

I.R. NO. 2019-6

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY and  
BERGEN COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CO-2019-036

BERGEN COUNTY PBA, LOCAL NO. 49,

Charging Party.

SYNOPSIS

A Commission Designee grants in large part and denies in part an application for interim relief that accompanied an unfair practice charge filed by Bergen County PBA, Local No. 49 against Bergen County and Bergen County Sheriff's Office. The charge alleges that the employer unlawfully eliminated a "day tour" worked by PBA unit employees; transferred their duties or "unit work" to Sheriff's officers; eliminated seniority-based shift and tour selection; reduced vacation/time off to one officer per shift per squad; and eliminated credit for "military time" served towards eligibility for a "senior officer pay" benefit memorialized in the parties' collective negotiations agreement. The charge alleges that following the parties' consensual withdrawal from interest arbitration proceedings, they remain in collective negotiations for a successor agreement.

The Designee granted interim relief on all allegations except the alleged unlawful reduction in vacation/time off, which was implemented in 2015 and the subject of a pending hearing before a grievance arbitrator.

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Appearances:

For the Respondent  
C. Elston & Associates, LLC  
(Catherine M. Elston, of counsel)

For the Charging Party  
Loccke, Correia & Bukosky, attorneys  
(Michael A. Bukosky, of counsel)

INTERLOCUTORY DECISION

On July 31, 2018, Bergen County PBA, Local No. 49 (PBA) filed an unfair practice charge against Bergen County and Bergen County Sheriff's Office (County or Sheriff), together with an application for interim relief, certification, exhibits and a brief. The charge alleges that on or about July 1, 2018, during [contract] mediation, following the Sheriff's withdrawal of its Petition to Initiate Interest Arbitration, (Dkt. No. IA-2018-012), the Sheriff, acting in capacity as public employer, ". . . by virtue of a merger/consolidation" between the County and

Sheriff, unilaterally and in retaliation for previous filings of the PBA,<sup>1/</sup> a) eliminated a day tour previously worked by PBA unit police officers; b) transferred day tour unit work to non-unit sheriff's officers; c) eliminated seniority-based shift and tour selection; d) reduced vacation/time off to one officer per shift per squad; and e) eliminated credit for military time towards "senior officer pay." The Sheriff's actions allegedly violate section 5.4a(1), (2), (3), (4), (5), (6) and (7)<sup>2/</sup> of the New

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1/ These matters include unfair practice charges; CO-2018-140 (filed December 21, 2017, unilateral change in work schedules); CO-2018-141 (filed December 21, 2017, transfer of unit work, change in work schedules and work conditions in retaliation for protected activity); CO-2018-142 (filed December 21, 2017, Sheriff uttered anti-union remarks reported in local newspaper article and took other retaliatory action in response to PBA grievance); and a petition for special mediation, SM-2018-001, filed June 19, 2018.

2/ These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a  
(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The application seeks an Order requiring the Sheriff, ". . . to maintain a status quo which existed before any change in the working conditions [set forth in the charge]."

On August 2, 2018, I issued an Order to Show Cause setting forth dates for submission of response(s) and for argument in a conference call. On August 20, 2018, the Sheriff filed a response, together with a brief, exhibits and a certification. On August 21, 2018, PBA filed a reply. On August 23, 2018, the parties argued their cases.

The Sheriff admits eliminating the day shift and reassigning personnel, contending that the change was made, ". . . to address gaps in coverage and supervision resulting from attrition [and] in furtherance of the governmental policy set forth in the Realignment MOA to provide for the ultimate abolition of County police positions." The Sheriff acknowledges that sheriff's officers provide sufficient coverage of the day shift. The Sheriff also admits that on or about November 17, 2015, he implemented the alleged, ". . . one officer per squad restriction

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2/ (...continued)  
negotiated agreement to writing and to sign such agreement.  
(7) Violating any of the rules and regulations established by the commission."

