

H.E. No. 2020-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-2019-137

HUDSON COUNTY PBA LOCAL 334,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the County's motion, and denies the PBA's cross-motion, for summary judgment. The PBA filed an unfair practice charge alleging that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (3), by transferring a Sheriff's officer and removing him from certain overtime lists. The Hearing Examiner finds that these claims were not filed within the six-month statute of limitations prescribed by N.J.S.A. 34:13A-5.4(c). Even assuming, arguendo, that the claim was timely with respect to the removal from certain overtime lists, the Hearing Examiner finds that the County was obligated to remove the Sheriff's officer from these overtime lists under subsections 5.4a(1) and (5) of the Act. The Hearing Examiner recommends that the complaint be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. No. 2020-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-2019-137

HUDSON COUNTY PBA LOCAL 334,

Charging Party.

Appearances:

For the Respondent, Donato Battista, Hudson County
Counsel (Nidara Y. Rourk, Assistant County Counsel)

For the Charging Party, Detzky, Hunter & DeFillippo,
LLC, attorneys (Stephen B. Hunter, of counsel)

**HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT**

On November 30, 2018, Hudson County PBA Local 334 (PBA) filed an unfair practice charge against the County of Hudson (County). The charge alleges that in May-August 2018, the County violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (3),^{1/} by retaliating against Sheriff's officer Juan Mendoza

^{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"; and "(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
(continued...)

(Mendoza) for engaging in protected activity and subjecting him to the following adverse actions:

-effective May 14, 2018, Mendoza was transferred from the Detective Bureau to the Cyber Crimes Unit;

-as of June 25, 2018,^{2/} Mendoza was removed from a list maintained by the Sheriff's Office regarding extradition assignments that cost Mendoza a substantial amount of overtime compensation; and

-on or about June 25, 2018, Mendoza was also removed from the overtime list for members of the Detective Bureau regarding early start trips, late trips, extradition-related assignments, and criminal and child support raids.

[PBA's Charge, ¶¶8(1-3); accord County's Br., Ex. 3.]

On June 24, 2019, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing. On July 10, 2019, the County filed a position statement dated February 11, 2019 and an Answer with Affirmative Defenses that was marked "DRAFT." During a pre-hearing telephone conference call on July 12, 2019, the County represented that the "DRAFT" had been filed in error and

1/ (...continued)
guaranteed to them by this act."

2/ In his certification, Mendoza clarified that he remained on the list maintained by the Sheriff's Office regarding extradition assignments from May 15, 2018 through August 21, 2018; and that he was removed from this list on August 21, 2018. See Mendoza Certification, ¶¶12, 15-16, 19.

requested additional time to submit a "FINAL" version.^{3/} On July 19, 2019, the County filed an Answer with Affirmative Defenses, specifically asserting a statute of limitations defense, denying the allegations in the charge, and maintaining the following:

-Mendoza was transferred out of the Detective Bureau based upon the needs of the County and the maximization of Mendoza's skills and experience as well as Mendoza's request to be transferred to the Cyber Crimes Unit;

-despite past practice that detectives are removed from the extradition list when they are transferred out of the Detective Bureau, the County attempted to accommodate Mendoza by entering into an agreement with the PBA that would allow him to remain on the extradition list but this created friction within the PBA membership and ultimately Mendoza was removed from the extradition list based upon the PBA's request;

-Mendoza has the opportunity to get overtime by conducting criminal raids, child support raids, and other overtime assignments that become available;

-Mendoza's primary assignment in the Cyber Crimes Unit is validating warrants and while validations were conducted by civilians in the past, Mendoza advised the County that it was not complying with New Jersey state regulations in allowing a civilian to perform warrant validations and volunteered to take on this task because warrant validations are a law enforcement assignment/position; and

-Per Article XI of the parties' CNA, the County has the discretion to transfer Sheriff's officers; noting that the Sheriff's Office is divided into two divisions - Operations (which includes the Detective

^{3/} The PBA did not object to the County's request.

Bureau and the Cyber Crimes Unit) and Courts - and that Undersheriff Conti has jurisdiction to transfer Sheriff's officers within division by memo or other means while Sheriff Schillari issues personnel orders when an officer is being transferred out of division.

[County's Answer, ¶¶8-10.]

On August 16, 2019, the County filed a motion for summary judgment, together with a brief, exhibits, the certification of Lieutenant Annette Rolon (Rolon), and the certification of Lieutenant Matthew Vogel (Vogel). On September 6, 2019, the PBA filed a cross-motion for summary judgment, together with a brief, exhibits, and the certification of Sheriff's officer Juan Mendoza (Mendoza). On September 13, 2019, the County filed a reply brief, exhibits, and the certification of Captain Jorge LaVerde (LaVerde).

On September 17, 2019, the Commission referred the cross-motions to me for a decision. N.J.A.C. 19:14-4.8(a). On October 21, 2019, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, I asked counsel to meet/confer with the parties regarding further mediation efforts. Ultimately, it became clear that it was necessary to render a decision with respect to the instant cross-motions for summary judgment because there was no mutual interest in mediation.

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. PBA Local 334 (PBA) represents Sheriff's officers employed by the County of Hudson (County), excluding superior officers, managerial executives, confidential employees, non-police employees, professional, Academy/trainees and craft employees, and all others. See 2016-2020 CNA, Art. I.
2. The County and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2016 through December 31, 2020. See 2016-2020 CNA, Art. XXXI.
3. Article VIII of the parties' CNA, entitled "Overtime," provides in pertinent part:

(G) When the need for overtime occurs in a particular unit within a division of the Sheriff's Office, it shall be accomplished by members of that unit where possible. If the need for overtime cannot be met by members of that unit, it shall be filled by members of the division.

(H) In emergent situations, where overtime cannot be filled by members of the division, it shall be assigned out of division with the approval of the Sheriff or his designee.

(I) Unit and division commanders shall make all attempts to keep overtime equitable, i.e., use of a rotating list when possible.

4. Article XI of the parties' CNA, entitled "Management Rights," provides in pertinent part:

(B) Without limitation of the foregoing, the following subjects are within the managerial rights of the County and Sheriff and shall not at any time be subject to negotiation or review under the grievance and arbitration procedure contained in this Agreement:

. . .3. The right to promote, transfer, demote, reassign and lay off employees, subject to Department of Personnel rules and regulations.

. . .6. The right to evaluate jobs, and to establish new assignments, modify or combine existing assignments, and to reassign duties from assignment to assignment, regardless whether such assignments are within or without the PBA Collective Negotiations unit to the extent consistent with Department of Personnel job description for the affected positions consistent with the Sheriff Officers series.

5. Annette Rolon (Rolon) is employed by the County as a Sheriff's officer and has been assigned to the Detective Bureau since 2011. In 2012, Rolon was promoted to the rank of Lieutenant. In 2014, Rolon was assigned a supervisory position in the Detective Bureau. As part of her duties as a Lieutenant in the Detective Bureau, Rolon assigns and coordinates extradition details, child support warrant raids, and criminal warrant raids. See Rolon Certification, ¶¶1-4.
6. Jorge LaVerde (LaVerde) is employed by the County as a Sheriff's officer and has been assigned to the Detective

Bureau since 2016. In 2016, LaVerde was promoted to the rank of Lieutenant and was assigned a supervisory position in the Detective Bureau. As part of his duties as a supervisor in the Detective Bureau, LaVerde assists with assigning and coordinating extradition details, child support warrant raids, and criminal warrant raids. In 2019, LaVerde was promoted to the rank of Captain. See LaVerde Certification, ¶¶1-4.

