STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

IN THE MATTER OF THE COUNTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION and RONALD BLECKINGER, CHARLES BURKHARDT, PAUL CONSTANTINO, ROBERT FIORETTI, LOUIS GONZALEZ, MARCIA KRUZYNSKI, ALLEN KUBIAK, KEVIN LOFTUS, JAMES McMAHON, DAVID O'BRIEN, VINCENT PUPO, NORMAN REDEYE, THOMAS RICH, MARK ROKITKA, JAMES RYAN, SYLVAN SCIRRI, RAYMOND SPENCER, LONNIE WILLIAMS, ALFRED MUSSACHIO (deceased), BENJAMIN CRESPO, WILLIAM ROGOWSKI, PEDRO PABON, LORENDA WILLIAMS, JENNIFER CATANIA, STEPHEN RAIPORT, RYAN LEHIGH, FRANK DISPENZA, THOMAS DUDEK, ROBERT SLOIER, TIMOTHY CARNEY, ROBERT BRAEUNER, BRADLEY HEBLER, DAVID KARNEY, CATHERINE LANNEN, CARL ANDOLINA, NICHOLAS BUDNEY, WILLIAM COOLEY, PATRCIK HUMISTON, ANDREW KIEFER, JOHN LAKE, PAUL O'BRIEN, JAMES UNGER, MARK DONAHUE, KRISTINE MURRAY-MACK, FRANK LORENZO, DAVID DILLON, MARK TUCZYNSKI, TIMOTHY TAYLOR, SUSAN PUMA, DOUGLAS TUBINAS, CHARLES TIRONE, SHARON SAVANNAH, ROBERT RUTKOWSKI, LARRY BRAND, JR., JAMES MAZUR and RICHARD MANLEY

Petitioners/Plaintiffs

MEMORANDUM DECISION

Index No. 4274/08

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vs.

THE COUNTY OF ERIE and ERIE COUNTY SHERIFF

Respondents/Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **THE TUTTLE LAW FIRM**
Attorneys for Petitioners/Plaintiffs
James B. Tuttle, Esq., of Counsel

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Paul D. Weiss, Esq., of Counsel

ERIE COUNTY ATTORNEY'S OFFICE
Attorneys for Respondents/Defendants
Kristin Klein Wheaton, Esq., 1st Assistant County Attorney, of Counsel

CURRAN, J.

Petitioners/plaintiffs ("plaintiffs") commenced this combined proceeding/action seeking to confirm a binding interest arbitration award rendered on November 28, 2007 ("Award") (Wheaton Affid., sworn to Jan. 15, 1009, Exhibit C). Additionally, plaintiffs assert a breach of contract claim against the respondents/defendants County of Erie and Erie County Sheriff ("defendants") alleging that the failure to pay those members of the Erie County Sheriff's Police Benevolent Association ("PBA") who had separated from service prior to the issuance of the Award was a breach of contract. The Award was confirmed by Order and Judgment of this Court entered on July 8, 2008. The breach of contract claim thereafter continued. Plaintiffs have now moved for summary judgment on that claim.

Defendants initially opposed the motion on various procedural grounds, including that the time to conduct discovery according to this Court's scheduling order had not yet passed and because plaintiffs had failed to attach the pleadings to their motion papers. Upon the initial return date of plaintiffs' motion, the parties agreed that the motion would be adjourned to allow the further submission of papers by both sides to the action and to thereby

cure the procedural objections raised by the defendants. Oral argument was conducted on January 22, 2009, and decision reserved.

The Award imposed salary increases of three percent (3%) each for the years 2005 and 2006 retroactively to January 1, 2005 and January 1, 2006, respectively. Defendants have paid those benefits to members of the bargaining unit who remained on the payroll as of the date of the Award, i.e., November 28, 2007 (Wheaton Affid. ¶ 10). However, defendants did not pay those benefits to any employee who left the bargaining unit due to transfer, resignation or retirement between January 1, 2005 and the date of the Award.

Defendants dispute whether plaintiffs have stated a cause of action for breach of contract on the grounds that plaintiffs are seeking an interpretation of the interest arbitration award. Further, defendants contend that the arbitration panel's intention was to compensate only current employees with a retroactive wage increase (Wheaton Affid. ¶¶ 27-28 & Award, at 8 & 30-31).

Plaintiffs characterize this as a breach of contract action even though in actuality they are seeking to enforce the Award according to its plain terms. This approach is understandable and not a defect in the action because, upon consideration of the language of the Award -- including the recitation therein of the parties' respective proposals (Award at 3-7) -- the Award is phrased in terms of modifying the language of the Collective Bargaining Agreement covering the period of 2001-2002 (Wheaton Affid., Ex. A). Thus, in effect, plaintiffs are seeking to enforce that contract as modified by the Award.

