

I.R. No. 2019-15

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Respondent,

-and-

Docket No. CO-2019-159

PBA LOCAL 167, MERCER COUNTY
CORRECTIONAL OFFICERS AND PBA
LOCAL 167A, MERCER COUNTY CORRECTIONAL
SUPERIOR OFFICERS,

Charging Parties.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge alleging that the public employer unlawfully and unilaterally changed the paid leave selection and allocation processes for units of corrections officers and superior officers. The charge specifically alleged that the imposed systems substantially reduced the available number of "slots" per shift or tour on which corrections officers and superior officers could bid, thereby decreasing the number of officers and superiors who could avail themselves of desired contractual vacation leave. The Designee found that the employer had not demonstrated a prerogative in making the change. The employer was ordered to reinstate the previous leave selection and allocation process.

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Appearances:

For the Respondent, Genova Burns (Joseph M. Hannon, of
counsel)

For the Charging Party (PBA Local 167), Law Offices of
David Beckett, (David Beckett, of counsel)

For the Charging Party (PBA Local 167A), Crivelli &
Barbati, LLC (Donald Barbati, of counsel)

INTERLOCUTORY DECISION

On December 21, 2018, PBA Local 167, Mercer County
Correctional Officers (PBA) and PBA Local 167A, Mercer County
Correctional Superior Officers (SOA) filed an unfair practice
charge against the County of Mercer, Department of Corrections
(County), together with an application for interim relief seeking
temporary restraints, certifications and a brief. The charge
alleges that on or about October 19, 2018, the Warden issued a
directive unilaterally changing leave selection and allocation
processes for corrections officers and superior officers for

calendar year 2019, thereby reducing their ability to use contractually guaranteed vacation leave, personal leave and compensatory time off (CTO).

The charge more specifically alleges that under the previous selection and allocation process, lieutenants were provided one available slot on all tours and sergeants were offered two or three slots on all but the 11 pm - 7 am tour. Under the new, disputed process (that maintains the same tours), sergeants and lieutenants were limited to one slot on all tours. For corrections officers, the new selection process allegedly reduces by one-half or more the available slots on each of three tours for vacation and personal leave and for CTO. The charge also alleges that on December 3, 2018, the County refused to negotiate over changes to the allocation and selection process. The parties are currently engaged in collective negotiations for a successor agreement. The County's conduct allegedly violates section 5.4a(1), (2), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:1A-1, et seq. (Act).

^{1/} 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. (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. (7) Violating any of the rules and regulations established by the commission."

The PBA and SOA seek a remedy enjoining the County from [continuing to] implement the 2019 vacation selection allotment process on each tour and shift; reinstating the allotments used for vacation selection in 2018; and re-posting vacation selections for 2019, among other things.

On December 31, 2018, I issued an Order to Show Cause without temporary restraints, setting forth dates for the receipt of the County's response, the Charging Parties' reply and for argument in a telephone conference call. On January 23, 2019, Counsel argued their respective cases.

The County denies that it has engaged in an unfair practice and instead exercised its managerial prerogative to reduce the number of officers on approved leave because there has been a reduction in staffing levels, owing to a "significant decrease in prison population."

The County asserts that its ". . . modified leave allotment per shift still ensures that all employees of PBA 167 and PBA 167A will be able to use their allotted vacation and personal leave time, [while] maintaining selection and seniority procedures negotiated by the parties." The County asserts that the charging parties have not demonstrated a substantial likelihood of success and any actual harm.

The following facts appear:

PBA and SOA signed separate collective negotiations agreements with the County extending from January 1, 2015 through

December 31, 2017. Both agreements set forth provisions regarding annual vacation leave (Articles 21 and 20, respectively), overtime (Article 12) and grievance procedure (Article 9). Collective negotiations for successor agreements between the PBA and the County and the SOA and the County are "impend[ent]" (Ryland cert., para. 21; Victor cert., para. 18).

On February 22, 2012, Mercer County Correctional Facility Warden Charles Ellis issued Standards and Operating Procedures 130 (SOP 130), "Vacation/Personal Leave/Compensation Time Requests." SOP 130 requires all employees to submit vacation requests by February 15th of each year and they will be approved on the basis of seniority, and, ". . . in the case of correction officers, on the basis of the quota system." It also provides that personal leave time must be used before the end of the year or it will be lost (and it cannot be carried over into the following year). An employee may accrue no more than 120 hours of compensation time and may carry-over no more than 120 hours to the next year.

SOP 130 provides at numbers 8, 9 and 10:

8. The following quota system, which includes vacation, comp time and personal leave days for Correction Officers, will be used:

- a. "A" Tour = 6 Officers per Shift = 4
vacation, 1 personal and 1 Compensation
Time day.
- b. "B" Tour = 9 Officers per Shift = 6
vacation, 2 personal and 1 Compensation
Time day.

- c. "C" Tour = 9 Officers per Shift = 6
vacation 2 personal and 1 Compensation
Time day.

