

I.R. NO. 2011-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF SOMERSET and
SOMERSET COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CO-2010-505

SOMERSET COUNTY SHERIFF'S OFFICERS
FOP LODGE NO. 39,

Charging Party.

SYNOPSIS

The Somerset County Sheriff's Officers FOP Lodge No. 39 filed an unfair practice charge, accompanied by an application for interim relief, against Somerset County and Somerset County Sheriff's Office, alleging that the County unilaterally changed terms and conditions of employment during ongoing negotiations and interest arbitration when it used county-wide seniority rather than sheriff's office seniority in its determination of layoff order. The County asserted that N.J.S.A. 40A:14-115 was controlling and required that it use county-wide seniority for its seniority calculation. The FOP argued that N.J.S.A. 40A:14-115 did not apply and that the County's Policy and Procedures Manual establish the condition of employment applicable to the order by which employees would be laid off. The Commission Designee found in favor of the FOP and determined that injunctive relief was appropriate. The Commission Designee ordered the County to revise the order by which it had laid off employees.

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Appearances:

For the Respondent
Ogletree, Deakins, Nash, Smoak & Stewart
(Evan J. Shenkman, of counsel)

For the Charging Party
Klatsky, Sciarrabone & DeFillippo
(David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

On June 24, 2010, the Somerset County Sheriff's Officers FOP Lodge No. 39 (FOP) filed an unfair practice charge with the Public Employment Relations Commission alleging that the County of Somerset and the Somerset County Sheriff's Office (County or Sheriff) violated 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of

^{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. (2) Dominating or
(continued...)"

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed terms and conditions of employment during negotiations for a successor agreement. The FOP contends that the County changed the manner in which seniority is calculated to identify the least senior employee for purposes of effecting a reduction in force. The FOP contends that the Sheriff wrongfully used the officers' seniority with the County rather than the officers' seniority accrued during employment in only the Sheriff's office. The FOP argues that Sheriff's Officer Christopher Omelio was wrongfully laid off as the direct result of the unilateral change in terms and conditions of employment which arose from other employees being credited with seniority earned while employed by the County, outside of the Sheriff's office. The County contends that

1/ (...continued)
interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

county-wide seniority, as opposed to Sheriff's Office seniority, is the appropriate seniority calculation for determining an employee's placement on a layoff list as required by N.J.S.A. 40A:14-115 and/or pursuant to the collective agreement.

The unfair practice charge was accompanied by an application for interim relief. On July 1, 2010, I executed an Order to Show Cause and set an August 4, 2010 return date. The parties submitted briefs, affidavits and exhibits and argued orally on the scheduled return date. The following facts appear.

The FOP is the collective negotiations representative for all non-supervisory sheriff's officers employed by the Somerset County Sheriff's Office. The parties' most recent collective negotiations agreement expired on December 31, 2004. The terms of the parties' 2005-2007 collective agreement were established pursuant to an interest arbitration award, but were not memorialized in a successor collective agreement. Currently, the parties are in negotiations for a post-2007 collective agreement. On or about March 10, 2008, the FOP filed a petition to initiate compulsory interest arbitration proceedings. The parties continue in the interest arbitration process.

The responsibilities of the Sheriff's Office include maintaining a safe a secure environment at the Somerset County Court House and the County Complex, providing support to all County law enforcement efforts, supervising the operation of the

Somerset County Jail, and the care and custody of persons incarcerated or committed by the courts. The law enforcement division of the Sheriff's office consists of approximately 60 sworn sheriff's officers, with county-wide jurisdiction. Sheriff's officers assist the local police departments, enforce criminal laws relating to fraud at the Somerville Motor Vehicle Commission, conduct prisoner transports, enforce traffic laws, serve civil process, execute warrants, transport inmates to court hearings and state prison, and provide court security for Superior Court judges at the County court house. Sheriff's officers have the authority to arrest for the commission of any crime in the County and for the commission of any crime committed in their presence in the State of New Jersey. Sheriff's officers receive their training at the New Jersey Division of Criminal Justice's Police Academy provided by the Police Training Commission and upon completion of the training program are certified by the Police Training Commission as police officers.

