

I.R. NO. 2009-16

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC AND  
PASSAIC COUNTY SHERIFF,

Respondents,

-and-

Docket No. CO-2009-178

PASSAIC COUNTY SHERIFFS  
PBA LOCAL 286,

Charging Party.

SYNOPSIS

The Passaic County Sheriffs PBA Local 286 applied for interim relief alleging that the County of Passaic and Passaic County Sheriff violated sections 5.4a(3) and (5) of the New Jersey Employer-Employee Relations Act when it recalled three sheriffs officers from layoff and placed them on step 2 of the salary guide instead of their previous salary at the top of the guide and when it terminated a sheriff's officer that requested to speak to his PBA representative about the salary change. The PBA argued that the County engaged in direct dealing with the recalled officers when it requested them to sign agreements to be paid at step 2. The County disputed the PBA's allegations and argued that the PBA reviewed the salary agreement; the PBA contract permitted it to pay the recalled officers at step 2 since they were provisional and had lost seniority in the layoff; and that the terminated officer was not needed because it only required three officers and he was fourth on the provisional seniority list. Noting the dispute over material facts, it was not possible to conclude that there was a substantial likelihood of success on the merits of the charge and the application was denied.

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Appearances:

For the Respondent, Genova, Burns & Vernioia, attorneys  
(Brian W. Kronick, of counsel)

For the Charging Party, Loccke, Correia, Schlager,  
Limsky & Bukosky, attorneys (Merick H. Limsky, of  
counsel)

INTERLOCUTORY DECISION

On November 19, 2008, the Passaic County Sheriffs PBA Local 286 filed an unfair practice charge with the Public Employment Relations Commission alleging that the County of Passaic and Passaic County Sheriff committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) through (7).<sup>1/</sup> The PBA alleges that the

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard (continued...)

County violated the Act when it recalled from a layoff Sheriff's Officer Anthony Rodriguez and two other sheriff's officers and paid them on step two of the salary guide instead of their previous salaries at the top of the guide. The PBA further alleges that the County rescinded its employment offer to Rodriguez after he asked for a PBA representative to review an agreement the County asked him and the other recalled officers to all sign in retaliation for protected activity. The letter allegedly stated the officers agreed to waive their former salary in order to be recalled at step two on the salary guide<sup>2/</sup>.

The County is a civil service jurisdiction. The County and PBA are parties to a collective negotiations agreement for the period effective from January 1, 2003 through December 31, 2006. The parties are currently in interest arbitration for a successor

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1/ (...continued)  
to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (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."

2/ A copy of the agreement has not been submitted by the parties.

agreement. The unfair practice charge was accompanied by a request for interim relief. An order to show cause was executed on November 21, 2008 and oral argument was conducted via telephone conference, at the request of the parties, on December 16. The parties submitted briefs, certifications and exhibits and argued orally on the return date. The PBA submitted the certification of Rodriguez. The County submitted the certification of Warden Charles Meyers. The following facts appear.

Rodriguez was hired on September 30, 2002 as a corrections officer. He graduated from the Corrections Academy on July 7, 2004 and became permanent in that position after completing his working test period on July 6, 2005. Officer Rodriguez participated in a modified basic course for sheriff's officers referred to as a "GAP Program" and was appointed as a sheriff's officer on March 16, 2006. Officers in the GAP program were appointed as sheriff's officers on a provisional basis pending their successful completion of a mandatory training course approved by the Police Training Commission. Rodriguez graduated from the police academy on August 30, 2007.

The corrections officers who participated in the GAP program entered into an "LTC Agreement", which provided that in the event of a reduction in staff, the officers would be laterally transferred back to their former correction officer titles and

that the change would be effectuated without recourse and in accordance with the rules and regulations of the New Jersey Department of Personnel. ("DOP")<sup>3/</sup>. On July 22, 2008, the Civil Service Commission ("CSC") denied the PBA's appeal of the decision of the DOP Division of Local Human Resource Management that had denied a request to change the appointment date of the sheriff's officers who laterally transferred from correction officer titles. The CSC further held that the sheriff's officers would not have lateral or demotional rights to a corrections officer title in a layoff regardless of the LTC agreements.