9. The following quota system, which includes vacation, comp time and personal leave days for Superior Officers, will be used:

- a. "A" Tour = 1 Lieutenant and 1 Sergeant per day.
- b. "B" Tour = 1 Lieutenant and 3 Sergeants per day Monday - Friday.
1 Lieutenant and 2 Sergeants per day Saturday and Sunday.
- c. "C" Tour = 1 Lieutenant and 2 Sergeants per day.

10. If the quota for time is filled, then the requested day will be denied.

Following the issuance of SOP 130, after February 15th each year, available slots were filled, "on an individual day basis." Also, there were "dedicated slots" for vacation days, personal days and CTO, ". . . so that officers had a chance to use their vacation and personal leave even after the selection of five-day blocks" (cert. of Donald Ryland, PBA President).

The correctional facility has three tours for both employee units: "A Tour" - 11 pm - 7 am; "B Tour" - 7 am - 3 pm; "C Tour" - 3 pm - 11 pm. Over the past five years, the inmate population has decreased from 849 to 409. Of the earlier 14 separate inmate housing units (known as "pods"), pods "C" and "D" were closed and unavailable for unit employee posts commencing in 2019.

Deputy Administrator of the facility Asa Paris analyzes staffing levels with Warden Ellis to ensure "appropriate staffing with sufficient personnel" to provide housing, food, clothing,

medical attention, security, maintenance and transportation (to and from court appearances) of and for the inmate population. In 2012, the County employed 235 "rank and file" officers and 39 superior officers. The County now employs 181 rank and file officers and 23 superior officers, representing a nearly 25% reduction over seven years (Paris cert., no. 9). Paris certifies the following reduction of posts per shift from 2018 to 2019:

TOUR	2018 Staffing levels	2019 Staffing levels
A (Mon - Fri)	40	33
A (Sat - Sun)	36	29
B (Mon - Fri)	61	53
B (Sat - Sun)	52	44
C (Mon - Fri)	49	41
C (Sat - Sun)	46	38

The chart demonstrates a less than 20% reduction in the number of corrections officers from 2018 to 2019.

Paris certifies that, "the staffing levels are the minimum staffing required for the correctional facility to operate. If a post is not filled due to an absence, then it will be filled another way. All posts are necessary . . ." (Paris cert., no. 8).

On an unspecified date before October 18, 2018, and owing to reduced correctional and superior officer staffing levels, the

County, ". . . was certain that the leave allocation should be reduced.

In reaching the appropriate staffing levels, it was determined that 10% of the staff could be allocated to use time off. This analysis revealed over 4200 opportunities for officers to be off and paid for work and over 1000 opportunities for superior officers to be off and paid for work. [Under this analysis], all employees [in both units] would be able to utilize all their allotted vacation and personal leave time and maintain selection and seniority procedures related to vacation selection. [Paris cert., nos. 12, 13].

On or about October 19, 2018, Warden Ellis issued an email to the PBA and SOA altering the leave selection and allocation process, effective January 5, 2019. These allotments for corrections officers were provided:

"A" Tour (M - F, Sat - Sun) = 3 officers per shift
"B" Tour (M - F) = 5 officers per shift
"B" Tour (Sat - Sun) = 4 officers per shift
"C" Tour (M - F, Sat - Sun) = 4 officers per shift

The allotments provided no longer identified slots that were usable for personal leave or CTO. This allotment for superior officers was provided:

All Tours = 1 lieutenant, 1 sergeant

A comparison of available slots on all three tours of corrections officers between SOP 130 and the County's October 19th revision shows a reduction of 50%. A comparison of available slots on all three tours of superior officers between SOP 130 and the County's October 19th revision shows a reduction of more than 50% for sergeants on "B" and "C" tours (and no change on "A" tour) and no

change for lieutenants. Certified and stated another way, under SOP 130, for every eight to ten assigned corrections officers, there was an available day to select for vacation leave, personal leave or CTO. Under the new allocation process, almost twenty corrections officers must compete for each day they want to use for vacation, personal leave or CTO (Ryland cert., para. 24-26). This change makes it increasingly difficult for all but the most senior officers to select uninterrupted vacation weeks in the summer or during a holiday week. It also diminishes the likelihood that corrections officers will be able to select personal days off and compensatory time off (Ryland cert., para. 27-30).

Representatives of the parties met on November 29, 2018, together with Counsel, to discuss the allocation of leave time, among other items. On December 3, 2018, the parties met again and the PBA and SOA objected to the allocation of leave time. PBA President Ryland and SOA President Victor certify that County representatives stated their belief that the new allocation could be implemented unilaterally and that the County will not negotiate over the changes (Ryland cert., para. 17, 18; Victor cert., para. 14). On or after December 3, the PBA and SOA demanded to negotiate over the allocation process and the County refused.

