P.E.R.C. NO. 93-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY SHERIFF and
MONMOUTH COUNTY,

Respondents,

-and- Docket No. CO-H-91-41

MONMOUTH COUNTY CORRECTION
OFFICERS ASSOCIATION, PBA LOCAL 240,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge which the Monmouth County Correction Officers Association, PBA Local 240 had filed against the Monmouth County Sheriff and Monmouth County. This charge had alleged that the respondents violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act by unilaterally shifting clerical and other work which had been performed by corrections officers in the PBA's unit to non-unit civilian employees. Under all the circumstances, the Commission concludes that the employer reasonably believed when it assigned clerical work to non-unit employees that the PBA would not object since the PBA had not previously objected to several such assignments and had affirmatively opposed the assignment of clerical duties to corrections officers. The Commission also concludes that storekeeper and bookkeeper functions had historically been performed by non-unit personnel exclusively or in conjunction with unit employees and therefore the employer had no obligation to negotiate before assigning those functions to other non-unit employees.

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MONMOUTH COUNTY CORRECTION
OFFICERS ASSOCIATION, PBA LOCAL 240,

Charging Party.

Appearances:

For the Respondents, Robert J. Hrebek, Assistant County Counsel

For the Charging Party, Klausner, Hunter & Cige, attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On August 21, 1990, the Monmouth County Correction Officers Association, PBA Local 240 filed an unfair practice charge against the Monmouth County Sheriff and Monmouth County. The PBA alleges that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by unilaterally shifting PBA unit work to

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to

Footnote Continued on Next Page

non-unit civilian employees.[2/] The PBA claims that the civilian employees are now performing recordkeeping, storekeeping and bookkeeping duties previously performed by correction officers.

On October 31, 1990, a Complaint and Notice of Hearing issued. On November 13, the respondents filed an Answer denying that they had violated the Act and claiming that they had timely notified the PBA of all their actions and that the PBA did not demand to negotiate.

On March 19 and May 16, 1991, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by August 16, 1991.

On October 2, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-9, 17 NJPER 509 (¶22251 1991). He found that correction officers had exclusively performed all required work in the booking area and that this work subsumed the recordkeeping functions now performed by civilians in the records room. He found, however, that a consistent past practice

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1/ Footnote Continued From Previous Page

negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The PBA also filed a charge (CO-91-42) alleging a refusal to negotiate in good faith over health and safety issues. That charge was consolidated with CO-91-41, but withdrawn at hearing.

evidenced by four occasions in 15 years allowed the Sheriff to unilaterally assign recordkeeping to civilian clerical employees. He therefore concluded that the Sheriff had not breached any negotiations obligation. He found an additional ground to dismiss the allegations concerning the storekeeping and bookkeeping work now performed by Charles Erbe and Annette DiFranza because that work had not been performed exclusively by PBA unit members.

On October 30, 1991, after an extension of time, both parties filed exceptions. The charging party claims that it did not clearly and unequivocally waive its right to challenge decisions to shift law enforcement work to civilian employees and the Hearing Examiner erred in concluding that storekeeping had not been performed exclusively by correction officers. The Sheriff urges adoption of the Hearing Examiner's conclusions but suggests that there are additional ways to reach the same result. It claims that the subcontracting portion of the contract's management rights clause and the New Jersey Department of Personnel's class specification for correction officer permit assignment of these duties to civilians.

On November 4, 1991, the Sheriff replied to the PBA's exceptions. The Sheriff claims that the record supports the factual findings and argues that to sustain its position, the PBA would have been required to demand negotiations. On November 6, the PBA filed a reply incorporating the arguments in its post-hearing brief. It claims that the contract's management rights clause is irrelevant because there are substantive differences between subcontracting to

private contractors and hiring civilian employees. The PBA also claims that the job specification should not be relied on to determine the duties actually performed by correction officers and that the County also violated the Act.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-9) are accurate. We incorporate them with one minor clarification. Finding no. 4 should indicate that the Sheriff added seven civilian employees including the civilian storekeeper. We specifically adopt finding no. 5 which indicates that before the civilian storekeeper was hired, Lieutenant Baumgartner performed the storekeeper functions.[3/] We also specifically adopt finding no. 7 which indicates that before Annette DiFranza was hired, Correction Officer Campbell and Lieutenant Baumgartner performed the work now performed by DiFranza.

