

I.R. NO. 2002-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Respondent,

-and-

Docket No. CO-2002-310

UNION COUNTY CORRECTIONS
PBA LOCAL 199,

Charging Party.

SYNOPSIS

In or about May 2001, the County of Union entered into a contract with Delaney House to provide drug rehabilitation services to inmates housed in the County jail. Inmates needed to be transported to Delaney House's Newark location; the County assigned corrections officers to perform that work. In June 2002, the County reassigned the transport work to sheriff's officers, who are included in a different collective negotiations unit. PBA Local 199, the corrections officers' exclusive representative, filed an unfair practice charge, accompanied by an application for interim relief, alleging that corrections officers exclusively performed the transport work and sought an order enjoining the County from reassigning the transport work to sheriff's officers before the County and PBA Local 199 completed negotiations relative to the shifting of unit work. The Commission Designee balanced the facts and issues presented in this case pursuant to City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998) and found that the employee interest outweighed the governmental policy interest thus requiring the County to negotiate with PBA Local 199 before it shifted the unit work to sheriff's officers. The Designee also found that the same result obtained if analyzed under the unit work rule test. The Designee granted PBA Local 199's application for interim relief and enjoined the County from shifting the unit work until negotiations on that issue were complete.

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Appearances:

For the Respondent
Schenck, Price, Smith & King, attorneys
(Douglas S. Zucker, of counsel)

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

INTERLOCUTORY DECISION

On May 16, 2002, the Union County PBA Local No. 199 (PBA) 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. 34:13-5.4a(1), (3), (5) and (7).^{1/} The PBA alleges that the County unilaterally altered

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

terms and conditions of employment during interest arbitration by improperly shifting unit work involving transport posts from the collective negotiations unit which includes corrections officers to a different unit which includes sheriff's officers. The unfair practice charge was accompanied by an application for interim relief. On May 17, 2002, I executed an order to show cause and set a return date for June 12, 2002. The PBA seeks the return of the transport assignment to corrections officers. The parties submitted briefs, affidavits, and exhibits in accordance with Commission rules and argued orally on the scheduled return date. The following facts appear.

The County and the PBA are parties to a series of collective negotiations agreements, the last of which expired on December 31, 2000. The parties have engaged in successor negotiations, including interest arbitration. The interest arbitrator has issued an award which is currently on appeal before the Commission.

1/ Footnote Continued From Previous Page

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."

Prior to April 1, 2001, the County operated two correctional facilities. These facilities were next to each other and the movement of inmates between the "Old Jail" and the "New Jail" was overseen by correction officers. On or about April 1, 2001, the County closed the old jail, except for the third and fourth floors, and transferred most of the corrections officers assigned to the "Old Jail" to the "New Jail."

Also, on or about April 1, 2001, the County entered into a contract with the Delaney House to provide drug rehabilitation services to inmates. Delaney House is located in Newark and the County transports inmates from the jail to Delaney House to receive rehabilitation services. Prior to April 2001, the County provided only in-house (inside the jail) rehabilitation services to prisoners. Consequently, when the County began using Delaney House's services, it was required to develop a means to transport inmates from the jail to Delaney House's Newark location. From the outset of the contract with Delaney House, the County assigned the responsibility of transporting prisoners to corrections officers. Corrections officers performed this function exclusively until approximately June 3, 2002. Other than moving inmates between jails and transporting inmates to Delaney House, corrections officers rarely performed routine transport services. Corrections officers transported prisoners in emergency situations or where the movement of prisoners was necessary to maintain order

within the jail. Most other routine transport services have historically been performed by sheriff's officers.^{2/}

From the beginning of the Delaney House contract, corrections officers assigned to transport the inmates were considered temporarily assigned to "administrative positions" in accordance with the collective agreement. The PBA previously filed an unfair practice charge (Docket No. CO-2001-314) contesting the County's classification of these transport positions as temporary, administrative positions and asserted that such positions must be included in the seniority pick system detailed in the collective agreement.^{3/} In November 2001, the next contractually mandated pick was scheduled among corrections officers and, since corrections officers were continuing to perform the Delaney House transport function, the County included the four transport posts in the pick. Post picks are conducted annually. (collective agreement, Article 14, section 5(c)).

