

I.R. NO. 2003-8

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Respondent,

-and-

Docket No. CO-2003-82

UNION COUNTY SUPERIOR CORRECTIONS OFFICERS  
ASSOCIATION, PBA LOCAL NO. 199A,

Charging Party.

SYNOPSIS

The Union County Superior Corrections Officers Association alleged that the County of Union committed unfair practices when it reduced the number of lieutenant positions on the day shift. The SOA claimed that such reduction in lieutenant slots constituted a unilateral change in terms and conditions of employment and was done to retaliate against the SOA's president. The Commission Designee found that the County's action may have been designed to enhance its supervisory coverage on the evening and night shifts and, thus, an exercise of its managerial prerogative. The Designee also found that the SOA was unable to establish that the County's decision to reduce the number of lieutenant slots on the day shift was motivated by union animus. He also found that there appeared to be a fundamental and material dispute of facts with respect to the SOA's a(3) claim. The application for interim relief was denied.

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Appearances:

For the Respondent,  
Schenck, Price, Smith & King, attorneys  
(Kathryn V. Hatfield, of counsel)

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

**INTERLOCUTORY DECISION**

On September 26, 2002, the Union County Superior Corrections Officers Association, PBA Local No. 199A (SOA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the County of Union (County) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by

violating N.J.S.A. 34:13A-5.4a(1), (3), (5) and (7).<sup>1/</sup> The SOA's unfair practice charge alleges three issues: 1) a change in the number of lieutenant slots on the day shift available to be bid upon; 2) threats against Sergeant Scott Bonito; and 3) the removal of Lt. Barber's access to a County car. The SOA seeks interim relief only concerning the issue of the number of slots available for lieutenants to bid upon during the day shift. The SOA contends that the change in the number of slots available for lieutenants during the day shift constitutes a unilateral change in terms and conditions of employment and was done specifically to discriminate against SOA President Thomas Barber because he has engaged in protected activity.

On September 30, 2002, I executed an order to show cause and set a return date for October 30, 2002. On October 29, 2002, the SOA requested that the scheduled return date be postponed and rescheduled to November 20, 2002. The County agreed to both the SOA's adjournment request and the date proposed for rescheduling.

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<sup>1/</sup> 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. (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. (7) Violating any of the rules and regulations established by the commission."

On November 1, 2002, I granted the SOA's request and rescheduled the return date for November 20, 2002. The parties submitted briefs, affidavits and exhibits in accordance with the Commission rules and argued orally on the scheduled return date. The following facts appear.

The County and the SOA are parties to a collective negotiations agreement covering the period January 1, 1998 through December 31, 2000. The parties are currently engaged in negotiations for a successor agreement; no agreement has yet been reached. A petition to initiate compulsory interest arbitration was filed on November 7, 2002.

Superior officers in the County's division of corrections work a schedule of four days on and three days off. There are three shifts daily in order to maintain coverage twenty-four hours per day, seven days per week. The day shift runs from 7 a.m. to 3 p.m.; the evening shift runs from 3 p.m. to 11 p.m.; and the night shift runs from 11 p.m. to 7 a.m. Seven of the eight lieutenants pick their posts and shifts in accordance with the seniority provision contained in the parties collective agreement. One lieutenant is an administrative lieutenant in booking and releasing and is not regularly assigned to a rotation. Additionally, there is one captain who works the day shift, Tuesday through Friday.

Recently, several employees were promoted to the rank of lieutenant. On November 19, 2001, Thomas Barber was provisionally promoted to lieutenant and made permanent on January 29, 2002. John

Staba was appointed acting lieutenant on March 9, 2002, provisionally appointed on July 1, 2002 and made permanent in his title on August 21, 2002. On June 30, 2002, three lieutenants retired. On July 8, 2002, Lazaro Alfonso and Wayne Caffrey were provisionally promoted to the title of lieutenant and made permanent on August 21, 2002.

The lieutenants' staffing and bid selection schedule has remained unchanged for many years. The schedule consisted of four lieutenants being assigned to the day shift, two lieutenants assigned to the afternoon shift, and one lieutenant on the night shift. Director Frank Crose has approved schedules providing for four lieutenants on the day shift in 1999, 2000 and 2001. Because of the expected retirements of three lieutenants on June 30, 2002 and the anticipated promotion of employees into the lieutenant position, Director Crose asked scheduling Sergeant Bonito to delay the shift pick bidding process to allow those personnel actions to occur. In late June 2002, the shift bid process proceeded. On or about July 10, 2002, Sergeant Bonito presented Director Crose with a proposed 2002 schedule reflecting the lieutenants' selection of shifts and posts.

