

P.E.R.C. NO. 2018-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY,

Respondent,

-and-

Docket No. CO-2013-269

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL 269 (CORRECTION OFFICERS),

Charging Party.

SYNOPSIS

The Public Employment Relations Commission rejects a Hearing Examiner's recommended decision in an unfair practice case filed by the PBA. The Commission finds that the County violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(5), by repudiating the grievance procedure when it refused to implement a grievance decision of its authorized hearing officer regarding implementation of an interest arbitration award's provision requiring new seniority post/shift bidding for a new Pitman schedule with 12-hour shifts.

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 Respondent, Capehart & Scatchard, attorneys
(Carmen Saginario, of counsel)

For the Charging Party, Law Offices of Mark W.
Catanzaro, attorneys (Mark W. Catanzaro, of counsel)

DECISION

This case is before the Commission on exceptions filed by PBA Local 249 to a Hearing Examiner's Report and Recommended Decision, H.E. 2017-4, 43 NJPER 274 (¶79 2016). The case involves unfair practice charges filed by the PBA on March 20 and June 24, 2013 against Burlington County. The PBA alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (4), (5), and (7), by refusing to honor the decision of its grievance hearing officer (County hearing officer) directing the County to re-bid all biddable posts for the entire new Pitman schedule as required by the parties' recent interest arbitration award, and

instead retaliating by eliminating half of the bids that had previously been made available by the Warden. On October 22, 2013, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the 5.4a(1), (3), and (5) charges.^{1/} On November 14, 2013, the County filed its Answer generally denying the allegations.

The Hearing Examiner conducted hearings on September 10 and 11, 2014 during which the parties examined witnesses and introduced exhibits. The parties filed post-hearing briefs by November 24, 2014. On December 29, 2016, the Hearing Examiner issued her decision recommending that the Complaint be dismissed. Because she found that the PBA's requested remedy was for the County to implement the same bidding schedule that had prompted the grievance, she concluded that the County's implementation of the Pitman schedule following the PBA's successful grievance did not violate section 5.4a(5) of the Act. She concluded that it was inappropriate for her to reexamine the grievance decision

^{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; (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; 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."

because the dispute over proper implementation of the grievance decision amounted to an issue of contractual interpretation appropriately raised through the parties' grievance procedure. The Hearing Examiner also found that the PBA did not establish a prima facie case that the County retaliated in violation of sections 5.4a(3) or 5.4a(1) by the way it implemented the new 12-hour Pitman shift schedules following the PBA's successful internal grievance hearing. She found that the County hearing officer's decision and interest arbitrator's award only required three shifts, that the Warden made all of those posts available for bid, and therefore the PBA did not prove the County was hostile to its protected activity. The Hearing Examiner also found no evidence of County hostility to the PBA's protected conduct in the following occurrences: the County hearing officer who issued the decision sustaining the PBA's grievance was terminated the day after the decision issued; and the County's counsel commented to the PBA President at the close of the grievance hearing that the PBA should "be careful what you wish for."

On January 9, 2017, the PBA filed its exceptions to the Hearing Examiner's report. On January 24, the County filed its answering brief. We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-

19), except for some modifications explained below. An overview of the key facts follows.

FACTS

The PBA represents approximately 223 corrections officers employed by the County at the Correctional Work Release Center (CWRC) and the Burlington County Detention Center (BCDC). The County and PBA were parties to a collective negotiations agreement (CNA) effective from January 1, 2009 through December 31, 2011. In October 2012, the County filed a petition for compulsory interest arbitration for a successor agreement with the PBA. At interest arbitration, the most contested issue between the parties was the County's proposal to change the work schedule from 8-hour shifts, 5 days a week, to 12-hour shifts under a 2-2-3 Pitman schedule.

