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STATE OF NEW JERSEY

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PBA LOCAL 109,

Union,

-and-

COUNTY OF HUDSON,

Employer.

PERC Docket No.: AR-2013-080

BEFORE:

ARBITRATOR FRANK J. COCUZZA

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POST-HEARING BRIEF ON BEHALF OF POLICEMEN'S BENEVOLENT  
ASSOCIATION LOCAL 109

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## ISSUE

Whether the July 19, 2012 memorandum violates the Collective Negotiations Agreement (“CNA”) and past practice. If so, what shall be the remedy?

### PRELIMINARY STATEMENT

The County of Hudson (“the County”) has violated the CNA by unilaterally “abolishing” full release time for the PBA Local 109 President. Since the mid 1990s, the President of PBA Local 109 has worked a full release schedule in order to tend to the needs of the bargaining unit. Such leave is absolutely essential, as there are nearly 450 members of PBA Local 109. The PBA President is responsible for representing the membership in collective negotiations, grievance administration, Internal Affairs and other disciplinary investigations and at various hearings. The position of PBA President is not a 9 a.m. to 5 p.m. job. Rather, the PBA Local 109 President must be on call twenty-four hours per day, seven days per week. The PBA President does not receive overtime for the work he puts in outside of business hours.

Article XIV, Section 6 of the CNA provides that the PBA President be granted reasonable release time from work duties to attend to union business during work time. “Reasonable release time” has been interpreted by the parties to mean full release time. However, in a memorandum dated July 19, 2012, Deputy Director Kirk E. Eady “abolished” full release time for the PBA President. (Exh. J-3). Unfortunately, the County’s unilateral assault on the PBA President did not stop there. The County also imposed a 48-hour notice requirement for the use of release time, despite the fact that no such restriction exists in the CNA. The County also restricted the PBA President’s access to the membership by placing him in Unit 2, mostly in the Intake Control post, and changing the PBA President’s tour of duty from 9:00 a.m. - 5:00

p.m. to 6:00 a.m. - 2:00 p.m. Id. These changes impermissibly restrict the PBA President's access to unit members in violation of the CNA.

There is no doubt that the language of Article XIV, Section 6 is unclear and ambiguous. The word "reasonable" is *per se* ambiguous, and its meaning can only be determined by the practice of the parties. Here, PBA Local 109 and the County have mutually interpreted Article XIV, Section 6 to provide the PBA President with full release time. This mutual interpretation is evidenced by the longstanding practice whereby the PBA Local 109 President has full release time to conduct union business. Even if the Arbitrator determines that the language of the CNA is clear, the practice of the parties is a modification of the contract.

The Arbitrator must sustain the grievance and order the County to return the PBA Local 109 President to a full release schedule. Similarly, the Arbitrator must order that the County rescind the 48-hour notice requirement and return the PBA President to the 9:00 a.m. to 5:00 p.m. shift. In the event that the Arbitrator does not return the PBA President to a full release schedule, which he should, the PBA President must be assigned to a post where he is reasonably accessible to bargaining unit members.

### **RELEVANT CONTRACTUAL PROVISIONS**

#### **ARTICLE XIV- TIME OFF FOR UNION OFFICIALS**

Section 6. The PBA President shall be assigned to a day tour, and to a duty assignment where he will be reasonably accessible to bargaining unit members.

The PBA President shall be granted reasonable release time from work duties to attend to union business during work time, provided that such release time shall in no way interfere with the operation or normal routine of the correctional facility or any other County department, office or function, and provided further that the PBA President first secures permission from Director or his designee to utilize such release time, which permission shall not be unreasonably withheld.

(Exh. J-1, Art. XIV(6), p. 22-23).

## STATEMENT OF FACT

PBA Local 109 is the exclusive representative of all Corrections Officers below the rank of Sergeant employed by the County, in its Division of Corrections. (Exh. J-1, Art. I, p. 2). The PBA and the County are parties to a CNA. (Exh. J-1).<sup>1</sup> On or about July 23, 2012, Interest Arbitrator Susan W. Osborn issued an Interest Arbitration Award in Hudson County Department of Corrections -and- PBA Local 109 (Corrections Officers), Docket No.: IA-2012-046. (Exh. C-1). The terms and conditions of the CNA that were not modified by the Interest Arbitration Award remain in full force and effect. (Exh. C-1, p. 138). Article XIV, Section 6 was not modified by the Interest Arbitration Award.

Article XIV of the CNA is entitled “Time Off For Union Officials.” (Exh. J-1, Art. XIV(6), p. 22-23). This provision provides that the PBA President (1) shall be assigned to a day tour; (2) shall be assigned to a duty assignment where he is reasonably accessible to bargaining unit members; (3) shall be granted reasonable release time from work to attend to union business. Id. The previous CNA between the parties, effective January 1, 1994 through December 31, 1998, contains identical language. (Exh. J-2, Art. XIV(6) p. 23-24). For decades, the parties have mutually interpreted this provision to provide full release time to the PBA Local 109 President.

Corrections Officer Luis Ocasio is the current president of PBA Local 109. He testified that he has been employed as a Corrections Officer since 2000. From 2008 through 2010, Ocasio served as the Alternate State Delegate. He was elected President in June 2010. When he was elected president, Ocasio was aware that he would receive full release time in order to conduct PBA business because, during his employment with the County, all of the Presidents of

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<sup>1</sup> The most recent full CNA between the parties was effective January 1, 1999 through December 31, 2003. (Exh. J-1). The parties entered into a Memorandum of Agreement effective January 1, 2004 through January 1, 2008. Id. All of the terms of the CNA not changed by the MOA remained in full force and effect. Id.

PBA Local 109, Joseph Jordan, Omar Ortiz, Derek Baker and Derek James, received full release time to tend to Union matters.

Omar Ortiz and Joseph Jordan both testified at the hearing. Officer Jordan is currently the Vice President of PBA Local 109. He was President between 1996 and 1997. There were approximately 280 members of PBA Local 109 during this time period. As PBA President, Jordan was granted full release time to tend to Union business. When he was President, Jordan was copied on a memorandum dated June 10, 1997, from Administrator Gregory Bach to Deputy Warden Howard Malachi, which stated:

Please advise Captain Wadleigh to cease listing P.B.A. 109 President's assignment as "P.B.A.," as it appears as if he is "off" for union leave. When on duty his assignment is to be listed as "Administration" therefore providing him with mobility to handle P.B.A. business as it arises. As you are aware, he is utilized by the administration office for official business. However, it has been proven to be cost effective to the county which is in the best interest of the taxpayers when employer-employee labor relations are for the most part functioning with open lines of communication. It behooves us all to deal with labor concerns prior to them becoming time consuming and costly through the grievance process and attorney involvement. (Exh. U-11).

After he received this memorandum, then-President Jordan's post was considered "Administration," and he continued receiving full release time.

Sergeant Ortiz testified that he was President of PBA Local 109 between the years 1998 and 2001. During his tenure as President of the PBA, Sergeant Ortiz represented approximately 300 Corrections Officers. Throughout his presidency, Sergeant Ortiz worked a full release schedule so that he could tend to PBA matters. He testified that he would arrive at the Correctional Facility and report to the Warden. Sergeant Ortiz would work out of the PBA Office in the Correctional Facility. For a time his assignment was "PBA" but it later changed to "Administration." Sergeant Ortiz testified that full release time was necessary in order to carry out the duties required of the PBA Local 109 President.

