

I.R. NO. 2003-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF HUDSON (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2003-178

PBA LOCAL 109,

Charging Party.

SYNOPSIS

PBA Local 109 alleged that the County of Hudson violated the specific terms of a previously issued Litigation Alternative Program award, the collective agreement and past practice by changing the seniority-based bidding procedure used to fill positions at the County's corrections facilities. The PBA contends that the change in the bidding procedure resulted in the most senior corrections officers not obtaining the shift, post and days off to which they were entitled. The County argues that it complied with the LAP award, the collective agreement and past practice by following a bidding procedure that allowed for senior employees to select their shift, but no practice existed which provided for employees to bid on a post or days off. The Commission designee found that substantial and material factual disputes existed causing the Charging Party to be unable to establish a likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. The PBA's application for interim relief was denied.

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Appearances:

For the Respondent,
Scarinci & Hollenbeck, attorneys
(Sean Dias, of counsel)
(Peter A. Tucci, Jr., on the brief)

For the Charging Party,
Griffin & Griffin, attorneys
(Robert C. Griffin, of counsel)

INTERLOCUTORY DECISION

On January 17, 2003, The Policeman's Benevolent Association, Local 109 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the County of Hudson (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) and (5).^{1/} The PBA's unfair practice charge alleges that

^{1/} These subsections prohibit public employers, their representatives of agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to
(continued...)

the County acted contrary to the specific terms of a previously issued Litigation Alternative Program (LAP) award by changing the bidding procedure used to fill positions at the County's correction facility. The PBA asserts that the change in the binding procedure resulted in senior corrections officers not obtaining the shift, post and days off to which they are entitled.

The unfair practice charge was accompanied by an application for interim relief and sought a temporary restraining order. On January 24, 2003, I heard oral argument on the Charging Party's application for temporary restraints. At the conclusion of oral argument, I denied the Charging Party's request. On January 27, 2003, I executed an Order to Show Cause on the Charging Party's application for interim relief and set a return date for February 28, 2003. Due to inclement weather on that date, all parties agreed to postpone the return date until March 4, 2003. The parties submitted briefs, affidavits, and exhibits in accordance

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

with the Commission's Rules and argued orally on the return date. The following facts appear.

PBA is the exclusive negotiations representative for all corrections officers below the rank of sergeant employed by the County. Historically, the work schedule pertaining to Hudson County corrections officers consisted of 4 days on and 2 days off (4/2). In the early 1990s, the County negotiated a change in the 4/2 work schedule to a 5 day on and 2 day off schedule (5/2). Some, but not all officers, moved from the 4/2 to the 5/2 work schedule. In October 2001, a dispute arose between the parties as the result of the County's announcement that it intended to unilaterally assign the 5/2 work schedule to all corrections officers. On October 17, 2001, the PBA filed an unfair practice charge (docket no. CO-2002-97). During the course of that proceeding, the parties engaged in discussions over the use of the Commission's Litigation Alternative Program in order to attempt to resolve the impact issues flowing from the change in the work schedule. A LAP umpire was appointed and proceeded to meet with the parties to address their dispute.

On December 24, 2002, the LAP umpire issued an award requiring the implementation of a 5/2 work schedule for all corrections officers at the Hudson County Correctional Facility. The LAP umpire stated:

With the exception noted below, I see no need to significantly alter the shift bidding criteria

currently in place simply because some corrections officers will be switching from a 4/2 to a 5/2 schedule. The current contractual shift bidding system and existing PERC precedent concerning the subject are more than adequate to facilitate annual shift bidding on the newly implemented 5/2 work schedule. Having said this, however, the following procedure discussed during the LAP proceeding for selecting shifts appears satisfactory to all parties, makes sense from a procedural stand-point, and is hereby awarded as follows:

Shift bids will be completed live or via telephone with one Union representative and one management representative present at all times. All corrections officers shall be given a date and time to report to make their selection. No officer shall receive additional compensation for appearing to make a shift selection. If a corrections officer fails to appear at the designated time and fails to call in to make a selection, despite having received prior notice to appear for selection, the union to which the officer belongs shall make the selection.