Under the old schedule, officers worked a fixed (non-rotating) eight-hour workday with five days on duty followed by two consecutive days off. J-17 at 60. There were three main shifts: 7am-3pm; 3pm-11pm; and 11pm-7am. Id. Each combination of shift and days off was a different "tour" and therefore there were 45 different tours. J-17 at 60-61. Most tours, except specialized assignments, were bid by seniority pursuant to Article 13 of the CNA. J-17 at 61; J-6. The contractual bidding process allowed officers to bid on the approximately 24 distinct posts within the BCDC and CWRC identified in Article 13, as well

as by shift and days off. J-6; H.E. at 4-6. At interest arbitration, the County argued that the 8-hour 5/2 schedule was an operational "nightmare" in the context of two correctional facilities that must be staffed 24/7. J-17 at 69. The County stated that because the schedule only allowed for some officers to have a weekend day off, it was incurring significant overtime costs due to officers self-creating weekends by calling out sick or taking other leave time. J-17 at 63-68. The County also asserted that the 45 different tours created an arduous and burdensome "daisy chain style" shift selection process every time a tour is open for bidding. J-17 at 69-70.

Under the Pitman schedule with 12-hour shifts, each employee works seven 12-hour days over every 14-day (two week) period with the following pattern: 2 days on, 2 days off, 3 days on, followed by 2 days off, 2 days on, and 3 days off. J-17 at 5-6, 62; CP-1 at 147-148, 204-205, 309-310; H.E. at 6. Thus, employees' days on and off alternate from one week to the next within the 14-day cycle and everyone is guaranteed one 3-day weekend off in each 14-day cycle. J-17 at 6, 62, 76; CP-1 at 204-205, 309-310.^{2/}

2/ Depending on how you look at it, or where in the pattern of days on/off you choose to begin the cycle, officers could be considered to be working 5 shifts in one week and 2 in the next week, or 4 shifts in one week and 3 in the next week. CP-1 at 204-205, 325-326; J-17 at 5-6, 62. Either way, by the end of a 14-day cycle, officers will have worked 7 shifts total and have had one period of three consecutive days on and one period of three consecutive days off.

Also inherent in the 12-hour Pitman schedule is two different sets of employees - or "platoons" - where Platoon "A" and Platoon "B" each work seven days in a 14-day cycle so that one platoon works all of the same shifts/posts as the other platoon but on the other platoon's off days, and vice-versa. J-17 at 62, 70, 72, 89. The platoons are both on regular, full-time schedules that are simply mirror images of each other as follows:

14-day schedule of 12-hour Pitman shifts

<u>Week 1:</u>	<u>M - T - W - Th - F - Sa - Su</u>
Platoon A:	A A - - A A A
Platoon B:	- - B B - - -
<u>Week 2:</u>	<u>M - T - W - Th - F - Sa - Su</u>
Platoon A:	- - A A - - -
Platoon B:	B B - - B B B

Specifically, the County proposed having three 12-hour shifts every day, from 6am-6pm, 9am-9pm, and 6pm-6am, so that the middle shift would provide a 12-hour overlap during the busiest part of the day (9am-9pm) with the early and late shifts. The County asserted in interest arbitration that the overlapping schedule affords immense operational benefits to the department by offering greater flexibility and continuity between shifts. J-17 at 70-71. The County's other arguments for its proposed 12-hour Pitman schedule were that it will:^{3/}

- Better meet its organizational needs;

^{3/} See J-17 at 63-78, 87-90.

- Create greater efficiencies through substantial decreases in weekend call-outs and subsequent overtime costs;
- Enhance supervision by providing consistency and predictability about which employees are on duty at any given time;
- Increase morale and employment stability by providing some 3-day weekends off (every other week) to employees who previously had no weekends off because only the most senior officers had preferred schedules with weekends off; and
- Streamline the shift/tour selection process enormously by reducing the number of different tour schedules from 45 down to 6 (2 platoons for each of the three 12-hour shifts).

The interest arbitrator found that the record supported each of the County's arguments for the schedule change. She found that the County met its burden to produce convincing evidence and rationale for the change, concluding: "In weighing all of the above factors together, I am convinced that the County has demonstrated a legitimate reason for implementing a 12-hour work schedule on an experimental basis." J-17 at 90. The interest arbitrator awarded the following schedule for an initial 18 month period, after which the parties were to evaluate its effects and whether it accomplished the County's goals:

I award the following 12-hour shifts on a trial basis, effective July 1, 2013:

6 a.m. to 6 p.m.
9 a.m. to 9 p.m.
6 p.m. to 6 a.m.

The County reserves the right to determine the number of officers on each shift. Additionally, officers in specialized

assignments will maintain their current work schedules.