7. Matthew Vogel (Vogel) is employed by the County as a Sheriff's officer within the rank of Lieutenant. In May 2018, Vogel was a supervisor in the TAC^{4/} unit. See Vogel Certification, ¶¶1-2.

8. Juan Mendoza (Mendoza) has been employed by the County as a Sheriff's officer since September 1999. He was assigned to the Detective Bureau from January 2008 until May 14, 2018. See Mendoza Certification, ¶1.

9. On April 27, 2015, Mendoza sent a memorandum to Sergeant Alfred Crawford (Crawford) requesting that he be transferred from the Detective Bureau to the Cyber Crimes Unit. The memorandum provides:

I respectfully request to return to my regular detective bureau duties (court writs, transports, etc.) and removed from investigations, or request to be assigned to

^{4/} TAC unit is synonymous with, and used interchangeably for, the Cyber Crimes Unit.

TAC under the command of Sgt. Vogel. I feel my training and experience is better utilized to train the department personnel in the areas of CJIS, Promis-Gavel, CODY and Warrant Complaints.

[County's Br., Ex. 6 (emphasis added).]

10. Mendoza certifies that the sole reason for his request to be transferred in 2015, which was not granted, related to his contention that Captain Czerwinski had prevented Mendoza from properly conducting investigations within the Detective Bureau. See Mendoza Certification, ¶23.
11. Mendoza has been a PBA Executive Board member since June 23, 2017 and the PBA's Treasurer since June 2018. He previously served as the PBA's Alternate State Delegate. He also served as the PBA's State Delegate from January 2019 through June 2019. See Mendoza Certification, ¶2.
12. Mendoza has filed numerous grievances on behalf of PBA members, including himself, and has represented PBA members during grievance hearings. See Mendoza Certification, ¶¶2-3.
13. Some of Mendoza's PBA-related activities include the following (compare Mendoza Certification, ¶¶4-10 with County's Answer, ¶¶7(a-c)):
 - a. On March 14, 2018, Mendoza received money related to a grievance he had filed on his own behalf regarding the non-payment of overtime for certain extradition assignments. See Mendoza Certification, ¶7.

- b. On or about April 25, 2018, Mendoza filed a grievance regarding the non-payment of hours for certain extradition assignments. Also on April 25, 2018, Mendoza filed a grievance on behalf of K-9 officers after receiving several complaints. See Mendoza Certification, ¶¶8-9.
 - c. On May 7, 2018, a large group of detectives was notified that their overtime rights had been reinstated due to Mendoza's filing of a grievance on their behalf relating to a "change in uniforms" directive from the Sheriff; overtime had been stopped by the Undersheriff because of Mendoza's complaints and grievances on behalf of this group of detectives. See Mendoza Certification, ¶4.
 - d. On May 10, 2018, Mendoza represented Sheriff's officer Jennifer Nevilles (Nevilles) at a departmental hearing regarding an extradition-related grievance that had been filed on her behalf. Ultimately, the grievance resulted in Nevilles being compensated for overtime that had been denied to her previously. See Mendoza Certification, ¶5.
 - e. In May 2018, Mendoza represented Sheriff's officer Thomas Destasio (Destasio) in a transfer-related matter. See Mendoza Certification, ¶6.
14. On May 7, 2018, Captain Anthony DeGennaro (DeGennaro) sent a memorandum to Lieutenant Vogel, with a copy to Mendoza, providing notice that Mendoza was being transferred from the Detective Bureau to the Cyber Crimes Unit. The memorandum provides:

Effective May 14, 2018, Det. J. Mendoza will be answering directly to you as a TAC officer. His assignments will be dictated by you and may change on an as needed basis. He will be assigned to work out of your office. Det. Mendoza will no longer be utilized by the Detective Bureau for trips, extraditions, etc. Det. Mendoza can switch into the uniform of the day for the TAC unit, but must maintain the Class "B" uniform of the day as

is required by policy. Det. Mendoza's excellent work as described to me after the audit shows how this will be a great fit for him and the agency. I look forward to additional success with Det. Tzoumas, Det. Mendoza, and yourself within this unit for the foreseeable future.

[County's Br., Ex. 2 (emphasis added); accord County's Answer, ¶8(a).]

15. On May 7, 2018, then-Lieutenant LaVerde was advised that Mendoza would be assigned to the TAC unit, effective May 14, 2018. Before being assigned to the TAC unit, Mendoza handled many duties related to the TAC unit, including training for CJIS, AOCTELE, and E-CDR.^{5/} See LaVerde Certification, ¶¶7-8.
16. On May 7, 2018, Lieutenant Vogel was advised that Mendoza would be assigned to the TAC unit, effective May 14, 2018. See Vogel Certification, ¶3.

^{5/} On April 26, 2017, Mendoza sent a memorandum to then-Lieutenant LaVerde that provides:

I respectfully request to continue to conduct CJIS and AOCTELE training of the Court Bureau Personnel at the administration building. These required trainings are crucial in maintaining proficiency and compliance of NJCJIS/NCIC policies and regulations. The trainings will also assist the personnel in the daily processing of individuals and the use of these systems to create a safer environment for all staff.

[County's Br., Ex. 7 (emphasis added).]

17. On May 7, 2018, Lieutenant Rolon was advised that Mendoza would be assigned to the TAC unit, effective May 14, 2018. Rolon became aware that Mendoza had requested to remain on the extradition assignment list despite his transfer from the Detective Bureau, and that the Sheriff's Office consented to Mendoza's request. See Rolon Certification, ¶¶7-8; accord County's Answer, ¶8(b); County's Br., Exhs. 4-5.
18. As a past practice, extradition assignments were given exclusively to detectives assigned to the Detective Bureau. Overtime assignments for child support warrants and criminal warrant raids are offered to Detective Bureau officers first, and if additional officers are needed, overtime assignments would be offered to officers not assigned to the Detective Bureau. This past practice has been in effect since at least 2014. See Rolon Certification, ¶¶5-6; accord LaVerde Certification, ¶¶5-6; 2016-2020 CNA, Art. VIII.
19. On May 14, 2018, Mendoza was transferred from the Detective Bureau to the Cyber Crimes Unit. See Mendoza Certification, ¶¶1, 3, 11; accord County's Answer, ¶¶8(a), 10; 2016-2020 CNA, Art. XI.
20. On May 15, 2018, Mendoza sent a memorandum to Captain DeGennaro requesting certain accommodations related to his transfer. The memorandum provides:

I was recently notified that I will be assigned to the "TAC" unit on May 14, 2018. I have been assigned to the Detective Bureau since 2008. I did not request this recent change, even though it was requested in 2015. Most of my knowledge and traits in being assigned to the Detective Bureau has a huge benefit to that unit. All warrants in which I validate are entered and modified within that unit. It is also my understanding that I will be assigned "TAC" responsibilities. I respectfully request a modification to the written change. I still would like to remain in the Extradition list, due to my pending grievances. This is the second attempt of removing me from the extradition list, on the first attempt when I was assigned to investigations, an agreement was made that I remain on the extradition list, while still conducting investigations. I still would like to have the option to volunteer on overtime if needed, especially during raids and if caught up on validations. I also would like to remain part of that unit along with the "TAC" assignment so both units can benefit from my experience and training. It's also my understanding that my time card will still be modified by Lt. Laverde.

[County's Br., Ex. 4; accord County's Answer, ¶¶8(a-b), 10; County's Br., Ex. 5; 2016-2020 CNA, Art. XI.]