In December 2009, the County advised the FOP of a budget deficit for 2010 in the range of \$7 to \$9 million dollars. The County further advised that while it was investigating all possible means of closing the budget gap, employee layoffs as well as other budget reduction efforts would be considered. The County and the FOP engaged in negotiations in an attempt to avoid layoffs. However, the negotiations proved unsuccessful and on

June 11, 2010, five sheriff's officers were laid off, including Officer Omelio. Omelio's hire date with the County and Sheriff's Office is November 1, 2005. Other sheriff's officers who were hired by the County into positions other than sheriff's officer prior to November 1, 2005, were not laid off. However, some of those same officers had hire dates in the sheriff's officer position after Omelio's November 1, 2005 hire date. Accordingly, those officers' total seniority with the County exceeded Omelio's County seniority, but were less than Omelio's seniority earned in the sheriff's officer title. Thus, the County calculated seniority as the determining factor by using date of hire with the County to make layoff determinations; employees in the Sheriff's Office with the least County-wide seniority were laid off first.

The FOP does not challenge the County's decision to layoff sheriff's officers, but rather, the County's decision to select officers for layoff based upon the date of hire with the County (County seniority), as opposed to an officer's date of hire in the Sheriff's Office (seniority as a sheriff's officer). The County contends that N.J.S.A. 40A:14-115 is controlling and preemptive with respect to the date of hire applicable to the order in which sheriff's officers were selected to be laid off. The County asserts that N.J.S.A. 40A:14-115 speaks in the imperative and expressly, specifically and comprehensively sets

the layoff selection criteria for the sheriff's officers at issue in this case. The County concludes that the term "appointment" in N.J.S.A. 40A:14-115, refers to the date of hire to a position with the County, not merely a date of hire with the Sheriff's Office. In the County's view, the intent of N.J.S.A. 40A:14-115 is to protect individuals with long County service from termination resulting from fiscal exigencies. The County claims that since N.J.S.A. 40A:14-115 is preemptive and controls the selection process for layoffs, it is not bound by any contractual provision or County policy contained in the County's Policies and Procedures Manual.

The FOP contends that N.J.S.A. 40A:14-115 does not preempt the selection process for layoffs and, in fact, is inapplicable to sheriff's officers' reductions in force. The FOP claims that N.J.S.A. 40A:9, et seq., applies to county sheriff's officers. The FOP asserts that N.J.S.A. 40A:14, et seq., constitutes the statutory scheme applicable to county police departments and county police officers, not sheriff's officers. Further, the FOP asserts that since the collective agreement contains no specific provision with respect to sheriff's officers' layoffs, the existing term and condition of employment with respect to sheriff's officers' layoffs is established through the parties practice and custom. The FOP contends that the practice is codified in the County's Policies and Procedures Manual at

Section 1B, Layoffs. The FOP argues that since the manual sets the term and condition of employment with respect to the layoff procedure, the County is not free to unilaterally change that procedure without prior negotiations. In this case, the FOP asserts that the County has unilaterally changed the conditions of employment by applying the layoff process reflected in N.J.S.A. 40A:14-115 rather than the process reflected in the policy manual which resulted in a unilateral change in terms and conditions of employment and in Omelio's wrongful layoff.

Article XXIX, Seniority, contained in the parties collective agreement states the following:

29.1 With respect to all incidents of employment, seniority shall be one of the major factors considered, provided the officer involved has the ability to perform the work involved.

29.2 Seniority with the Sheriff's department shall be one of the major factors considered regarding promotional opportunities, overtime opportunities, the granting of vacation and personal day requests and longevity pay.

29.3 Seniority with the County shall be one of the major factors considered regarding salary levels, service recognition and benefits.

Section 1.B., Layoff, contained in the County's Policies and Procedures Manual, states:

Once Human Resources is notified of a pending layoff by the Board, Human Resources shall notify the affected employees and attempt to transfer or reassign these employees. Employees shall be laid off in inverse order

of their length of service within each affected job classification within a particular division. All temporary, probationary and provisional employees, in that order, shall be laid off before any regular employee.