The delay in implementation is to permit any appeals from this decision; to give the department time to determine the number of officers it needs on each tour/platoon; to allow sufficient time for the Corrections Department to put the entire schedule up for bidding; to allow time for the County to negotiate with the SOA over proposed changes in their work schedule, and (perhaps most importantly) to allow time for corrections officers to plan their lives around the new schedule.

[J-17 at 91-92, emphasis added.]

The interest arbitration award was issued on November 26, 2012. In the following weeks, the County's Warden, Lawrence Artis, who is responsible for the operations of all of the County's correctional facilities, began working on converting the 8-hour schedule to the 12-hour schedule. Artis initially issued Request for Work Schedule forms requesting each unit officer to rank their preferred work schedules (6am-6pm, 9am-9pm, or 6pm-6am) but did not include the bidded posts provided in Article 13 of the CNA. H.E. at 7-8; J-7; 1T143-146. Robert Swenson, a corrections officer and PBA Local 249 President, asked Warden Artis why the Article 13 posts were not put up for bidding by seniority along with the shift selections. H.E. at 9-10; 1T146-147. In response, Warden Artis proposed a new bidding schedule

that ostensibly included all of the Article 13 biddable posts for all shifts on both platoons.^{4/} H.E. at 10-11; J-9; CP-2; 1T88.

However, instead of fully re-opening the bidding process for all posts in the new 12-hour Pitman schedule, Warden Artis permitted unit members to preserve their "legacy" bids from prior to the interest arbitration award's schedule change. H.E. at 10-14; 1T75-76, 1T88, 1T116-117, 1T149-153, 1T158-159. This effectively meant that some less senior officers were "locked in" to desirable shifts/posts that senior officers wanted to bid on now that the new Pitman schedule gave everyone the same alternating 3-day weekend schedule. H.E. at 13-14; 1T50-51.

On January 10, 2013, the PBA filed a grievance contesting the Warden's bidding schedule proposal for failing to put up the entire schedule for bidding. J-1. The grievance alleged violations of the Article 13 seniority post bidding clause and of the recent interest arbitration award's change to the 12-hour Pitman schedule which provided the County with approximately six months "to put the entire schedule up for bidding." J-1.

Departmental grievance hearings took place on January 30 and February 13, 2013 before County "Contract Referee" Joseph J. Doherty. The issue was whether the County's bidding process to implement the 12-hour Pitman schedule complied with the interest

^{4/} Warden Artis' January 4 and January 9, 2013 letters notifying the corrections officers of the posts/shifts open for bidding made all bids due by January 16. J-10; J-11.

arbitration award's requirement that the entire schedule be up for bidding. J-13 at 1. The PBA argued at the grievance hearing that Warden Artis misapplied the arbitrator's award because he failed to allow all corrections officers an opportunity to bid on each post, thus destroying the CNA's seniority bidding clause. J-13 at 1-2. At the conclusion of the grievance hearing, when the parties stood up, the County's counsel said to Swenson to "be careful what you wish for." H.E. at 15; 1T53-54.^{5/}

Doherty's March 6, 2013 grievance decision summarized testimony from officers whose bids for their preferred post/shift selections were not granted because the Warden had already reserved those posts/shifts for less senior officers. J-13 at 1-2. Doherty noted Warden Artis' testimony that he did not reopen bidding for every post because he did not think the interest arbitration award required posts to be rebid. J-113 at 3.

Doherty found:

In the Osborn arbitration, the County's final offer included the 12-hour shift but not a change in the agreement's seniority provision for posting/bids. . . . Under the existing format, there are 45 different tours with multiple variations without days off. The new structure will have six (6) tours without the various off days. . . . The granting of the County's final offer for the 12-hour shift arrangement on an experimental basis recognized the benefits in . . . reducing the

^{5/} During his questioning of Swenson during the unfair practice hearing, the County's counsel twice admitted saying this to Swenson at the grievance hearing. 1T85, 109.

tours from 45 to 6 will facilitate the shift selection process and eliminate the "daisy chain" (T2-314, 316) shift selection circumstance.

[J-13 at 2-4.]