for time off," following his learning of inadequate staffing of "affected shift(s)." The Sheriff also asserts that in February, 2016, PBA filed a grievance contesting the change that proceeded to arbitration (Docket No. AR-2016-524), ". . . where it remains pending." The Sheriff contends that 17 PBA unit employees had improperly "designated themselves as eligible for senior officer status; the PBA filed a grievance contesting the Sheriff's determination. The Sheriff contends that the PBA claim for credit for military time towards senior officer pay is grounded in a "practice that provided a more generous benefit than set forth in the parties' collective negotiations agreement." Finally, the Sheriff disputes that its motivation for its actions was retaliatory.

On September 24 and 25, 2018, PBA filed requests to supplement the record with an audio recording of the (now former) Sheriff, Michael Saudino, allegedly admitting, ". . . to improperly reassign[ing] unit work of County police officers." The September 25th letter specifically contends that the surreptitious recording reveals the former Sheriff saying, ". . . that he was violating rules when he reassigned K-9 work [from the police unit] to corrections officers." PBA Counsel wrote that the Sheriff's admission "undermines any claim of legitimate [managerial] prerogative."

On October 1, 2018, the Sheriff filed a reply, contending that the request should be denied because the charge doesn't allege that K-9 duties were unlawfully transferred from police officers to corrections officers and K-9 duties are "special duty work," rather than unit work. It asserts that even if the K-9 duties are considered to be PBA "unit work," the Sheriff's motive for his action is the subject of a material factual dispute, warranting a plenary hearing.

I deny the PBA's request to supplement the record because the former Sheriff's alleged admission, if true, is not sufficiently relevant to this unfair practice charge filed on behalf of police officers.

The following facts appear:

The PBA represents County police officers excluding the Chief and deputy chief. The County of Bergen and the PBA negotiated a 2001-2004 collective negotiations agreement that has been extended and modified by a series of memoranda of agreement, the most recent of which extended from January 1, 2014 through January 1, 2017.

The agreement includes Article IV, "Preservation of Rights," providing in a pertinent part that the County, ". . . agrees that all benefits, terms and conditions of employment

. . . [that] are not specifically set forth in this agreement shall be maintained at not less than the highest standards in effect at the time of the commencement of collective bargaining negotiations between the parties leading to the execution of the agreement;" Article V ("Discrimination"); Article VII ("Notification of Changes") providing that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established"); Article VIII ("Salaries"), providing in a pertinent part:

8. All employees covered by this agreement who have completed sixteen (16) or more years of Police service shall receive a base rate of compensation equal to the base rate for their rank, as is calculated above in this Article, plus one-half (1/2) the rank differential to the next higher rank. (For example, a police officer would receive police officer's pay plus one-half (1/2) of the then-current rank differential to sergeant as said police officer's base rate). This special base pay rate category shall be effective for all ranks in the bargaining unit and shall be referred to a 'senior officer status.' At least four (4) years of the sixteen (16) years required to qualify for the benefit under this Article shall be in the service of Bergen County.

Article XIII ("Vacation") provides a basis for earning vacation time off and a method for selecting such time. Article XVI ("Grievance Procedure") provides a four-step procedure ending in binding arbitration.

On January 1, 2015, the County, Sheriff's Office and Bergen County Prosecutor signed a memorandum of agreement, "For the Long Term Realignment of Police Services by and between the Bergen County Police Department and the Office of the Bergen County Sheriff" (Realignment MOA). On January 21, 2015, the Bergen County Board of Chosen Freeholders (Board) approved the Realignment MOA by Resolution No. 42-15.