21. The PBA, with Mendoza's agreement, decided not to file an unfair practice charge concerning Mendoza's reassignment to the Cyber Crimes Unit as long as he continued to be able to wear his detective badge and receive the stipend of a Detective Bureau representative. See Mendoza Certification, ¶14.

22. From May 15, 2018 through August 21, 2018, Mendoza remained on the extradition assignment list. See Mendoza Certification, ¶16; accord County's Answer, ¶8(b).
23. On June 25, 2018, Mendoza was removed from the overtime lists pertaining to early start trips, late trips, and criminal/child support raids. This reduced Mendoza's overall compensation. See Mendoza Certification, ¶¶13, 15, 19; accord Rolon Certification, ¶¶5-6; LaVerde Certification, ¶¶5-6; County's Answer, ¶8(b); 2016-2020 CNA, Art. VIII.
24. On July 10, 2018, Lieutenant Rolon - in her capacity as President of FOP Lodge 127 (FOP)^{6/} - sent an email to Undersheriff Andrew Conti (Conti) and Captain DeGennaro, with a copy to the PBA President, Sheriff's officer Osbado Hernandez (Hernandez), making a joint FOP-PBA request that Mendoza be removed from the extradition assignment list.
- FOP President Rolon's email provides:

I spoke with the PBA President Det. Hernandez (who is cc'ed on this email), we both agree that Det. Mendoza should be taken off the extradition list. As Presidents of both Unions, we agree that this agreement is in violation of the current rank and file contracts. By allowing a member from another unit to continue staying on the Detective Bureau extradition will open a can of worms with other members in other unit. Myself and

^{6/} The FOP represents superior Sheriff's officers employed by the County. See <https://www.njfop.org/nj-fop-local-lodges/>

Ozzy have already been approached by Detectives in other units regarding this issue. We would both like to prevent this from becoming a union issue. This can also effect the distribution of overtime within this and other units. There is no reason that Det. Mendoza should stay on the extradition list.

[County's Br., Ex. 5; accord Rolon Certification, ¶9; County's Answer, ¶8(b); County's Br., Ex. 4; 2016-2020 CNA, Art. VIII.]

25. Mendoza certifies that on or about August 1, 2018, the Sheriff's Office issued a Personnel Order transferring him from the Detective Bureau to the Cyber Crimes Unit. Compare Mendoza Certification, ¶26 with County's Answer, ¶10 and 2016-2020 CNA, Art. XI.
26. On August 20, 2018, PBA President Hernandez sent an email to FOP President Rolon, with a copy to Undersheriff Conti and Captain DeGennaro, reiterating the joint FOP-PBA request that Mendoza be removed from the extradition assignment list. PBA President Hernandez's email provides:

The topic of Detective Juan Mendoza doing extraditions, has been brought to my attention as well as Lt. Annette Rolon that several Detectives that are not in the Detective Bureau are questioning why Detective Mendoza, who is not in the Detective Bureau, is being allowed to do extraditions. When I made the agreement with Captain DeGennaro, I didn't think of all the possible issues and concerns that could arise from our agreement. To avoid any problems and to continue past practice, Detectives that are not in the Detective Bureau except for emergency situations, are not allowed to

go on extraditions. Therefore for these reasons, Detective Juan Mendoza should be removed from the extradition list to keep everything equally fair for everyone.

[County's Br., Ex. 5; accord Rolon Certification, ¶9; County's Answer, ¶8(b); County's Br., Ex. 4; 2016-2020 CNA, Art. VIII.]

27. Mendoza certifies that there were numerous instances when detectives were transferred out of the Detective Bureau while they remained on the extradition overtime assignment list, including the following individuals:

- a. Tori Carter
- b. Milton Tzoumas
- c. Ingrid Baird
- d. Antonio Lucia
- e. William Velez
- f. Vivian Rosado

[Mendoza Certification, ¶¶17-18.]

28. On August 21, 2018, Undersheriff Conti sent an email to PBA President Hernandez and FOP President Rolon, with a copy to Captain DeGennaro, then-Lieutenant LaVerde, and Chief Oliver King (King), granting the joint FOP-PBA request to remove Mendoza from the extradition assignment list. The email provides:

Det. O. Hernandez (PBA Union President), with the absence of Capt. DeGennaro (presently O.J.I.) I will approve your current request to have Det. Mendoza removed from the extradition rotation list. However upon the return of Capt. DeGennaro from his O.J.I. status, should he want to re-address this issue with you for any reason due to an approval reached between the both of you

appr. 2 months ago I will allow him that courtesy should it come up. Also, unless Chief King (cc'd in this email) has an opinion contrary to my decision I ask that Det. Mendoza be removed as soon as possible by the Det. Bureau Lieutenants who are both cc'd in this email.

[County's Br., Ex. 5; accord Rolon Certification, ¶10; County's Answer, ¶8(b); County's Br., Ex. 4; 2016-2020 CNA, Art. VIII.]

29. On August 21, 2018, Mendoza was removed from the extradition assignment list. This resulted in Mendoza losing a substantial amount of overtime compensation. See Mendoza Certification, ¶¶12, 15, 19; accord County's Br., Ex. 5; Rolon Certification ¶¶5-6, 9-10; LaVerde Certification, ¶¶5-6; County's Answer, ¶8(b); 2016-2020 CNA, Art. VIII.
30. Lieutenant Vogel certifies that Mendoza's duties in the TAC (Cyber Crimes) unit include, but are not limited to, validating warrants and training officers in CJIS, AOCTELE, Promis-Gavel and E-CDR. As a member of the TAC unit, Mendoza has the opportunity to receive overtime assignments for which he can seek pay or "comp time" in lieu of pay. There is no pre-determined cap on the overtime work compensation, by way of pay or "comp time," that Mendoza can earn in the TAC unit. Mendoza's assignment in the TAC unit does not prevent him from seeking other overtime work, such as warrant raids or other overtime opportunities that are not exclusive to other units in the Sheriff's Office, in

accordance with past practice and the collective bargaining agreement. See Vogel Certification, ¶¶4-6; accord County's Br., Ex. 7; County's Answer, ¶¶8(c), 9.

31. Mendoza certifies that his present desk duty assignments within the Cyber Crimes Unit were previously performed by civilian employees within the Sheriff's Office and had been viewed by the County as non-law-enforcement. Compare Mendoza Certification, ¶27 with County's Answer, ¶9.
32. One of Mendoza's current responsibilities is to validate warrants. In the past, warrant validations were completed by civilian employees. Mendoza advised his chain of command, including then-Lieutenant LaVerde, that the civilian employee was incorrectly validating warrants. To cure this problem, Mendoza volunteered to validate warrants to ensure that the Sheriff's Office was following proper protocol. See LaVerde Certification, ¶9; accord County's Answer, ¶9.
33. Mendoza certifies that, to date, he continues to be deprived of thousands of dollars worth of overtime opportunities that would have been provided to him if he had not been transferred to the Cyber Crimes Unit on or about August 1, 2018, after a County Personnel Order was issued. Compare Mendoza Certification, ¶26 with Rolon Certification, ¶¶5-6 and LaVerde Certification, ¶¶5-6 and Vogel Certification,

¶¶4-6 and County's Answer, ¶¶8(c), 10 and 2016-2020 CNA, Art. VIII & XI.