The Award was the result of the binding arbitration authorized by New York Civil Service Law § 209(4), pursuant to which such an arbitration may occur after an impasse

in contract negotiations. Here, the impasse in contract negotiations was based on the failure of the parties to agree to a new Collective Bargaining Agreement, as extended through the Memorandum of Agreement for the period of 2003 and 2004 (Wheaton Affid., Exhibit A at 68-71 ["Memorandum of Agreement"]).[1]

The Award, covering the period of 2005 and 2006, must be understood in the context of the language used by the arbitrators. The language of the Award makes clear that the arbitrators were in effect revising the actual language used in the previously-existing Collective Bargaining Agreement with respect to wage increases.

The Award directs that Article XVII, section 2, page 23, of the 2001-2002 Collective Bargaining Agreement be amended to include the 2005 and 2006 years which were the subject of the arbitration proceeding.[2] The Award is written as though it is amending the wage portion of the Collective Bargaining Agreement to result in retroactive wage increases effective January 1, 2005 and January 1, 2006 at three percent (3%) each (Award at 3 & 31). Reading the Award as an amendment to the Collective Bargaining Agreement is further

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[1] The Memorandum of Agreement was effectuated by a resolution of the Erie County Legislature, which stated in part that "said retroactive salary increases be extended to all eligible employees covered by [the Collective Bargaining Agreement] who are on the active payroll as of the date of approval of this Resolution" (Wheaton Affid., Exhibit B). According to the reply affidavit of Michael Summers, Erie County Deputy Sheriff and former President of the PBA at the time of negotiation of the Memorandum of Agreement, the limitation of the retroactive wage benefits to current employees was specifically agreed to between the County and the PBA in the course of negotiations (Summers Affid. ¶ 3).

[2] Pursuant to New York Civil Service Law § 209(4)(c)(vi), the award could not pertain to any period in excess of two years unless the parties otherwise agreed. The record confirms that the parties did not otherwise agree and therefore the arbitrators were restricted to a two-year period.

substantiated by the manner in which the arbitrators treated the issue as to health insurance (*compare* Award at 34-35 *to* Collective Bargaining Agreement at 28-31). Because the arbitrators described their Award as though the Collective Bargaining Agreement was being amended retroactively and therefore as though the parties had initially agreed upon these terms, it follows that the persons covered by the Award are those who were eligible at that retroactive time to benefit from the modified agreement.

According to the terms of the Collective Bargaining Agreement, the wages described therein would be in effect "for all bargaining unit employees" (Article XVII, section 2[a], at 23). Thus, anyone who was a "bargaining unit employee" as of January 1, 2005 and/or as of January 1, 2006, is entitled to the benefits of the respective wage increases (*see Matter of Lecci v Levitt*, 71 Misc2d 1091, 1094-1095 [Sup Ct Albany County 1972] [petitioner entitled to benefits under Collective Bargaining Agreement executed after petitioner's retirement, but retroactive by its terms to one day prior thereto], *modified on other grounds* 41 AD2d 452 [3rd Dept 1973], *aff'd* 34 NY2d 797, *cert denied* 419 US 997 [1974]; *see generally Matter of Town of Southampton v New York State Public Employment Rel. Bd.*, 2 NY3d 513, 523 [2004] ["status quo" is defined to include terms of expired CBA as amended by expired interest arbitration award]). Absent any ambiguity, it is the responsibility of the Court to apply the Award as written (*see Ottley v Schwartzberg*, 819 F2d 373, 376 [2nd Cir 1987]; *see generally Hartford Accid. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]; *Village of Hamburg v American Ref-Fuel Co. of Niagara, L.P.*, 284 AD2d 85, 88 [4th Dept], *lv denied* 97 NY2d 603 [2001]). The Award unambiguously applies to "all bargaining unit employees" which would

necessarily include anyone who was a member of the bargaining unit as of the retroactive effective date of the Award.

Based on the foregoing, plaintiffs have established their entitlement to summary judgment as a matter of law on the issue of liability, and defendants have not raised any material issues of fact. The Court therefore grants summary judgment on liability to plaintiffs, and counsel for the parties shall meet with the Court on **Tuesday, June 30, 2009 at 9:30 a.m.**, 2009 to set a date for an inquest on damages.

Settle Order.

DATED: May 26, 2009

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HON. JOHN M. CURRAN, J.S.C.