The duties of the PBA Local 109 President are vast. Today, there are approximately 450 members of PBA Local 109. These members are employed within the Hudson County Correctional Facility and outside the facility as well. There are also PBA Local 109 members working in the Hudson County Courthouse. The President's duties include fielding complaints from members, representing Corrections Officers in Internal Affairs investigations, attending disciplinary and grievance hearings, attending negotiations meetings, attending preparation sessions with attorneys for negotiations and hearings, attending PBA meetings and events, and filing grievances. Once a grievance is filed, it must be properly shepherded through the grievance procedure. (See Exh. J-1, Art. X, p. 14). With so many members, grievances are filed every day. President Ocasio also testified that there were occasions where he would be asked by the Director to retrieve a weapon from an officer that was in the hospital.

President Ocasio testified that the job of PBA Local 109 President is not a forty (40) hour per week job. He testified that he is regularly works nights and weekends in order to properly represent the membership. Sergeant Ortiz similarly testified that the PBA Local 109 President works "24/7," that is, twenty-four hours per day, seven days per week. The PBA President is not paid overtime for working these extra hours.

President Ocasio testified concerning his typical day as PBA Local 109 President prior to the County's unilateral "abolition" of full release time. Ocasio testified that he would arrive at work at 9:00 a.m. and punch in. He would report to either Lieutenant Edwards or Deputy Director Eady, depending upon who was supervising Union leave at the time. He would then check his voice mail, respond to calls from attorneys and members and handle member complaints. After that, he would typically walk through the housing units and record complaints from members. He would then take appropriate action with regard to the complaints and either

attempt to resolve them informally by speaking with a supervisor, filing a grievance or taking other appropriate action. If President Ocasio had to leave the Correctional Facility, he would inform either the Lieutenant or Deputy Director, as appropriate. This was to ensure that management knew where he was at all times.

While he was on the full release schedule, President Ocasio would wear either a suit or a polo shirt with khakis. He was assigned to the PBA office in the correctional facility and was permitted to carry a cellular phone so that he could communicate with PBA Local 109 members. President Ocasio was required to respond to “codes” that were called at the jail while he was on duty.<sup>2</sup>

There are four tours at the Correctional Facility: 6 a.m. to 2 p.m., 2 p.m. to 10 p.m., 10 p.m. to 6 a.m. and 9 a.m. to 5 p.m. None of the aforementioned tours is considered the day tour. Officers are required to report for their tour fifteen (15) minutes prior to the time it begins. When he was elected President, Ocasio was given the option to choose the tour he wanted to work. Ocasio chose the 9 a.m. to 5 p.m. tour because it allowed him the most access to the membership. The 9 a.m. to 5 p.m. tour overlaps with both the 6 a.m. to 2 p.m. tour as well as the 2 p.m. to 10 p.m. tour.

Working the 9 a.m. to 5 p.m. tour was also advantageous because it allowed him access to the administration of the Department of Corrections. Administrators like Director Aviles would work customary business hours and President Ocasio could meet with them during the 9 a.m. to 5 p.m. tour. If there was a problem with an officer that needed to be addressed by the Director or another member of the administration, he would be able to meet with the member upon the approval of administration.

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<sup>2</sup> President Ocasio explained that “codes” were emergencies occurring at the Correctional Facility. For example, “code blue” meant that an officer was being assaulted.

On or about July 19, 2012, Deputy Director Kirk E. Eady issued a memorandum to PBA President Ocasio. (Exh. J-3). The memorandum states:

The practice of the PBA President having full released *[sic]* time is abolished. Based upon Article XIV, Section 6, effective Monday, July 23, 2012, you will be assigned to the 6-2 tour, Unit 2, Monday through Friday with Saturday and Sunday off. You will report to duty in full uniform.

In accordance with the article listed above any request for union release time will be directed to my office 48 hours prior to release time.

Requests can be made in memo or email form at [keady@hcnj.us](mailto:keady@hcnj.us). In the event of an emergency please contact me at 908-827-1837. (Exh. J-3).

The County did not seek to negotiate with the PBA prior to the issuance of this memorandum. Despite the fact that the parties were in Interest Arbitration only weeks earlier, the County did not include a change to Article XIV, Section 6 in its Final Offer. (Exh. C-1, pp. 7-9). On July 23, 2012, President Ocasio was reassigned from his post in the PBA office to Unit 2. His shift was changed from the 9 a.m. to 5 p.m. tour to the 6 a.m. to 2 p.m. tour. He was also forced to provide 48-hours' notice to Deputy Director Eady prior to engaging in any PBA business.

When President Ocasio was reassigned to Unit 2, he was placed primarily in the Intake Control post. Intake Control is an extremely important post that requires an officer's undivided attention. (See Exh. U-3). The Intake Control Officer's job is to "ensure the safety and security of the Receiving / Intake Area," which includes gate number one and the vehicle ports. (Exh. U-3, p. 6). The Intake Control Officer is required to maintain the Transportation Custody Sheet and must ensure that the sheet matches each inmate entering or exiting the facility. The Intake Control Officer performs his duties in the Intake Control Room.

In addition, the Intake Control Officer must perform the "running count." (Exh. U-4). Intake Control and the running count were previously performed by two separate officers;



however the positions were consolidated by Deputy Director Eady on June 20, 2012. (Exh. U-4, Exh. U-3). Thus, when assigned to Intake Control, President Ocasio was also required to perform the running count. The Running Count Officer keeps track of every inmate that enters or leaves the facility. (Exh. U-3, p. 7). Ocasio testified that this is a zero fail post. If the running count is off, an officer is subject to discipline. Maintaining an accurate running count requires all of an officer's concentration.

The Intake Control Officer is isolated from other unit members. Although other officers are present in the Receiving / Intake area, only the Intake Control Officer is permitted in the Intake Control Room. No one can enter the Intake Control Room unless let in by the Intake Control Officer. PBA members may not enter the Intake Control Room freely. While there is a telephone in the Intake Control Room, the phone can only make calls within the Correctional Facility. Officers in the Intake Control Room are prohibited from having and using a cell phone. President Ocasio illustrated the Receiving / Intake Area at the hearing. (Exh. U-5). His drawing shows the Intake Control Room separated from the main Intake / Receiving Area, and away from the other officers assigned to the area.

President Ocasio testified concerning the numerous problems that resulted from his assignment to Intake Control. He stated that he was not able to attend certain hearings because he was not relieved by another officer. He also testified that in one instance, a female officer called and requested that he represent her but he was unable to do so. The female officer alleged that she was being written up for refusing mandatory overtime. The officer felt threatened and requested a PBA representative. President Ocasio was unable to represent her because he was assigned to Intake Control. In another instance, a Corrections Officer's family was attempting to reach him concerning a distressed officer. However, he was not able to contact the officer until

after he was relieved from his post. Prior to his assignment to Unit 2 and the Intake Control Post, President Ocasio was fully accessible to PBA members. However, after the issuance of the July 19, 2012 memorandum, President Ocasio's access to unit members was severely restricted.

At the hearing, Lieutenant Edwards testified that President Ocasio was not assigned solely to the Intake Control Post. (See Exh. C-2 through C-7). Although the County submitted numerous Monthly Calendars in an attempt to show that President Ocasio received regular Union Leave and was only assigned to the Intake Control Post sporadically, it was evident that these calendars were not accurate. For example, on April 15, 2013, President Ocasio's Monthly Calendar indicates that he was assigned to Holding South, when in reality he had to take Vacation Leave in order to attend the arbitration hearing in this matter. (Compare Exh. C-8, Exh. U-9).

Lieutenant Edwards further testified that Ocasio was assigned to numerous posts, including Municipal Video and Holding South. However, he admitted that the Municipal Video Post was restrictive. He also testified that an officer could not simply leave his post for any reason unless the officer was properly relieved.

