

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Arbitration	*	
between	*	
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COUNTY OF HUDSON	*	DECISION
	*	AND AWARD
	*	
-and-	*	
	*	
PBA LOCAL 109A	*	Docket No.
	*	AR-2012-640
	*	(salary)
	*	
	*	
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Before: Joel M. Weisblatt, Arbitrator

Appearances:

<u>For the County</u>	
Scarinci, Hollenbeck	
By: Sean D. Dias, Esquire	
<u>For the PBA</u>	
Klatsky, Sciarrabone & DeFillippo	
By: David J. DeFillippo, Esquire	

D E C I S I O N

The County of Hudson (the "County" or the "Employer") and the Hudson County Corrections PBA Local 109A (the "PBA" or the "Union") are parties to a collective bargaining agreement. Consistent with the terms of that contract, and pursuant to the Rules and Regulations of the Public Employment Relations Commission, the undersigned Arbitrator was duly appointed to serve in this matter.

An evidentiary hearing was held on February 5, 2013, April 9, 2013 and April 30, 2013. Both parties were afforded an opportunity to argue orally, present documentary evidence, and examine and cross-examine witnesses. The parties failed to mutually agree to the wording of the issue to be submitted to the Arbitrator for determination. However, each presented a proposed issue and they both specifically stipulated to the Arbitrator's authority to frame the issue based on the context of the case presented.

The issue proposed by the Union reads as follows:

(1) Whether the County violated the collective negotiations agreement when it did not pay officers promoted to Lieutenant and Sergeant in March 2012 the contractual salary for said ranks?

(2) If so, what shall be the remedy?

The County proposed that the issue be phrased as follows:

Whether the Union agreed to a promotional salary waiver for a one-year period for members promoted in March 2012?

The Arbitrator finds that the two proposed issues are not mutually exclusive. Indeed, the issue proposed by the County is a subset of the greater issue proposed by the Union. It is interesting to note that the issue proposed by the Employer represents an affirmative defense to the issue grieved by the Union. As such it establishes the burden of proving that a waiver agreement was reached with the Union, as a defense to the claim that the contract was violated through payment of improper salary rates.

The Arbitrator finds that the issues proposed by both parties shall be considered and decided in the Decision and Award herein. Each party has identified a relevant question and the two issues both warrant a determination.

Both parties have submitted written, post-hearing briefs. The record was closed with the receipt of the briefs as of July 5, 2013.

Positions of the Parties

Position of the PBA

The PBA contends that the County violated the collective negotiations agreement between the parties with respect to the pay rates used to compensate bargaining unit members who were promoted in March of 2012. Specifically, it insists that those employees were paid at rates lower than the contractual rates for the newly attained positions.

The PBA cites the contractual *Recognition* clause of Exhibit J-1, to establish that the positions are covered by terms of the collective negotiations agreement as modified by the memorandum of agreement and interest arbitration awards [Exhibits J-2, J-3 and J-4]. The PBA asserts, without contradiction by the Employer, that the unit members promoted in March 2012 were not paid at the rates specified in the contract for the newly promoted positions. It stresses that this is a violation of the clear and unambiguous terms of the agreement. The Union maintains that the Employer has intentionally, as a "calculated" measure, violated the terms of the contract.

The PBA assails the defenses raised by the County. It notes that the denial of the grievance at Step 1 [Exhibit U-1] was based upon the contention that, "the newly appointed supervisors signed an agreement." It emphasizes that this claim by the Employer fails to allege that the PBA signed any agreement to waive the salary rates. The Union further questions the defense raised later by the County that there was a "verbal agreement" to waive the pay rates, noting that this was not raised in the Step 1 response.

With specific attention to the defense of the claim of a verbal agreement to the waiver, the PBA relies upon Article XXV, Section 25.2, which reads as follows:

This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing executed by both parties.

The PBA insists that the County cannot succeed with a defense based upon a supposed verbal agreement in the face of clear and unambiguous contract language requiring all modifications to be reduced to a written instrument signed by both parties.

The PBA asserts that the facts clearly establish that no PBA officials, neither President Ortiz nor Vice President Caraccio, agreed to the change sought by the County. It acknowledges that there were discussions as to the topic but

maintains that the PBA position remained constant that any agreement as to the County's desire for a waiver was contingent of getting something in return and some variation of the position, relating to exempting those promoted to Lieutenant from the waiver. The Union stresses that its officials refused to sign any agreement and that the Employer refused to offer any concession as a trade-off for an agreement, as insisted-upon by the PBA.

