

I.R. NO. 89-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JOSEPH C. SPICUZZO, SHERIFF OF  
MIDDLESEX COUNTY & THE COUNTY  
OF MIDDLESEX,

Respondent,

-and-

Docket No. CO-88-342

FRATERNAL ORDER OF POLICE,  
LODGE NO. 59,

Charging Party.

SYNOPSIS

In a matter brought by the Fraternal Order of Police, Lodge No. 59, against the Sheriff and County of Middlesex, a Commission Designee denies a request for interim relief. The FOP alleged that the Sheriff failed to abide by an agreement regarding the use of seniority to determine shift staffing. The Sheriff denied the existence of any such agreement. The Designee determined that the FOP did not meet the first standard for granting interim relief because a dispute exists over a significant fact that makes it impossible to conclude that there is a substantial likelihood of success.

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Appearances:

For the Respondent, Dominic J. Cerminaro, Esq.

For the Charging Party, Markowitz & Richman, Esqs.  
(Joel G. Scharff, of counsel)

INTERLOCUTORY DECISION

On June 27, 1988 the Fraternal Order of Police, Lodge No. 59 (FOP) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the Middlesex County Sheriff and the County of Middlesex (Sheriff) alleging that the Sheriff violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)<sup>1/</sup>

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<sup>1/</sup> 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; (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."

by repudiating terms of a negotiated agreement regarding the use of seniority for shift selection. The Charge was accompanied by a request for interim relief and an Order to Show Cause.

The Order was signed on June 27, 1988 and made returnable for July 6, 1988. Pursuant to a joint request the hearing was held on July 12, 1988. The Sheriff did not submit responsive papers but testified on his own behalf, and both parties argued orally in support of their positions.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.<sup>2/</sup>

### Findings

The FOP became the majority representative of a unit of sheriff officers in February 1988. The prior majority representative, the PBA, had a collective agreement which expired on

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<sup>2/</sup> Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); and Crowe v. DeGioia, 90 N.J. 126 (1982).

December 31, 1987. The terms of that agreement have remained in effect pending the completion of negotiations between the Sheriff and the FOP for a new collective agreement. Pertinent provisions of that agreement provide as follows:

Art. 25, Sec. 1(b)

In the selection of an applicant [for a job vacancy], seniority will be given prime consideration.

Art. 25, Sec. 1(f)

It is the intention and the policy of the employer to recognize seniority in cases of reassignment. This recognition of seniority will be made in conjunction with demonstrated ability and past experience.

Upon request of the Officer who has been denied reassignment, the employer will advise said employee the reason of denial.

Art. 25, Sec. 1(g)

It shall be the sole right of the Sheriff of the County of Middlesex to re-assign employees between units of the Department provided that such re-assignments are in accordance with recognized State Civil Service procedures. In furtherance thereof, when a re-assignment is interpreted to mean a change in work, hours off, or days off, the employee affected shall be notified no less than five (5) work days prior to the re-assignment in order to enable the employee to arrange for an orderly change. This section shall not apply in cases of extreme emergency. Extreme emergency is defined as a declaration of said condition by the Sheriff of Middlesex County.

Prior to July 1988 the shift schedules that existed in the Sheriff's department were 8:30 a.m.-4:15 p.m. Monday-Friday for the courthouse, 7:30 a.m.-3:30 p.m. or 8:00 a.m.-4:00 p.m. Monday-Friday for identification, process serving and transportation sections, and

an additional transportation shift of 3:00 p.m.-11:00 p.m. On or about April 28, 1988 FOP officials learned that the Sheriff intended to create a night shift to give the department 24-hour coverage. The Sheriff wanted to have the transportation section staffed around the clock to alleviate problems with call-ins late at night.

The Sheriff directed Chief Warrant Officer Mildred Scott to have discussions with the FOP leadership about how the late night shift would be staffed. The Sheriff determined that at least two senior officers had to be working the late night shift, and that at least one female officer be on that shift.

The FOP argued that the meetings between its leadership and Chief Scott regarding the staffing of the late night shift were negotiation sessions, and that those meetings resulted in a negotiated agreement that seniority would be the prime factor for making assignments to the late night shift. The FOP also argued that the parties agreed to rotate weekend work to avoid having any employees working every weekend.

On May 9, 1988 the Sheriff issued a memorandum-notice to the sheriff officers advising them of their right to bid for the new assignments. The pertinent language in that notice provided as follows:

...seniority will be the prime consideration in assigning shifts on a non-volunteer basis. Each shift will have assigned to it two new Sheriff's Officers and two experienced Sheriff's Officers, with seniority as the prime consideration.

In June the FOP officials learned that the Sheriff allegedly did not use seniority as the prime consideration for

voluntary assignments. At least two grievances were filed over the seniority issue. The FOP alleged that the Sheriff exempted the officers in the transportation section from involuntary assignments based upon seniority. On July 5, 1988, the Sheriff implemented the new shift schedule which the FOP alleged was not staffed in compliance with the allegedly negotiated agreement on shift staffing.

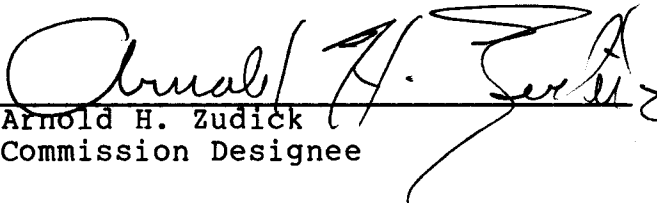
The Sheriff argued that there were no negotiations over shift staffing, that Chief Scott was not authorized to negotiate on his behalf, and that no negotiated agreement was reached. There was no written document outlining an agreement regarding shift staffing, and the Sheriff alleged that Scott had only been authorized to inform the FOP of the new shift and obtain their input on how it could be staffed. The Sheriff further alleged that he continued to abide by the language in the expired PBA contract, and that the "prime consideration" language in the May 9 memo was only intended to comply with the language in Art. 25, Sec. 1(b) of the expired contract.

### Analysis

In order for the FOP to obtain the relief it seeks here it must establish a substantial likelihood of success on the merits of this case. Where significant facts are in dispute, however, there can be no finding of a substantial likelihood of success. Significant facts are in dispute here, the Sheriff claims that there were no negotiations and no agreement with the FOP over a new procedure to select employees for shift work, and that he was in compliance with the prior agreement.

As a result of the parties' different presentation of the facts, a full plenary hearing is necessary to decide whether the meetings between the FOP and Chief Scott were negotiation sessions; whether Scott had the apparent authority to negotiate on the Sheriff's behalf; whether the parties reached a meeting of the minds on the use of seniority to determine shift staffing; whether the Sheriff was in compliance with the expired collective agreement; and whether the parol evidence rule should apply.

Since the first interim relief standard has not been met, the FOP's request for relief must be denied.

  
Arnold H. Zudick  
Commission Designee

DATED: July 14, 1988  
Trenton, New Jersey