[LAP award, p. 30.]

Article XXVII of the collective negotiations agreement states, in relevant part, as follows:

Section 2. Officers may bid by seniority for choice of shift assignments. The County shall, however, at all times, have the right to assign officers as needed in order to guarantee such adequate manning levels as the County, in its sole discretion, shall determine. Assignments made under this Section shall not be subject to arbitration under this agreement.

Section 4. Except as noted below, job assignments become the responsibility of the officer. The County is not responsible for transporting officers to their assignments or getting officers to their assignments on time.

Section 5. Employees who are assigned to one work location and who report to that location will be

provided transportation if they are directed by a superior officer to report to another work location.

Article XXIII of the collective agreement states, in relevant part, as follows:

Section 2.

a. Subject to paragraphs b., and c., below, the County retains the sole right to determine where 5/2 and 4/2 schedules shall be utilized, and the County reserved the sole right to implement 5/2 and 4/2 schedules at any time and to determine the starting and ending days and time of each officer's 5/2 and 4/2 schedule. Unless the officer volunteers to the contrary and the County agrees, each 5/2 schedule officer shall be scheduled for 2 consecutive days off each 5/2 cycle. However, the County retains the full managerial discretion to schedule the 2 consecutive days off that the officer shall receive; that is, the County is not required to grant officers on the 5/2 work schedule weekends off.

b. Notwithstanding paragraphs (sic) a., above, the County agrees that any 5/2 schedule officer who as of November 9, 1995, was assigned to a duty post that has weekends off shall retain weekends off as long as the duty post remains in existence. The officer may be assigned by the County to any 5/2 schedule if said duty post is eliminated.

c. Notwithstanding paragraph a., above, whenever the County chooses to create a 5/2 work schedule for a duty post that involves weekends off, assignment to the duty post shall be based upon seniority, provided that the County determines that the employees' skills, abilities, experience, and other qualifications are equal.

The LAP award allowed the County to eliminate the 4/2 schedule and to move those corrections officers assigned to such

a schedule to be reassigned to a 5/2 schedule. As noted above, all corrections officers were to submit shift bids either live or via telephone. The PBA understood this process to allow the most senior corrections officer to be called in first to select the shift (e.g., 8 a.m. - 4 p.m., 4 p.m. - midnight, midnight - 8 a.m.), the post and the days off aligned with the particular post. Thereafter, the next most senior corrections officer would place his or her bid in the same manner, and the process would continue through the ranks on a descending order of seniority until completed. The PBA supports its contention by citing the HCCC Request Post Unit bid form. The form required the applicant, in relevant part, to fill in his/her name, title, current assignment (indicating the tour and tour commander), the position being applied for (showing the unit or shift and the tour commander.) It is the PBA's contention that the HCCC Request Post Unit bid form which calls for the employee to designate the position for which he/she is applying, allows the employee to know the post and days off of the position as well as the shift. The PBA asserts that knowledge of the post and days off represents the existing practice.

The County disagrees with the PBA's understanding of what constitutes the current practice and the process required to be followed pursuant to the LAP umpire's award. The County contends that corrections officers have not historically been permitted to

bid for either days off or posts. The County asserts that it is required to let officers bid only for shift assignments.^{2/} The County cites Article XXXVII, Section 2 of the collective agreement which states that "Officers may bid by seniority for choice of shift assignments." Additionally, the County cites Article XXIII, Section 2 a., which provides that ". . . the County retains the full managerial discretion to schedule the 2 consecutive days off that the officer shall receive"

The County contends that it complied with the LAP umpire's directive to conduct a "live bid" by having all officers, in person, submit a form designating their first three preferences for a shift.^{3/} The County asserts that the LAP umpire only required shift bids to be completed live or via telephone and the procedure it employed adhered to the umpire's directive. Upon receipt of the newly created bid forms, the County claims to have assigned shifts on the basis of the most senior employee receiving preference for his/her selection. The County supports its assertion that the current practice does not necessarily include the designation of specific posts or days off by citing

^{2/} The County appears to concede that at times, where the post and days off are known, such information may be designated on the posting.