34. Mendoza certifies that contemporaneously with his reassignment to the Cyber Crimes Unit, he was prohibited from entering the Detective Bureau office pursuant to Lieutenant Rolon's directive, notwithstanding his continued possession of a detective badge and detective stipend. Mendoza also certifies that on several occasions after he left the Cyber Crimes Unit office to travel to the County Administration Building, he was questioned by Undersheriff Conti as to why he left the office and it was implied that Mendoza was engaging in PBA-related activities. See Mendoza Certification, ¶¶24-25.
35. On November 30, 2018, the PBA filed the underlying unfair practice charge. See County's Br., Ex. 3.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{2/} In determining whether summary judgment

^{2/} N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other

(continued...)

is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Twp., 95 N.J. 235, 240-245 (1984). "The charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action." Newark Housing Auth., P.E.R.C. No. 2016-29, 42

7/ (...continued)

documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

NJPER 237, 239 (¶67 2015). 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. Ibid. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Ibid. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Ibid. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Ibid.

Public employers are prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of

Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)); accord Morris Tp., P.E.R.C. 2017-21, 43 NJPER 140 (¶43 2016) (noting that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary; the tendency to interfere is sufficient). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

ANALYSIS

Transfer

N.J.S.A. 34:13A-5.4(c) provides in pertinent part:

The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice
Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The Commission has held that “[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed” and “[i]n determining whether a party

was 'prevented' from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim." State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff'd 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). "Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge." Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), adopted P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

In this case, Mendoza was unequivocally informed in writing that he was being transferred from the Detective Bureau to the Cyber Crimes Unit on May 7, 2018; that the transfer would be effective May 14, 2018; and that he would "no longer be utilized by the Detective Bureau for trips, extraditions, etc." See County's Br., Ex. 2. Moreover, Mendoza was in fact transferred from the Detective Bureau to the Cyber Crimes Unit on May 14, 2018. See Mendoza Certification, ¶¶1, 3, 11. Accordingly,

pursuant to N.J.S.A. 34:13A-5.4(c), Mendoza was required to file an unfair practice charge pertaining to his transfer on or before November 7, 2018. Even if the effective date of the transfer is considered the operative event, Mendoza was required to file an unfair practice charge on or before November 14, 2018. See Middlesex Cty. Sheriff's Office and Mandato, P.E.R.C. No. 2017-8, 43 NJPER 90 (¶26 2016), aff'd 44 NJPER 333 (¶95 App. Div. 2018) (holding that when there is nothing "equivocal" about an employer's notice to an employee regarding his/her transfer or reassignment, "the limitations period to challenge the [transfer or reassignment] beg[ins] to run that day"). However, the underlying charge was not filed until November 30, 2018 - at least 16 days after the six-month statute of limitations had run - and there are no facts indicating that Mendoza or the PBA was prevented from filing the charge by November 14, 2018. See County's Br., Ex. 3; Mendoza Certification, ¶14 ("[t]he PBA, with Mendoza's agreement, decided not to file an unfair practice charge concerning Mendoza's reassignment to the Cyber Crimes Unit"). Therefore, the charge is untimely and barred by N.J.S.A. 34:13A-5.4(c).

Despite the undisputed facts and law set forth above, Mendoza contends that the statute of limitations should not apply in this way. I address his legal arguments below in seriatim.

Mendoza asserts that the County is "equitably estopped from asserting a 'timeliness' defense" because it failed to raise the statute of limitations "in its February 11, 2019 position[] statement and its initial answer to the complaint submitted to PERC on or about July 10, 2019." See PBA's Br. at 25-27. However, the PBA did not object to the County's request for additional time to rescind its "DRAFT" Answer with Affirmative Defenses and submit a "FINAL" version, which included a statute of limitations defense. Even assuming, arguendo, that the PBA had objected, the County was permitted to amend its answer pursuant to N.J.A.C. 19:14-3.3.^{8/} Moreover, even if the County had never raised a statute of limitations defense, I am permitted to raise jurisdictional issues sua sponte. The Commission has held "that it is not inappropriate for a Hearing Examiner to raise the issue [of timeliness] sua sponte with the parties when it appears during the course of the hearing on an unfair practice complaint." Teaneck Tp., H.E. No. 81-22, 7 NJPER 61 (¶12024 1981), rev'd P.E.R.C. No. 81-142, 7 NJPER 351 (¶12158 1981) aff'd NJPER Supp.2d 121 (¶101 App. Div. 1982) (emphasis added) (the

8/ N.J.A.C. 19:14-3.3, entitled "Amendment," provides in pertinent part:

The respondent may amend its answer at any time before the hearing. During or after the hearing the hearing examiner or the Commission may permit the respondent to amend its answer at any time upon such terms as may be deemed just.

Commission reversed the hearing examiner, who had found that a statute of limitations defense was waived by the respondent because it was not raised in its answer, at the hearing, or in its post-hearing brief). Accordingly, I find that this legal argument lacks merit.

Mendoza also asserts that the "New Jersey Attorney General Guidelines require the issuance of formal Personnel Orders by a Sheriff whenever there is a change in the assignment, rank or status of personnel." See PBA's Br. at 24; accord Mendoza Certification, ¶21. However, the Model Rules and Regulations to which Mendoza refers are advisory in nature; they "**[are] for consideration by municipalities when implementing police ordinances . . . [and] may not be all-inclusive for purposes of implementing a police ordinance.**" STATE OF NEW JERSEY, OFFICE OF ATTORNEY GENERAL GUIDELINES, MODEL RULES AND REGULATIONS, INTRODUCTION - AUTHORITY FOR RULES AND REGULATIONS (Rev. 7/2001) at 1 (emphasis added).^{9/} In fact, the Model Rules and Regulations provide in pertinent part:

Over the years, the scope of department rules and regulations has been narrowly focused. It was once thought the rules and regulations should contain everything a police officer needed to know to do his job. It is now recognized that the rules and regulations should provide broad guidance for police officer behavior. Specifics of day-to-day

^{9/} See <https://www.nj.gov/oag/dcj/agguide/modelrules2001.pdf>

police operations properly belong in department policies and procedures. In addition, the adoption of rules and regulations is not the responsibility of the chief of police, but instead it is the responsibility of the Appropriate Authority within the municipality. Issuing policies and procedures, orders and directives that govern the day-to-day operation of the police department is, however, the responsibility of the police executive.

[STATE OF NEW JERSEY, OFFICE OF ATTORNEY GENERAL
GUIDELINES, MODEL RULES AND REGULATIONS, INTRODUCTION
(Rev. 7/2001) at 1 (emphasis added).]

Mendoza has produced "specific County Personnel Orders" to support his position that a "formal Personnel Order[] . . . had to have been issued . . . before the six month time period for the filing of the . . . unfair practice charge[] at issue could begin." See Mendoza Certification, ¶¶21-22, Ex. A. However, the Personnel Orders that Mendoza has produced do not demonstrate that the Sheriff's Office was required to issue a Personnel Order to effectuate a transfer when the employee's rank, division, and hours are unchanged - i.e., although he was transferred from the Detective Bureau to the Cyber Crimes Unit, Mendoza remained a Sheriff's officer (detective) working in the Operations Division during the same hours. See County's Answer, ¶10 ("Undersheriff Conti has jurisdiction to transfer Sheriff's Officers within its division by memo or by other means"; "[t]he Detective Bureau and the Cyber Crimes Unit are both in the [O]perations [D]ivision"; "Sheriff Schillari issues personnel orders when an officer is

being transferred out of Operations Division or Court Division"); see also 2016-2020 CNA, Art. XI. Moreover, Mendoza has not cited any provision of the parties' CNA or any County policy, procedure, order, rule, or directive that requires the Sheriff's Office to issue a formal Personnel Order for any reason. See County's Answer, ¶10; 2016-2020 CNA, Art. XI.

