

I.R. No. 2012-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 134,

Respondent,

-and-

COUNTY OF BERGEN,

Charging Party,

-and-

Docket No. CE-2011-015

BERGEN COUNTY SHERIFF'S OFFICE,

Intervenor.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that PBA Local 34, refuses to negotiate collectively with Bergen County as a "joint employer" of corrections and sheriff's officers (with the Sheriff) as determined by the Commission in Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). The charge alleges that PBA Local 34 has violated 5.4b(3) and (5) of the new Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The application sought an interim restraint enjoining the PBA from negotiating "economic terms" of a successor agreement without the County Executive and directing the PBA to immediately commence negotiations over economic terms with the County Executive.

The Designee determined that a legislative amendment to N.J.S.A. 40A:9-117 passed soon after Bergen Cty. Sheriff issued could have shifted power to determine "economic terms" from the County to the Sheriff, thereby implicating the County's ability to demonstrate that it is a joint employer of corrections and sheriff's officers. The Designee also disagreed that the County would be irreparably harmed if an Order was not issued in its favor.

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Appearances:

For the Respondent,
Detzky and Hunter, LLC, attorneys
(Stephen B. Hunter, of counsel)

For the Charging Party,
Cleary, Giacobbe, Alfieri and Jacobs, LLC, attorneys
(Matthew J. Giacobbe, of counsel)

For the Intervenor,
C. Elston and Associates, LLC, attorneys
(Catherine M. Elston, of counsel)

INTERLOCUTORY DECISION

On May 24, 2011, Bergen County (County) filed an unfair practice charge against Bergen County PBA 134 (PBA), together with an application for interim relief, a verified charge and exhibits. The charge alleges that on March 21, 2011, in response to County Labor Counsel inquiry, PBA counsel advised the

County that the PBA will not collectively negotiate a successor agreement on behalf of sheriff's officers and corrections officers with it and will only negotiate with the Bergen County Sheriff (Sheriff). The charge alleges that on May 20, 2011, PBA counsel, again replying to County Labor Counsel, refused to negotiate "the economic terms" of a successor agreement to that which expired on December 31, 2010. The charge alleges that the PBA's refusal to negotiate with the County violates 5.4b(3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq. (Act).

The application sought an interim restraint enjoining the PBA from negotiating economic terms of a successor agreement without the County Executive and directing the PBA to immediately commence negotiations over economic terms for a successor agreement with the County Executive.

On May 26, 2011, I issued a letter to both counsel confirming scheduled submission dates for the County's brief and the PBA's reply. The letter also confirmed that the schedule was

^{1/} These provisions prohibit public employers, their representatives or agents from: (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

made possible by the PBA's representation that no negotiations sessions would occur between the PBA and Sheriff, nor would it sign an agreement before June 17, 2011. On June 1, 2011, I issued a letter to the Sheriff, advising of the charge, application and schedule and inviting it to intervene in the case.

On June 6, 2011, the County filed a brief and on June 15 (following a requested and granted a two-day extension of time), the PBA filed a reply including a brief, certification and exhibits. Also on June 15, the Sheriff filed a letter seeking to intervene in the case. On June 16, I issued a letter advising that unless a valid objection to the intervention was promptly filed, intervention would be approved on June 20. Also on June 16, I signed an Order to Show Cause without an interim restraint, specifying June 24, 2011 as the return date for argument on the application in a telephone conference call. Also on June 16 and 22, 2011 the County and PBA respectively filed unsolicited, supplemental letter briefs.

On June 22, 2011, I received a notice of substitution of counsel on behalf of the Sheriff, together with requests for an adjournment of the scheduled argument and an extension of time in which to file a brief. On June 23, I issued a letter acknowledging the substitution permitting the Sheriff to file a brief by July 7, 2011 and rescheduling the argument on the

application to July 11. The Sheriff has filed a letter opposing the County's application. On July 11, the parties argued their cases. The following facts appear.

The PBA and the Sheriff signed a collective negotiations agreement extending from January 1, 2006 through December 31, 2010.

The agreement was signed by representatives of those two parties exclusively on August 18, 2006. The document provides at its outset: "This agreement made this [18th] day of [August] 2006 between the Bergen County Sheriff, a constitutional officer of the State of new Jersey . . . and the Policemen's Benevolent Association, Local 134" The negotiations unit is comprised of corrections officers, corrections officer sergeants, corrections officer lieutenants, and sheriff's officers, sheriff's officer sergeants and sheriff's officer lieutenants.

From 1984 through the filing of this matter, the PBA has negotiated collectively and exclusively with the Sheriff.

Before April 19, 1984, N.J.S.A. 40A:9-117 provided in a pertinent part:

The sheriff shall select and employ the necessary deputies, chief clerks and other personnel. They shall receive such compensation as shall be recommended by the sheriff and approved by the governing body.