Section 2 of the Realignment MOA, "Transfer of Control and Responsibility," provides in a pertinent part:

Effective upon final adoption and publication of an ordinance to be prepared and passed by the Board of Chosen Freeholders, the passage of which shall be an express condition of this Agreement, any and all ordinances currently in effect within the County of Bergen in the administrative code, policy or otherwise, and which place operational and administrative authority over the Bergen County Police Department with the Bergen County Department of Law and Public Safety and/or County Executive shall be deemed as null and void and of no further effect. Simultaneously therein and included within the aforementioned ordinance, the Board shall further provide that all operational and administrative authority over the Bergen County Police Department shall be transferred and placed under the authority of the Bergen County Sheriff. Thereafter, the unit formerly known as the Bergen County Police shall be known as 'Bergen County Sheriff, Bureau of Police Services' or just 'Bureau of Police Services' or, hereinafter, 'Bureau.'

\* \* \*



2.2 . . . All conditions, contracts and agreements in which the County of Bergen previously reached on behalf of the BCPD shall continue to exist without change, and full faith and credit shall be given to and by all governments and agencies established within the County, as it is the intent of this agreement to maintain, at this time, the entire BCPD and only to transfer the person or entity to which they are to be governed. That is, this Agreement does not abolish the Bergen County Police Department.

2.3 . . . The Bergen County Sheriff shall, by Freeholder Ordinance to be adopted, become the Appropriate Authority for all staff currently under the employ of the Bergen County Police Department, and as such shall have all authority to direct its day-to-day operations, including uniforms, assignments, hiring, retention, discipline and responsibilities, subject to existing law and statutes provided for that concern the governance of law enforcement agencies in New Jersey . . . The Sheriff shall assume the responsibility for all of its day-to-day actions, effective upon the Ordinance transferring same, including the maintenance of all accounts, responsibilities and operations of the Department . . . No changes shall be required of any labor contract in existence between the County and the Sheriff PBA Local 134 and Bergen County Police Local 49, both of which were approved by the Freeholder Board, and both the Bergen County Police PBA staff and the Sheriff Department PBA staff remain unchanged and neither shall not, for purposes of salary, benefits and other terms and conditions of employment, be merged with each other.

On December 29, 2017, Counsel for the Sheriff filed a completed Petition to Initiate Compulsory Interest Arbitration with the Commission's Director of Conciliation and Arbitration

regarding a collective negotiations unit of about 41 "Bergen County police officers employed by the Bergen County Sheriff's Office in the Bureau of Police Services." The Director tentatively supported the Petition, to which the PBA objected, contending in part that the Sheriff was not the public employer of PBA unit employees. Following the Chair's written determination that the Petition shall proceed, the Director, on January 29, 2018, issued a letter to the Sheriff and PBA Counsel advising of a named Interest Arbitrator assigned to the case (Dkt. No. IA-2018-012).

On April 26, 2018, the Sheriff filed a letter requesting to withdraw its Petition, with the consent of the PBA. Sheriff Counsel wrote that the Interest Arbitrator had provided "considerable assistance" to the parties, bringing them close to a voluntary settlement and they were optimistic about achieving a settlement, ". . . in reasonably short order." On or about June 13, 2018, PBA filed a request for special mediation with the Director, seeking assistance in ". . . integrating the PBA contract with the Sheriff" (Dkt. No. SM-2018-001).

On October 4, 2018, the Director of Conciliation and Arbitration issued a letter to the parties, declining to assign a mediator to "consolidate" the contracts between the PBA and Local 134 (representing sheriff's and corrections officers). The

Director wrote that the Commission's impasse procedures, including the interest arbitration process, are available to them.

On May 30, 2018, Sheriff Chief Kevin Pell issued a memorandum to Police Bureau Lieutenant James Mullin regarding "temporary reassignments." The memorandum provides at the outset: "Effective July 1, 2018, there will no longer be a day shift within the Bureau of Police Services Patrol Unit. Sworn personnel from the Patrol Unit day shift will be reassigned in accordance with the attached Bureau of Police Services Personnel Chart." The memorandum advises of the specific "reassignment" of four named PBA unit employees. Two were to be reassigned, on a rotation, to two community college campuses, Monday through Friday; another was to remain on an "administrative schedule," Monday through Friday, supervising different "units;" and another was to be reassigned to a "traffic safety unit" on a Monday through Friday schedule.

