

I.R. NO. 2011-29

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX and
ESSEX COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CO-2011-212

ESSEX COUNTY SHERIFF'S
PBA LOCAL NO. 183,

Charging Party.

SYNOPSIS

A Commission Designee grants an interim relief application based upon an unfair practice charge alleging that the public employer unlawfully transferred negotiations unit work from sheriff's officers to non-unit corrections officers. The disputed work is criminal identification responsibilities in the Essex County Jail.

The Designee balanced the interests of the parties under the tests set forth in City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). The Designee found that employee interests outweighed the governmental policy interests, thereby requiring that the employer negotiate with the majority representative before shifting work to corrections officers. The same result occurs when the facts are analyzed under the unit work rule standard. The County was enjoined from shifting the unit work until negotiations on the issue were completed.

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Appearances:

For the Respondent
Genova, Burns and Giantomasi, attorneys
(Brian W. Kronick, of counsel)

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

INTERLOCUTORY DECISION

On November 22, 2010, Essex County Sheriff's PBA Local No. 183 (PBA) filed an unfair practice charge against the County of Essex and Essex County Sheriff's Office (County), together with an application for interim relief, a proposed Order to Show Cause, exhibits, a certification and brief. The charge alleges that on or about October 18, 2010, the PBA learned that criminal identification duties, which had been performed by about eleven sheriff's officers, were to be reassigned to corrections officers (not included in the PBA negotiations unit). The charge alleges

that the County "will not discuss the issue with the PBA, let alone negotiate [collectively]." The charge also alleges that "the parties have gone through compulsory interest arbitration for a successor agreement [and] an arbitrator has issued a decision which is currently under appeal." The County's conduct allegedly violates section 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The application seeks an order restraining the County from "assigning employees outside of the [negotiations] unit to perform the duties at the bureau of criminal identification;" and directing the County to negotiate any changes in terms and conditions of employment.

^{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 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."

On December 2, 2010, I issued an Order to Show Cause, specifying January 4, 2011 as the return date for argument (later changed by consent from appearances to a telephone conference call scheduled for January 11). I also directed the County to file a response by December 27, 2010 (later changed to January 4, 2011), together with proof of service upon the PBA. On the return date, the parties argued their cases. The following facts appear.

The PBA and the County signed a series of collective negotiations agreements. The most recent agreement is unsigned and extended from January 1, 2007 through December 31, 2008. The parties have proceeded "through compulsory interest arbitration for a successor agreement" and "an arbitrator issued a decision [on August 3, 2010] which is under appeal." On August 16, 2010, the County filed an appeal of the interest arbitration opinion and award with the Commission (IA-2008-098).

In 2004 or 2005, a new Essex County Jail was completed, replacing the Newark Jail and Essex County Jail Annex. In the Newark Jail, sheriff's officers had performed criminal identification duties as part of the Bureau of Criminal Identification (BCI). The former director of the County Department of Corrections (2004-2009) certifies that in the Annex, corrections officers (non-unit employees) performed criminal identification duties. A PBA representative certifies

that criminal identification duties were always performed by sheriff's officers, ". . . before and after the change in location of the current correctional facility." When the new County Jail opened, BCI was moved there and only sheriff's officers performed criminal identification duties. Before December, 2010, eleven sheriff's officers and three sheriff's officers supervisors worked in the BCI.

Alfaro Ortiz is the current County Director of the Department of Corrections and has held the title since July 1, 2009. In September 2010, Ortiz met with the Department's associate director, the chief of staff and a former director and ". . . decided to reorganize the criminal identification process at the Essex County Jail." In considering a reorganization of the criminal identification process, Ortiz learned that in 16 New Jersey counties, corrections officers performed identification duties; that two counties employed civilians for that purpose; and two counties employed sheriff's officers to perform those duties.

On October 18, 2010, the associate director of the department of corrections posted memoranda seeking "post bids" for "Chart Division, Offender Identification Section (OIS) Sergeant." The PBA was informed that "OIS" will be the new name of BCI. The PBA representative "repeatedly demanded information from supervisors regarding the change in unit work" and that the

County "will not discuss the issue with the PBA, let alone negotiate with [it]."

On December 6, 2010, the Director certifies, "the BCI will be replaced by the Central Reception Unit which will consist of eleven corrections officers that are supervised by three corrections supervisors." Ortiz also certifies that the change will "improve the efficiency and effectiveness of the criminal identification process at the Essex County Jail."