President Ocasio testified that the change in the time of his tour further restricted his accessibility to PBA members. When he worked the 9 a.m. to 5 p.m. tour, President Ocasio would have access to officers on the 6 a.m. to 2 p.m. tour as well as the 2 p.m. to 10 p.m. tour during his normal working hours. During the time he worked the 9 a.m. to 5 p.m. tour, President Ocasio would go to the Correctional Facility late at night to handle issues that arose on the 10 p.m. to 6 a.m. shift. He was permitted to use flex-time for this purpose. However, after the July 19, 2012 memorandum was issued, President Ocasio's access to unit members is limited.

When working the 6 a.m. to 2 p.m. tour, President Ocasio must report for lineup at 5:45 a.m. Thus, he is not accessible to unit members being relieved from the 10 p.m. to 6 a.m. tour. When Ocasio is relieved from his tour, the 2 p.m. to 10 p.m. tour has started its lineup. Further, President Ocasio has been restricted from entering the facility to tend to PBA matters outside of his regular tour of duty.

Another accessibility issue that has arisen concerns mandatory overtime. Prior to the July 19, 2012 memorandum, President Ocasio was not subject to mandatory overtime. If an incident occurred after Ocasio's regularly scheduled shift, he would be able to respond to it but would not be compensated. However, now that he is assigned to Unit 2, President Ocasio can be assigned mandatory overtime. This further restricts his accessibility to unit members.

The July 19, 2012 memorandum also imposed a 48-hour notice requirement upon the PBA President. Article XIV, Section 6 does not contain such a notice requirement. (Exh. J-1, Art. XVI, p. 23). President Ocasio testified that in many instances, providing 48-hours notice is impossible. He testified that prior to the July 19, 2012 memorandum he would regularly be called to attend Internal Affairs Investigations or disciplinary interviews and would call or email his supervisor to inform them that he had to attend the interview. He had never been denied leave time before. Now, he could be denied leave time if he is notified of the interview within 48-hours of its occurrence.

President Ocasio also testified that there were instances where he would be driving to work and would be contacted by a PBA Local 109 unit member that needed immediate attention. Prior to the July 19, 2012 memorandum, President Ocasio would be able to simply contact his supervisor and aid the unit member. After the July 19, 2012 memorandum, he would not be able to respond to the membership if he does not provide his superiors with 48 hours notice.

Since the imposition of the July 19, 2012 memorandum, President Ocasio has had numerous requests for release time denied despite giving adequate notice. The PBA submitted numerous emails at the hearing in which President Ocasio was denied release time to represent the membership. For example, President Ocasio requested leave time on September 7, 2012 to attend attorney meetings at 10:30 a.m. and 12:00 p.m. (Exh. U-6). This request was denied without explanation. Id. On August 20, 2012, President Ocasio requested leave time to attend an attorney meeting at 3:30 p.m. on August 23, 2012, after his shift. (Exh. U-7). He made this request in order to avoid being kept for a mandatory overtime assignment. This request was denied without explanation. Id. President Ocasio's request to attend a disciplinary hearing prep session scheduled for August 22, 2012 was also denied without explanation. (Exh. U-8).

On April 9, 2013, President Ocasio requested release time on April 15, 2013, so that he could attend the arbitration hearing in this matter. (Exh. U-9). However, the County denied this request, and required President Ocasio was forced to use his own vacation time to attend. Id.

After the County imposed the terms of the July 19, 2012 memorandum, President Ocasio was even restricted from coming in early to tend to PBA matters. On July 26, 2012, President Ocasio appeared at the Correctional Facility at 4:00 a.m. to conduct Union business because he had to attend an attorney meeting after his work schedule. However, this became an issue for the County and President Ocasio had to fill out an Incident Report form. (Exh. U-10).

The PBA filed a grievance contesting the "abolition" of full release time for the PBA President. (Exh. U-1). The grievance states:

I am writing this grievance to bring to your attention the recent order received by PBA President Luis Ocasio who has been reassigned to Unit 6-2 shift.

Past practice has been that all PBA Presidents have been given full release time in order to handle Union business and have contact with all three shifts on any and all days of the week. This has been the practice in order to protect the Taxpayer

from paying overtime for the position since Our President oversees 3 shifts on 7 days of the week including holidays.

Remedy sought: Per Past Practice return the Union President to a full release schedule so he may properly represent our members and make necessary appointments. (Exh. U-1).<sup>3</sup>

The grievance contests the imposition of the July 19, 2012 memorandum and seeks a broad remedy that would return the *status quo ante*.

In response, the County claims that it “abolished” full release time for “economic reasons.” It cites a State of New Jersey Commission of Investigation Report entitled “Union Work Public Pay, the Taxpayer Cost of Compensation and Benefits for Public-Employee Union Leave.” (Exh. C-9). This report was not prepared by Hudson County. The report notes that five counties in New Jersey—Essex, Hudson, Mercer, Passaic and Union permit officers to receive full release time. (Exh. C-9, p. 10). It also states: “In all of the counties except Union and Passaic, these officials are required to report their attendance to facility administrators. In all of the counties except Union, these officials are required to report to their offices in uniform and can be called into action in emergencies.” *Id.*

As set forth more fully below, the grievance must be sustained and the PBA President must be returned to a full release schedule on the 9:00 a.m. to 5:00 p.m. tour. In addition, the 48-hour notice requirement must be abolished. In the event that the Arbitrator does not return the PBA Local 109 President to a full release schedule, which he should, the PBA President must be assigned to a post in which he is reasonably accessible to unit members.

## **LEGAL ARGUMENT**

### **POINT I**

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<sup>3</sup> The date of the grievance contains a typographical error. The grievance is dated “July 29, 2011,” but should read “July 29, 2012.”

**THE COUNTY HAS VIOLATED THE COLLECTIVE  
NEGOTIATIONS AGREEMENT BY “ABOLISHING” FULL  
RELEASE TIME FOR THE PBA PRESIDENT AND  
THEREFORE THE GRIEVANCE MUST BE SUSTAINED.**

The County has violated the CNA by unilaterally “abolishing” full release time for the PBA Local 109 President. The CNA does not specifically define the amount of release time afforded to the PBA President. However, since at least the mid-1990s, the parties have mutually interpreted the vague and ambiguous language of Article XIV, Section 6 to mean that the PBA President will work a full release schedule. This longstanding and mutual interpretation of this vague, unclear and ambiguous provision provides meaning to the language. The County cannot unilaterally alter a contractual provision that has been mutually interpreted in the same way for decades. Doing so is a violation of the CNA, and therefore the grievance must be sustained and the Arbitrator must return the PBA President to a full release schedule.

Here, there is no doubt that the language of Article XIV, Section 6 is unclear and ambiguous. Article XIV, Section 6 of the CNA provides:

The PBA President shall be assigned to a day tour, and to a duty assignment where he will be reasonably accessible to bargaining unit members.

The PBA President shall be granted reasonable release time from work duties to attend to union business during work time, provided that such release time shall in no way interfere with the operation or normal routine of the correctional facility or any other County department, office or function, and provided further that the PBA President first secures permission from Director of his Designee to utilize such release time, which permission shall not be unreasonably denied. Id.<sup>4</sup>

The very terms of this provision are imprecise and open to interpretation. Indeed, none of the key terms are defined. Thus, the parties’ mutual interpretation of the disputed provision gives meaning to the language.

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<sup>4</sup> The only difference between Article XIV, Section 6 in the most current agreement and Article XIV, Section 6 in the CNA effective January 1, 1994 through December 31, 1998 is that the words “Chief Warden” have been replaced with “Director.” (Exh. J-1, Art. XIV, Section 6, p. 22-23, Exh. J-2, Art. XIV, Section 6, p. 23-24).