The PBA concludes that there was no agreement, either verbal or written, by the PBA to allow the County to waive the contractual salary rates for employees newly promoted in March of 2012. As a result, it insists, the County must be found to be in violation of the collective negotiations agreement with respect to the salaries paid to those bargaining unit members. The Union proclaims that "the County must be compelled to properly compensate said officers at the contractual rate of pay for each rank, retroactive to March 23, 2012. It seeks an award ordering such a make-whole remedy.

Position of the County

The County contends that the Union "has failed to establish that the County violated the collective bargaining agreement." It specifically asserts that the parties "met and

negotiated a mutual oral agreement by which several PBA members would be promoted to higher ranks, subject to a one-year waiver of promotional salary increases."

The Employer notes that certain Union members provided the County with an "unsolicited signed document" confirming the terms that had been outlined by the PBA representatives to the membership on November 16, 2011. It considers the members to have expressed the PBA's agreement to the one-year salary waiver.

The County notes evidence that the other law enforcement bargaining units, FOP Local 127 representing the Sheriff's Superior Officers and PBA Local 232A representing the Prosecutor's Superiors, reached agreement with the County and executed side-bar agreements providing for the one-year salary waiver upon promotion [Exhibits C-2, C-3, and C-4]. The Employer points out that the Director of Corrections, Oscar Aviles, testified that he met with the Union President and Vice President, who indicated that the membership had authorized them to agree to a waiver but that they refused to sign the waiver agreement that had been prepared.

The Employer questions the credibility of the testimony of Lt. Ortiz, noting that there are inconsistencies between that testimony and the certification placed in evidence as Exhibit C-1. It voices the opinion that Lt. Ortiz refused to sign the waiver agreement in an effort to protect his own overtime opportunities.

The County further draws attention to the testimony of Lt. Michael Conrad that, at the November 30, 2011 meetings, 80% of the members were not opposed to the waiver. The County suggests that the PBA membership, at the meetings held on November 16, 2011, "agreed to the salary waiver upon promotion." Finally, it also maintains that the PBA President and Vice President reached an oral agreement with the County as to the salary waiver

In conclusion, the County argues that there was no contract violation. It insists that there was an agreement with the PBA membership and an oral agreement with the PBA representatives. The County seeks a denial of the grievance.

Discussion and Analysis

The questions presented in this dispute involve both factual issues and those of contract interpretation. There are, however, certain central facts that are clearly not in dispute. In March of 2012, the County promoted seven Corrections Officers to the rank of Sergeant and three Sergeants to the rank of Lieutenant. Upon promotion, none of the promoted employees received the contractual pay rate for the newly attained position. Each continued to receive the salary for their prior rank; this appears to have been the case for the period of one year following promotion.

It is absolutely clear that the titles of Sergeant and Lieutenant are within the bargaining unit represented by the PBA. This is reflected in the *Recognition* clause, Article I, of Exhibit J-1 [the base collective negotiations agreement]; in the terms of the Memorandum of Understanding [Exhibit J-3] covering contract years 2004 through 2009; and in the Interest Arbitration Award [Exhibit J-4] covering the period of January 1, 2010 through December 30, 2012.

There are several key contractual provisions of importance to the case at hand. Of greatest consequence is Article XXV [Exhibit J-1], *Fully Bargained Clause*, Section 25.2 which reads as follows:

This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing executed by both parties.

The Arbitrator stresses that the parties to the contract, referred to above, are the County and the PBA. Any instrument executed by individual employees does not qualify under Section 25.2 unless they are empowered with authority to act in the capacity of representatives of the Union.

Article XXIV of Exhibit J-1 further establishes that the provisions of the Agreement continue in full force until a successor Agreement is executed. The Interest Arbitration Award covering the duration of January 1, 2010 through December 31, 2012 [Exhibit J-4] specifically provides that "[A]ll provisions of the existing agreement shall be carried forward except for those which have been modified by the terms of this Award." There was no modification of the *Fully Bargained Clause*, Section 25.2, noted above.

Exhibit J-4 also sets forth the salary rates for the ranks of Sergeant and Lieutenant for 2010 through 2012. Effective January 1, 2012, the salary rate for Sergeants was \$99,949 and that for Lieutenants was \$104,946, annually. Note that although these rates became effective retroactively, they were not set until July 2, 2012 and were not yet established at the time of the promotion in March of 2012. They are, however, now known to be the rates applicable to the time frame at issue.