^{2/} I take administrative notice of the certification submitted by Frank M. Crose, Director of the Division of Correctional Services for Union County, dated May 31, 2001, submitted in connection with Docket No. CO-2001-314, wherein he indicates that "prior to April 1, 2001, the Jail has two transportation posts which were considered administrative posts not filled by seniority." (Crose certification, p. 9). These transport posts were filled by corrections officers.

^{3/} While I denied the PBA's application for interim relief in that matter, I.R. No. 2001-16, 27 NJPER 273 (¶32098 2001), the unfair practice charge is currently being processed in normal course.

In or about October 2001, the County advised the PBA that the Delaney House transport assignment would be temporary and that such responsibility would ultimately be transferred to sheriff's officers. In May 2002, the County officially notified the PBA that it intended to reassign the Delaney House transport work to sheriff's officers. In correspondence dated May 13, 2002, the PBA advised the County that it objected to "unilaterally shifting unit work such as the transport posts . . . without negotiations . . . especially when such modifications occurred during the pendency of negotiations or interest arbitration proceedings." [Letter from PBA Attorney Bukosky to County Attorney Hatfield, dated May 13, 2002]. In that letter, the PBA demanded negotiations over the shifting of unit work to sheriff's officers. The transfer of the transport assignment to sheriff's officers has not resulted in any loss of corrections officers' jobs. Transportation of prisoners is not mentioned in the corrections officers' collective agreement. The County has taken the position that it need not engage in collective negotiations with the PBA concerning the shift of the transport assignment from corrections officers to sheriff's officers.

The Department of Personnel job specification for County corrections officer states, in relevant part, that corrections officers "[escort] a group of inmates during movements within or outside the institution to prevent disorder or breaches in security." The job specification for sheriff's officer states, in

relevant part, that a sheriff's officer "may operate a motor vehicle for transporting prisoners to various locations" and "is responsible for the care, custody and security of prisoners while being transported to various locations." Both job specifications contain the following language:

NOTE: The examples of work for this title are for illustrative purposes only. A particular position using this title may not perform all duties listed in this job specification. Conversely, all duties performed on the job may not be listed.

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).

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the Supreme Court analyzed the transfer of unit work issue under the unit work rule and the balancing test set forth in Local 195, IFPTE, 88 N.J. 393 (1982).

Under the unit work rule, the shifting of work from employees within a particular negotiations unit to other public employees outside of the unit is a mandatorily negotiable subject of negotiations. An employer has an obligation to negotiate with the majority representative before shifting work to employees outside of the unit. Id. at 575. The rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable. The exceptions apply where (1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit personnel, and (3) the municipality is reorganizing the way it delivers government services. Id. at 577.

The County argues that the unit work rule is inapplicable to the present facts and, therefore, the County has no obligation to negotiate with the PBA concerning the transfer of the transport assignment. The County asserts that it incurs no negotiations obligation since the transfer of the transport assignment will not cause job losses among corrections officers. The PBA contends that because no corrections officers' positions are immediately eliminated, work removed from the corrections officers' unit may allow the employer to refrain from filling positions it would otherwise have to fill.

In Jersey City, the Supreme Court stated the following regarding the unit work rule:

Typically, the rule applies to require collective bargaining before workers in the bargaining unit

are replaced by non-unit workers, the objective being to provide the union with at least an opportunity to negotiate an acceptable alternative, one that would not result in loss of jobs and reduction in union membership. In this matter, no job losses are contemplated because the police officers performing non-police duties are being reassigned to police work. Their replacements, however, cannot be represented by the unions, which represent only police officers, and thus the possible reduction in union membership is merely coincidental. Accordingly, the concerns that inspired the unit work rule are not fully implicated in Jersey City's plan to reorganize the police department. [Id. at 576.] (emphasis added).

