P.E.R.C. NO. 2002-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BOARD
OF CHOSEN FREEHOLDERS,

Petitioner,

-and- Docket No. SN-2002-10

P.B.A. LOCAL 249
(CORRECTION OFFICERS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Burlington County Board of Chosen Freeholders for a restraint of binding arbitration of grievances filed by P.B.A. Local #249 (Correction Officers). The grievances contest the deputy warden's decision to designate as female-only a post in the female housing unit of the Corrections and Work Release Center. The Commission concludes that precluding the employer from making this designation would substantially limit governmental policymaking powers in deciding how best to accommodate the security needs of the center; the employment rights of the guards, and the privacy rights of inmates.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Evan C. Crook, Burlington County Solicitor (Daniel Hornickel, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Charles E. Schlager, Jr., on the brief)

DECISION

On October 17, 2001, the County of Burlington petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of grievances filed by P.B.A. Local #249 (Correction Officers). The grievances contest the deputy warden's decision to designate as female-only a post in the female housing unit of the Corrections and Work Release Center (CWRC).

The parties have filed briefs, exhibits, affidavits and certifications. These facts appear.

The PBA represents rank-and-file county correction officers. The County and the PBA are parties to a collective

negotiations agreement effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article XXXVI is entitled Equal Treatment. It provides:

> The Employer agrees that there will be no discrimination or favoritism practiced upon or shown employees for any reasons of sex, age, nationality, race, religion, marital status, political status, political affiliation, sexual orientation, national origin, color, handicap, Association membership, Association activities, or the exercise of any concerted rights or activities. For the purposes of this Agreement he shall be a generic term referring to any employee regardless of their sex. Said usage is not intended to be discriminatory or sexually based.

The County operates two corrections facilities, the Burlington County Detention Center, which houses approximately 426 male inmates, and the CWRC, a minimum security facility housing 54 female inmates as well as an unspecified number of male inmates eligible for work release. Each facility operates on three shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. They are staffed by approximately 215 correction officers, 70 of whom are female. Total daily CWRC staffing is 50, with 35 males and 15 females.

Unit members bid for assignments and shifts in the two facilities pursuant to Article XIII, Section D. That section provides:

> All new assignments and vacant assignments which the County seeks to fill shall be posted for bid at the County's various correction facilities for a minimum of seven (7) working

> days. The bid sheet shall state facility, shift, and days off as well as any special requirements for the assignments. The position shall be filled with the most senior employee who bids on the assignment and who has the minimum qualifications to perform the job.

Female inmates, many of whom are pre-trial detainees, are housed at CWRC on the E, F, G, and K-wings. The G-wing houses medium to maximum risk inmates and is connected to the K-wing, a segregation unit that houses those inmates who pose the highest security risk. The E and F-wings house lower-risk inmates and are separated from the G and K-wings.

There is an average of 45 officer slots per shift. Before March of 2000, the County's corrections department had three male-only posts (presumably at the Detention Center) and two female-only posts at CWRC. The female-only posts were Post #3 in the female intake/booking unit and Post #4, a roving special assignment (SA) post. The Post #3 officer orients new inmates to the facility by recording identifying information; conducting strip searches; supervising showers; inspecting inmates for bruises, injuries, scars or tattoos; and issuing jail garments. The Post #3 guard also conducts "15-minute watches" of female inmates in medical hold cells. The SA officer escorts female prisoners out of the jail for health care appointments and provides assistance to the intake/booking and Post #2 housing officers. She must be able to strip search female inmates outside the CWRC to prevent inmates from bringing in contraband.

On March 10, 2000, Deputy Warden Henry J. Jackson issued a directive that, effective March 19, Post #2 at the CWRC also would be female-only. The directive added that "Operations shall assign additional female officers to cover the post for time off and unforeseen emergencies." Two male officers who had bid Post #2, Keith Penn and Kenya Edwards, were permitted to maintain their shifts and days off until each could obtain a bidded assignment with the same schedule. Post #2 had been open to both female and male officers for the five years prior to the March 2000 order; before then it had been a female-only post.

Post #2 is located in the common area between the G and K-wings and the Post #2 officer is responsible for security in both wings. The Post #2 officer's duties include regular but unannounced tier inspections on the G-Wing -- including cell and pat searches -- and 15-minute or half-hour visual checks of K-wing detainees, where the officer often views female detainees in the nude, performing personal hygiene and other bodily functions. The Post #2 officer must also conduct strip searches of K-Wing detainees who are removed from and return to the tier -- a circumstance that the County contends happens frequently. The PBA maintains that surprise inspections are rare and that, after inmates are admitted to the CWRC, strip searches are also infrequent.