The County is currently experiencing a budget crisis. As a result, the County instituted layoffs that included the Sheriff's Department. On July 9, 2008, Rodriguez was laid off from his provisional sheriff's officer position with two other sheriff's officers.<sup>4/</sup> According to Meyers, the County laid off a total of 47 sheriff's officers. On August 15, Officer Rodriguez was rehired at step 2 of the salary guide instead of the top step. According to Rodriguez, step two is a \$45,000 reduction in salary from his previous salary.

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<sup>3/</sup> A copy of the LTC Agreement was not provided by either party.

<sup>4/</sup> The two other employees are not identified by either party.

The PBA filed a grievance on August 21, 2008 on behalf of Rodriguez and the two other officers that were rehired at the lower step 2 salary.

**Rodriguez Certification**

Rodriguez certifies that on August 22, 2008, he and the two officers also recalled were told to report to the Warden's office on Monday August 25. At that meeting, the three officers were given an agreement to sign wherein they would agree to waive their regular salary and agree to be paid at step 2 of the guide. Rodriguez certifies that when he was given the agreement to sign, he asked to speak to his PBA representative. He was told to go outside and call the PBA president, but to leave the agreement in the room. The PBA president spoke to the warden and requested that the officers have one day to have the agreements reviewed by their attorney. According to Rodriguez, the Warden stated that the agreements had to be signed that day or the officers would not have their jobs. Rodriguez agreed to sign the agreement and was then told that he would not be rehired. Rodriguez was terminated and paid for the period from August 15 to 25 that he had worked on recall.

**Meyers Certification**

Meyers certifies that in August 2008, the County determined that it needed to recall some laid off sheriff's officers that were still in their provisional status. Due to the fact that

these employees were not permanent employees according to the DOP, their names did not appear on a special reemployment list issued by the DOP. The County conditionally hired the employees and petitioned the DOP to relax their rules and issue a special reemployment list that included provisional employees. According to Meyers, Officer Rodriguez was number four on the seniority list of provisional employees. Meyers certifies that the County recalled more sheriff's officers than it needed and decided to re-hire three of the four provisional employees on the list. Since Rodriguez was number four, he was not re-hired.

According to Meyers, the provisional officers were re-hired at step 2 due to fiscal constraints. Meyers states that the officers were asked to attend a meeting where it was explained to them that the provisional employees considered for re-hire would be paid at step 2 of the guide pending certification procedures from the DOP. Meyers certifies that when he realized that a PBA representative was not at the meeting, he stopped the meeting and contacted PBA President Patrick Murray. Once Murray arrived, the meeting commenced.

According to Meyers, the County requested the provisional employees execute two agreements. One agreement provided that the officers agreed to be paid on step 2 of the salary guide pending certification from the DOP. The other agreement requested that the employees acknowledge that their re-hire was

conditional upon the DOP agreeing to relax its rules and include the provisional employees on the special re-employment list.

Ultimately, the DOP issued a determination that Officer Rodriguez's separation due to layoff was from a regular but non-permanent position since he had not completed his working test period by the effective date of the layoff. He was therefore not eligible for inclusion on the DOP special reemployment list.<sup>5/</sup> According to the County, Rodriguez cannot be recalled until the DOP special reemployment list is exhausted.

#### Analysis

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

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<sup>5/</sup> The County has provided a letter dated September 18, 2008 from Sucel Gonzalez, Acting Manager of the New Jersey Department of Personnel Division of Local Human Resource Management to Anthony Rodriguez that contains the heading "Corrected Determination" and advises that since Rodriguez was in a provisional status at the time of his layoff, his name cannot be placed on a special reemployment list and there are no displacement rights available to him at that time.



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).

In Little Egg Harbor Tp., the designee stated:

[t]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The PBA argues that it has a substantial likelihood of success on the merits because it is clear that the County retaliated against Rodriguez for engaging in protected union activity and that it has established a clear case that the County engaged in "direct dealing" with the recalled members. It further contends that PBA members will suffer irreparable harm as the County's actions undermine the PBA's ability to represent its members and a balancing of the equities clearly establishes that interim relief is appropriate under the facts presented.