We add these findings:

1. Section 1 of the contract's management rights clause provides:

> It is recognized that the Monmouth County Sheriff has and will continue to retain the rights and responsibilities to direct the affairs of the jail in all its various aspects. Among the rights retained by the Sheriff are the rights to direct the working forces; to plan, direct and control all the operations and services of the jail; to determine the methods, means,

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3/ The PBA has not designated a portion of the record to support its claim that correction officers previously performed those duties under Baumgartner's supervision. See N.J.A.C. 19:14-7.3(b).

> organization and personnel by which such operations are to be conducted; to contract for and subcontract out services; to relieve Employees due to lack of work or for other legitimate reasons; to make and enforce reasonable rules and regulations to change or eliminate existing methods, equipment, or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement and that a grievance may be filed by the Association alleging such conflict.

2. The contract recognizes the PBA as the exclusive representative of the classification "County Correction Officer." The Department of Personnel's class specification for County Correction Officer does not emphasize clerical duties but includes "[p]erforms related tasks as required."

3. In 1989, a correction officer was assigned to the administration office to do typing. The PBA complained and the officer was put in the court house as a transportation clerk. At about the same time, the PBA wrote the employer a memorandum entitled: Utilization of Correction Officers out of Title. It stated:

> In reference to the above matter, this office is concerned with the utilization of corrections in duties which are outside their respective title. These positions are:
>
> Kitchen Duties
> Clerical Duties
>
> Prior to any action on [sic] a formal nature, I would extend to you the opportunity to review this and give an appropriate answer.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable

terms and conditions of employment. Preservation of unit work is mandatorily negotiable. See Rutgers, The State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83); see also cases cited by Hearing Examiner at 9-10. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

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

See also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978); State of New Jersey, Dept. of Corrections v. CWA, 240 N.J. Super. 26 (App. Div. 1990).

The PBA has shown a change in a mandatorily negotiable term and condition of employment: recordkeeping work previously performed by PBA unit members was transferred to non-unit employees of the public employer. Any such change violates subsection 5.4(a)(5) unless the employer can prove that the matter had already been negotiated or that the PBA had waived its right to negotiate. The employer concedes that the contract is silent with respect to any specific provision relating to preservation of unit work. Brief in Support of Exceptions at 1. We therefore look to see whether the PBA waived its statutory right to negotiate over that issue. A waiver can come in a number of different forms, but must be clear and unmistakable. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); cf. Red Bank Reg. Ed. Ass'n v. Red Bank

Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). For example, if the contract explicitly and unmistakably allows the employer to make the changes, the employee representative has no right to negotiate over the changes during the term of the contract. In addition, if the employee representative has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate before a change is made. We now consider the respondent's affirmative defenses.

The respondent asserts that it was not obliged to negotiate because the portion of the contract's management rights clause giving it the right to "contract for and subcontract out services" is the antithesis of a preservation of unit work provision. It contends that there is no substantive difference between subcontracting and hiring civilian employees. We disagree. Subcontracting and transferring work to non-unit employees are not the same. See Rutgers. Subcontracting is not mandatorily negotiable because it is a matter of public concern whether governmental services are provided by government employees or by contractual arrangements with private organizations. Local 195, IFPTE v. State, 88 N.J. 393, 407 (1982). That type of policy decision does not necessarily concern solely fiscal considerations. Ibid. But a decision to reduce labor costs by using one classification of employees rather than another to perform a particular function is of a different order. It does not implicate the same policy concerns and, under established caselaw, it is

mandatorily negotiable. See cases cited by Hearing Examiner at 9-10. Thus, the subcontracting portion of the management rights clause dealing with subcontracting is not a clear and unmistakable waiver of the Association's right to negotiate over the transfer of unit work.

The respondent asserts that the job description of correction officers, as set by the Department of Personnel, does not encompass the non-security, clerical duties being performed by the civilian clericals in the records room. We disagree. The relevant class specification includes "performs related tasks as required." There is insufficient evidence in the record to convince us that the Sheriff cannot assign these recordkeeping tasks to correction officers as had been done before August 1990.

Finally, the respondent asserts that a consistent past practice constitutes a clear and unmistakable waiver of the Association's right to negotiate over these changes. We have dismissed complaints on such grounds.

For example, in Rutgers, The State Univ., P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982), the employer ordered most employees not to work on January 2, 1981, otherwise a normal work day, and required those employees to use a vacation day or not be paid. We found that the employer's action was consistent with a policy which it had followed since 1972 and which the union had not disputed. In addition, when the employer announced its decision on June 16, 1980, the union did not protest or demand negotiations. It appeared that the union had no objection.