On June 1, 2018, PBA Counsel wrote a letter to Counsel for the Sheriff, demanding negotiations over "all aspects" of the "unilateral change in the elimination of the day shift as well as the transfer of such duties and work to other County unit employees." PBA Counsel also sought reasons for eliminating the day shift, including the exercise of any managerial prerogative.

Executive Undersheriff George Buono certifies that the "staffing changes" identified in the memorandum, ". . . were made to address gaps in coverage and supervision resulting from the attrition in the Bureau subsequent to the implementation of the layoffs in June, 2017" (§32, Buono cert.). He further certified that the "staffing changes" of July 1, 2018:

. . . were an exercise of the sheriff's managerial prerogative to determine staffing levels and assign personnel based on experience and training and as a result there is better distribution of experienced senior officers between the two remaining tours within the Bureau providing greater supervision and training of less experienced personnel, improved patrol coverage within the County around the clock and there is more efficient use of the particularized training of individual Bureau personnel. [§36 Buono cert.]

He certified that between January 1, 2015 (the date of the signing of the 2015 Realignment MOA) and July 1, 2018, Bureau unit employees generally worked in one of three 8-hour shifts, 11 p.m.-7 a.m. ("tour 1"); 7 a.m.-3 p.m. ("tour 2"); and 3 p.m.-11 p.m. ("tour 3"). Following layoffs, demotions and retirements of unit employees, ". . . the Bureau no longer had sufficient personnel to properly staff all three tours." From June, 2017 until July 1, 2018, the number of PBA unit (Bureau) employees declined (through attrition) from 49 to 39.

In July, 2017, the Sheriff demoted an unspecified number of supervisory police officers. They remain employed by the Sheriff and are available to fill needed supervisor vacancies [¶58, Wren cert.]. By August 1, 2018, the Sheriff employed 38 Bureau [police] employees, 142 sheriff's officers (in various titles) and about 280 corrections officers.

The Sheriff learned that as a consequence of the seniority bidding process, ". . . the midnight tour was chronically understaffed and under-supervised and the 3 p.m.-11 p.m. tour was overstaffed with inexperienced officers because senior officers typically selected the day tour and to a lesser extent, the midnight tour" (¶33, Buono cert.). Buono certified:

In deciding to eliminate the day tour of the Bureau, the Sheriff determined that sheriff's officers assigned to the Homeland Security Unit could provide sufficient coverage during the day. [¶35, Buono Cert.]

"Police services" performed by PBA unit employees on the day tour continue to be performed by sheriff's officers [¶33-39, Wren Cert.]. Such "services" include "the patrol function."

On March 8, 2017, the County, the Sheriff and the County Prosecutor signed a "First Amendment" to the Realignment MOA that was adopted by the County Board of Chosen Freeholders about one month later (Sheriff Exhibit A). Paragraph 11 of the "First Amendment" specifies these "core functions" of the Sheriff:

- (A) County jail operations (which are not subject to this agreement);
- (B) Security for the courthouse and courtrooms and upon request of the Assignment Judge of Bergen County, the Probation Department;
- (C) Execution of Warrants;
- (D) Transportation of prisoners;
- (E) Bureau of Criminal Identification and Ballistics;
- (F) Legal process.

On June 28, 2018, Sheriff Captain Michael Griffin issued a memorandum to all "department personnel," advising:

At the direction of Sheriff Michael Saudino, effective July 1, 2018, the name of the Homeland Security Unit of the Sheriff's Office will be changed to the Patrol/Homeland Security unit. Please update all schedules, memorandums and documents to refle[ct] the name change.