N.J.S.A. 40A:14-115, Decrease of Force for Reasons of Economy, states:

The Board of Chosen Freeholders of any county, if they shall deem it necessary for reasons of economy, may decrease the number of members and officers of the police department or force or their grades or ranks. In case of demotion from the higher ranks, the officers or members to be so demoted shall be in the inverse order of their appointment. When the service of members or officers is terminated, such termination shall be in the inverse order of their appointment. Any member or officer who is demoted or whose service is terminated by reason of such decrease shall be placed on a special employment list and in the case of subsequent promotions, a person so demoted shall be reinstated to his original rank, and in the case of termination of service and new appointment, prior consideration shall be given to the persons on said special employment list.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v.

Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's 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.

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Education Assn., 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

I first address the requisite element of likelihood of success. The seniority article in the collective negotiations agreement does not specifically reference the application of seniority in a layoff context. Each party has expressed alternate interpretations with regard to the application of the contractual seniority article. While it is possible that either of the parties' respective interpretations regarding the application of the seniority article ultimately may have a significant impact on the outcome of this case, I make no finding with respect to either party's asserted interpretation. A determination of whether the contract language impacts on the

application of seniority in the layoff context is appropriately made by an arbitrator based on a reading of the collective agreement, negotiations history and other relevant factors presented in that forum.^{2/} Based on the record at this point, however, I find that the collective agreement is not controlling and does not set the conditions of employment.

I find that the County's reliance on N.J.S.A. 40A:14-115 as preempting the manner in which sheriff's officers are laid off is misplaced. The County acknowledges that N.J.S.A. 40A:14-115 does not specifically reference sheriff's officers but instead refers generally to "members and officers of the police department or force." While the County concedes that there is no case law under N.J.S.A. 40A:14-115 holding that sheriff's officers fall under the definition of "officers of the police department or force," it cites certain cases which it contends contains analogous provisions which support its interpretation. In Camden Cty. Sheriff, P.E.R.C. No. 2004-46, 30 NJPER 33 (¶10 2004), the Camden County Sheriff filed petitions seeking several scope of negotiations determinations concerning proposals made by the Camden County Sheriff's Officers PBA Local 277 and Camden County Sheriff's Superior Officers, PBA Local 277 (SOA) during interest arbitration proceedings. One proposal pertained to the Camden

^{2/} The FOP has filed a related grievance asserting similar issues raised in this unfair practice charge. That grievance is pending arbitration.

County Sheriff paying attorney's fees and related costs should the PBA/SOA prevail on any litigated issue. In finding the subject matter of the proposal to be negotiable, the Commission tangentially referred to N.J.S.A. 40A:14-117 in support of its general determination that a public body may be statutorily obligated to pay for legal services rendered to another. Id. at 38. The Commission did not find N.J.S.A. 40A:14-117 applicable to sheriff's officers specifically.

The County also cites Union County, P.E.R.C. No. 99-108, 25 NJPER 329 (¶30141 1999). In Union County, Union County PBA Locals 199 and 199A (Superior Officers) filed an unfair practice charge against Union County alleging that the County refused to pay the fees of attorneys selected by corrections officers to represent them in civil or criminal cases that stemmed from the performance of their duties. Union County filed a motion for summary judgment alleging that the charge was untimely and that the refusal to pay attorneys fees involves a non-negotiable managerial prerogative. In denying Union County's motion, the Commission found that N.J.S.A. 40A:14-117 does not preempt a practice of the County providing the "necessary means" for County correction officers to defend against civil or criminal charges arising out of or incidental to the performance of their duties. A careful reading of Union County does not indicate whether the

correction officers were included in the sheriff's office or that the Union County Sheriff was in any way involved in that case.