In South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), the employer reduced the hours of a part-time teacher and then reduced her salary pro rata. The majority representative had not contested similar changes in the hours of part-time teachers and part-time teachers had consistently been paid, per period, 1/8 of the full-time salary according to the applicable step on the salary guide. We found that the changes conformed to the parties' prior conduct and dismissed the Complaint.

Rutgers and South River are two cases where the employer had every reason to believe, absent any past objections, that the unions would not object to the current changes. It would therefore have been unfair to find that they had violated the Act. This case raises similar concerns.

The PBA did not object in the past when the Sheriff hired civilian employees to perform clerical work previously performed by correction officers. Civilian secretaries replaced correction officers in the administration wing approximately 15 years ago; a civilian was hired as timekeeper over ten years ago; and a civilian was hired to replace a correction officer as the medical records clerk approximately five years ago. The PBA's decision not to oppose those assignments signaled its lack of interest in negotiating over the otherwise negotiable subject of transferring clerical work to non-unit employees. The PBA also affirmatively opposed the assignment of clerical duties to correction officers. At one point, it complained that a correction officer was assigned

to the administration office to do typing. The dispute was resolved and the officer reassigned to the court house. At about the same time, the PBA formally objected to correction officers performing clerical duties outside their job title.

Under the particular facts of this case and given the parties' overall understanding about civilian employees performing clerical work, we find that the employer did not breach any negotiations obligation when it hired civilian employees to perform recordkeeping duties and had the correction officers perform more traditional security functions. Accordingly, we dismiss that aspect of the Complaint.

We also find no violation with respect to the allegations concerning the civilian storekeeper and bookkeeper functions. Both those functions were historically performed by non-unit personnel exclusively or in conjunction with unit employees. Under those circumstances, the employer was not obligated to negotiate before assigning that work to other non-unit employees. See Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989).

We dismiss the allegations against the County as well as the Sheriff. The parties stipulated that the County is the funding agent for the Sheriff's Office. No other evidence implicates the County in any unfair practice.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Regan, Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: August 20, 1992
Trenton, New Jersey
ISSUED: August 21, 1992

H.E. NO. 92-9

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

In the Matter of

MONMOUTH COUNTY SHERIFF,

Respondent,

-and-

Docket No. CO-H-91-41
& CO-H-91-42

MONMOUTH COUNTY CORRECTION
OFFICERS ASSOCIATION, PBA LOCAL 240,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Monmouth County Sheriff did not violate the New Jersey Employer-Employee Relations Act when it assigned civilian employees to perform work which had been previously exclusively or partially performed by correction officers included in the negotiations unit represented by the Monmouth County Correction Officers Association, PBA Local 240. The Hearing Examiner found that the Sheriff's actions were in accordance with a long-established practice which allowed the Sheriff to assign clerical work previously performed by correction officers to civilians.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 92-9

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

In the Matter of

MONMOUTH COUNTY SHERIFF,

Respondent,

-and-

Docket No. CO-H-91-41
& CO-H-91-42

MONMOUTH COUNTY CORRECTION
OFFICERS ASSOCIATION, PBA LOCAL 240,

Charging Party.

Appearances:

For the Respondent, Robert J. Hrebek, Assistant County Counsel

For the Charging Party, Klausner & Hunter, Attorneys (Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 21, 1990, the Monmouth County Corrections Officers Association, PBA Local 240 ("Local 240") filed unfair practice charges (C-3 and C-4)[1/] with the Public Employment

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1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" and "R" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits. The transcript citation 1T1 refers to the transcript developed on March 19, 1991, at p. 1, and citations 2T refer to the transcript developed on May 16, 1991.

Relations Commission ("Commission") against the Monmouth County Sheriff ("Sheriff" or "Respondent"). Local 240 alleges that the Sheriff violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1) and (5)[2/] by (1) unilaterally implementing a plan wherein civilian employees are used to perform a series of duties and functions previously exclusively performed by corrections officers represented by Local 240 (Docket No. CO-H-91-41); and (2) refusing to negotiate with Local 240 regarding numerous health and safety issues (Docket No. CO-H-91-42).