In October, 2017, the Sheriff petitioned the State Civil Service Commission for a "rule relaxation" permitting "out of title work," specifically, "the establishment of reporting relationships between the County police officer title and sheriff officer title." On November 30, 2017, the request was denied and the sheriff appealed. On June 6, 2018, the State Civil Service Commission solicited the parties' "supplements" to the record. On July 19, 2018, the Chair/Chief Executive Officer of the Commission issued a letter to the parties reiterating that in the

interim before it renders a "formal" decision, ". . . the assignment of out-of-title work to employees [in] the title series of sheriff officer and county police officer is prohibited." The letter warned of monetary fines in the event of "noncompliance."

On or about June 25, 2018, Chief Pell, writing on behalf of the Sheriff, advised Police Bureau Lieutenant James Mullin that, "one [police] officer per squad is authorized to be approved for time-off for a shift." Previously, two or more unit employees per squad were authorized for approved time off.

Executive Undersheriff Buono certified that in 2015, after control of PBA unit employees was transferred to the Sheriff, it learned

. . . that vacations and other time off for Bureau employees were being approved without consideration for the staffing level of the affected shift. So, for example, it was discovered that on a number of occasions, there was no midnight tour even though the Bureau was expected to provide services 24 hours per day/seven days per week. [Buono cert. ¶34]

Buono certifies that on or about November 27, 2015, the Sheriff implemented, ". . . a one (1) officer per squad restriction for time off." He certified that on or about February 4, 2016, PBA filed a contractual grievance that proceeded to binding arbitration. On April 18, 2016, PBA filed a Request for

Submission of a Panel of Arbitrators for its grievance contesting "time off request limitation." On May 16, 2016, the matter was assigned to a named grievance arbitrator, who conducted (but did not complete) a formal Hearing (Dkt. No. AR-2016-524). Buono certifies that Pell's June 25th notice to Mullin, ". . . reaffirms the restriction in light of the change to work schedules and related reassignments, effectuated on July 1, 2018."

On July 16, 2018, Chief Counsel to the Sheriff, Patrick O'Dea, wrote a letter to PBA Counsel regarding "improper granting of senior officer status to members of PBA Local 49." Referencing Article VIII, paragraph 8 of the parties' agreement (see page 6), O'Dea wrote that PBA President Wren and another unit employee (and fifteen others, previously) "improperly designated themselves as eligible for senior officer status [i.e., a higher rate of pay] by calculating their years of pensionable credit time in the N.J. Police and Firemen's Retirement System instead of calculating their years of police service as provided in the collective bargaining agreement." O'Dea wrote that commencing in the next payroll period, the two officers currently "improperly" receiving "senior pay" will no longer receive "the special base pay rate" and the fifteen others who, for a time improperly received the special pay rate, ". . .



will be required to reimburse the County for the premature payments."

PBA President Wren certifies that the parties' "agreement and understanding" of eligibility for "senior pay" includes "pensionable military time," which the "employer recognized [as a] working condition for decades" [Wren Cert. ¶64]. Wren certifies that during mediation for a successor agreement, the Sheriff informed the PBA that senior officer pay would be eliminated. He certifies that on July 6, 2018, PBA sought negotiations over "the elimination of credit for military time towards eligibility for senior officer pay," together with negotiations over the reduction in vacation/time off to one shift per squad; elimination of seniority-based shift and tour selection; transfer of unit work and elimination of the day tour.

#### 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 unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. See Hudson Cty. Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003), recon. den. P.E.R.C. No. 2004-39, 29 NJPER 547 (¶177 2003); Rutgers, The State Univ., P.E.R.C. No. 2003-70, 29 NJPER 158 2003). In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. That test provides:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the

public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees working conditions. [88 N.J. at 404-405]

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Id. at 573.

The unit work rule contemplates three exceptions in which the transfer of unit work is not mandatorily negotiable. The exceptions apply where (1) the union waived its right to negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of unit personnel; and (3) the municipality is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577.