Thus, in Jersey City, the Supreme Court recognized that since job losses were not expected to occur, concerns over job loss were not "fully implicated." Yet, the Court did not find that the unit work rule was wholly inapplicable. Accordingly, it appears that the unit work rule is applicable under the facts of this case. The unit work rule continues to apply even in circumstances where a transfer of claimed unit work may not result in immediate diminution of the collective negotiations unit. Consequently, it appears that the PBA has met its burden of showing that the unit work rule may apply in this case by claiming that it has exclusively performed the Delaney House transport work for a substantial period of time and showing that it sought to negotiate with the County before transferring the work to other public employees in a different collective negotiations unit.

In the alternative, the County argues that even if the unit work rule applies, the County still would not have an obligation to negotiate with the PBA concerning the transfer of the transport

assignment. The County contends that under the exceptions to the unit work rule, it incurs no negotiations obligation. The County asserts that the PBA has waived its right to negotiate over the transfer of unit work. The County argues that from the outset of the assignment when it entered into a contract with the Delaney House in April 2001, the PBA was on notice that the transport assignment was temporary. As a consequence of the County's determination of the temporary nature of the assignment, it exempted the transport posts from the bidding procedure reflected in the PBA's collective agreement. The PBA then filed an unfair practice charge (Docket No. CO-2001-314) challenging the County's action. Additionally, the County claims that it advised the PBA again in October 2001, that the transport post assignment for corrections officers continued to be temporary and that the responsibility would ultimately be transferred to sheriff's officers.

The PBA denies that it has waived its right to negotiate. It contends that it has contested the County's initial assignment of the transport posts as temporary and exempt from the seniority bid process when it filed its unfair practice charge in Docket No. CO-2001-314. Moreover, nothing contained in the collective negotiations agreement serves to relinquish its right to continue to perform the transport assignment.

A waiver can come in a number of different forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). The County's contention that it

consistently told the PBA that the assignment was temporary both in April and in October 2001, does not constitute a legal waiver of the PBA's right to seek negotiations in this case. The County's expressed intention to transfer the transport work may or may not have materialized. Consequently, it appears that the PBA's determination to file this unfair practice charge upon the actual transfer of the work to be a timely expression of dispute and dispositive of its intention not to waive its right to seek negotiations. See Tp. of Riverside, P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994).

The County claims that historically, prisoner transport was not within the exclusive province of the corrections officers. The County asserts that sheriff's officers have historically been responsible for routine transportation of prisoners outside of the jail. The County further relies upon the job descriptions for corrections officers and sheriff's officers in support of its argument that sheriff's officers are responsible for routine transportation of inmates. Finally, the County claims that prior to April 2001, the initiation of the Delaney House contract, corrections officers did not transport prisoners outside of the jail. The PBA asserts that for approximately 14 months, it has exclusively been transporting prisoners between the jail and Delaney House. It argues that transporting prisoners to the Delaney House is no different than transporting inmates within the jail facility.

There is no dispute that corrections officers have been exclusively assigned the transport responsibility of inmates between the jail and Delaney House for 14 months. While it is also clear that sheriff's officers are responsible for performing much of the other routine inmate transportation outside of the jail, it is equally clear that corrections officers have performed some inmate transport work. It appears that historically the Delaney House transport function has been within the exclusive province of the corrections officers. Moreover, in light of Crose's May 31, 2001 certification submitted regarding Docket No. CO-2001-314, it is questionable whether all inmate transport outside of the jail has been performed only by sheriff's officers. Further, the job descriptions do not appear to resolve the issue of whether only sheriff's officers perform inmate transport outside of the jail. Neither job description contains a complete recitation of duties performed by corrections officers and sheriff's officers and neither appears to preclude the transport responsibility from properly being assigned to either job title.