Prior to the July 2002 schedule pick wherein schedules provided for four lieutenants on the day shift, the Division of Corrections operated two jails, the "Old Jail" and the "New Jail," and oversaw 1400 inmates. Recently, the Old Jail was closed leaving the Division of Corrections responsible for operating only the New Jail which houses approximately 950 inmates.

The SOA contends that on July 10, 2002, Director Crose was presented with the proposed 2002 bid selection schedule. The schedule was a multi-page document showing the bids of captains, lieutenants and sergeants. The SOA claims that Director Crose inspected the document only long enough to view the first page and stated "how can a lieutenant with only six months on the job have days and weekends off." The SOA claims that Crose went on to say "everytime I got promoted, I went backwards." Finally, Crose is alleged to have said that "this is unacceptable." The SOA characterizes Crose's tone as excited and angry. The SOA asserts that Crose was angry because SOA President Barber would be working days with weekends off. The SOA claims that Crose could only have been referring to Barber because he is the only lieutenant who was promoted within six-months and picked weekends off. The SOA further contends that Crose was angry because with a day schedule and weekends off, Barber would be working at the correctional facility at the same time as Crose. Consequently, the SOA argues that Crose ordered the elimination of the fourth day-shift lieutenant slot which was filled by Barber in order to take Barber off of the day shift. The SOA avers that by removing Barber from the day shift, his ability to represent the unit membership is undermined.

The County disputes the SOA's version of the events. It contends that Crose was not angry but concerned about the staffing levels on the evening and night shifts and during the weekends. The County asserts that when Crose saw the proposed schedule, he needed

only to look at the first page to ascertain the lieutenants' bid selections. At that point, Crose expressed surprise that a newly promoted lieutenant was able to have weekends off. In that regard, the County claims that Crose was not referring to Barber when he commented on a newly promoted lieutenant having weekends off, but was actually referring to Lt. Alfonso, who had been promoted to lieutenant on July 8, 2002, and had bid on and obtained weekends off. The County claims that Crose made no reference to working the day shift. The County contends that the reason why Crose eliminated one lieutenant post on the day shift and moved that post to the evening shift was to better balance the number of supervisors on each of those shifts and effectively enhance the level of supervision. The County asserts that six supervisors (four lieutenants, the administrative lieutenant and an administrative captain) constituted an overabundance of supervision on the day shift. The County claims that Crose determined that leaving three lieutenants to cover the evening and night shifts was inadequate.

A review of exhibits A and B attached to the SOA's November 4, 2002 reply brief shows that the Saturday and Sunday slots on the evening shift have now been permanently filled by a lieutenant as the result of the elimination of the fourth lieutenant on the day shift. Additionally, one fewer lieutenant is assigned to a mandatory 16-hour workday on Mondays and three lieutenants are assigned to cover the Friday, Saturday and Sunday slots on the midnight shift through the use of mandatory overtime assignments which were previously left uncovered.

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 SOA asserts that the elimination of the fourth lieutenant from the day shift constitutes a unilateral change in terms and conditions of employment which requires the County to engage in collective negotiations prior to implementing the modification. The SOA cites Bd. of Ed. of Woodstown-Piles Grove v. Woodstown-Piles Grove Ed. Assn. 81 N.J. 582 (1980) for the proposition that the New Jersey Supreme Court has adopted a balancing test requiring that the "nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives." Id. at 589-591. The Court further held "[w]hen the dominate issue is [a governmental policy] goal, there is no obligation to negotiate. . . ." Id. at 591. However, "[i]t is only when the result of bargaining may significantly or substantially encroach upon the



management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions." Id at 593. Applying Woodstown-Pilesgrove, the SOA argues that the elimination of the fourth lieutenant's slot on the day shift, at most, resulted in the filling of two additional lieutenant's slots on the evening shift. The SOA asserts that such a minor operational change, when weighed against the employees' interest in preserving shift bidding opportunities does not constitute an exercise of a managerial prerogative and, therefore, must be negotiated prior to its implementation.