ANALYSIS

In Gloucester Cty. Sheriff's Department, P.E.R.C. No. 2019-19, 46 NJPER 205 (¶53 2018), the Commission wrote about the negotiability of vacation or other time off. It elaborated:

'Leave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation.' Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Therefore, the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment, and a public employer does not have a managerial prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements or other managerial prerogatives would be jeopardized. Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016) (limits on numbers of officers per squad who could use vacation days were arbitrable, but limits on sergeant and watch commander taking vacation on same day implicated managerial prerogative to meet supervision needs); Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991) (limit of two weeks summer vacation leave was negotiable; employer may review individual vacation requests in light of its staffing requirements). 'Once an employer has determined its staffing requirements, the method of allocating available vacation time among employees is mandatorily negotiable.' Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989) (limits on length of vacation leave and the times of year when vacation leave could be used were arbitrable); see also Borough of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989) (holding seniority vacation preference clause negotiable and that 'arbitrability of a grievance filed under this article can be assessed in light of any alleged staffing shortages when a vacation request is denied.'). [Id., 46 NJPER at 207]

The term and condition of employment in this case - paid leave selection and allocation standards - was set forth in the County's 2012 SOP 130, rather than the parties' collective negotiations agreements. Within the limitations expressed and cited in Gloucester Cty. Sheriff's Department, SOP 130 established (over a period of time), "an existing working condition," the desired change of which triggers the duty to negotiate under Section 5.3 of the Act. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1988), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

In October, 2018, the County announced and in December refused to negotiate over, and in January, 2019, unilaterally implemented a substantial decrease in the number of available paid leave "slots" per tour on which corrections officers and superior officers could bid. That decision in turn, substantially decreased the number of officers and superiors who could avail themselves of desired contractual vacation leave and it implicated the continuing viability of personal leave and CTO.

The County asserts that its action is rooted in reduced numbers of unit(s) employees that was prompted by a reduced (and reducing) number of inmates and the consequential closing of two "pods" (inmate housing structures). Even if the contested decrease in "slots" was mathematically proportional to the reduction in the number of unit(s) employees, the County would

still have the burden to prove its exercise of a managerial prerogative. See Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995)(fire unions' request for interim relief restraining the town from altering vacation policy established under status quo terms of expired collective agreement was granted where town's restriction on number of employees permitted on vacation at same time was more severe than necessary to meet minimum staffing requirements). The facts of this case apparently show that the County's unilateral reduction of available paid leave slots was disproportionately and significantly high, compared to the reduced complement of employees, begging the question of what prerogative justifies its action.

The County chiefly relies on Teaneck Firefighters Mutual Benevolent Ass'n., Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd 41 NJPER 293 (97 App. Div. 2015). There, an agreed-upon system for scheduling time off prevented the employer from meeting its staffing requirements. The Commission accordingly found that that system was no longer mandatorily negotiable, based on its reporting of these facts:

Given the current decreased number of active firefighters [77 of 89, formerly] and that each shift is manned with either 14 or 15 firefighters, allowing 4 firefighters off from each shift would drop manning levels below the 13 firefighters that the Township has determined is required on each shift to ensure public safety.

[Id., 39 NJPER at 424]

But Cf. Town of Kearny.

Despite the County's contention that the facts in Teaneck are "precisely analogous" to those in this case, the County has not asserted or demonstrated with facts analogous to those in Teaneck that continued implementation of SOP 130 will cause staffing to fall below levels that are required on each shift or tour. That under its recently imposed leave allotment system, all employees may use their paid contractual leave time (albeit not when a substantial number or majority of them wish to use that time) fails to demonstrate a prerogative to change the extant allocation of paid leave, particularly if maintaining the allocation system in SOP 130 merely requires some overtime expenditures. See Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27103 1996; Town of Secaucus, I.R. No. 2000-6, 226 NJPER 83 (¶31032 1999), aff'd P.E.R.C. No. 2008-73, 26 NJPER 174 (¶31070 2000).

For the reasons expressed, it appears to me that the PBA and SOA have established a substantial likelihood of success in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

I also find that the PBA and SOA have established irreparable harm. Leave time that may be wrongfully denied represents leave opportunities which are lost forever and cannot be remedied later in a Commission order. See City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); North Bergen Tp.,

I.R. No. 97-16, 23 NJPER 249 (¶28119 1997); Essex Cty., I.R. No. 90-2, 15 NJPER 459 (¶20188 1989).

In weighing the relative hardships to the parties resulting from granting or denying interim relief, I find that the scale favors the PBA and SOA. This order will return the parties to the status quo ante, enabling the County to maintain minimum staffing while prospectively permitting employees to obtain paid leave as they had before January 5, 2019. Employees who have been denied leave time to which they may be entitled between January 5 and this order have suffered some irreparable harm.

Finally, the public interest is not injured by granting an interim relief order in this case. The County shall maintain minimum staffing levels at the correctional facility, thereby assuring the public of the level of protection designed by the County. The public interest is also benefitted when the parties - in this case, the County - adhere to the tenets of the Act.

ORDER

The County is enjoined from continuing to implement the 2019 vacation selection allotment process on each tour and shift. The County shall reinstate the allotments set forth in SOP 130 and provided for all selections in 2018. The County shall re-post vacation leave, personal leave and CTO leave opportunities for corrections officers and superior officers for 2019 in accordance with those allotments set forth in SOP 130, so long as minimum staffing levels are sustainable.

This interim order will remain in effect, pending a final Commission order in this case. This case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: January 25, 2019
Trenton, New Jersey