The County did not negotiate with the PBA before shifting criminal identification duties from sheriff's officers to corrections officers (non-unit employees).

N.J.S.A. 40A:9-117.6 (sheriff's officers) provides in a pertinent part:

The sheriff of each county shall, subject to the budget of the county, appoint such persons as may be necessary, to the position of sheriff's officer . . . to perform the duties involved in attending the courts heretofore performed by court attendants, or in serving court processes, or in the investigation and apprehension of violators of the law, or in criminal identification, or in bulletins, or in any related work . . . (emphasis added).

ANALYSIS

A charging party may obtain interim relief in certain cases. 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).

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. See Hudson Cty. Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003). In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. That test provides:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with

the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [88 N.J. at 404-405]

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Id. at 573.

The unit work rule contemplates three exceptions in which the transfer of unit work is not mandatorily negotiable. The exceptions apply where (1) the union waived its right to negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of unit personnel; and (3) the municipality is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577.

The County asserts that both sheriff's officers and corrections officers have performed identification duties, undermining the PBA's claim that sheriff's officers performed the

work exclusively. It contends that the Director of the department of corrections decided to "reorganize the process used for criminal identification" and that the process ". . . will operate much more efficiently and smoothly with corrections officers being utilized instead of sheriff's officers." The County also argues that the change will ". . . free up more sheriff's officers to perform other assignments" (brief at p. 8).

The certifications reveal that sheriff's officers exclusively performed criminal identification duties since 2004 or 2005, when the new Essex County Jail commenced operations. The Director of the County Department of Corrections certifies that on December 6, 2010, the Bureau of Criminal Identification was "replaced" by a "Central Reception Unit" consisting of eleven corrections officers and three corrections supervisors. These facts substantially show that in December, 2010, the County "shifted" unit work to corrections officers. Union Cty., I.R. No. 2002-12, 28 NJPER 279 (¶33105 2002), mot. for recon. den., P.E.R.C. No. 2003-14, 28 NJPER 352 (¶33126 2002), But cf. Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989) (town did not violate negotiations obligation when it laid off civilian dispatchers and assigned work to non-unit police officers who had previously performed dispatching functions).

The Commission has found that if an employer exercises a managerial right to reorganize the way it delivers government services, it may by necessity transfer job duties to non-unit employees without incurring a negotiations obligation. Monroe Fire Dist. #2, P.E.R.C. No. 98-158, 24 NJPER 347, 350 (¶29165 1998). In Jersey City, our Supreme Court cautioned that ". . . whether a public employer's actions will be deemed to constitute a legitimate reorganization depends both on the employer's motivations and whether there is a change in the delivery of services." 154 N.J. at 578-579.

Union Cty. is particularly instructive. There, the Designee enjoined the County from shifting certain inmate transportation duties from corrections officers, who performed those duties exclusively for 14 months, to non-unit sheriff's officers, until negotiations were completed. The Designee was not persuaded of a reorganization because the employer ". . . gives no specifics how the work transfer has affected the delivery of government services" or accomplishes the asserted goal of "improving performance." The Designee wrote: "Absent such specifics, the County's claim of managerial prerogative may constitute a hollow contention." I.R. No. 2002-12, 28 NJPER at 282. The Commission essentially affirmed. Union Cty., P.E.R.C. No. 2003-14, 28 NJPER at 353.

In this case, I glean no specific facts describing how the transfer of criminal identification duties "reorganizes the process," creates "efficiencies" or improves performances that were not or could not be obtained when sheriff's officers performed those duties. Nor did the substitution of a "central reception unit" for the "bureau of criminal identification" constitute a reorganization, inasmuch as the "new" jail (which replaced the older jails) has operated for more than five years and no facts indicate when the "central reception unit" was created or how it differs, functionally or operationally, from its predecessor. The County's assigning of eleven non-unit corrections officers to that location matches the number of unit sheriff's officers who previously performed the same duties there. No facts indicate that each corrections officer is not performing the same duties as his or her immediate predecessor, suggesting continuity in structure, rather than a change. Cf. Nutley Tp., P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985). The County has not identified a change in the delivery of government services at the time of the transfer of work which implicates the reorganization exception to the unit work rule.

Our Supreme Court in Jersey City requires the application of the Local 195 balancing test to the facts and issues raised in each case. It appears that the PBA has met the first part of the test, specifically, whether the "item" intimately and directly

affects the employees' work and welfare. Sheriff's officers exclusively have performed criminal identification duties at the Essex County Jail since the facility opened in 2004 or 2005. I infer that the substitution of eleven unit employees would likely diminish overtime opportunities of sheriff's officers. Also, the PBA has an interest in maintaining the size of its negotiations unit. Accordingly, the transfer of criminal identification duties appears to intimately and directly affect the work and welfare of sheriff's officers.