Mendoza also certifies that on or about August 1, 2018, the Sheriff's Office issued a Personnel Order transferring him from the Detective Bureau to the Cyber Crimes Unit, but he has not produced that order. Compare Mendoza Certification, ¶26 with Mendoza Certification, ¶¶21-22, Ex. A. Even assuming, arguendo, that the Sheriff's Office was required to issue a Personnel Order transferring Mendoza from the Detective Bureau to the Cyber Crimes Unit, the following is undisputed:

-on May 7, 2018, Mendoza received unequivocal written notice that he was being transferred from the Detective Bureau to the Cyber Crimes Unit, the consequences of the transfer, and the effective date of the transfer (County's Br., Ex. 2); and

-on May 14, 2018, Mendoza was in fact transferred from the Detective Bureau to the Cyber Crimes Unit (Mendoza Certification, ¶¶1, 3, 11; accord County's Answer, ¶8(a)).

The Commission has held that "an employee . . . [need] not be told a change is permanent before the limitations period begins to run" because "[s]uch a blanket rule would not be consistent with N.J.S.A. 34:13A-5.4(c)" and "there is no reason to focus on the duration of a reassignment, including whether it is temporary

or permanent, since its unlawfulness would not ordinarily turn on its duration." Middlesex Cty. Sheriff's Office and Mandato, P.E.R.C. No. 2017-8, 43 NJPER 90 (¶26 2016), aff'd 44 NJPER 333 (¶95 App. Div. 2018) (finding that Mandato received a "telephone call from an Internal Affairs sergeant advising him that the Sheriff was removing him from his assignment", that when Mandato "reported for duty [five days later]. . . [he] was told that the Sheriff had reassigned him effective immediately", and that more than a month later Mandato inquired as to whether the change of post was permanent; holding that when there is nothing "equivocal" about an employer's notice to an employee regarding his/her transfer or reassignment, "the limitations period to challenge the [transfer or reassignment] beg[ins] to run that day"). Similarly here, the permanence or duration of Mendoza's transfer is irrelevant to the issue raised in the underlying charge - i.e., whether the County's exercise of its managerial prerogative to transfer Mendoza was retaliatory. Accordingly, I find that this legal argument also lacks merit.

Finally, Mendoza asserts that despite being transferred on May 14, 2018, the six-month statute of limitations was not triggered until he was removed from certain overtime lists on June 25, 2018 and August 21, 2018; and that "[i]t would have been specious for the PBA to file an unfair practice charge . . . when there was no ascertainable harm that inured to [Mendoza's]

detriment . . . for a period of months" given that he "continued to be able to put in for extradition-related overtime and had not been excluded from any of the other overtime lists maintained by the County." See PBA's Br. at 22-24; see also Mendoza Certification, ¶¶11-16. However, taken to its logical conclusion, this approach would lead to results that run contrary to the very purpose for the statute of limitations.^{10/} See City of Margate, H.E. No. 93-28, 19 NJPER 296 (¶24153 1993), adopted

^{10/} Under Mendoza's approach, the statute of limitations pertaining to a discrete employer action that was known by the charging party and alleged to be illegal under the Act would not be triggered - possibly for days, weeks, months, or years - until any/all consequences that flowed directly from the action occurred. For example, the operative date pertaining to the termination of an employee would not be triggered until he/she received a determination regarding an application for unemployment benefits or fully litigated a related grievance. Contrast, e.g., Teamsters Local 866, D.U.P. No. 99-13, 25 NJPER 265 (¶30112 1999) (noting that the date of a disciplinary meeting and the charging party's resignation was the operative event; holding that subsequent events, including a determination regarding the charging party's unemployment benefits, "[did] not trigger a new operative event which extends the six month statute of limitations because the unemployment determination, standing alone, does not establish that [the majority representative's] advice . . . violated its duty of fair representation"; also holding that "even if [the majority representative] was negligent in investigating the disciplinary charges and . . . gave [the charging party] faulty advice, mere negligence is insufficient to find that a union breached its duty of fair representation . . . when it exercises its discretion in good faith"); Atlantic City Special Improvement District and SEIU, Local 255, D.U.P. No. 99-14, 25 NJPER 272 (¶30115 1999) (holding that "the operative event . . . occurred . . . when [the employee] was terminated, not . . . when [the employer] denied [the employee's] grievance").

P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993) ("holding that there is no "equitable justification for tolling the statute of limitations" where the charging party "believe[s] that an unfair practice might have occurred" and fails "to further this claim and the Legislative purpose of encouraging the diligent pursuit of causes of action"). Moreover, Mendoza has provided no legal support for his position that in this case, the statute of limitations pertaining to the County's alleged retaliatory transfer was tolled (or extended) until he was removed from certain overtime lists.^{11/} Contrast, e.g., Local Lodge No. 1424, Int'l Ass'n of Machinists, AFL-CIO v. N.L.R.B., 362 U.S. 411,

^{11/} The Supreme Court of New Jersey has held that "the substantive decision to transfer or reassign an employee is preeminently a policy determination" and "[t]he power of the employer to make the policy decision would be significantly hampered by having to proceed through negotiation." Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982). In particular, the Commission "ha[s] often restrained arbitration over claims contesting the substantive decision to transfer a police officer from detective to patrol officer" (Old Bridge Tp., P.E.R.C. No. 2016-76, 42 NJPER 550 (¶151 2016)) and has noted that "[i]t does not matter whether the personnel action is disciplinary or not" (Bloomfield Tp., P.E.R.C. No. 2010-55, 36 NJPER 29 (¶14 2010)). With respect to compensation, the Commission "[has] not restrain[ed] arbitration over [a] claim that [a] grievant was contractually entitled to continue to receive additional pay" despite being transferred; however, the Commission has held that if "the [union] cannot prove the existence of an agreement to continue any additional pay after a transfer from the detective bureau, it would follow that the reduction was a direct consequence of the managerial decision to transfer the grievant . . . [and] [a]bsent such an agreement, an arbitrator cannot order that the grievant continue to receive additional pay." Old Bridge Tp.; accord Bloomfield Tp.

416-417 (1960) ("where a complaint based upon [an] earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice"); Salem Cty. Freeholder Bd., H.E. No. 87-50, 13 NJPER 242 (¶18098 1987), adopted P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987) (affirming the partial dismissal of an unfair practice charge based upon the statute of limitations; noting that "[a] continuing violation theory is not applicable where the claim is not based on a new violation, but rather, as here, on the effect of an earlier allegation"); see also, e.g., Caldwell-West Caldwell Bd. of Ed., D.U.P. No. 81-3, 6 NJPER 362 (¶11183 1980) ("the allegation herein that the parties engaged in negotiations subsequent to the unilateral change in an attempt to resolve their dispute . . . does not alter the fact that more than six months elapsed between the operative event and the filing of an unfair practice charge"); Dennis Tp. Bd. of Ed., D.U.P. No. 93-16, 19 NJPER 34 (¶24016 1992) ("attempts to internally resolve [a] matter are not reasons to toll the statute of limitations"); City of Margate, D.U.P. No. 92-17, 18 NJPER 259 (¶23107 1992), adopted P.E.R.C. No. 93-1, 18 NJPER 391 (¶23175 1992) (noting that a "charging party's unsuccessful attempts to resolve [a] matter informally [do] no toll the six month statute of limitations"); City of Margate, H.E. No. 93-28, 19 NJPER 296 (¶24153 1993), adopted P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270