The March 2000 order was precipitated by the County's determination that the G and K wings "were in turmoil" because of

numerous complaints made by female inmates against male correction officers who were working within or had access to the female housing units. During 1998-1999, seven male officers at CWRC were charged with harassing or fraternizing with female inmates. Four officers resigned rather than face "severe impending discipline"; another officer was demoted and received a 90-day suspension; and a Post #2 male officer received a 30-day suspension for derogatory remarks made to a female inmate. Only one officer was cleared of wrongdoing. The County asserts that Post #2 was designated as female-only with the PBA's knowledge and consent, a contention the PBA denies.

Between March 22 and April 11, 2000, four officers -- two males and two females -- filed grievances asserting that the County violated the equal treatment clause of the agreement when it designated Post #2 as female only. Doris J. Chilton alleged that the redesignation was unnecessary because there is always a female on duty to search new commits and the SA female officer can perform strip or cell searches. Karen Crosby-Perez protested that female officers working bids would be transferred to Post #2 because too many males have problems with self-control. Penn asserted that there was no need to make Post #2 female-only and Edwards maintained that he had been working the post since 1995 without difficulty.

In denying the grievances, Jackson and other County officials cited the need to protect female inmates' privacy rights

and the fact that males may not be in the housing unit when strip searches are performed. Jackson stated that assigned female officers would not be taken off their jobs to cover Post #2 and that Post #2 would become part of the job bidding process.1/

The PBA demanded arbitration and the four grievances were consolidated. At a September 28, 2001 arbitration hearing, the arbitrator agreed to hold the arbitration in abeyance pending the filing and disposition of this petition.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that

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1/ In an affidavit filed in this proceeding, Captain Ramonita Ortiz states that when Post #2 must be filled with a female officer working mandatory overtime, the County will, as specified by the parties' contract, require the least senior female officer to work. Thus, a junior officer assigned to the Main Jail would be required to staff Post #2 on mandatory overtime before more senior female officers assigned to CWRC.

> intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

Because this dispute arises through grievances, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The County raises no preemption arguments. However, it maintains that arbitration of grievances arising out of the March 2000 order would substantially limit governmental policymaking. It maintains that it has a right to determine the qualifications of housing officers for maximum security inmates; to eliminate harassment and security-threatening conduct in the housing unit; and to consider the right of pre-trial detainees to some privacy and dignity. It asserts that the designation of Post #2 was a tailored response to an "epidemic" of misconduct that had caused severe disruption in the female housing unit and had compromised

the security of the facility. It asserts that the March 2000 order has resulted in a safer and more secure institution, with no recurrence of the problems experienced in 1998-1999. In addition, it contends that tier inspections are now conducted more effectively, given the County's "knock and announce" policy when an officer inspects the cell of an opposite-sex inmate. It states that while that policy protects inmate privacy, it also allows inmates to, for example, conceal contraband. The County also cites federal and state cases holding that sex is a bona fide occupational qualification (BFOQ) for some employees in prisons, hospitals, and other custodial settings.

The PBA counters that the County has not shown a governmental policy need for converting Post #2 to a female-only position. It argues that the fact that some officers were investigated or disciplined does not entitle the County to bypass contractual seniority bidding procedures and determine staffing for Post #2 based on employee gender. It stresses that the negotiated bidding process is important to unit members because it allows them to select a shift, facility, work assignment and regular days off, thereby enabling them to spend quality time with their families and pursue other personal interests.

The PBA also argues that the need for surprise inspections does not warrant making Post #2 a female-only position, because corrections officers of both sexes must respect the privacy of inmates. Finally, it maintains that there is no

statutory or case law basis for requiring a third female on every shift, and that any strip searches that need to be performed in the housing unit may be conducted by the Post #3 or SA officer.

This dispute implicates Commission case law concerning the establishment of job qualifications and shift and assignment bidding; federal and state laws prohibiting gender discrimination in employment; and federal decisions concerning inmates' privacy rights. We start by reviewing some pertinent principles in each of these areas.