The phrase “reasonable release time” is unclear and ambiguous. The word “reasonable” is, in and of itself, open to debate. As Director Aviles admits, the term is not defined in the CNA. (See Exh. J-1, Exh. J-2). The words “reasonable release time” have no meaning in the abstract. Their meaning can only be derived from the parties’ interpretation. For example, the phrase “reasonable release time” in an agreement covering a small municipal police department may mean one hour per week, while “reasonable release time” in an agreement covering hundreds of Corrections Officers may mean full release time. The Arbitrator’s only means of interpreting this unclear and ambiguous contract language is through the meaning the parties have applied to such language. This meaning is ascertainable through practice and custom.

When contract language is unclear ambiguous, Arbitrators look to the parties’ “manifestation of intent as shown through past practice and custom. Indeed, use of past practice to give meaning to ambiguous and unclear contract language is so common that no citation of arbitral authority is necessary.” HOW ARBITRATION WORKS, 623 (Elkuori & Elkuori, eds., Sixth Ed. 2003). In Webster Tobacco Co., 5 LA 164 (Brandschain, 1946), Arbitrator Brandschain opined:

There would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over several years and several contracts. There would have to be a clear and unambiguous direction in the language used to effect such a change. Id.

The degree of mutuality in interpreting a disputed contract provision is an important factor in determining the weight to be accorded to a particular practice. Longstanding arbitral authority holds that when the parties have mutually interpreted a contract provision uniformly over the course of numerous contracts, the parties’ interpretation is controlling. HOW ARBITRATION WORKS, 623 (Elkuori & Elkuori, eds., Sixth Ed. 2003). “Where a practice between the parties has occurred in an uninterrupted fashion, and has established meaning

contained in past contracts and continued by the parties in the present agreement, the language will be presumed to have the meaning attached to it by that practice.” Barrett Paving Materials, 78 LA 819, 822 (Murphy 1982), see also, HOW ARBITRATION WORKS, 624 (Elkuori & Elkuori, eds., Sixth Ed. 2003).

Here, the language of Article XIV, Section 6 has remained the same since at least 1994. (Exh. J-1, Art. XIV, Section 6, p. 22-23, Exh. J-2, Art. XIV, Section 6, p. 23-24). Since at least the mid-1990s, the parties have afforded the same meaning to the provision. The PBA Local 109 President has been assigned to a duty assignment entitled “PBA” or “Administration,” and he has been required to notify a superior officer of his whereabouts while on duty. President Ocasio, Sergeant Ortiz and Officer Jordan all testified that during their respective tenures as PBA Local 109 President, they were afforded full release time, but that their duty assignment fluctuated between “Administration” and “PBA.” This fact is corroborated by the June 10, 1997 memorandum from Administrator Bach to Deputy Warden Howard Malachi, which changed then-President Jordan’s duty assignment from “PBA” to “Administration.” (Exh. U-11). The memorandum states: “[p]lease advise Captain Wadleigh to cease listing PBA 109 President’s assignment as ‘PBA,’ as it appears as if he is ‘off’ for union leave. When on duty his assignment is to be listed as ‘Administration’ therefore providing him with mobility to handle PBA business as it arises.” Id.

President Ocasio, Sergeant Ortiz and Officer Jordan all testified that the PBA President would report to a superior each day, thus complying with the requirement that the PBA President secure permission from the Director (or Warden), or his designee, to utilize release time. Sergeant Ortiz testified that he was required to report to the Warden when he arrived at the Correctional Facility each day. President Ocasio testified that he would report to either Deputy



Director Eady or Lieutenant Edwards as circumstances dictated, and he would always advise them if his duties required that he be away from the facility for any period. President Ocasio also testified that he would be required to perform duties as a Corrections Officer if needed during a code or other emergency at the facility. Thus, the parties have mutually interpreted the “permission” requirement to mean a duty to report to a supervisor, which the PBA Presidents have complied with.

With regard to release time, the longstanding mutual interpretation has been that the PBA Local 109 President would work a full release schedule. There is no real dispute concerning this practice. President Ocasio testified that he was hired by the County in 2000, and that as long as he has been employed, the PBA President has worked a full release schedule. Officer Jordan testified that when he was PBA President between 1996 and 1997, he worked a full release schedule. Similarly, Sergeant Ortiz testified that during his tenure as PBA President, he also had full release time to tend to the needs of unit members. The County itself recognized the practice in its July 19, 2012 memorandum, which “abolished” the “practice of the PBA President having full release time.” (Exh. J-3)(emphasis added).

Full release time for the PBA President was not simply a benefit bestowed upon the PBA by the County. Rather, it was a mutually beneficial proposition. In a memorandum from Administrator Gregory J. Bach to Deputy Warden Howard Malachi, the Administrator recognized the benefit the PBA President provided to the County. (Exh. U-11). Officer Jordan testified that he was copied on this memorandum while he was PBA President, at a time when the issue of full release time was in doubt. Officer Jordan testified that this memorandum resolved the issue. In the memorandum, the Administrator states:

...it has been proven to be cost effective for the County which is in the best interest of the taxpayers when employer-employee relations are for the most part

functioning with open lines of communication. It behooves us all to deal with labor concerns prior to them becoming time consuming and costly through the grievance process and attorney involvement. Id.

Thus, the County recognized the benefit of full release time for both parties, and that this benefit is in the best interest of the taxpayers.

The time commitment and myriad duties of the PBA President support the parties' mutual interpretation Article XIV, Section 6. Indeed, full release time is reasonable in light of the amount of work required to successfully carry out the duties of the office. The current and past PBA Local 109 Presidents that testified all stated, unequivocally, that performing the duties of the PBA President was all consuming. Officer Jordan testified that when he was the PBA President, there were approximately 280 members. He recalled that being the PBA President was more than a full time job, and that he had to deal with unit members being written up and disciplined as well as handling grievances and negotiations. He worked a full release schedule during his term as PBA President.

Sergeant Ortiz testified that he represented approximately 300 unit members during his tenure as PBA President. He testified that the PBA President worked "24 / 7," that is, the President may be called upon to perform his duties twenty-four hours a day, seven days per week. Sergeant Ortiz worked a full release schedule during his Presidency and testified that full release time was necessary in order to carry out the duties required of the office.

Currently, there are nearly 450 members of PBA Local 109. President Ocasio testified that he works significantly more than forty (40) hours per week tending to the needs of the membership. He testified that he regularly works nights and weekends to properly represent the membership. President Ocasio also comes in early to deal with PBA matters. For example, on July 26, 2012, he arrived at work at 4:00 a.m. (Exh. U-10). President Ocasio regularly fields

complaints from members, drafts grievances, attends disciplinary and grievance hearings, attends negotiations meetings, attends meetings with attorneys and members. (See Exhs. U-6, U-7, U-8, U-9). He testified that with so many members, grievances are filed daily. Grievances must then be shepherded through the grievance procedure. (See Exh. J-1, Art. X, p. 14).

The County's unilateral "abolition" of full release time has caused numerous problems, thus proving that the previous work schedule for the PBA President was reasonable. President Ocasio testified that after he was no longer permitted to work a full release schedule, the number of grievances filed increased because he could no longer take the time to properly investigate them. He also testified that he had been unable to secure relief from his duty assignment in order to properly represent unit members on several occasions. Thus, full release time is certainly reasonable, if not necessary, for the PBA Local 109 President.

Here, there is no doubt that the parties have mutually interpreted the language of Article XIV, Section 6 to provide full release time to the PBA Local 109 President. This language has spanned several decades and several CNAs. Thus, the language contained in Article XIV, Section 6 must be presumed to have the meaning that the parties have attached to it. See Barrett Paving Materials, 78 LA 819, 822 (Murphy 1982). Thus, the County's unilateral "abolition" of full release time for the PBA President is a violation of the CNA. Accordingly, the Arbitrator must sustain the grievance and order the County to return the PBA President to a full release schedule.