1993) (noting that “[a] voluntary delay in filing a charge does not toll the statute [of limitations]”); Atlantic City Special Improvement District and SEIU, Local 255, D.U.P. No. 99-14, 25 NJPER 272 (¶30115 1999) (“[f]iling with another administrative agency does not toll the statute of limitations for filing unfair practice charges with the Commission”; “[t]he initiation and processing of a grievance does not toll the statute of limitations concerning [a] charge against [an employer]”; “[a] charging party’s lack of knowledge of the Commission’s jurisdiction is insufficient to toll the six-month filing deadline”); Secaucus Public Employees Ass’n, D.U.P. No. 99-19, 25 NJPER 314 (¶30134 1999) (“the fact that [an employee] renew[s] his request for legal fee reimbursement after the settlement of his Superior Court litigation does not trigger a new operative event which extends the six-month statute of limitations”); Monmouth Cty. Freeholder Bd. and Sheriff, D.U.P. No. 2003-3, 28 NJPER 395 (¶33141 2002) (“[t]he Commission has held that pursuing grievances and other forms of voluntary resolution of alleged unfair practices does not constitute a tolling of the six-month statute of limitations”).

It appears that Mendoza may be conflating the operative date for discrete County actions (i.e., a transfer; removal from certain overtime lists) in order to circumvent the statute of limitations regarding the alleged retaliatory transfer. If

Mendoza is claiming that the County's exercise of its managerial prerogative to transfer him was retaliatory, Mendoza has conceded that "[the] PBA, with [his] agreement, . . . **decided not to file [an] unfair practice charge concerning [his] reassignment to the Cyber Crimes Unit** as long as [he] continued to be able to wear [his] Detective Badge and receive the stipend of a Hudson County Detective Bureau Representative." See Mendoza Certification, ¶14 (emphasis added). Thus, the PBA (and/or Mendoza) was not prevented^{12/} from filing a timely unfair practice charge; it consciously elected not to do so despite the fact that Mendoza received unequivocal written notice that he was being transferred

^{12/} Mendoza does not argue that he was "prevented" from filing a timely unfair practice charge regarding the alleged retaliatory transfer based upon any agreement/understanding with the County to rescind his transfer. Contrast, e.g., Maplewood Tp., D.U.P. No. 2007-2, 32 NJPER 296 (¶123 2006), rev'd P.E.R.C. No. 2007-28, 32 NJPER 360 (¶151 2006) (reversing the Director's dismissal of a charge; holding that the union's allegation that "the employer's representatives had agreed to [the union's] position and that only the details of implementation needed to be worked out" may have prevented the union from filing a timely unfair practice charge because "it had every reason to believe that there was no dispute and no reason to file a charge"). Rather, it is undisputed that there was an agreement between the PBA and the County to permit Mendoza to remain on the extradition overtime list until the Charging Party (i.e., the PBA, which was the exclusive majority representative) made a joint FOP-PBA request to remove Mendoza from the list. See County's Answer, ¶8(b); Rolon Certification, ¶¶5-10; LaVerde Certification, ¶¶5-6; Mendoza Certification, ¶¶12, 15-16, 19; County's Br., Exhs. 4-5; 2016-2020 CNA, Art. VIII. Accordingly, this agreement pertains to the timeliness of Mendoza's removal from certain overtime lists claim; it does not pertain to the timeliness of his retaliatory transfer claim.

from the Detective Bureau to the Cyber Crimes Unit, the consequences of the transfer, and the effective date of the transfer; and despite the implementation of the transfer. See County's Br., Ex. 2; Mendoza Certification, ¶¶1, 3, 11. On the other hand, if Mendoza is claiming that his removal from certain overtime lists was retaliatory and assuming, arguendo, that this aspect of the charge was timely, he cannot establish a retaliation claim as set forth in the "Overtime Lists" section below. Accordingly, I find that this legal argument also lacks merit.

Under these circumstances, I reject Mendoza's assertions regarding the timeliness of the charge as unsupported by the facts and the law. Even when viewed in the light most favorable to Mendoza, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve the issue in his favor. See Brill, 142 N.J. at 523. I find that the charge is untimely and barred by N.J.S.A. 34:13A-5.4(c).

Overtime Lists

Even assuming, arguendo, that Mendoza's retaliation claim is timely with respect to his removal from certain overtime lists, I find that the County was obligated to remove him from these overtime lists under subsections 5.4a(1) and (5)^{13/} of the Act.

^{13/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

The Supreme Court of New Jersey has described exclusive representation as "the keystone of sound labor-management relations." D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74, 78 (1990); see also Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545, 548 (¶15254 1984) ("this exclusivity principle is a cornerstone of the Act's structure for regulating the relationship between public employers and public employees"). Exclusive representation by the majority representative is essential to collective negotiations, whereas fractured bargaining by individuals or subgroups of the unit can be destructive to the process enshrined in the Act. In Lullo v. Int'l Ass'n of Firefighters, Local 106, 55 N.J. 409 (1970), the Court explained:

[T]he major aim [of achieving an equitable balance of bargaining power with employers] could not be accomplished if numerous individual employees wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would serve disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests.

13/ (...continued)

restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(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."

[Lullo, 55 N.J. at 426.]

N.J.S.A. 34:13A-5.3 establishes that the exclusive right and obligation to negotiate terms and conditions of employment for unit members is vested not in an individual employee or group of employees, but in the majority representative. It provides, in pertinent part:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. . . . A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

[N.J.S.A. 34:13A-5.3.]

N.J.S.A. 34:13A-5.3 also defines when a public employer has a duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

Consistent with the Act, New Jersey courts and the Commission have held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process. *See, e.g., Middletown Tp.*, P.E.R.C. No. 98-77, 24 *NJPER* 28, 29-30 (¶29016 1997), *aff'd*, 334 *N.J. Super.* 512 (App. Div. 1999), *aff'd*, 166 *N.J.* 112 (2000); *Hunterdon Cty. Freeholder Bd. and CWA*, 116 *N.J.* 322, 338 (1989); *Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n*, 78 *N.J.* 25, 52 (1978). A public employer's unilateral change to negotiable terms may constitute an unfair practice in violation of subsections 5.4a(1) and (5) of the Act. *See, e.g., In re Atlantic Cty.*, 230 *N.J.* 237 (2017); *Hunterdon Cty. Freeholder Bd. and CWA*, 116 *N.J.* 322, 338 (1989). For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. *State of New Jersey (Ramapo State College)*, P.E.R.C. No. 86-28, 11 *NJPER* 580 (¶16202 1985); *Willingboro Bd. of Ed.*, P.E.R.C. No. 86-76, 12 *NJPER* 32 (¶17012 1985). An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. *Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n*, P.E.R.C. No. 2004-74, 30 *NJPER* 186 (¶69 2004), *aff'd*, 31 *NJPER* 290 (¶113 App. Div. 2005).

The Commission has consistently held that "the allocation of overtime and procedures for selecting employees to work overtime are generally mandatorily negotiable and arbitrable." West Milford Tp., P.E.R.C. No. 2016-45, 42 NJPER 310 (¶90 2015) (citing City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982); City of Elizabeth, P.E.R.C. No. 80-80, 6 NJPER 14 (¶11008 1979); New Jersey Sports & Expo. Auth. and Local 560 IBT, Laborers' Local 472 and Laborers Int'l Union Local 734, P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988)). Moreover, New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by **past practice**, without first bargaining to impasse [with a majority representative]." In re Atlantic Cty., 230 N.J. 237, 252 (2017) (emphasis added) (citing Bd. of Educ. v. Neptune Tp. Ed. Ass'n, 144 N.J. 16, 22 (1996)); accord Closter Bor., I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001), recon. granted P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated"); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n,

78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation").