On April 19, 1984, the statute was amended and provides:

The sheriff shall select and employ the necessary deputies, chief clerks and other

personnel. The Sheriff shall fix the compensation they shall receive in accordance with the generally accepted county salary ranges and within the confines of the sheriff's budget allocation set by the governing body.

The accompanying "Senate County and Municipal Government Committee Statement" for "Senate No. 1060-L. 1984, c. 35" provides:

Senate Bill No. 1060 would transfer the power to fix the compensation of sheriff's officers and certain other sheriff's employees from the county governing body to the sheriff. The sheriff would be required to fix compensation of these employees 'in accordance with the county budget.'

The Committee amendments would specify that the compensation shall be fixed by the sheriff in accordance with the generally accepted county salary ranges and within the confines of the sheriff's budget allocation set by the governing body.

Under "Historical and Statutory Notes" regarding N.J.S.A. 40A: 9-117, the "1984 Legislation," specifically, L. 1984 c. 35 1 provides that ". . . the sheriff would fix compensation of personnel in accordance with county salary ranges and within the confines of the budget allocation set by the governing body, rather than submit a recommendation to the governing body for approval."

N.J.S.A. 40A:41A-36 grants various duties to the County Executive, including:

. . .(i) Negotiate contracts for the county subject to board [of freeholders] approval;

make recommendations concerning the nature and location of county improvements and execute improvements determined by the board . . .

On March 21, 2011, PBA Counsel wrote a letter to County Labor Counsel, advising that ". . . the PBA would only negotiate a successor collective negotiations agreement with the Sheriff and his designated negotiations team." In May, 2011, the PBA again refused to negotiate collectively with the County.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The County contends that it is entitled to interim relief in part because the PBA has refused to negotiate with it, a "joint employer" (with the Sheriff) of sheriff's officers, as determined by the Commission in Bergen Cty. Sheriff, P.E.R.C. No.84-98, 10

NJPER 168 (¶15083 1984). The County asserts that the "joint employer" status of a county and sheriff was affirmed in Prunetti v Mercer Cty. Bd. of Chosen Freeholders, 350 N.J. Super 72 (2001) and that continuing support for such a holding may be gleaned from Ocean Cty. Sheriff, D.R. No. 99-2, 24 NJPER 461 (¶29213 1998) and Hudson Cty., P.E.R.C. No. 2008-43, 34 NJPER 13 (¶6 2008).

I disagree that the County has demonstrated by a substantial likelihood of success on the merits that it is a joint employer with the Sheriff.

On February 16, 1984, the Commission issued Bergen Cty. Sheriff, finding that the County and the Sheriff were "joint public employers" of the sheriffs and corrections officers because ". . . they each possess independent, distinct and controlling authority over separate aspects of the employment relation." Id., 10 NJPER at 169. Writing that the Sheriff has "extensive" authority over the employees, owing to his hiring, directing, promoting, evaluating and disciplining them, the Commission observed that ". . .all these attributes of his authority came from the Legislature, not the County," citing N.J.S.A. 40A:9-117. Id., 10 NJPER at 170. The Commission continued:

But the Sheriff's authority as employer is not complete. He has no power to compensate these employees. That remains with the

County. In pertinent part, N.J.S.A. 40A:9-117 provides that sheriff's employees, 'shall receive such compensation as shall be recommended by the Sheriff and, approved by the governing body.' Thus, the County has ultimate control over the compensation for the petitioned for employees. In fact, the County conducts a budget hearing to scrutinize the Sheriff's recommendations and has exercised its power to deny the Sheriff's funding requests. This power to determine compensation is unquestionably one of the most important attributes of an employer and leads us to conclude under all the circumstances of this case, that the County is also a public employer of the petitioned for employees. [Id., 10 NJPER at 170]

Considering the different lines of authority over separate aspects of negotiable matters, the Commission concluded that an effective negotiations process required the joint participation of the County and the Sheriff and warranted a "joint public employer" status. The Commission observed ". . . in general, the County has authority over the economic terms and conditions of employment and the Sheriff has authority over what would generally be termed non-economic terms and conditions of employment." Id., 10 NJPER at 170-171.

Two months after Bergen Cty. Sheriff issued, the Legislature amended N.J.S.A. 40A:9-117 [See pages 4-5].

In Hudson Cty., the Commission wrote about that legislative change:

An earlier version of that bill provided simply that the 'sheriff shall fix the compensation they shall receive in accordance with the county budget;' but the Senate

County and Municipal Government Committee recommended adding the more specific language later adopted. The Committee stated that the bill 'would transfer the power to fix the compensation of sheriff's officers and certain other sheriff's employees from the county governing body to the sheriff.' In signing the bill, Governor Kean stated that the legislation would change current law to permit sheriffs, rather than freeholders, to fix their employees' salaries. Thus, the sheriff now has enhanced statutory power over economic matters as well as complete control over non-economic matters.