The County contends that interim relief must be denied because there are material facts in dispute; there is no irreparable harm as the union president participated in the meeting and reviewed the agreements; the public interest is not implicated by a denial of interim relief; and the DOP has primary

jurisdiction of the review and approval of the County layoff plan.

The PBA responds that there are undisputed facts that are at the center of its charge: three officers were called into the Warden's office and handed the salary agreements and when the one that called for the PBA representative left, he was fired. The PBA also argues that I must reject the County's argument that Rodriguez was terminated because he was ineligible according to the DOP because that determination was not made until September.

#### **The 5.4a(3) Allegations**

During the oral argument, the PBA confirmed that it was seeking interim relief on its 5.4a(3) and (5) allegations. The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246. Thus, the assessment of the employer's motivation in determining whether it

has violated section 5.4a(3) of the Act is critical. However, by its very nature, establishing the employer's motivation is a fact intensive exploration and does not readily lend itself to a grant of interim relief. See Tp. of Parsippany-Troy Hills, I.R. No. 2008-15, 34 NJPER 86 (¶36 2008); Newark Housing Auth., I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); Cty. of Union, I.R. No. 2003-8, 28 NJPER 572 (¶33175 2002).

The PBA alleges that Rodriguez was terminated because he requested his union representative. The Warden states that he was the person that called PBA President Murray during the meeting and not Rodriguez. The County also asserts that Rodriguez was terminated because it only needed three officers and not four. This a dispute as to material facts of the charge. The only people that know what happened in that room on August 25, 2008 are the two unnamed officers, Rodriguez, Meyers and Murray. The parties have only submitted the certification of Rodriguez and Murray which are in conflict as to the reasons for the termination. The employer's motivation to terminate Rodriguez is the central issue in the PBA's 5.4a(3) allegations. Bridgewater. Whether Rodriguez was terminated in retaliation for protected activity or whether the employer had recalled more officers than it required is a determination that cannot be made on the record before me and must be made after a plenary hearing.

Thus, it is not possible to conclude that a substantial likelihood of success exists on the 5.4a (3) allegations.

**The 5.4a(5) Allegations**

N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative concerning employees' terms and conditions of employment. A public employer may violate these obligations by changing a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual defense authorizing the change and by repudiating a term and condition of employment it had agreed would remain in effect throughout a contract's life. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

Terms and conditions of employment may be set forth in the parties' collective negotiations agreement or may derive from the parties' practice. Placement on the salary guide is a mandatorily negotiable term and condition of employment. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd. 334 N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000).

The PBA alleges that the County engaged in direct salary negotiations with the recalled officers when it offered them the agreements to be paid at step 2. The County responds that the

PBA president was present, at the Warden's request, when the officers were given the agreements and that President Murray was present to review the two agreements that the members eventually signed. At oral argument, the County also asserted that this was a breach of contract issue and that it had a contractual defense to the charge because the recalled officers had lost DOP seniority when the CSC denied their appeal and therefore they were appropriately placed on step 2.

There exists a dispute as to whether the PBA participated in the review and execution of the step 2 agreements and whether any contract language would permit placement of the officers on step 2 of the guide. These are issues that must be resolved by an arbitrator or hearing examiner.


### **Conclusion**

At this early stage of the case, there exists factual disputes as to the allegations set forth in the charge. To counter the County's contentions, the PBA has not proffered the necessary competent proof to establish, by a preponderance of the evidence, that the County has violated the Act. Thus, I find that the PBA has not carried its burden of establishing a substantial likelihood of success on the merits, a requisite element to obtain interim relief. Having found that the PBA has not established the first requirement for interim relief, I do not have to address the irreparable harm standard or the County's

defense that the DOP has primary jurisdiction to hear this case. Accordingly, this case will proceed through the normal unfair practice processing mechanism.

ORDER

The Passaic County Sheriffs PBA Local 286's application for interim relief is denied.

  
Mary E. Hennessy-Shotter  
Commission Designee

DATED: December 22, 2008

Trenton, New Jersey