizabeth v. Elizabeth Fire Officers Assn., Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Ramapo-Indian Hills Ed. Ass'n Inc. v. Ramapo-Indian Hills H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980).^{10/}

Accordingly, I find that the Judiciary's refusal to respond to C-1D by engaging in negotiations with the Association over additional compensation violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act.

Based upon the above findings and analysis, I make the following:

RECOMMENDATIONS

I recommend the Commission issue a decision:

9/ Footnote Continued From Previous Page

Probation Officer duties to meet governmental needs, particularly in emergencies as existed when Webster died. Compare, City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12305 1981). A public employer cannot be prevented from making such assignments until compensation is negotiated because that may or will interfere with -- and/or adversely affect its governmental mission. Local 195, IFPTE v. State, 88 N.J. 393 (1982). Compensation, however, can be negotiated retroactively after the assignment has been implemented.

10/ Compare, County of Morris, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd App. Div. Dkt. No. A-5560-82T2 (1/12/84).

A. Finding that the Judiciary failed to negotiate with the Association upon demand over additional compensation for employees Christie and Grauer.

B. Recommending that the Judiciary engage in good faith negotiations with the Association over additional compensation for employees Christie and Grauer for the Principal Probation Officer duties they performed between April and August 1990.^{11/}

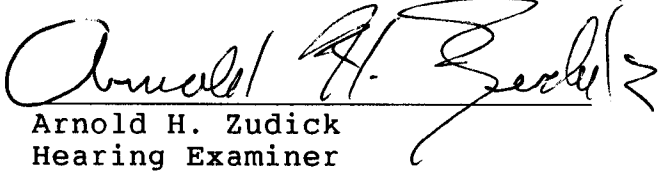
^{11/} In its post-hearing brief the Association requested that I recommend that Christie and Grauer receive, as additional compensation, the difference between their salaries and Webster's salary for the period in question, or alternatively, that I recommend negotiations over additional compensation. I have recommended the latter. There is no basis for recommending the former. The Association has yet to achieve that through negotiations, and it is not entitled to achieve through an unfair practice charge what it has not achieved in negotiations. The purpose of this decision is to give the Association the opportunity to negotiate over compensation.

In its post-hearing brief the Association also requested that I recommend the issuance of an order compelling good faith negotiations, and the posting of a notice. Since this case comes before the Commission as a matter of comity, it is for the Commission to decide, as a matter of policy, whether orders should issue in cases involving the Judiciary. I have recommended the Commission's decision reflect that the Judiciary failed to negotiate, and that it should engage in good faith negotiations.

I am not recommending a posting here. This case arose under unique circumstances. The 1990 collective agreement that was in place during the relevant time period was negotiated and administered by the OPEIU. The OPEIU had not made a demand for negotiations over compensation between April and August. In August, just when Christie and Grauer were being relieved of PPO duties, OPEIU disclaimed interest in representing the unit. It wasn't until October that the new union, the Association, made a demand to negotiate. The demand was

Footnote Continued on Next Page

C. Dismissing any independent 5.4(a)(1), as well as the (a)(3) and (a)(6) allegations.^{12/}


Arnold H. Zudick
Hearing Examiner

Dated: April 14, 1992
Trenton, New Jersey

11/ Footnote Continued From Previous Page

timely, but was also coupled with a demand to begin negotiations for a new agreement. The Judiciary did engage in the latter negotiations. The original charge was filed before the formal written demand to negotiate was sent, and the amended charge was filed just after. This was not a repudiation. On balance, I believe the process is better served by the parties just engaging in negotiations.

12/ This decision is based upon the particular facts here which included the performance of higher level duties for an extended time period. It is not meant to cover the occasional performance of PPO duties by Senior Probation Officers.