The timing of the County's unilateral "abolition" of full release time for the PBA President is simply egregious. The New Jersey Public Employment Relations Commission ("PERC") has long held that employee release time for representational purposes mandatorily negotiable. City of Paterson, 20 NJPER 463 (¶30 2004); City of Newark, 16 NJPER 394

(¶21164 1990); Maurice River Tp. Bd. of Educ., 13 NJPER 123 (¶18054 1987). Despite the fact that the parties were engaged in negotiations and subsequent Interest Arbitration in the Spring and early Summer of 2012, the County did not propose a change to Article XIV, Section 6. Indeed, the County's Final Offer does not include any change to the provision. (Exh. C-1, pp. 7-11). Thus, either the County simply forgot to include such a change in its proposals, or it decided that it would wait and unilaterally change a term and condition of employment immediately prior to the issuance of the Interest Arbitration Award. In either event, the Arbitrator must not permit the County to circumvent the negotiations process. If the County wanted to terminate the longstanding and mutually interpretation of Article XIV, Section 6, it should have done so at the negotiating table. By unilaterally imposing the terms of the July 19, 2012 memorandum, the County violated the terms of the CNA and therefore the grievance must be sustained.

In the Unfair Practice context, PERC has held that a County's changes to union release time absent negotiations entitled the PBA to interim relief. In Cty. of Essex, 37 NJPER (¶51 2011), the Commission Designee found that a fifteen (15) year practice existed whereby the PBA President was granted full release time. The President did not have to report to any individual prior to the start of each day. Id. The County unilaterally imposed a requirement that the PBA President must personally report to the Chief Warrant Officer at the start of each workday. Id. PERC's designee restrained the County from unilaterally altering the practice that allowed the PBA President full release time from his duties to engage in representational activity. Id. Although not binding upon the Arbitrator, Cty. of Essex is instructive. Here, as in Cty. of Essex, the County unilaterally changed a negotiable term and condition of employment that had been in place since the mid-1990s.

Even if the Arbitrator determines that the language of Article XIV, Section 6 is not ambiguous, the CNA has clearly been amended by the practice. HOW ARBITRATION WORKS, 629 (Elkuori & Elkuori, eds., Sixth Ed. 2003). Arbitrators have found that a mutually accepted past practice of the parties may serve to modify an agreement. Hercules Products, Inc., 81 LA 191 (Goodman, 1983), Rockwell Int'l, 71 LA 1055 (Rimer, 1978). "It is generally accepted in arbitration that the parties may modify an existing agreement by their actions whether or not such modification is in writing... the past practice just as surely modified the written agreement as if the parties had executed a signed written document. Hercules Products, Inc., 81 LA 191 (Goodman, 1983).

In Rockwell Int'l, 71 LA 1055 (Rimer, 1978), the employer unilaterally discontinued the practice of paying shift bonuses to employees for working shifts other than their normal shift as defined by the contract. The issue in this case was whether the continued payment of the shift bonus became a binding practice. Arbitrator Rimer opined:

Given the long history of the practice, its survival under two or more contracts, one of which involved the parties to this dispute, we must conclude that it became an agreement by acquiescence and is binding on the Company. If the practice was not discussed during negotiations, much less challenged by the Company, the inference must be drawn that the practice would be continued under the Agreement executed May 15, 1976, along with other existing conditions of employment, written and unwritten. Article 7, Section 8 was re-incorporated in the new Agreement with full knowledge of the existence of the pay practice, since repudiated during the term of that Agreement. In our view, supported by many respected arbitral authorities, the unilateral discontinuance of the practice of paying a shift bonus more than two years later was untimely and cannot be upheld. The Company's remedy lies in collective bargaining in the process of negotiating a new contract in 1979. Relief cannot be found in arbitration. Id.

Thus, the Arbitrator determined that the past practice, known and accepted by the parties, was sufficient to amend the CBA.

The situation is similar here. Article XIV, Section 6 has contained the same language in numerous contracts. The parties knew that the PBA Local 109 President received full release time. Such release time was a benefit to the PBA as well as the County. (See Exh. U-11). The County has clearly agreed to the practice by acquiescence. It accepted the benefit of full release time for the PBA President. The conduct of the parties and the longstanding practice proves that the CNA has been effectively modified by the parties to provide the PBA Local 109 President with full release time. The County's unilateral "abolition" of full release time is therefore a violation of the CNA. Accordingly, the grievance must be sustained and the PBA President must be returned to a full release schedule.

Further, the County, knowing full well that the PBA President received full release time, did not even attempt to negotiate a change to the longstanding practice. (See Exh. C-1, pp. 7-11) (County did not propose a change to Article XIV(6) during Interest Arbitration). The PBA believed that full release time for the PBA President would continue, due to the longstanding practice. The County's actions are clearly inequitable because it led the PBA to believe that the PBA President would continue to receive full release time and then pulled the rug out from underneath them. Such action cannot stand. The parties modified the CNA by engaging in a mutually beneficial past practice. The County's unilateral repudiation of the practice is a violation of the CNA and therefore the grievance must be sustained.

The County will argue that the language of the CNA is clear and that the contract permits the PBA President to be assigned to a "duty assignment," and does not specifically require that the President work a full release schedule. The County will likely argue that the phrase "duty assignment" means that the PBA President must work in the capacity of a Corrections Officer.

Such a mandate, however, does not appear in Article XIV, Section 6. Thus, this argument actually proves that the language is unclear and ambiguous.

The term “duty assignment” is not defined in the CNA. President Ocasio, Sergeant Ortiz and Officer Jordan all testified that they were assigned to a “duty assignment” that fluctuated between “PBA” or “Administration.” This fact is corroborated by the June 10, 1997 memorandum, which specifically provides that the PBA President’s duty assignment should be listed as “Administration.” Thus, at worst the term “duty assignment” is completely undefined, unclear and ambiguous. At best, the term “duty assignment” means either the PBA or Administrative post that the previous PBA Presidents had been working. Thus, the County’s argument that the CNA requires the PBA President to be assigned to a “duty assignment” similar to that of other Corrections Officers is not supported by the language of the CNA.

Similarly, the County will likely argue that the CNA’s requirement that the PBA President “first secure permission from the Director or his Designee to utilize such release time” indicates that the language of Article XIV, Section 6 clearly requires that the PBA President need not be afforded full release time. This argument similarly falls flat. As set forth above, each previous PBA President that testified at the hearing similarly described how this provision has been treated in the past. The PBA President has always reported his whereabouts and activities to a superior officer. Sergeant Ortiz testified that he reported to the Warden, while President Ocasio testified that he reported to Deputy Director Eady, Lieutenant Edwards or Lieutenant Dembowski as required.

The parties have treated this requirement similarly since the mid-1990s. Thus, the County cannot claim that the language contained in the CNA is so clear that the Arbitrator can

decipher it without resort to the practice. Accordingly, the County's argument must be dismissed out of hand and the grievance must be sustained.

The County will no doubt rely heavily on an Interim Relief decision issued by a PERC designee filed as a result of the County's unilateral change to the PBA President's release time. County of Hudson -and- Policemen's Benevolent Ass'n, Local 109, CO-2013-039 (2013). However, this case has no precedential value. First and foremost, this matter involves an unfair practice charge, which requires the Charging Party to prove a violation of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1.1, et. seq. The PERC designee's decision was limited to his interpretation of the facts in light of the Statute.