On October 31, 1990, the Director of Unfair Practices issued an Order Consolidating the charges (C-2) and a Consolidated Complaint and Notice of Hearing (C-1). On November 13, 1990, the Sheriff filed an Answer (C-5) generally denying that it violated the Act. Hearings were conducted on March 19 and May 16, 1991, at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. On May 16, 1991, I granted Local 240's motion to withdraw its charge in CO-H-91-42

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

(2T77-2T78). At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were timely filed by August 16, 1991.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Sheriff is the public employer and Local 240 is the public employee representative within the meaning of the Act (1T10-1T11). The parties further stipulated that the Monmouth County Board of Chosen Freeholders is the funding agent with respect to the Monmouth County Sheriff's Office (1T10).

2. A prisoner arriving at the Monmouth County Correctional Facility is brought to the booking area where the person is checked for weapons and other contraband, relieved of personal items, photographed, etc. (1T17-1T18). Correction officers handle all phases of booking (1T18). Prior to August, 1990, the correction officers in the booking area also obtained personal information from the prisoner such age, religion and next of kin (1T17). That information was recorded into books, or, more recently, entered into computers (1T18). Correction officers were exclusively responsible for fielding telephone calls, answering inquiries and providing information regarding an inmate's status to judges and lawyers (1T18). After computers were installed in the booking area to maintain inmates' records, correction officers were

trained and assigned to input and retrieve information in the computers (2T35).

3. The jail had experienced some problems involving premature releases of inmates. The problems were traced to paperwork errors in inmates' records. As the result of an evaluation which was conducted by Undersheriff Theodore Freeman and a consultant from the National Institute of Corrections, a recommendation was made to establish a separate records room (2T22). The separate records room was established to streamline the operations in the booking area and, thereby, eliminate confusion and reduce the possibility of releasing inmates prematurely (2T23). The new records room became operational sometime between late April and June 1990 (2T33-2T34). As was the case when the records and booking functions were integrated, correction officers performed all of the duties required in the newly established records room, including working on the computer, preparing paperwork, filing, and answering the telephone until civilians were hired and assigned to the records room (2T34-T35). In deciding to establish a separate records room, Respondent always intended to use civilians to perform the functions required to maintain inmates' records (2T57). One reason Respondent decided to use civilians was to save money (1T28). However, correction officers were initially assigned to the records room in order to provide a smooth transition of the records function to the newly hired civilian employees. Respondent deemed it necessary to use correction officers initially because the records function

involved complicated procedures with which the correction officers were familiar (2T56-2T57). The civilian positions never existed before the separate records room was created (2T23).

4. Respondent hired six civilian employees: Lisa Davenport, Annette DiFranzia, Lorraine Bonett, Andrea Jones, Tonya Hyman and Erika Bryant (2T26; 2T37-2T38; R-8). With the exception of Annette DiFranzia and Lorraine Bonett, the civilian employees began working in the jail on September 24, 1990 (2T66-2T6; R-8). DiFranzia and Bonett started on August 27 and September 10, 1990, respectively (R-8). These civilian employees were interviewed and offered jobs prior to the dates that they actually started working (2T94-2T95). The decision to hire civilian employees to work in the records room was made by Undersheriff Freeman in April, 1990, pursuant to the consultant's recommendation to establish a separate records room (2T22; 2T95-2T96). All of the civilian employees (except DiFranzia) were initially assigned to the booking area for training. Subsequently, they were permanently reassigned to the records room (2T55-56).

5. Charles Erbe was hired in June, 1990, to function as the storekeeper at the jail (1T26-1T27; 2T24). There had never been a storekeeper position before Erbe was hired (2T24). Prior to

Erbe's employment, Lt. Baumgartner, a correction supervisor, was responsible for the storekeeper functions (2T43).[3/]

6. The records room is staffed 24 hours per day. Correction Officer Acaccia is assigned to the records room on the 8:00 a.m. to 4:00 p.m. shift. Other correction officers are assigned to the records room on the 4:00 p.m. to midnight and the midnight to 8:00 a.m. shifts (2T41). Lt. Clements supervises the civilian employees assigned to the records room. Clements works the 8:00 a.m to 4:00 p.m. shift (2T39-2T40).

7. Annette DiFranzia assists in the preparation of the fiscal budget, monthly budgetary reports and the processing of vouchers and other payments. Prior to her employment, Lt. Baumgartner was responsible for performing the functions assigned to DiFranzia. Correction Officer Campbell performed similar bookkeeping-type work prior to DiFranzia's employment at the jail. DiFranzia was the first civilian who performed such work (2T42).