During its opening presentation, the County noted the question of whether the Union had failed to reduce a verbal agreement to writing, the subject of a pending unfair practice charge. It is informative to note that in Article XXV, Section 25.1, the parties agreed to the following:

This Agreement represents and incorporates the complete and final understanding and settlement by the parties of the bargainable issues which were or could have been the subject of negotiations. During the terms of this Agreement, neither party will be required to negotiate with respect to any such matter whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

This may be the basis for a valid defense to any claim of a refusal to reduce to writing of a claimed verbal agreement, because the Union may not have been obligated to negotiate.

Further, if no verbal agreement was ever reached, there can be no refusal to reduce to writing.

There is other documentary evidence of critical importance to the issues presented herein. Exhibit C-2 is a Side Bar Agreement between the County and PBA Local 232A, representing the Prosecutor's Superiors. This agreement, executed June 9, 2011, expressly agrees to modify the parties' collective negotiations agreement through the waiver of the Salary Article as applied to all officers promoted into the unit from the Investigators' ranks. Specifically, the promotional increases for those employees and employees promoted within the unit, were waived through December 31, 2011. This written instrument enacting a contract modification is signed by all parties (the President of PBA Local 232A, the County Administrator and the Prosecutor) to the collective negotiations agreement.

Similarly, the County and FOP Local 127 (Sheriff's Superiors) executed a Side Bar Agreement [Exhibit C-3] on November 16, 2011. This written modification also waived salary increases for a specified period of one year for certain newly promoted employees. It was signed by the FOP Local President and the County Administrator and the Sheriff.

Another such Side Bar Agreement [Exhibit C-4] was executed by the same parties in June of 2012 expressing agreement to waive salary increases for one year for other newly promoted employees. Once again the document was signed by the Local President, the County Administrator and the Sheriff.

The significance of Exhibits C-2, C-3 and C-4 is that it is abundantly clear that the County was aware that written and signed instruments were the standard for negotiating any modification of the collective negotiations agreement. It was clearly capable of negotiating such agreements with other, similarly situated, bargaining units, and it did so. Indeed, the County prepared a side bar agreement for signature [Exhibits U-11 and C-5 (identical)] which proposed the salary waiver for newly promoted unit members. This side bar agreement was never executed by the PBA representatives with authority to negotiate contract modifications. Indeed, the Director of Corrections acknowledged during his testimony in the hearings for this dispute that the PBA President and Vice President refused to sign the document. The record could not be clearer, the requirements of Article XXV, Section 25.2 were not met; there was no written, signed instrument evidencing agreement to waive the salary rate provisions of the contract with respect to newly promoted employees. The contrast with

the signed written agreements with PBA 232A and FOP 127 is stark evidence of the validity of the PBA's claims in the grievance presented herein. The County violated the terms of the contract when it did not pay the newly promoted employees in accordance with the pay rates in the parties' contract.

The Arbitrator now turns to the County's defense that the Union agreed to the one year waiver of the salary provisions for the newly promoted unit members. This issue presents questions relating to both contract interpretation and a factual determination.

It must be noted at the outset that under the contract, Section 25.2, the agreement to modify the contract terms [in this case the waiver of salary] must be reduced to writing and executed by both sides. There can be no dispute that no such written and signed agreement exists. Under the context of Section 25.2, there was no valid agreement between the County and the PBA to modify the contract.

It is further significant to consider the County's contention on a purely factual basis. As early as October of 2011, the Union expressed its refusal to consent to the waiver of the salary provisions [see Exhibits U-4 and U-5]. Indeed,

the Director of Corrections testified (on cross-examination) that the initial plans to promote employees in late 2011 did not take place because "the Union did not agree to waive the pay increase."

This acknowledgment was a reference to the meeting held on November 30, 2011. The participants were the President and Vice President of the PBA and the Director and Deputy Director of Corrections. The Director specifically noted that the PBA President said "I'm not going to sign the agreement." He noted that there was a discussion as to the Union's desire for a trade-off; it wanted the selection of days off by seniority. The Director told the Union that he was without authority to negotiate such an exchange and the PBA President was said (by the Director) to have stated "I won't take it to the members for a vote." The Director also acknowledged (on cross-examination) that in an informal discussion with the PBA President, prior to the November 30, 2011 meeting, the President told the Director that the agreement to a waiver "ain't gonna happen." The Arbitrator can unequivocally find, as a factual matter, that no mutual agreement to waive the contractual salary rates for newly promoted employees was reached at the November 30, 2011 meeting, or at any other time.