The second part of the Local 195 test is not implicated in this case. Although N.J.S.A. 40A:9-117.6 sets forth examples of work for sheriff's officers which include criminal identification duties, it does not partially or fully preempt negotiations over those duties. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 44 (1982) (a preemptive statute must expressly, specifically and comprehensively fix an employment condition so firmly that it cannot be changed through negotiations).

I must balance the interests of public employees and the public employer, as specifically set forth in the third prong of the Local 195 test. For the reasons I have described in this decision, it appears that the transfer of criminal identification duties from sheriff's officers to corrections officers is closer to a substitution of ". . . one person for another without

changing the structure or nature of the job, [which] does not eliminate per se, a duty to negotiate over the transfer of duties to non-unit employees." Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251, 252 (¶27131 1996). See also, Union Cty., I.R. No. 2002-12, 28 NJPER at 282. Sheriff's officers wish to continue performing criminal identification duties for which they are apparently qualified. The PBA has an interest in maintaining the size of its negotiations unit (the employer has not certified that sheriff's officers will not be laid off as a consequence of its disputed action). On the other hand, the County has not clearly articulated its policy goal necessitating the unilateral transfer of criminal identification duties, nor the manner in which the transfer affects the delivery of government services. The County argues that the Director will obtain direct authority over personnel performing criminal identification duties. No facts show how the Director's authority was manifested or limited by the sheriff's officers' performance of identification duties. That interest alone does not describe how the transfer of duties affects the delivery of government services, creates efficiencies or improves performance. That an overwhelming majority of other New Jersey counties assign these duties to corrections officers does not, in and of itself, justify a unilateral transfer. On balance, it appears that the interests of sheriff's officers

prevail over the County's desire to now have corrections officers perform criminal identification duties.

For all of the reasons mandated by an application of the unit work rule or the Local 195 test, the same result appears. The County has incurred an obligation to negotiate over the reassignment of criminal identification duties from sheriff's officers to corrections officers. Accordingly, I find that the PBA has established a substantial likelihood of success on the merits of its charge.


In Union Cty., the parties were in the same position as are the County and PBA at the time the application for interim relief was filed. The interest arbitrator's award has issued and was (is) currently on appeal before the Commission. N.J.S.A. 34:13A-16f(5)(a). The Designee in Union Cty. found that the Act prohibited any change in terms and conditions of employment while the parties are engaged in "the interest arbitration process," citing N.J.S.A. 34:13A-21. I.R. No. 2002-12, 28 NJPER at 282. He reasoned that the "interest arbitration proceeding remain[ed] within the Commission's jurisdiction," finding that the PBA in that case established irreparable harm. The Commission concurred, noting that irreparable harm occurs when there is a unilateral change before the execution of an agreement. Union Cty., P.E.R.C. No. 2003-14, 28 NJPER at 353. Accordingly, I find that the PBA has established irreparable harm in its application.

In weighing the relative hardships to the parties resulting from a decision to grant or deny interim relief, I find that the scales favor the PBA. Sheriff's officers have been exclusively performing identification duties for more than five years. The County has not asserted that they have performed inadequately, nor has the union representing corrections officers claimed that the disputed work should be performed by its unit employees. The County has not alleged that the criminal identification responsibility will suffer if sheriff's officers continue to perform those duties. On the other hand, sheriff's officers forced to relinquish their assignments must now be provided other duties, without a certified assurance that they or other sheriff's officers will not be laid off or denied overtime assignments. The County appears to suffer no harm as a result of an Order maintaining the status quo ante until the charge is resolved.

Finally, I do not believe that the public interest is harmed by granting an interim relief order in this case. It does not appear that financial costs for maintaining the assignment of sheriff's officers to the criminal identification function is an issue. No facts suggest that the public is at any heightened risk of harm if sheriff's officers continue to perform criminal identification duties. The public interest is also served by requiring the County to adhere to the tenets of the Act.

ORDER

The County is restrained from transferring criminal identification duties at the Essex County Jail from sheriff's officers to non-unit employees until negotiations over the transferred work are completed. This interim order will remain in effect pending a final Commission order in this matter. This case shall be processed in the normal course.


Jonathan Roth
Commission Designee

DATED: January 14, 2011
Trenton, New Jersey