8. Prior to March, 1990, four clerical employees worked at the jail: two secretaries in the administration wing, a medical records clerk, and a timekeeper (2T19; 2T36; 2T61). There have been

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3/ Correction Officer Lambertson corroborated the fact that a correction supervisor performed the storekeeper function before Erbe was hired (1T21). Lambertson also testified that correction officers assisted the correction supervisor performing the storekeeper function or supervised inmates who assisted (1T21). I conclude that while various correction officers may have had some role in this aspect of the work, a correction officer was never assigned the specific and exclusive responsibility of storekeeper.

secretaries in the administration wing for approximately 15 years (2T63). The secretaries answer the telephone and other questions, file and type (2T36). In 1986 a civilian medical records clerk was hired to work in the medical wing (2T63).[4/] The medical records clerk answers the telephone and maintains the medical files on each inmate (2T88). The timekeeper is responsible for determining the amount of time employees work each day, and calculating the amount of vacation and personal time available to the employee. A civilian has performed the timekeeping function for about the last ten years (2T89). Before civilians were hired into the secretarial positions in the administration section, the clerical position in the medical wing and the timekeeping position, correction officers were exclusively assigned to perform those functions (2T63-2T64).[5/] Local 240 did not file an objection when the Sheriff filled these four positions with civilian employees (2T63-2T64).

4/ Initially, Deputy Warden Daniels testified that the medical records clerk was hired in 1986 (2T63). In subsequent testimony, Daniels testified that a civilian medical records clerk was hired in 1976 (2T88). Freeman testified that a civilian medical records clerk has been employed for approximately five years (2T36). Thus, Freeman's testimony supports the 1986 date for the medical records clerk. I find that Daniels merely misspoke when he indicated that the medical records clerk started in 1976.

5/ Lambertson testified that when the medical records clerk was hired, Local 240 did not file a complaint because "...she didn't take a correction officer's job away..." (1T41). However, Daniels stated that a correction officer filled the position of the medical records clerk before a civilian was hired into it (2T63). I credit Daniels. His testimony was forthright and he clearly had a good command of the factual details. Lambertson was more tentative and uncertain.

9. Prior to August, 1990, administrators in the Sheriff's Office advised Local 240 that they were considering hiring civilians for certain positions in the jail. Warren Chamberlain, President of Local 240, indicated that Local 240 was opposed to such plan (1T88; 1T107; 1T111; 2T38-2T39). The parties' established procedure for initiating mid-term negotiations requires that the attorney for the side seeking the reopener to write a letter to the other side (1T95). Local 240 made no demand upon the Sheriff to begin negotiations, and no negotiations between the parties ever took place regarding the hiring of the civilians (1T35; 1T96-1T97; 2T26; 2T69; 2T96-2T97).[6/] Local 240 did not file a grievance regarding the hiring of the civilian employees (1T35; 1T39; 2T26; 2T68-2T69).

10. None of the civilian employees listed on R-6 possess any law enforcement background nor have they received police training. Also, Erbe has no law enforcement background or training (1T29; 2T39). The civilian employees listed on R-6 perform the same work which was previously exclusively performed by correction

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6/ Respondent attempted to introduce evidence pertaining to matters raised during successor negotiations which occurred after the civilians were assigned to the records room. I sustained objections by the charging party that such evidentiary proffers were irrelevant. Respondent argues in its brief that such rulings limited its presentation of this case to matters which occurred before the filing date of the unfair practice charge (Respondent brief dated July 15, 1991, at page 14; Respondent reply brief dated August 16, 1991, at page 2). Respondent's argument is without merit. Respondent confuses rulings which limit it to the submission of only relevant evidence with its misconception that it was limited in the presentation of its overall case.

officers, except that the civilian employees use equipment which provides for new ways of accessing and storing inmate records (2T92).

11. Most of the correction officers assigned to the records room were reassigned to other positions in the jail after the civilian employees were hired.[7/] No correction officers were laid off as the result of hiring of the civilian employees (1T40; 1T45; 1T102-1T103).

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. Section 5.3 defines an employer's duty to negotiate before changing working conditions:

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

The Commission and the Courts have long held that shifting work from employees in one unit to employees outside of that unit is generally mandatorily negotiable if it does not impinge on the employer's governmental policy determinations. See City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988); City of Newark,

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7/ A correction supervisor and/or correction officer continues to be assigned to the records room for oversight purposes and at times no civilian employee is on duty (1T25; 1T42-1T43; 2T41; 2T54-2T55).