The record contains substantial evidence relating to two membership meetings held by the Union on November 16, 2011. There were extensive discussions of the promotional salary waiver issue at these meetings. The evidence establishes that the membership authorized the President and Vice President to negotiate with the County over the proposed waiver. There were discussions as to various elements of Employer concessions to be sought in exchange for a waiver agreement, including the possibility of seniority shift selection, gaining more Lieutenant positions, and limiting the waiver to newly promoted Sergeants and not Lieutenants. There is absolutely nothing in the evidence of the November 16, 2011 meetings with the members to even suggest a ratification of an agreement to waive the salary rates for newly promoted employees. The evidence of these meetings clearly establishes that without further negotiations, there was no agreement to the County's position.

On February 6, 2012, a letter was written to the Director [Exhibit U-10] and signed by nine unit members. It was drafted by Lt. Michael Conrad (then a Sergeant). This letter discusses the membership meetings of November 16, 2011 and indicates that about 80% of the membership favored the waiver

as means of attaining promotional opportunities and that the PBA President was to negotiate a deal with the Director. It also noted that there were discussions about "some suggestions to the President that we thought could be negotiated in his meeting with the Director." At least two members of the PBA Executive Board were signatories to this February 6, 2012 letter. This letter is completely consistent with the other record evidence about the November 16, 2011 membership meetings. The members expressed support for the negotiation of a waiver agreement in exchange for something in return. The members clearly authorized the President to negotiate over the waiver proposal. There is no evidence in either Exhibit U-10 nor in Lt. Conrad's testimony to support the claim that an agreement was reached between the parties. Indeed, Lt. Conrad insisted that only the President and Vice President were authorized to negotiate over the County's proposed waiver. Further, he specifically testified that no "vote" was taken but only a consensus reached with suggestions for negotiating positions. The February 6, 2012 letter to the Director does not provide evidence to establish that agreement had been reached between the parties.

The record contains evidence of the written acceptance by nine of the ten individuals promoted, to the waiver of the

contractual salary rate for one year following the promotion. Absent the written and signed agreement of the PBA to modify the contract, these individual agreements have no probative value nor warrant any weight with respect to the contention that the Union agreed to the waiver. Further, they have no force of contract on their own as they fly in the face of well-established law that prohibits **direct dealing** with individual employees with respect to terms of employment negotiated by the majority representative and embodied in an existing contract. This concept is explained particularly well in Hillsborough Bd. of Educ and Hillsborough Educ Assn, P.E.R.C. NO. 2005-54 (2005). In that case the employer conditioned additional hours for part-time employees upon their individual waiver of health insurance benefits. PERC held that "[T]he very act of soliciting and securing those agreements conflicted with the principles of collective bargaining." [citing support from Burlington Cty College Fac Assn v. Bd of Trustees, 64 N.J. 10, 14 (1973)]. The Arbitrator finds that the individual employee acceptance of the waiver are of no substantive impact in the issues presented herein.

There is simply no evidence to prove that the parties to the contract reached an agreement, either written or verbal, to waive the salary rate provisions for newly promoted

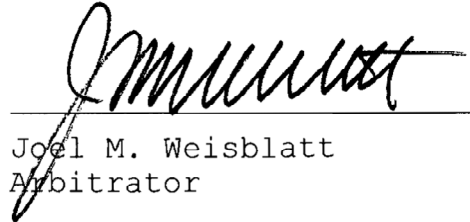
bargaining unit members. Although the Union engaged in discussions toward that end with the County, there is absolutely no indication that agreement was ever achieved. On the contrary, **there is substantial evidence revealing that no agreement existed, not in writing nor even verbally.** As a factual determination, the evidence is clear and convincing that the Union did not agree to a one-year promotional salary waiver for unit members promoted in March of 2012.

It is equally clear that the County violated the collective negotiations agreement when it did not pay contractual salary rates to officers who were promoted to Sergeant and Lieutenant titles in March of 2012. The employees promoted in March of 2012 must be made whole for the contract violation. The County shall be ordered to compensate the officers for the difference in all compensation provided on the lower rates, rather than the contractual rates set forth in Exhibit J-4, for the full period of time from the date of promotion until the rates were adjusted to the proper contractual salary rates.

A W A R D

For the reasons set forth in the Decision herein IT IS HEREBY ORDERED that the County shall compensate the officers promoted to the ranks of Sergeant and Lieutenant in March of 2012 for the difference between the lower rates upon which they were paid and the contractual rates set forth in Exhibit J-4, for the full period of time from the date of promotion until the rates were adjusted to the proper contractual salary rates. This remedy shall apply to all compensation paid during the relevant period of time.

Dated: July 15, 2013, 2013
Skillman, N.J.


Joel M. Weisblatt
Arbitrator

On this 15th day of July, 2013, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



Attorney-at-law