The PERC designee that decided this case did not have the same evidence before him that is before the Arbitrator. Indeed, the only evidence before the PERC designee were the unfair practice charge, application for Interim Relief, an affidavit and a brief and documents. County of Hudson -and- Policemen's Benevolent Ass'n, Local 109, CO-2013-039 (2013), at p. 1. Here, the Arbitrator heard the testimony of numerous individuals and was provided with documentary evidence by both parties. Moreover, it is the Arbitrator's decision on this issue that the parties negotiated, not a PERC designee's determination. See Exh. J-1, Art. X(6), p. 14 (The Arbitrator shall have full power to hear the dispute and make a final determination...). Thus, it is the Arbitrator's determination that the parties have agreed will be final with regard to contractual violations. Accordingly, the Arbitrator must not rely upon the incorrect decision of a PERC designee.

The County may also claim that it has a managerial prerogative to schedule personnel to avoid non-operation posts, to organize and deploy its employees and to make employees work the hours set forth in the contract. These arguments are misplaced. If the County seeks to make



such arguments, it is in the wrong forum. The Legislature has determined that PERC is the appropriate forum for determinations concerning the scope of collective negotiations. N.J.S.A. 34:13A-5.4(d) (2014).<sup>5</sup> Thus, the Arbitrator must dismiss any arguments the County may make in this regard.

Finally, the County will argue that it reassigned the PBA President to a duty assignment for economic reasons. Director Aviles testified that full release time was “abolished” due to economic factors. However, an employer may not simply violate an agreement for “economic reasons.” See Bergen Cty., 17 NJPER (¶22197 1991). Entertaining such an argument is a slippery slope. If the County can abolish a mutually agreed upon provision concerning release time for economic reasons, what is to stop the County from unilaterally reducing salaries? If the County wished to change the longstanding mutually interpreted provisions of Article XIV, Section 6, it could have negotiated them with the PBA. It chose not to do so, and must not be permitted to do so now. Accordingly, the Arbitrator must dismiss this argument.

In further support of its argument, the County introduced a State of New Jersey Commission of Investigation Report entitled “Union Work, Public Pay-The Taxpayer Cost of Compensation and Benefits for Public-Employee Union Leave.” (Exh. C-9). However, this document was neither commissioned, nor authored by the County. Interestingly, the study notes that full union release time is not uncommon for Corrections Officers. Five counties, Essex, Hudson, Mercer, Passaic and Union have contract provisions that provide full-time release. Id. at 10. The State Department of Corrections has eleven (11) officers that receive full-time paid

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<sup>5</sup> N.J.S.A. 34:13A-5.4(d) provides:

The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

leave. Id. The report notes that local corrections union officials report daily to their correctional facilities and must report their attendance to facility administrators. Id.

While the above-referenced study recommends that union leave in general be eliminated or curtailed, it does not give public employer's *carte blanche* to ignore their own CNAs. Indeed, doing so would violate the CNA, as well as the Contracts Clause in both the State and Federal Constitutions. See U.S. Const. art I, §10, cl. 1, N.J. Const. art. IV, §VII, ¶3. Accordingly, Exhibit C-9, and any arguments referencing it, must be dismissed.

The grievance in this matter must be sustained. The County has violated the CNA by “abolishing” full release time for the PBA President. Accordingly, the Arbitrator must reinstate the PBA President to a full release schedule.

## **POINT II**

### **THE COUNTY HAS VIOLATED THE COLLECTIVE NEGOTIATIONS AGREEMENT BY UNILATERALLY CHANGING THE PBA PRESIDENT’S DUTY HOURS, IMPOSING A 48-HOUR NOTICE REQUIREMENT AND REQUIRING HIM TO WORK A DUTY ASSIGNMENT IN WHICH HE IS NOT ACCESSIBLE TO UNIT MEMBERS.**

The County has further violated the CNA by changing the PBA President’s duty hours from the 9 a.m. to 5 p.m. tour to the 6 a.m. to 2 p.m. tour, imposing a 48-hour notice requirement for Union leave, and requiring the President to work a duty assignment in which he is not accessible to unit members. Accordingly, the grievance must be sustained and the Arbitrator must order that the PBA President be returned to the 9 a.m. to 5 p.m. tour in a duty assignment where he is accessible to unit members. The Arbitrator must also order the County to rescind the 48-hour notice requirement.

The grievance filed in this matter was drafted broadly to ensure that all of the above remedies are available. The grievance challenges the reassignment of President Ocasio to Unit 2

and the change of his work hours to the 6 a.m. to 2 p.m. tour. (Exh. U-1). The remedy sought in the grievance is “[p]er past practice return the Union President to a full release schedule so that he may properly represent our members and make necessary appointments.” Id. Both the grievance and remedy sought are drafted broadly to contest the restrictions placed on the PBA President pursuant to the July 19, 2012 memorandum. Indeed, the PBA President cannot properly represent the membership if his access to unit members is restricted by his tour of duty and his duty assignment. Similarly, the PBA President cannot properly represent the membership if he is restricted by a 48-hour notice requirement that does not exist in the CNA.

Any argument advanced by the County that the grievance does not contest any of the restrictions imposed by the July 19, 2012 memorandum must be denied. While the grievance seeks initially to return the PBA President to a full release schedule, it similarly seeks relief that would allow the President to properly represent unit members and make necessary appointments. The issues of access and notice speak directly to the President’s ability to properly represent the membership. Moreover, all of these issues were fully litigated at the arbitration hearing in this matter. Accordingly, these issues are appropriately before the Arbitrator.

As set forth more fully below, the Arbitrator must sustain the grievance and order that the County reinstate the PBA President to the 9 a.m. to 5 p.m. shift and invalidate the 48-hour notice requirement. In the event that the Arbitrator does not return the PBA President to a full release schedule, the PBA President must be placed in an assignment in which he is accessible to unit members.

*A. The Arbitrator Must Order the County to Rescind the 48-Hour Notice Requirement Contained in the July 19, 2012 Memorandum.*

The County’s unilateral imposition of a 48-hour notice requirement is a clear violation of the CNA. The July 19, 2012 memorandum states that “in accordance with [Article XIV, Section

6], any request for union release time will be directed to my office 48 hours prior to release time.” (Exh. J-3). The CNA, however, contains no such requirement. Accordingly, the Arbitrator must sustain the grievance and require that the County rescind the 48-hour notice requirement.

There is no time limitation that restricts the use of release time in any manner. Similarly, there is no practice that the PBA President provide 48-hours notice prior to using release time. The CNA merely requires that the PBA President “first secure permission from the Director or his designee to utilize release time, which permission shall not be unreasonably withheld.” (Exh. J-1, Art. XIV(6), p. 22-23). So long as the PBA President secures permission from the Director or his Designee, the CNA specifically permits the use of release time, regardless of how much notice is given. Thus, the County’s unilateral imposition of a 48-hour notice requirement is a violation of the CNA.

Notice provisions are, in general, mandatorily negotiable. City of Vineland, 10 NJPER 8 (¶15005 1983); Jersey City Bd. of Educ., 7 NJPER 682 (¶12308 1981). Therefore, if the County wished to change the precise language of the CNA, it must first negotiate the change with the PBA. Here, the County did not negotiate any aspect of the July 19, 2012 memorandum before unilaterally imposing its requirements. Accordingly, the County’s actions are a clear violation of the CNA.

Requiring that the PBA President provide 48-hours notice for the use of release time is not only unreasonable, but impossible in many cases. President Ocasio testified at the hearing with regard to the numerous instances in which he gets calls at the last minute to accompany a unit member to an Internal Affairs investigation or must travel to the hospital to see a PBA Local 109 unit member. Ocasio testified that on one occasion he was called to meet a unit member in

the hospital while he was driving to work. He contacted his superior and informed him that he would be going to the hospital before he came in to work.