Public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001). However, public employers and majority representatives may agree to shift bidding by seniority, as long as all qualifications are equal and the employer retains the right to deviate from the procedures where necessary to accomplish a governmental policy goal -- such as strengthening supervision or assigning employees with special qualifications to special tasks. Somerset Cty. Sheriff, P.E.R.C. No. 2000-20, 25 NJPER 419 (¶30182 1999), recon. den. P.E.R.C. No. 2000-38, 26 NJPER 16 (¶31003 1999), aff'd 27 NJPER 356 (¶32127 App. Div. 2001). Seniority bidding procedures for assignments as well as work hours may also be mandatorily

negotiable, provided the procedures do not pertain to assignments that require special training, experience or other qualification beyond those possessed by all prospective bidders. Camden.

While employers generally have a prerogative to establish qualifications for a position, gender-based restrictions are illegal unless an employer shows that sex is a bona fide occupational qualification (BFOQ). 42 U.S.C. 2000e-2(e); N.J.S.A. 10:5-1 et seq. The BFOQ exception is narrowly construed and an employer has the heavy burden of proving that the essence of its business operation would be undermined by failing to employ members of one sex exclusively. International Union v. Johnson Controls, 499 U.S. 187, 201 (1991); Dothard v. Rawlinson, 433 U.S. 321, 394 (1977); Dale v. Spragg, 293 N.J. Super. 33, 52 (App. Div. 1996); see also N.J.A.C. 4A:4-4.5(a); N.J.A.C. 13:11-1.6.

A majority representative may arbitrate a claim that an employer violated a contractual equal treatment clause covering a term and condition of employment independently of any statutory claim that individual unit members may have. Cf. Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 559 (App. Div. 1980). However, a claim that an employer acted discriminatorily in exercising a managerial prerogative must be asserted in a statutory forum rather than through binding arbitration. Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9, 16-17 (1983).

With respect to prison inmates' privacy or other rights, the federal courts have held that inmates retain at least some of

their constitutional rights while incarcerated. Turner v. Safley, 483 U.S. 78, 84 (1987). In evaluating an inmate's claim of an alleged constitutional violation, the courts consider the connection between the challenged action or policy and the governmental interest allegedly justifying it; the existence of other means of exercising the asserted right; the impact on guards and other prisoners of accommodating that right; and the availability of ready alternatives to the regulation. Id. at 85-91. Federal courts generally defer to prison administrators' weighing and balancing of the employment rights of guards; the privacy rights of inmates; and the security needs of the institution. Timm v. Gunter, 917 F.2d 1093, 1097, 1101 (8th Cir. 1990), cert. den. 501 U.S. 1209 (1991).

These principles have been applied both in cases where corrections officers have challenged gender restrictions on prison posts and in suits by inmates alleging that their privacy rights were violated by the use of opposite sex guards. Courts have found that inmates' privacy interests may be implicated by pat or frisk searches by opposite sex guards and by cross-sex monitoring of inmate dressing, toilet, or showering areas. However, they have seldom held that such privacy interests required the assignment of same sex guards. See, e.g., United States v. Gregory, 818 F.2d 1114 (4th Cir. 1987), cert. den. 484 U.S. 847 (1987) (desire to curtail cross-sex monitoring of naked prisoners does not make sex a BFOQ; employer must show that it cannot

reasonably rearrange job responsibilities to minimize clash between inmate privacy interests and Title VII); Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980) (female inmates' privacy rights violated where guards could view them partially or completely unclothed while dressing or asleep; but those privacy concerns could be addressed without prohibiting assignment of male officers); Gunter, 917 F.2d at 1097, 1101 (pat search is minimally intrusive and requiring same-sex searches would burden guards and prison resources and potentially decrease internal security). In evaluating inmate privacy claims, some courts have stated that they will give more weight to the privacy rights of female inmates vis-a-vis male guards than to the privacy rights of male inmates vis-a-vis female officers, particularly where female inmates have a history of physical or sexual abuse. See Jordan v. Gardner, 986 F.2d 1521, 1525-1526 (9th Cir. 1993); Colman v. Vasquez, 142 F. Supp.2d 226, 232 (D. Conn. 2001).

New Jersey administrative rulings and regulations are in accord with these cases. See In re County Corrections Officers, Middlesex Cty., Merit System Board (6/16/98), modified on other grounds, In re County Corrections Officers, Merit System Board (7/12/99) (supervision of showers, dressing areas, and toilets were not among the duties that supported a BFOQ designation) and N.J.A.C. 10A:3-5.6 (pat searches at State correctional facilities may be conducted by either male or female custody staff regardless of the inmate's gender). Other New Jersey regulations require

that, absent an emergency, strip searches be performed by guards of the same sex. N.J.A.C. 10A:3-5.7; N.J.A.C. 10A:31-8.5(e); N.J.A.C. 10A:31-21.2.