The Realignment MOA, by simultaneously positing in the Sheriff all "day-to-day" responsibilities of the police department, while leaving the collectively negotiated terms and

conditions of employment of the officers intact, ". . . without change," renders this case more akin to an alleged transfer of work between employees of same employer than to one involving the transfer of work to another public employer. In other words, before the alleged unlawful changes occurred in this case, the County Police Department police officer unit represented by the PBA was "realigned" under but not merged into the Sheriff's Office. When the Sheriff acted, as set forth in the charge, it allegedly transferred work from unit employees (i.e., police officers) to non-unit employees (i.e., sheriff's officers). Cf. Hudson Cty., P.E.R.C. No. 2008-43, 34 NJPER 13 (¶6 2008).

The Sheriff admits eliminating the day tour of County police officers and transferring their unit work to sheriff's officers (brief at 19). It maintains that it, ". . . exercised its managerial prerogative to determine staffing levels and assign personnel based on experience and training to address gaps in coverage and supervision resulting from attrition [following layoffs of unit employees in June, 2017]." It relies on Jersey City, City of Paterson, I.R. No. 2006-12, 32 NJPER 26 (¶13 2006) (unilateral changes in work hours by changing start and stop times of shifts and reduction in number of squads occasioned by redistricting plan responding to increase in violent crime implicates employer supervision and operational needs found to be

exercise of managerial prerogative) and Woodbridge Tp., I.R. No. 99-11, 25 NJPER 113 (¶30049 1999) (employer exercised prerogative to reorganize operation by eliminating specialized K-9 unit of three officers and dogs and move the one remaining officer into the patrol division).

On June 1, 2018, two days after the Sheriff announced the elimination of the police day shift, the PBA demanded negotiations over "all aspects" of that action, including the transfer of police duties to sheriff's officers. No facts indicate that police "patrol duties" were historically shared with sheriff's officers, whose "core functions" concern courthouse and jail operations, transporting prisoners, executing warrants, criminal identification, etc. (see p. 11). The only remaining question is whether the Sheriff's July 1, 2018 implementation of its May 30th decision to eliminate the police officer day shift, reassign those officers to other shifts and transfer their "patrol duties" to sheriff's officers comprise a "reorganization" of government services, pursuant to Jersey City. In Jersey City, our Supreme Court cautioned that ". . . whether a public employer's actions will be deemed to constitute a legitimate reorganization depends both on the employer's motivations and whether there is a change in the delivery of services." 154 N.J. at 578-579.

Sheriff Chief Pell's May 30, 2018 "temporary reassignment" notice advising of the July 1 elimination of the police unit day shift does not announce a change in the delivery of government services. The Sheriff's June 28, 2018 memorandum announcing the name change of the "Homeland Security Unit" to the "Patrol/Homeland Security Unit" is otherwise undefined, apparently foretelling the imminent substitution of sheriff's officers for police officers on the day shift. The Sheriff has not asserted any minimum staffing levels for any "Bureau" police unit shift, nor has it substantively defined "gaps in coverage" as a consequence of police unit attrition. I must similarly infer (in the absence of facts to the contrary) that supervision deficiencies are (at least, partially) the self-inflicted result of the Sheriff's demotions of police superior officers, who remain employed in the Bureau, nevertheless. Finally, no quantitative facts support the Sheriff's stated goals of achieving "a better distribution of experienced senior officers" or a "more efficient use of particularized training of Bureau personnel." These omissions or variables in the record facts inadequately explain how the transfer of patrol duties from unit police officers to non-unit sheriff's officers affects the delivery of government services or accomplishes the Sheriff's proffered goals. See Union Cty., I.R. No. 2002-12, 28 NJPER 279,

282 (¶33105 2002), mot. for recon. den., P.E.R.C. No. 2003-14, 28 NJPER 352 (¶33126 2002) (Absent specifics about how the work transfer has affected the delivery of government services or accomplishes the asserted goal of improving performance, the [Employer's] claim of managerial prerogative may constitute a 'hollow contention'); Cf. Hudson Cty. (legitimate reorganization where County determined it didn't need independent police department and that other government entities, including the Sheriff and local municipalities, could provide needed services).