The County contends that the reassignment of transport duties to the sheriff's officers is part of an organizational restructuring that included consolidation of most of the operations from the old jail to the new jail. The restructuring also included implementation of the Delaney House rehabilitation program. The County argues that prior to the Delaney House contract, inmates received rehabilitation services in the jail where the inmate was

housed. With the initiation of the Delaney House contract, drug rehabilitation services were then provided to inmates at Delaney House's Newark location. The County asserts that the reassignment of the transport work to sheriff's officers does not result in a significant cost savings.

The PBA asserts that the County's claim that the transport work was transferred as the result of a reorganization and consolidation of operations into the new jail merely constitutes a ". . . parroting of the traditional managerial defenses which employer's claim to insulate [themselves] from the consequences of merely transferring and reassigning work from one unit to another without prior negotiations." (PBA reply brief, June 7, 2002). The PBA contends that the County has not identified an operational justification flowing from the transfer of the transport assignment.

In Monroe Tp. Fire Dist. #2, P.E.R.C. No. 98-158, 24 NJPER 347, 350 (¶29165 1998), the Commission said:

. . . where an employer has exercised its managerial right to reorganize the way it delivers government services it may, by necessity, be able to transfer job duties to non-unit employees without incurring a negotiations obligation.

However, ". . . 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." Jersey City 154 N.J. at 578-579. Where the Commission finds that a claimed reorganization is nothing more than

a shifting of work out of the unit, prior negotiations between the employer and employee representative are required. Thus, unless at least one of the three exceptions to the unit work rule is present, the employer must negotiate the transfer of work between units before such action is effectuated.

In this case, the County's actions were not taken pursuant to a formal study conducted by a management consulting firm, as was the case in Jersey City. Moreover, while the County claims that its actions are for purposes of consolidation and reorganization, clearly management prerogatives, it gives no specifics regarding how the work transfer has affected the delivery of government services. Having found that the PBA appeared to have met its burden of showing that the unit work rule obtained, the County now bears the burden of offering some demonstration of how its action -- the transfer of the inmate transport assignment from corrections officers to sheriff's officers -- accomplishes the asserted goal of improving performance or service delivery effectiveness. Absent such specifics, the County's claim of managerial prerogative may constitute a hollow contention. The closure of most of the old jail, the "ramping up" of full operations at the new jail, and the initiation of drug rehabilitation services by Delaney House occurred approximately 14 months ago, contemporaneously with the transport assignment to corrections officers. The County has identified no change in the delivery of governmental services at or around the time of the work transfer in May 2002, that would appear to implicate the reorganization exception to the unit work rule.

In Local 195, the Supreme Court detailed the fundamental test for the negotiability of subjects between public employers and employees. The Court stated that:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of 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 the policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405.]

Jersey City requires application of a balancing test in light of the facts and issues presented in each case. As was the case in Jersey City, and for the same reasons in this case, the first prong of the Local 195 test appears to be met. Corrections officers had been exclusively performing this work for 14 months. Corrections officers bid on the transport job with the expectation of continuing in the job for one year, as provided by the collective agreement. Apparently, the County's claim that the posts were temporary did not deter corrections officers from bidding on the job since the County had expressed the same claim six months earlier, yet the County subjected the posts for bid in accordance with the terms of the agreement. Further, the PBA is intimately affected by the County's transfer of the posts relative to its interest in

maintaining unit size. Removal of the transport assignment from the corrections officers' unit could also negatively impact on overtime assignments and employee work schedules. Thus, the transfer of the transport assignment appears to intimately and directly affect the work and welfare of the corrections officers.

The second prong of the Local 195 test does not appear to be implicated. There has been no claim that the matter at issue here has been fully or partially preempted by statute or regulation.

Regarding the third prong of the Local 195 test, the determination of 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. [Local 195, 88 N.J. at 405].