President Ocasio also testified that there were numerous instances in which he was contacted to represent an officer in an Internal Affairs or disciplinary investigations. Although these investigations can occur without much notice, unit members are nonetheless entitled to representation. See Attorney General Guidelines on Internal Affairs Policy and Procedures, p. 39 *available at* [http://www.nj.gov/oag/dcj/agguide/internalaffairs2000v1\\_2.pdf](http://www.nj.gov/oag/dcj/agguide/internalaffairs2000v1_2.pdf) (requiring that the target of an Internal Affairs Investigation be allowed a representative during the investigation); NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (holding that unit members have a right to union representation during disciplinary interviews). Thus, in many cases, a 48-hour notice requirement is simply unreasonable, and imposing such a requirement violates the CNA's mandate that release time will not be unreasonably withheld.

The County will likely argue that the 48-hour requirement is necessary to ensure the effective operation of the Correctional Facility. This argument, however, is belied by the facts. First and foremost, the County did not provide any evidence providing less than 48-hours notice for release time hindered the operation of the facility. Moreover, it is clear that the County is using the 48-hour notice requirement offensively, as a way to inform itself of the PBA's activities 48-hours prior to their occurrence.

Although he testified at the hearing, Director Aviles did not indicate that the way release time was requested, either before or after the July 19, 2012 memorandum, was a problem. President Ocasio testified that he would always let his supervisor know where he was at all times when he was on a full release schedule, and even after this schedule was "abolished," he

understood that he could not simply leave his post without relief. Thus, there is no evidence in the record that the use of release time without 48-hours notice was ever a problem.

Moreover, when the County denied release time after the issuance of the July 19, 2012 memorandum, it did so without justification – despite the fact that the CNA requires that release time will not be unreasonably withheld. For example, when President Ocasio requested release time on Friday, September 7, 2012, the response was simply “your request is denied” with no explanation given. (Exh. U-6). Similarly, when he requested release time for an attorney meeting on August 23, 2012, the response was simply, “you will work your regular schedule. Your request is denied.” (Exh. U-7). When he requested release time on August 22, 2012 for a disciplinary hearing prep session, the response received from Deputy Director Eady was simply “your request is denied.” (Exh. U-8).

Following the issuance of the July 19, 2012 memorandum, the County has unreasonably denied release time, despite the fact that the 48-hour requirement has been followed. The County has denied release time after the end of President Ocasio’s shift for no reason. It also denied President Ocasio requested release time to attend the hearing in this very matter. (Exh. U-9). Despite the fact that he provided ample notice, Ocasio’s request was denied and President Ocasio was required to his accrued time to attend the hearing. Id.

The 48-hour notice requirement imposed by the July 19, 2012 memorandum is not set forth in the CNA. The County has not set forth any facts that there is a practice that requires the PBA to provide a request to use release time 48 hours in advance. Indeed, the County has only imposed the 48-hour requirement in order to place another hurdle for the PBA to jump over prior to utilizing contractually guaranteed release time. Accordingly, the grievance must be sustained and the 48-hour notice requirement must be rescinded.

*B. In the Event That The Arbitrator Does Not Reinstate the PBA President to a Full Release Schedule, the President Must Be Assigned to a Duty Assignment in Which He is Reasonably Accessible to Unit Members.*

As set fully set forth above, the Arbitrator must sustain the grievance and order the County to return the PBA President to a full release schedule. However, if the Arbitrator does not afford such relief, which he should, the County must assign the PBA President to a duty assignment where he is accessible to unit members. After the County issued the July 19, 2012 memorandum, President Ocasio was assigned to Unit 2. He was primarily assigned to the Intake Control post. The duties of this post, as well as its location within the Correctional facility, did not allow President Ocasio access to bargaining unit members. Accordingly, the County has violated the CNA, and President Ocasio must be placed on a post with reasonable access to unit members.

Article XIV, Section 6 of the CNA requires that the PBA President be “reasonably accessible to bargaining unit members.” (Exh. J-1, Art. XIV, Section 6, p. 22-23). After the County “abolished” full release time for the PBA President, Ocasio was assigned to Unit 2. Although Unit 2 contains numerous duty assignments, President Ocasio was primarily assigned to the Intake Control post. Quite literally, President Ocasio was exiled to a small, isolated room in which no other officers had access. The duties of the post did not permit him to tend to any PBA business, as even the slightest missed detail in intake control could lead to discipline or termination.

The Intake Control post is located in the Intake / Receiving area. (See Exh. U-3, Exh. U-5). Although other officers are present in the Intake / Receiving area, the Intake Control Officer works alone, locked in the Intake Control Room. President Ocasio’s illustration of the Intake / Receiving area shows how isolated the Intake Control Officer is. (Exh. U-5). Although there is

a telephone in the Intake Control Room, the telephone can only make calls within the Correctional Facility. Cell phones are not permitted in the Intake Control Room, and therefore President Ocasio is not accessible to PBA members outside of the Correctional Facility while he is working the Intake Control post. PBA members cannot approach President Ocasio while he is in the Intake Control Room because the room is locked.

The duties of the Intake Control Officer further restrict the PBA President's access to unit members. Indeed, the duties of the Intake Control Officer are extremely important and require the officer's undivided attention. (See Exh. U-3, p. 6-8). The Intake Control Officer is charged with "ensuring the safety of the Receiving / Intake Area." (Exh. U-3, p. 6). Specifically, the officer is responsible for (1) identifying each vehicle entering the facility Gate Number 1; (2) each vehicle entering or exiting the vehicle port for the purposes of picking up or depositing inmates; (3) maintaining the operation of the numerous doors; (4) maintaining and monitoring the control console monitors and keeping the control room door secure at all times; (5) maintaining the transportation custody sheet; (6) ensuring that transporting officer's weapons are secured in gun locker boxes in the sally port; and (7) maintaining a log book detailing a continuous chronological record of any and all events, incidents, situations of special interests and a constantly updated record of issued equipment. (Exh. U-3, p. 6-7).

On June 20, 2012, the Running Count Officer Post was consolidated with the Intake Control Post. (Exh. U-4). The only job of the Running Count Officer was to ensure that the running count was accurate. (Exh. U-3, p. 7). The Post Orders for the Running Count Officer provide "The Running Count Officer shall ensure that no inmate enters or departs from the facility without being put on or taken off the running count." (Exh. U-3, p. 7). President Ocasio



described this as a “zero fail” position. Maintaining an accurate running count takes all of an officer’s concentration. If the running count is inaccurate, the Officer is subject to discipline.

By assigning President Ocasio to the Intake Control Post, the County effectively made him inaccessible to unit members. Ocasio is locked in the Intake Control Room and must perform duties that require such intense concentration that he cannot effectively tend to PBA matters while working as the Intake Control Officer. Sergeant Ortiz, a superior officer that supervised the Receiving Area testified that the Intake Control Post was a busy post and that the PBA President could not effectively perform his duties as both PBA President and Corrections Officer in that post. President Ocasio testified that as a result of his assignment to the Intake Control post, he was not able to attend certain hearings because he was not relieved by another officer in a timely manner. He also testified that he was unable to represent a female officer that was being disciplined for refusing mandatory overtime because of his assignment. In another instance, the distraught family of a Corrections Officer was unable to reach President Ocasio because he was assigned to Intake Control and could not be reached by the outside world.

The County’s assignment of President Ocasio to the Intake Control post was clearly no accident. By placing the PBA President in a locked room with no access to the outside world or most of the Corrections Officers within the facility, the County was clearly attempting to keep the President from the membership. This conduct is a clear violation of Article XIV, Section 6, which requires that the PBA President have “reasonable access” to bargaining unit members. Therefore, if the Arbitrator does not return the PBA President to a full release schedule, which he should, he must restrain the County from placing the PBA President on a post where he is not accessible to unit members.