The third case cited by the County in support of its contention that N.J.S.A. 40A:14-115 applies in the instant matter is Hudson County, P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982). Hudson County filed a Petition for Scope of Negotiations Determination alleging that an article contained in the collective agreement regarding the provision of legal counsel to unit members in connection with claims arising from the employee's reasonable and proper discharge of duties was non-negotiable. PBA Local 109 represented superior officers within the county's correctional facility. The County argued that N.J.S.A. 40A:14-117 preempted the inclusion of the disputed article in a successor agreement. In finding the provision of legal counsel to be mandatorily negotiable, the Commission specifically concluded that the superior officers at the Hudson County Correctional Facility were county police officers within the meaning of N.J.S.A. 40A:14-117. The instant case is readily distinguishable since it is exclusively sheriff's officers, and not county police officers, that are at issue here. N.J.S.A. 40A:14, et seq., applies to county police officers, not sheriff's officers. Accordingly, I conclude that it appears that the statutory scheme set forth in N.J.S.A. 40A:14-115 is inapplicable to the layoff of sheriff's officers as raised in this case. I

find that N.J.S.A. 40A:14-115 is not controlling with respect to sheriff's officers' layoffs. See also Communications Workers of America, AFL-CIO, et. al. v. Treffinger, 291 N.J. Super. 336 (1996).

Thus, I find, that the existing condition of employment regarding the layoffs which occurred in the sheriff's office are reflected in the County's Policies and Procedures Manual, section 1.B., Layoff, which, in part, states:

. . . employees shall be laid off in inverse order of their length of service within each affected job classification within a particular division.

Since the County appears to have wrongfully relied on N.J.S.A. 40A:14-115 to arrive at its seniority calculation for purposes of layoff, rather than its policy manual, I find that the County has unilaterally changed terms and conditions of employment without negotiations in violation of the Act. Consequently, I find that the FOP has established the requisite element of a substantial likelihood of prevailing in a final Commission decision.

The parties are currently in the midst of collective negotiations for a successor agreement. A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act, undermines labor stability, and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v.

Galloway Tp. Ed. Assn. Further, a unilateral change of a term or condition of employment during the pendency of interest arbitration constitutes a violation of N.J.S.A. 34:13A-21. Therefore, I find that the County's unilateral change in terms and conditions of employment during the course of collective negotiations and interest arbitration undermines the FOP's ability to represent its members and results in irreparable harm.

In consideration of the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and, thus, promotes the public interest.

In assessing the relative hardship to the parties, I find that the scales tip in favor of the FOP. The County experiences a lesser degree of hardship by being required to return to the status quo ante during the processing of the instant matter. The County suffers no financial harm as the result of recalling Omelio and replacing him with another, less senior employee on layoff.^{3/} However, the FOP will be irreparably harmed as the

^{3/} The FOP has asserted other errors in identifying the proper employee to be laid off based on the employee's proper seniority calculation or whether such employee is serving in provisional status. The unfair practice charge filed

(continued...)

result of a unilateral change in terms and conditions of employment during the pendency of collective negotiations and interest arbitration. Additionally, Omelio suffers greater harm by being wrongfully laid off than does the County by being required to reinstate him and layoff another less senior employee.

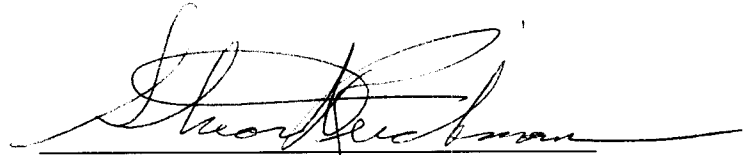
This case will proceed through the normal unfair practice processing mechanism.

ORDER

The County is restrained from unilaterally changing terms and conditions of employment with respect to the calculation of seniority applicable to Sheriff's Officer Omelio and is directed

3/ (...continued)
addresses only Omelio. I would expect the parties to review the employees identified for layoff in a manner consistent with this decision, however, I limit my order to only Omelio.

to recall Omelio to active duty.^{4/} This interim order will remain in effect pending a final Commission order in this matter.



Stuart Reichman
Commission Designee

DATED: August 9, 2010
Trenton, New Jersey

^{4/} I have not ordered back pay as that remedy is available to the Commission and/or an arbitrator subsequent to plenary hearings in those respective fora. However, the parties are certainly free to negotiate a total remedy as pertains Omelio and other possibly wrongfully laid off unit members, if any.