The Supreme Court of New Jersey has specifically discussed the harm to the collective negotiations process caused by a public employer's granting of increased benefits to individual employees:

It has been said that advantages to an employee through an individual contract "may prove as disruptive of industrial peace as disadvantages." Individually negotiated agreements constitute "a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." J.I. Case Co. v. N.L.R.B., supra, 321 U.S. at 338-339, 64 S. Ct. at 581; N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180-181, 87 S. Ct. 2001.

[Lullo, 55 N.J. at 428.]

The Commission has held that "public employers violate subsection 5.4a(5) by negotiating directly with individual employees or groups of employees rather than with their majority representative over negotiable terms or conditions of employment, even where individual negotiations resulted in greater benefits." City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018)

(citing Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999) (unilateral placement of unit member at highest salary level to settle political discrimination lawsuit); Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (unilateral salary increase); City of Union City, P.E.R.C. No. 90-37, 15 NJPER 626 (¶20262 1989) (unilateral salary range increase for two positions); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) (employer created incentive program through direct dealing with individual employees); Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (employer dealt directly with employees about merit pay program); Cf. Buena Reg. School Dist. Bd. of Ed., P.E.R.C. No. 93-97, 19 NJPER 246 (¶24121 1993) (union's challenge to disciplinary settlement resulting in employee's salary exceeding salary guide was arbitrable)).

The Supreme Court of New Jersey has held that "when provisions in an individual employment contract conflict with the terms in a CNA, and diminish or interfere with rights provided by the CNA, the language in the individual contract must yield to the collective agreement." Mount Holly Tp. Bd. of Ed. v. Mount Holly Tp. Ed. Ass'n, 199 N.J. 319, 322 (2009) (noting that "[i]ndividual employees retain no separate negotiating rights"; reaffirming that "in general, collective agreements supersede individual contracts"); accord Troy v. Rutgers, 168 N.J. 354, 375-376 (2001) (individual agreements are void "to the extent

that they conflict with collective agreements or interfere with the principles of collective negotiation"); Lullo v. Int'l Ass'n of Firefighters, Local 106, 55 N.J. 409 (1970).

Given these legal precepts, I find that the County was obligated to negotiate exclusively with the PBA, Mendoza's majority representative, regarding all mandatorily negotiable subjects. I also find that the County was obligated to comply with/implement the terms and conditions of employment negotiated with the PBA regarding mandatorily negotiable subjects, including the allocation of overtime, as memorialized in the parties' CNA and past practice. Although the PBA was free to reach an agreement with the County regarding the allocation of overtime that was inconsistent with the parties' CNA and past practice, upon receipt of a demand to negotiate from the PBA, the County was obligated to discontinue such an agreement and restore the status quo consistent with the parties' CNA and past practice.^{14/}

^{14/} Even assuming, arguendo, that the parties' CNA and past practice was silent regarding the allocation of overtime, upon receipt of a demand to negotiate from the PBA, the County was obligated to discontinue any individual agreement with Mendoza (and/or any other unit member) and negotiate exclusively with the PBA; any individual agreement in conflict with the parties' collectively negotiated terms and conditions of employment "must yield to the collective agreement." Mount Holly Tp. Bd., 199 N.J. at 322; see also J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 337-338 (1944) ("[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective

(continued...)

In this case, the following facts are undisputed:

-Mendoza received unequivocal written notice that he was being transferred from the Detective Bureau to the Cyber Crimes Unit, including the consequences of the transfer (i.e., "Det. Mendoza will no longer be utilized by the Detective Bureau for trips, extraditions, etc.") and the effective date of the transfer; and he was in fact transferred on May 14, 2018. See County's Br., Ex. 2; Mendoza Certification, ¶¶1, 3, 11.

-Article VIII of the parties' CNA specifies that overtime opportunities in a particular unit within a division of the Sheriff's Office will be filled by members of that unit where possible; that members of the division will fill overtime opportunities that cannot be met by members of the unit; that members outside the division will fill overtime opportunities that cannot be met by members of the division in emergent situations; and that unit and division commanders will attempt to distribute overtime opportunities on an equitable basis. See 2016-2020 CNA, Art. VIII.

-The parties have a past practice that has been in effect since at least 2014 whereby extradition overtime assignments are given exclusively to detectives assigned to the Detective Bureau; and that overtime assignments for child support warrants and criminal

14/ (...continued)

bargaining . . . [a]nd [w]herever private contracts conflict with [the National Labor Relations Board's] functions, they obviously must yield or the Act would be reduced to a futility"; "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group"); Hillsborough Bd. of Ed., H.E. No. 2005-5, 30 NJPER 449 (¶150 2004), adopted P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005) ("we need not decide whether the individual agreements secured . . . conflicted with the terms of the collective agreement or diminished rights provided under that agreement . . . [because] [t]he very act of soliciting and securing those agreements conflicted with the principles of collective negotiations").

warrant raids are offered to Detective Bureau officers first, and if additional officers are needed, overtime assignments are offered to officers not assigned to the Detective Bureau. See Rolon Certification, ¶¶5-6; accord LaVerde Certification, ¶¶5-6; County's Answer, ¶¶8(b-c).

-Members of the Cyber Crimes Unit, including Mendoza, have the opportunity to receive overtime assignments for which they can seek pay or compensatory time in lieu of pay; that there is no pre-determined cap on the overtime work compensation, by way of pay or compensatory time, that can be earned in the Cyber Crimes Unit; and that an assignment in the Cyber Crimes Unit does not prevent a member of the unit from seeking other overtime work, such as warrant raids or other overtime opportunities that are not exclusive to other units in the Sheriff's Office, in accordance with past practice and the collective bargaining agreement. See Vogel Certification, ¶¶4-6; accord County's Answer, ¶8(c).

Consistent with the parties' CNA and past practice, after Mendoza was transferred to the Cyber Crimes Unit, he was removed from the overtime lists for members of the Detective Bureau pertaining to early start trips, late trips, and criminal/child support raids. See 2016-2020 CNA, Art. VIII; Rolon Certification, ¶¶5-6; LaVerde Certification, ¶¶5-6; Mendoza Certification, ¶¶13, 15, 19; accord County's Answer, ¶¶8(b-c). There is no allegation or evidence that Mendoza as an individual, or the PBA as exclusive majority representative, had an agreement with the County to permit him to remain on these overtime lists after he was transferred. However, to the extent that Mendoza (and/or any other unit member) reached such an individual agreement with the County, same would constitute direct dealing

and breach the County's obligation to negotiate exclusively with the PBA in violation of subsections 5.4a(1) and (5) of the Act. See Hillsborough Bd. of Ed., H.E. No. 2005-5, 30 NJPER 449 (¶150 2004), adopted P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005) ("we need not decide whether the individual agreements secured . . . conflicted with the terms of the collective agreement or diminished rights provided under that agreement . . . [because] [t]he very act of soliciting and securing those agreements conflicted with the principles of collective negotiations"). In addition, I find that such an individual agreement would conflict with the parties' CNA and past practice regarding the allocation of overtime and "must yield to the collective agreement." Mount Holly Tp. Bd., 199 N.J. at 322; see also J.I. Case Co., 321 U.S. at 337-338. Moreover, absent an agreement with the PBA, the County would have violated subsections 5.4a(1) and (5) of the Act if it had unilaterally changed the procedures for the allocation of overtime by permitting Mendoza (and/or any other unit member) to remain on these overtime lists after he was transferred. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) (holding that "the allocation of overtime among unit employees is a mandatorily negotiable subject"; "an employer must negotiate over such questions . . . as whether overtime will generally be distributed according to seniority, according to a schedule, or according to who volunteers"); accord State of New