^{3/} The County did not use the HCCC Request Post Unit bid form which had always been used in the past. It created a new bid form for this process which allowed corrections officers to list, in order of preference, the officer's shift selection.

certain memoranda regarding position vacancies which indicated that days off or posts would be established at the discretion of the tour commander or administration.

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).

There appears to be a number of aspects raised in this matter constituting substantial and material factual disputes. Evidently, all corrections officers were directed to appear at a particular place and time to submit their bids resulting from the conversion of all 4/2 schedules to 5/2. The County contends that this directive fulfilled the LAP umpire's requirement for a live bidding procedure. The PBA contends that in order to comply with the LAP umpire's directive of providing a "live" bidding process, the employee must be given the opportunity to select his/her shift, post and days off at the time of their appearance to

submit their bid. While clearly the LAP award mandates a live bid, it does not set forth the criteria required to satisfy that directive. On the basis of the record submitted at this juncture of the proceeding, I cannot and should not interject my own interpretation of the meaning of the LAP award's mandate to engage in "live" bidding, nor do I render a determination on whether that requirement was properly fulfilled.

There also appears to be a substantial and material factual dispute pertaining to the meaning of particular elements contained in the collective negotiations agreement and with regard to what constitutes the current practice. The PBA asserts that references in the collective agreement to "assignments" are synonymous with "posts" and it has been the practice to indicate the days off which are aligned with any given post. The County argues that reference in the collective agreement to "shift assignments" does not implicate "posts." The County contends that Article XXXVII, Section 2, which speaks to officers exercising their bids by seniority for "shift assignments," does not involve the designation of posts or days off.

Moreover, on this record, there does not appear to be a consistent practice with respect to corrections officers bidding for posts with known days off. Clearly, some memoranda (postings) submitted by the PBA designate particular posts and specific days off. However, other memoranda (postings) submitted

in this matter appear to indicate that a number of positions are available but do not designate either the post or the days off. Those postings indicate that either the tour commander or the administration will designate days off.

In any event, interim relief is denied in circumstances where disputes of material facts exist. See Union County, I.R. No. 2001-16, 27 NJPER 273 (¶32098 2001); City of Trenton, I.R. No. 2001-8, 27 NJPER 206 (¶32070 2001); Borough of Franklin, I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000); Tp. of Dover, I.R. No. 94-4, 20 NJPER 6 (¶25004 1993). In light of such substantial and material factual disputes, I find that the PBA has not established a likelihood of prevailing in a final Commission decision on its legal and factual allegations at this stage of the case.

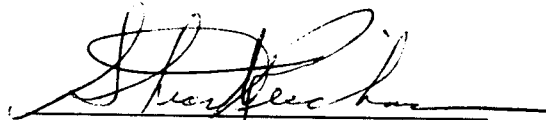
The parties both point to articles in the collective agreement and argue their meaning. Specifically, the parties differ on how the word "assignment" is to be interpreted. The Commission has refused to issue a Complaint on unfair practice charges where the alleged violation is dependent upon an underlying dispute arising out of the collective negotiations agreement. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). This part of the PBA's unfair practice charge appears to be essentially a contractual dispute which is properly resolved through the

parties' negotiated grievance procedure reflected in the collective agreement and not through the unfair practice mechanism. Thus, it may not be appropriate to resolve the contract interpretation dispute through the unfair practice mechanism.

Consequently, for the reasons discussed above, I find that the PBA 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. Accordingly, I decline to grant the PBA's application for interim relief. This case will be processed through the normal unfair practice mechanism.

ORDER

The PBA's application for interim relief is denied.



Stuart Reichman
Commission Designee

DATED: March 13, 2003
Trenton, New Jersey