For the reasons expressed above, it appears that the transfer of the transport assignment from corrections officers to sheriff's officers seems to be more in the nature of a substitution of ". . . one person for another without changing the structure or nature of the job[, which] . . . does not per se eliminate 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 (¶27131 1996). The corrections officers wish to continue performing the transport assignment for which they bid. They have a legitimate expectation

under the terms of the collective agreement to continue in that assignment for one year. It is in the PBA's interest to seek the maintenance of the size of the unit. On the other hand, there does not appear to be a clear expression of the County's policy goal necessitating the unilateral transfer of the transport assignment, nor the manner in which the transfer has affected the delivery of governmental services. On balance, it appears that the interests of the corrections officers prevail over the County's desire to have sheriff's officers now perform the transport work.

Thus, it appears that whether this case is analyzed by applying the unit work rule or the Local 195 test, the same conclusion is obtained. It appears that the County has incurred an obligation to negotiate over the reassignment of the transport work from corrections officers to sheriff's officers. Accordingly, it appears that the PBA has established the requisite likelihood of success needed to obtain interim relief.

The parties are currently proceeding through the statutorily-provided interest arbitration process. The interest arbitrator's award is currently on appeal before the Commission in accordance with N.J.S.A. 34:13A-16f(5)(a). The Act expressly prohibits any change in terms and conditions of employment while parties are engaged in the interest arbitration process. N.J.S.A. 34:13A-21. See Borough of Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), mot. for recon. denied P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002); Roseland Boro., I.R. No. 2000-11, 26 NJPER 191

(¶31077 2000); Borough of Bogota, I.R. No. 98-23, 24 NJPER 237 (¶29112 1998). The interest arbitration proceeding remains within the Commission's jurisdiction. Accordingly, I find that the PBA has established irreparable harm in light of the pending status of the interest arbitration proceeding.

In weighing the relative hardships to the parties resulting from the grant or denial of interim relief, I find that the scales tip in favor of the PBA. I find that the "balance of hardships" element for granting interim relief warrants particular emphasis in determining whether interim relief is appropriately granted in this case. Corrections officers have been exclusively performing the inmate transport assignment for 14 months. There is no claim that corrections officers have performed the assignment inadequately, nor is there any claim on behalf of the employee organization representing sheriff's officers (Sheriff's officers of Union County, PBA Local No. 108) that this transport assignment should be performed by sheriff's officers. The County does not contend that the transport function will be negatively impacted in any way as the result of corrections officers continuing to perform that assignment. Alternatively, the corrections officers who have successfully bid on the transport assignment in November 2001 must now relinquish that position and bid on another job. Under the terms of the collective agreement, they appear to have a legitimate expectation that the post would continue for one year. The change of assignment for affected employees may result in changes in

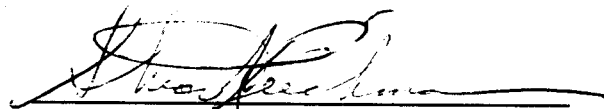
schedule and overtime opportunities. The County appears to suffer no harm as the result of maintaining the status quo ante until the charge is resolved.

The public interest is not injured by the granting of an interim relief order in this case. The County has indicated that there is no cost issue present. Further, by continuing to have corrections officers perform the transport duty, the public continues to be adequately protected by trained personnel overseeing the custody of incarcerated individuals. Moreover, the public continues to benefit from the delivery of drug rehabilitation services to eligible inmates. The public interest is also fostered by requiring the County to adhere to the tenets of the Act.

The above-captioned matter will proceed through the normal unfair practice processing mechanism.

ORDER

The County is restrained from transferring the inmate transport function between the jail and Delaney House out of the corrections officers' collective negotiations unit until negotiations are completed. This interim order will remain in effect pending a final Commission order in this matter.



Stuart Reichman
Commission Designee

DATED: June 28, 2002
Trenton, New Jersey