The County contends that its actions were reflective of a change in its operational structure and constitutes an exercise of its managerial prerogative. The County asserts that since the last bid for shift and post slots, one of the County's correctional facilities was closed and its inmate population has contracted by approximately 450. The County contends that the change has resulted in improvements in the level of supervision on both the evening and midnight shifts. The County asserts that its elimination of one lieutenant on the day shift improved its current operational and supervisory structure in which it found itself to have been overweighted with supervision on the day shift.

While I do not make a final determination regarding whether the County has properly exercised its managerial prerogative when it went from four to three lieutenants on the day shift, certain aspects appear to be uncontroverted. The operational structure of

the County's correctional facilities has been changed by the closure of one of its correctional facilities. The inmate population has significantly decreased. Two slots on the evening shift and three slots on the midnight shift have been filled by lieutenants, apparently as the result of the elimination of one lieutenant serving on the day shift and being reassigned to the evening shift. Consequently, it appears that the County's action may have enhanced its supervisory coverage on the evening and midnight shifts. Actions taken which are designed to enhance the level of supervision constitute an exercise of management prerogative. See Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App Div. 1979), certif. den. 82 N.J. 296 (1980).

In this matter, it appears that the County's underlying rationale for implementing the change in the number of lieutenants who may bid for the day shift may implicate the exercise of a managerial prerogative. Consequently, at this early stage of the proceeding it appears that the charging party has not demonstrated that it has a substantial likelihood of prevailing in a final Commission decision with respect to the claim that the County has unilaterally changed terms and conditions of employment. See N.J. Division of State Police, I.R. No. 2001-7, 27 NJPER 155 (¶32053 2001).

The SOA also contends that the County modified the shift schedules for the purpose of removing SOA President Barber from the day shift and, thereby, preventing him from having access to the

correctional facility at the same time that Director Crose is present in violation of 5.4a(3) of the Act. The SOA asserts that upon reviewing the proposed schedule prepared by Sergeant Bonito, Crose immediately stated "how can a lieutenant with only six-months on the job have days and weekends off." Crose is also alleged to have said "every single time I got promoted, I went backwards." The SOA then claims Crose said that "this is unacceptable."

The County denies that Crose made the statements which the SOA alleges. The County asserts that when Crose examined Bonito's proposed 2002 schedule for lieutenants, he was able to immediately determine that there were too many lieutenants assigned to the day shift and not enough coverage on the other shifts. The County claims that while Crose expressed his surprise that a newly promoted lieutenant was able to have weekends off, such comment was directed toward Lt. Alfonso, who had just been provisionally promoted to lieutenant on July 8, 2002, and not toward Lt. Barber, who had held the lieutenant's position since November 2001, well over six-months.

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association, 95 NJ 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee

engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

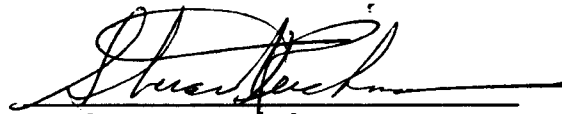
The assessment of the employer's motivation in determining whether it has violated a(3) of the Act is critical. However, by its very nature, establishing the employer's motivation is a fact intensive exploration and does not readily lend itself to a grant of interim relief. A determination concerning whether the County was motivated to change the number of lieutenant slots available on the day shift because Barber engaged in protected activity will ultimately be made by a hearing examiner or the Commission at the conclusion of a plenary hearing. However, at this juncture, it is premature to make such a determination as to the County's motivation and, therefore, the SOA has not established a likelihood of success on its a(3) claim. Somerset Hills Bd. of Ed. I.R. No. 2001-9, 27 NJPER 208 (¶32071 2001). See also Woodbridge Tp. I.R. No. 2000-8, 26 NJPER 163 (¶31063 2000).

There appears to be a fundamental and material factual dispute with respect to the SOA's a(3) claim. The SOA contends that Crose made certain statements which it relies upon to demonstrate the County's discriminatory motivation. The County contends that such statements were never made. While the County concedes that Crose did make certain statements, the parties disagree regarding whether those statements were directed toward Barber or another employee. Consequently, regarding the SOA's 5.4a(3) claim, in light

of the material factual disputes which exist, the Association has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Franklin Bor. I.R. No. 2001-1, 26 NJPER 346 (131136 2000). Consequently, for the reasons expressed above, I decline to grant the SOA's application for interim relief. This case will proceed through the normal unfair practice mechanism.

ORDER

The SOA's application for interim relief is denied.



Stuart Reichman  
Commission Designee

DATED: December 10, 2002  
Trenton, New Jersey