Our Supreme Court in Jersey City requires the application of the Local 195 balancing test to the facts and issues raised in each case. It appears that the PBA has met the first part of the test, specifically whether the "item" intimately and directly affects the employees' work and welfare. Police officers, now identified as "Bureau" officers, exclusively performed patrol duties in Bergen County for many years. The transfer of their unit work and the reassignment of officers who had performed that work to other shifts negatively impacts work schedules and overtime assignments. The second part of the Local 195 test does not appear to be implicated because neither party claims that the subject matter has been fully or partially preempted by statute or regulation.

I must balance the interests of public employees and the public employer, as set forth in the third prong of the Local 195 test. For the reasons I have described in this decision, it appears that the transfer of patrol duties from police officers to sheriff's officers and the elimination of the police officer day shift most closely resembles a substitution of ". . . one person for another without changing the structure or nature of the job, [which] does not eliminate per se, a duty to negotiate over the transfer of duties to non-unit employees." Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251, 252 (¶2731 1996); Union Cty. Police (or "Bureau") officers wish to continue performing patrol duties for which they are particularly qualified on their regular shifts. The PBA has an interest in maintaining its unit and contractual rights throughout the period of voluntary officer attrition. On the other hand, the Sheriff has not factually substantiated its stated policy goals necessitating the unilateral transfer of patrol duties and elimination of the police day shift. Nor has it articulated how the transfer affects the delivery of government services; the Sheriff has not demonstrated how a need for improved supervision warranted its actions, especially in light of the continuing employment of police superiors in demoted titles. Cf. Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984) (where



public employer demonstrated managerial prerogative to reorganize the "supervisory structure" of its custodial staff). On balance, it appears under an application of the unit work rule or the Local 195 test that the Sheriff incurred the duty to negotiate over the reassignment of patrol duties from police officers to sheriff's officers on the police day shift or tour. It appears that the PBA has demonstrated the requisite likelihood of success to obtain interim relief on these section 5.4a(5) and derivatively, a(1) allegations.

The PBA alleges that the Sheriff "eliminated seniority-based shift and tour selection," i.e., disallowed officer seniority bids into day tour positions (¶67, ¶68 of charge). The Sheriff denies eliminating such selections, contending, ". . . that those practices were not negotiated or otherwise authorized" (brief at 21). The Sheriff next contends:

Even if seniority-based shift and tour selection were to be deemed a negotiated term or condition of employment or past practice, the Sheriff would have the managerial right to eliminate the practice because its elimination would be in conjunction with [the policy set forth in the Realignment MOA to provide for the abolition of County police positions by attrition and public safety considerations]. [brief at 21]

I disagree that the Sheriff has demonstrated a justification or a "right to eliminate the practice" (emphasis added). It is true that contract proposals basing shift assignments solely on

seniority are not mandatorily negotiable because they do not preserve management's right to deviate from a seniority system to accomplish its governmental policy goals. Hudson Cty., P.E.R.C. No. 97-16, 22 NJPER 328 (¶27167 1996); Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶25196 1994).

In this case, the PBA essentially alleges that despite the absence of a contract provision regarding seniority-based shift and tour selection, ". . . an existing working condition is changed" and the Sheriff, ". . . does not claim or cannot prove, an express or implied right to impose that change without negotiation. Such a change triggers the duty to negotiate under section 5.3." Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd. 334 N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000). The most that may be said of the Sheriff's asserted prerogative is that it could permit a deviation from seniority-based shift and tour selection. For this reason, it appears that the PBA has demonstrated a substantial likelihood of success on this section 5.4a(5) allegation.