At the hearing, the County took the untenable position that assigning President Ocasio to the Intake Control post was acceptable because he was only assigned to the post in certain instances. (See Exhs. C-2 – Exh. C-7). This argument falls flat. Any assignment where President Ocasio does not have access to bargaining unit members is a violation of Article XIV, Section 6 of the CNA. Accordingly, the Arbitrator must sustain the grievance and order that the PBA Local 109 President be returned to a full release schedule, or alternatively, to a position where he is reasonably accessible to unit members.

The County's claim that its violation of the CNA was justified because it did not assign President Ocasio to Intake Control every day must be dismissed out of hand. The Daily Schedule Reports and Monthly Calendars clearly show that President Ocasio was assigned to Intake Control on numerous occasions. (Exh. C-2 – Exh. C-7). Each instance is a violation of the CNA. Further, the Monthly Calendars submitted by the County were shown to be inaccurate and it is likely that President Ocasio worked the Intake Control Post more often than the County would like the Arbitrator to believe. For example, the April 2013 calendar shows President Ocasio working in Unit 2 when in actuality he was testifying at the arbitration hearing in this matter.

Further, the posts besides Intake Control that President Ocasio has been assigned to provide no better access to bargaining unit members. Lieutenant Edwards testified that there were instances where President Ocasio was assigned to the Municipal Video post or to Holding South. (Exh. C-6, Exh. C-7). However, he then admitted that Corrections Officers are restricted in the Municipal Video post and cannot leave the post to deal with other matters.

The County may also argue that it has assigned President Ocasio to the Intake Control Post because it has the right to assign officers to posts that best match their skills. This argument

similarly fails because there is no evidence in the record that indicates that President Ocasio has a certain skill set that would require him to work the Intake Control Post. Thus, to the extent the County makes this argument, it must be denied.

The PBA has clearly proven that the County violated Article XIV, Section 6 by assigning President Ocasio to an assignment in which he is not accessible to bargaining unit members. Accordingly, the Arbitrator must sustain the grievance. In the event that the Arbitrator does not return the PBA Local 109 President to a full release schedule, which he should, the County must assign the President to a post in which he is reasonably accessible to bargaining unit members. Posts such as Meal Relief, Receiving Officer and Convoy provide more access than restrictive posts like Intake Control or even Municipal Video.

C. The Arbitrator Must Order the County to Reinstate the PBA President to the 9 a.m. to 5 p.m. Tour.

As set forth in Point I, the Arbitrator must sustain the grievance and return President Ocasio to a full release schedule. In addition, the Arbitrator must return President Ocasio to the 9:00 a.m. to 5:00 p.m. tour. Article XIV, Section 6 of the CNA requires that the PBA President be assigned to a “day tour, and to a duty assignment where he will be reasonably accessible to bargaining unit members.” (Exh. J-1, Art. XIV, Section 6, p. 22). Since he was elected President in 2010, President Ocasio has worked the 9:00 a.m. to 5:00 p.m. tour. However, on July 19, 2012, the County unilaterally reassigned him to the 6:00 a.m. to 2:00 p.m. tour. This unilateral change restricts President Ocasio’s access to bargaining unit members. Accordingly, the Arbitrator must return the PBA President to the 9:00 a.m. to 5:00 p.m. shift.

President Ocasio chose to work the 9:00 a.m. to 5:00 p.m. tour because it provided the most access to bargaining unit members and administrators at the Correctional Facility. The

9:00 a.m. to 5:00 p.m. tour overlapped the 6:00 a.m. to 2:00 p.m. tour as well as the 2:00 p.m. to 10:00 p.m. tour.<sup>6</sup> This allowed President Ocasio access to unit members on those tours.

As set forth above, the term “day tour” is not defined anywhere in the CNA. (Exh. J-1). Since there are numerous tours of duty that take place during the day, the term is, at best, ambiguous. As set forth above, when contract language is ambiguous and unclear, Arbitrators often turn to past practice to determine the parties’ intent with regard to the disputed term. HOW ARBITRATION WORKS, 623 (Elkuori & Elkuori, eds., Sixth Ed. 2003). Here, there is a clear and unequivocal past practice that the “day tour” for the PBA President is the 9:00 a.m. to 5:00 p.m. tour. Accordingly, the Arbitrator must sustain the grievance and return to the PBA President to the 9:00 a.m. to 5:00 p.m. tour.

Since at least 2010, there has been a clear and unequivocal practice that the PBA President works the 9:00 a.m. to 5:00 p.m. tour. President Ocasio testified that he began working this tour since he was elected PBA Local 109 President in 2010. There is no doubt that the 9:00 a.m. to 5:00 p.m. tour is a day tour, as its hours are all during the day. Thus, since at least 2010, the parties have interpreted the language requiring the PBA President to be assigned to a day tour to mean the 9:00 a.m. to 5:00 p.m. tour. The County does not dispute this practice. Therefore, the County violated the CNA by unilaterally changing President Ocasio’s tour. Accordingly, the Arbitrator must sustain the grievance and require that the PBA President be returned to the 9:00 a.m. to 5:00 p.m. tour.

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<sup>6</sup> There are four tours of duty at the Correctional Facility, the 6:00 a.m. to 2:00 p.m. tour, the 9:00 a.m. to 5:00 p.m. tour, the 2:00 p.m. to 10:00 p.m. tour and the 10:00 p.m. to 6:00 a.m. tour. Corrections Officers working each tour must report for lineup fifteen (15) minutes before the start of their scheduled tour. Thus, the officers working the 6:00 a.m. to 2:00 p.m. tour must be at lineup by 5:45 a.m. Although the County disputes the existence of the 9:00 a.m. to 5:00 p.m. shift, Lieutenant Edwards admitted on cross-examination that such a tour exists. He also testified that certain managers work 8:00 a.m. to 4:00 p.m.

The County further violated the CNA by changing the PBA President's tour of duty because the change denies the President reasonable access to unit members. Working the 9:00 a.m. to 5:00 p.m. tour allows the PBA President access to unit members working the 6:00 a.m. to 2:00 p.m. tours, as well members working the 2:00 p.m. to 10:00 p.m. tours. Further, it allows the PBA President access to the Correctional Facility's administration. Many grievance hearings and arbitrations begin in the morning and end after 2:00 p.m. Further, many disciplinary hearings begin in the afternoon. Thus, the 9:00 a.m. to 5:00 p.m. tour allows the PBA President time to attend hearings during working hours. Accordingly, the Arbitrator must sustain the grievance.

The County will likely argue that the change in shift complies with the contractual requirement to assign the PBA President to a "day tour" and that he is more accessible to unit members when working the 6:00 a.m. to 2:00 p.m. tour. This, however, is not the case. As set forth above, the term "day tour" for the PBA President has been defined by the parties through longstanding practice to mean the 9:00 a.m. to 5:00 p.m. tour. Further, the PBA President is not accessible to other officers on the 6:00 a.m. to 2:00 p.m. tour, especially in light of the fact that President Ocasio has been assigned to the Intake Control Post.

Despite the fact that the 6:00 a.m. to 2:00 p.m. shift is adjacent to both the 2:00 p.m. to 10:00 p.m. tour and the 10:00 p.m. to 6:00 a.m. tour, President Ocasio's access to individuals on these tours is extremely limited. This is because President Ocasio must be at lineup by 5:45 a.m., and thus has no access to unit members getting off the 10:00 p.m. to 6:00 a.m. tour. Similarly, when President Ocasio is relieved from duty each day at 2:00 p.m., the Corrections Officers working the 2:00 p.m. to 10:00 p.m. tour are in lineup. This fact, when coupled with President Ocasio's reassignment to a post in which he cannot bring a cell phone and has no