P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988); Boro of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Washington Tp., P.E.R.C. No. No. 83-166, 9 NJPER 402 (¶14183 1983); Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83)("Rutgers II"); Monroe Tp., P.E.R.C. No. No. 81-145, 7 NJPER 357 (¶12161 1981); Passaic Cty. Reg. H.S. District No. 1, H.E. No. 81-26, 7 NJPER 124 (¶12053 1981), adopted P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981); Jersey City Bd. of Ed., P.E.R.C. No. 81-24, 6 NJPER 434 (¶11219 1980); Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), mot. for recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979), aff'd App. Div. Dkt. No. A-3651-78 (7/1/80)("Rutgers I"); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pt. rev'd in pt. App. Div. Dkt. No. A-3564-78 (6/19/80); Piscataway Bd. of Ed., P.E.R.C. No. 78-81, 4 NJPER 246 (¶4124 1978); Middlesex Cty. College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977).

Before the new records room was established, correction officers exclusively performed all required work in the booking area. This work subsumed the record keeping function now performed in the records room. When the records room became operational between late April and June, 1990, correction officers continued to exclusively perform the records room work. It was not until September, 1990, when the civilians were hired that correction

officers shared any work performed in the booking area or records room.

Between June and September, 1990, the Sheriff hired seven civilian employees. Five of those employees -- Davenport, Bonett, Jones, Hyman and Bryant -- were assigned to work in the records room. Those five employees were assigned work which was previously exclusively performed by correction officers.

However, under the particular facts found in this case, I find that the Sheriff has not violated the Act. The parties' collective agreement (J-1) is silent with respect to any specific provision relating to preservation of unit work. Consequently, the parties' established practice with regard to unit work preservation becomes the key factor. The facts establish that on four separate occasions over the last 15 years the Respondent has moved unilaterally to hire civilian employees to perform functions previously done by correction officers. This occurred 15 years ago when two correction officers performing clerical/secretarial work in the administrative section were replaced by civilians. Ten years ago, a civilian was hired to perform the timekeeping function which was, until that time, performed by a correction officer. Again, approximately five years ago, the Sheriff acted unilaterally by hiring a civilian medical records clerk to replace a correction officer who had previously performed that function. On none of these occasions did Local 240 raise any objection. Thus, the extant condition of employment, as established through a consistent

application of the past practice, allows the Respondent to unilaterally reassign work which was previously exclusively performed by correction officers to civilian clerical employees. Since the Respondent has acted in accord with the established practice, the Sheriff has not modified the existing terms and conditions of employment and, consequently, incurs no negotiations obligation. See Rutgers University, H.E. No. 82-20, 8 NJPER 8 (¶13004 1981), adopted P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982). See also Watchung Boro, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981); Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981).

The factual circumstances pertaining to Erbe and DiFranzia differ from the other five civilians discussed above. I note, however, that the above analysis is nonetheless applicable to them. In addition to the above analysis, no violation of the Act occurs with respect to Erbe and DiFranzia, because the work which they perform is not exclusively unit work. Therefore, the Sheriff incurred no negotiations obligation with Local 240 when Erbe and DiFranzia were hired and assigned their duties in the correctional facility.

Before Erbe was hired in June, 1990, the functions which he performed were Lt. Baumgartner's responsibility. Baumgartner, a corrections supervisor, is not included in the correction officer negotiations unit. Thus, although various correction officers may have been assigned to assist Baumgartner perform the storekeeping

function, the evidence establishes, and I find, that the storekeeping work was not exclusively performed by correction officers.

Likewise, prior to DiFranzia's employment, her work was shared by Lt. Baumgartner and another correction officer. Accordingly, I find that DiFranzia's work was also not exclusively performed by employees included in the correction officers negotiations unit.

In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), mot. for recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989), the Commission found that where the collective agreement did not contain a work preservation clause and the work performed was not exclusive to employees contained in the negotiations unit, the employer does not violate the Act if it does not enter into negotiations with the majority representative before it assigns such work to non-unit employees. Thus, with respect to Erbe and DiFranzia, the Sheriff incurred no negotiations obligation when it assigned them to perform work which was not previously exclusively performed by employees included in the correction officers collective negotiations unit.

Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

Since the Monmouth County Sheriff did not change any term and condition of employment, no violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) occurred by not negotiating with the Monmouth County Correction Officers Association, PBA Local 240 when it hired civilian employees to perform work which was previously exclusively or partially performed by correction officers.

RECOMMENDATION

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Stuart Reichman
Hearing Examiner

Dated: October 2, 1991
Trenton, New Jersey