Jersey (Dep't of Corrections), H.E. No. 91-42, 17 NJPER 324 (¶22143 1991), adopted P.E.R.C. No. 93-11, 18 NJPER 439 (¶23196 1992) (holding that an employer violated subsections 5.4a(1) and (5) of the Act by unilaterally changing the procedures for allocating overtime); Franklin Tp., H.E. No. 99-9, 24 NJPER 500 (¶29232 1998), adopted P.E.R.C. No. 99-78, 25 NJPER 133 (¶30059 1999) (holding that "[o]vertime allocation systems are, in general, mandatorily negotiable"; finding that an employer would not be permitted to "unilaterally end[] [a] practice [of allocating overtime by seniority] and adopt[] a new one", but was permitted to "deviate[] from it in this . . . instance because of a perceived need to more closely supervise and control the assignments of one police officer pending an internal investigation . . . for legitimate public safety reasons" regarding the police officer's "temperament because of his on-the-job behavior").

Inconsistent with the parties' CNA and past practice, after Mendoza was transferred to the Cyber Crimes Unit, he was permitted to remain on the overtime list for members of the Detective Bureau pertaining to extradition assignments based upon an agreement between the PBA and the County. Mendoza was only removed from the extradition detail list after the County received a demand to negotiate the discontinuation of that agreement and restore the status quo consistent with the parties'

CNA and past practice (i.e., the joint FOP-PBA request to remove Mendoza from the list). See Rolon Certification, ¶¶5-10; LaVerde Certification, ¶¶5-6; Mendoza Certification, ¶¶12, 15-16, 19; County's Answer, ¶8(b); County's Br., Exhs. 4-5. Again, to the extent that Mendoza (and/or any other unit member) reached an individual agreement with the County to permit him to remain on the extradition overtime list after he was transferred, same would constitute direct dealing and breach the County's obligation to negotiate exclusively with the PBA in violation of subsections 5.4a(1) and (5) of the Act. See Hillsborough Bd. of Ed., H.E. No. 2005-5, 30 NJPER 449 (¶150 2004), adopted P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005) ("we need not decide whether the individual agreements secured . . . conflicted with the terms of the collective agreement or diminished rights provided under that agreement . . . [because] [t]he very act of soliciting and securing those agreements conflicted with the principles of collective negotiations"). In addition, I find that such an individual agreement would conflict with the parties' CNA and past practice regarding the allocation of overtime and "must yield to the collective agreement." Mount Holly Tp. Bd., 199 N.J. at 322; see also J.I. Case Co., 321 U.S. at 337-338. Moreover, the County would have violated subsections 5.4a(1) and (5) of the Act if, after reaching an agreement with the PBA to permit Mendoza (and/or any other unit member) to remain on the

extradition overtime list despite being transferred, the County refused a demand to negotiate the discontinuation of that agreement and restore the status quo consistent with the parties' CNA and past practice (i.e., the joint FOP-PBA request to remove Mendoza from the list)^{15/} or unilaterally changed the procedures for the allocation of overtime. See City of Long Branch; accord State of New Jersey (Dep't of Corrections); Franklin Tp.

Mendoza asserts that "there were numerous instances when detectives were transferred out of the Detective Bureau while they remained on the extradition overtime assignment list" including six named individuals. See Mendoza Certification, ¶¶17-18. However, "an individual employee normally does not have standing to assert a [5.4]a(5) violation, as the employer's duty to negotiate in good faith runs only to the majority representative." Atlantic City Convention and Visitors Auth., D.U.P. No. 98-2, 23 NJPER 427 (¶28197 1997) (dismissing the charging party's allegation that "the [employer] unilaterally changed the overtime policy without negotiating with the union"); accord New Jersey Turnpike Auth., H.E. No. 81-7, 6 NJPER 473

^{15/} A broad, but reasonable, interpretation of the demand to negotiate would require the County to discontinue any/all agreements that were inconsistent with the parties' CNA and past practice pertaining to the allocation of overtime (i.e., the overtime lists for early start trips, late trips, and criminal/child support raids; and the extradition overtime list; etc.) and completely restore the status quo consistent with the parties' CNA and past practice. See County's Br., Ex. 5.

(¶11241 1980), adopted P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981) (holding that “[i]t is not an unfair practice for a public employer to refuse to negotiate with an individual employee or even a group of employees if they do not constitute the exclusive majority representative”). Moreover, Mendoza’s unfair practice charge does not include an allegation that his exclusive majority representative – the PBA^{16/} – breached its duty of fair representation. The Commission has held that “where [an] employee not only alleges a breach of the contract, but also alleges that the majority representative either alone, or in collusion with the employer, processed [a] grievance in bad faith, or in some other way violated the duty of representation owed the employee[,]’ an employee may only proceed with a 5.4a(5) claim against his/her employer if he/she has also asserted a viable breach of the duty of fair representation claim against his/her majority representative.” Essex Cty. and Public Employees Supervisors Union, D.U.P. No. 2018-12, 44 NJPER 475 (¶132 2018), adopted P.E.R.C. No. 2019-16, 45 NJPER 195 (¶50 2018) (citing New Jersey Turnpike Auth., H.E. No. 81-7, 6 NJPER

^{16/} It should be noted that, although it is the Charging Party in this matter, the PBA has not alleged that the County breached its duty to negotiate in good faith nor has it submitted any evidence in support of Mendoza’s claim that his removal from certain overtime lists was retaliatory.

473 (¶11241 1980), adopted P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981)).

Even assuming, arguendo, that Mendoza could demonstrate that the County was motivated by anti-union animus when it removed him from the overtime lists discussed above, the County was obligated to negotiate exclusively with Mendoza's majority representative - the PBA - regarding all mandatorily negotiable subjects including the allocation of overtime. See N.J.S.A. 34:13A-5.3; City of Hackensack; City of Long Branch; Mount Holly Tp. Bd.; Hillsborough Bd. of Ed. Accordingly, to hold that the County retaliated against Mendoza by doing precisely what it was required to do (i.e., comply with/implement the parties' CNA and past practice regarding the allocation of overtime after Mendoza was transferred; accede to the PBA's demand to negotiate the discontinuation of an agreement that was inconsistent with the parties' CNA and past practice regarding the allocation of overtime and the restore the status quo consistent with the parties' CNA and past practice) under subsection 5.4a(1) and (5) of the Act would produce a legally irreconcilable result.

Under these circumstances, I find that this aspect of Mendoza's retaliation claim must fail as a matter of law. Even when viewed in the light most favorable to Mendoza, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in his favor. See

Brill, 142 N.J. at 523. I find that the charge must be dismissed.

CONCLUSION

For these reasons, I grant the County of Hudson's motion for summary judgment and deny Hudson County PBA Local 334's cross-motion for summary judgment.

RECOMMENDATION

I recommend that the complaint be dismissed.

/s/ Joseph P. Blaney
Joseph P. Blaney
Hearing Examiner

DATED: January 9, 2020
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by January 21, 2020.