Given the post-Bergen amendment to N.J.S.A. 40A:9-117, this case is more akin to one involving the transfer of work to another public employer than a transfer of work between employees of the same employer. Cf. Cacciatore v Bergen Cty., 2005 U.S. Dist. LEXIS 37569 (D. N.J. 2005) (sheriff was not a county policymaker for purposes of holding county liable in civil rights action). [Hudson Cty., 34 NJPER at 18]

The Commission expressed this view in the context of a claim that Hudson County had violated the Act by transferring unit work from its police officers to non-unit employees of the same employer. The Commission determined that the transfer ". . . was entailed in a legitimate reorganization [of government services]" and that the County was not required to negotiate before the Sheriff assumed responsibility for providing some patrol division services.

The County argues, "significantly, the Commission did not find that the Sheriff has 'complete control' over economic matters, reaffirming the joint-employer status between the County

and the Sheriff as was previously enunciated in Bergen Cty. Sheriff" (6/15/11 letter brief at 7).

"Complete control" by the Sheriff is impossible because N.J.S.A.40A:9-117, as amended, demands the Sheriff to "fix" compensation ". . . in accordance with generally accepted salary ranges and within the confines of the sheriff's budget allocation set by the governing body." No facts suggest that the County cannot discharge these necessary functions.

The question is whether the Sheriff's "enhanced statutory power over economic matters" implicates the continuing viability of the "joint employer" status of the County and Sheriff. Specifically, if the County is not at least a public employer of the sheriff's and corrections officers, what justifies an Order essentially mandating its place at the negotiations table with the Sheriff?

In Bergen Cty. Sheriff, the Commission determined that the "power to determine compensation is unquestionably one of the most important attributes of an employer," enabling it to declare the County a "public employer" of the sheriff's officers. The subsequent amendment, if read together with its legislative history, could be understood as shifting that power to the Sheriff. In my view, the Commission implied as much in Hudson Cty., when it wrote that ". . . given the post-Bergen amendment to N.J.S.A. 40A:9-117, this case is more akin to one involving

the transfer of work to another public employer than a transfer of work between employees of the same employer" (emphasis added). Id., 34 NJPER at 18. Also, the issues before the Commission in Hudson Cty. did not require it to specifically overrule the joint employer status finding in Bergen Cty. Sheriff.

I do not agree that Prunetti sheds light upon the issue in this case because it does not reference or discuss N.J.S.A. 40A:9-117, as amended.

The County also relies upon the Director's decision in Ocean Cty. Sheriff, D.R. No. 99-2, 24 NJPER 461 (¶29213), rev'd, P.E.R.C. No. 99-70, 25 NJPER 117 (¶30051 1999), aff'd 26 NJPER 170 (¶31067 App. Div. 2000). The Director found that Ocean County and the Ocean County Sheriff comprised a "joint employer" of sheriff's officers. The Sheriff fixed compensation, exercised disciplinary authority, controlled appointments, staffing levels, work hours, tours of duty and equipment. Ocean County made final decisions on sheriff's officer evaluations and "their impacts upon salary increases, disciplinary actions and promotions." The County also approved all promotions recommended by the Sheriff, heard step 3 grievances and negotiated collectively ". . . with regard to sheriff's officers, receiving input from the Sheriff." Id., 24 NJPER at 463. Except for the statutory role of counties as set forth in N.J.S.A. 40A:9-117, none of the indices of public

employer status found in Ocean Cty. have been demonstrated in this case.

I am also not persuaded that the County suffers irreparable harm if an Order is not issued in its favor. First, if the County is correct in its view that, ". . . it is futile to have the Sheriff negotiate alone with PBA Local 134 over economic items when he has not final authority to enter or implement any agreement reached" (6/6/11 brief at 14), then neither it nor the County taxpayers will be harmed by an agreement that is ultra vires on behalf of the disputed employer. Second, I am not persuaded that the County has standing to assert that PBA members shall be irreparably harmed if collective negotiations proceed without the County Executive. Finally, the County contends that the negotiations process shall be irreparably harmed because ". . . it will create an irrevocable labor discord between the parties" (6/6/11 brief at 17). For more than twenty years, the Sheriff and PBA have negotiated collective agreements on behalf of the County sheriff's and corrections officers. In the absence of any harm demonstrated in that history, and under all the circumstances, I am not persuaded that the County shall be irreparably harmed in this case if an Order is not issued in its favor.

ORDER

Under all the circumstances, I find that the County has not demonstrated by a substantial likelihood of success on the merits that the PBA has unlawfully refused to negotiate collectively in violation 5.4b(3) and (5) of the Act. I am also not persuaded that the County shall suffer irreparable harm if an Order is not entered in its favor. Accordingly, I deny the application for interim relief. The charge shall be processed in the normal course.


Jonathan Roth
Commission Designee

DATED: July 18, 2011
Trenton, New Jersey