The PBA alleges that the Sheriff unilaterally "eliminated credit for pensionable/military time toward senior officer pay [status]" and certifies that such credit had been recognized by the employer [i.e., the County], ". . . for decades." Sheriff

Counsel's July 16, 2018 letter to PBA Counsel announced a discontinuation of senior pay to two unit employees, including the PBA President and an intention to seek partial reimbursements from fifteen other unit employees who had "improperly" claimed senior pay status. The Sheriff has not contested the previous crediting of military time toward senior officer pay status.

The Sheriff contends that eliminating a more generous benefit than required under the collective negotiations agreement is not an unfair practice, citing Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) (where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by ending a past practice granting more generous benefits and by returning to the benefit level set by the contract).

I disagree that Article VIII of the parties' agreement "clearly and unambiguously" defines "police services," the specified quantities of which qualifies a unit employee for the benefit. In this regard, "pensionable/military time" is alleged to be either "an existing employment condition" or an "implied contractual commitment based on an established practice," adding to the total of a unit employee's years of "police service," thereby triggering the employer's duty to negotiate (before making a change) under section 5.3 of the Act. Middletown Tp.

and Middletown PBA Local 124. Cf. Egg Harbor Tp. Bd. of Ed.,

I.R. No. 2012-2, 38 NJPER 115 (¶28 2011).

For this reason, it appears that the PBA has demonstrated a substantial likelihood of success on this allegation.<sup>3/</sup>

I find that the PBA has demonstrated irreparable harm on all its allegations except the alleged unlawful unilateral reduction of vacation/time off from two officers per shift per squad to one. The parties remain in negotiations for a successor agreement. Any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability. Rutgers, the State University and Rutgers University Coll. Teachers Ass'n., et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp.2d 96 (¶79 App. Div. 1981). The PBA has not denied that in November, 2015, the Sheriff implemented a "one officer per squad restriction for time off." Nor has it denied filing a

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<sup>3/</sup> The PBA has alleged that all of the Sheriff's actions are in retaliation for rights protected by the Act. The Sheriff has denied those allegations, asserting that the disputed changes in terms and conditions of employment are exercises of its managerial prerogatives. Applying standards set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), I believe that the PBA has not demonstrated the Sheriff's unlawful motivation for its conduct -- an inherently fact-intensive exploration that does not readily lend itself to a grant of interim relief. For this reason, it appears that the PBA has not demonstrated a substantial likelihood of success on its 5.4a(3), (4) and derivatively a(1) allegations.

contractual grievance contesting the Sheriff's alleged "time off request limitation" that proceeded to binding grievance arbitration, where it remains pending. Applications for interim relief, including its "irreparable harm" component connote a wrong that cannot be adequately compensated at a distant time, a claim undercut by the long pendency of both the Sheriff's action and the PBA's response. See State of New Jersey (State Police), I.R. No. 99-9, 25 NJPER 84 (¶30035 1999).

I also find that the public interest is advanced when the parties adhere to the tenets of the Act, which require collective negotiations (through impasse processes) before any unilateral implementation of terms and conditions of employment. The negotiations process advances labor stability.

#### ORDER

The application for interim relief is granted in part and denied in part. The Bergen County Sheriff's office is ordered to reinstate the day tour (no. 2) for police officers; and transfer "patrol duties" from sheriff's officers to police officers reinstated to the day tour in keeping with police seniority shift and tour selections procedures, subject to reasonable staffing and supervision requirements. The Sheriff is also ordered to reinstate "credit for military time" as a factor in establishing unit employee eligibility for "senior pay" status; and reimburse

employees retroactively for reductions to their compensation as a consequence of discontinuing such credit as set forth in Sheriff Counsel's July 16, 2018 letter to PBA Counsel.

The application is denied on the request to reinstate a two (2) officer per squad time off restriction.

This case shall be processed in the normal course. This order shall remain in place until the case is resolved.

/s/Jonathan Roth  
Jonathan Roth  
Commission Designee

DATED: October 11, 2018  
Trenton, New Jersey