While courts have seldom required administrators to impose gender restrictions in order to protect inmates' privacy rights, they have deferred to administrators' own judgments that such restrictions, particularly limited ones, were needed to further specified security, safety or other operational goals. Thus, in a case very similar to that here, the Ninth Circuit upheld the decision of prison officials to assign only females to six out of 41 correction officer posts. The posts were so designated in order to prevent a recurrence of serious misconduct allegations that female inmates had lodged against male officers. Robino v. Iranon, 145 F.3d 1109, 1110-1111 (9th Cir. 1998). The Court reasoned that the policy imposed a minimal restriction on male officers' employment opportunities; that prison officials had made a considered judgment that the restrictions were necessary for purposes of security, rehabilitation, and morale; and that it was immaterial whether the inmates could have successfully asserted their own right to privacy had the prison not adopted the policy. The Court concluded that sex was a BFOQ for the positions, which afforded either unsupervised access to the inmates or required the officer to observe inmate shower and toilet areas. Ibid.

Similarly, in Gunter, the Court held that administrators could restrict posts in "unit 5" to males, even though sex was not

a BFOQ for corrections officers at the maximum security prison as a whole. It noted that guards in unit 5 were required to monitor shower areas at close range and reasoned that the "minimal restrictions" did not violate equal employment laws and that administrators could choose to accommodate inmate privacy rights and internal security needs by excluding women from the assignments. At the same time, it noted it would have been constitutionally permissible, from the perspective of inmate privacy rights, to assign female guards to unit 5. 917 F.2d at 1102 n.13. See also Torres v. Wisconsin Dept. of Health and Social Services, 859 F.2d 1523 (7th Cir. 1988) (ordering remand to consider State's contention that rehabilitative needs of female inmates justified hiring only female guards).

Within this framework, we conclude that the County has strong governmental policy interests in preventing harassment and fraternization; maintaining security; and ensuring that cell inspections are conducted effectively. Prison administrators made a considered, experience-based judgment that, given the incidents of misconduct by male officers in 1998 and 1999 and the security-threatening nature of that conduct, only females should be assigned to Post #2. Prison administrators have further determined that cell searches on the G and K-Wings can be conducted more effectively if a female officer is assigned to Post #2. Finally, the County has made a governmental policy decision that increasing inmate privacy is desirable, both because it is

linked to the goal of preventing harassment and fraternization and because many of the inmates are pre-trial detainees who may have greater rights than those who have been convicted. In these circumstances, we conclude that precluding the employer from making Post #2 at the CWRC female-only would substantially limit governmental policymaking powers in deciding how best to accommodate the security needs of the CWRC, the employment rights of the guards, and the privacy rights of inmates.2/

We have considered the laws against gender discrimination in reaching this determination. Somerset. However, those laws appear to permit gender restrictions on prison posts in circumstances such as those here. Robino; Gunter. In any case, the County's designation may be challenged in other forums.

Finally, we comment on Somerset, on which the PBA relies. The employer in that case argued that it had a right to deviate from a seniority bidding procedure both because statutes and regulations required at least two female corrections officers per shift and because it had a prerogative to determine how many officers, beyond two, should be assigned to particular shifts. We held that N.J.S.A. 30:8-12, together with the strip search regulations, mandated only one female officer per shift. We also

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2/ We do not decide whether the alleged need to have more female officers available to strip search G and K-wing inmates also supports this conclusion. The record does not indicate how often strip searches are performed in the G and K-wings; how often the Post #3 and SA officers are available to assist or perform such searches; and what arrangements were made for strip searches in the G and K-wings before the March 2000 order.

rejected the County's prerogative claim, citing gender discrimination laws and the fact that the County had articulated no governmental policy reason for assigning female rather than male officers. The circumstances here are readily distinguishable: the County has shown a history of operational problems and governmental policy reasons for the female-only designation that are consistent with gender restrictions approved by the federal courts.

For all these reasons, we conclude that applying Article XXXVI in these circumstances would substantially limit governmental policymaking powers.

ORDER

The request of the County of Burlington for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: March 27, 2002
Trenton, New Jersey
ISSUED: March 28, 2002