The Doherty decision noted that the new 12-hour Pitman schedule achieved by the County through interest arbitration represents a significant restructuring of the playing field for PBA members' posts, shifts, and days off compared to the prior 8-hour five days a week schedule. J-13 at 4. Doherty concluded:

Doing anything less than opening each position recognized in Article XIII up for bid is not placing the "entire schedule" in the bidding process as awarded by Arbitrator Osborn. . . . Each post cited in Article XIII, paragraph D. is now subject to new bidding because of the substantial change in the days off created by the 12-hour schedule format and the extensive reduction in the number of tours from 45 to 6.

[J-13 at 4-5; emphasis added.]

The day after Doherty issued his decision sustaining the PBA's grievance, he was terminated from employment with the County. H.E. at 18, 25; 1T178.^{6/}

Also on March 7, 2013, the day after the Doherty decision issued, Warden Artis issued four new letters indicating the bids which would be open and effective July 2013, and soliciting

^{6/} The County did not deny this fact, and did not offer any testimony or documentation regarding why Doherty was terminated the day after his grievance decision issued. Warden Artis only testified that he played no part in the County's decision to terminate Doherty. 1T178.

responses by March 13. H.E. at 17; J-14. As requested by the PBA, the revised bidding process no longer retained legacy bids. H.E. at 17. However, the new shift bidding process implemented by Warden Artis in response to the Doherty decision eliminated half of the bid posts provided under his pre-grievance proposal because it only allowed bid posts on the Platoon A side of the Pitman schedule. J-14; 1T56-60, 1T82, 1T120-121. Following the Doherty decision, Warden Artis re-labeled Platoon B as the "Relief Platoon" and did not put any Article 13 posts up for bid on that entire half of the schedule. CP-2; J-9; J-15.

In testimony, Warden Artis admitted that his revised bidding process only allowed bids for one half of the scheduled shifts because, although he now opened up all Platoon A shifts/posts for seniority bidding, he no longer allowed any shift/post bidding for Platoon B. 1T140-141, 1T171-175. Warden Artis testified that his pre-grievance bidding proposal had allowed a combination of legacy bids and new seniority bidding to fill all Article 13 posts for all shifts on both the Platoon A and B sides of the schedule, whereas his revised bidding process following the Doherty decision put only half of those shifts/posts up for bidding. 2T15-27.

Specifically, by way of example, Control Room 1 requires 8 total full-time officers under the Pitman schedule because it consists of two shifts (6am-6pm and 6pm-6am), two officers per

shift, and two platoons on opposite schedules. 1T94, 1T111-113, 1T140, 1T150-151, 1T172-173, 2T16-22, 2T26-27, 2T30. Prior to the grievance decision, Warden Artis allowed all 8 Control Room 1 positions to be bid posts (thus, both platoons), consisting of 5 legacy bids and 3 remaining shifts to be re-bid by seniority. 2T16-22. Following the grievance decision, Warden Artis allowed only 4 of the 8 Control Room 1 positions (the ones on Platoon A) to be filled by bids. 2T26-27. Similarly, Pod 3 requires 12 full-time officers under the Pitman schedule because it consists of two shifts (6am-6pm and 6pm-6am), three officers per shift, and two platoons on opposite schedules. 2T22-25. Prior to the grievance decision, Warden Artis allowed all 12 Pod 3 positions to be bid posts, consisting of 9 legacy bids and 3 remaining shifts to be re-bid by seniority. 2T22-25. Following the grievance decision, Warden Artis allowed only 6 of the 12 Pod 3 positions (the ones on Platoon A) to be filled by bids. 2T28.

ANALYSIS

Based upon the foregoing summary of the relevant facts, we find that the following inferences and conclusions set forth by the Hearing Examiner in her analysis are inaccurate and unsupported by the record:

Thereafter, Artis proceeded [sic] re-work the schedule and to issue the March 7 letters, making every post and every bid available. . . . [T]hree shifts appears consistent with the schedule the County proposed in the interest arbitration, and with the

arbitrator's award. . . . I can find nothing in the record which would require the County to implement six twelve-hour shifts.

* * *

The PBA requests Artis' originally proposed scheduling methodology as a remedy to the unfair practice - which suggests that the PBA believes it was "given" something which was then "taken away" in retaliation for the grievance. . . . It is incongruous that the PBA would grieve the Warden's proposed methodology, succeed in the grievance, and then request an order to have him implement the very methodology it requested to have abandoned.

[H.E. at 24-25, 28.]

We agree with the Hearing Examiner that it would indeed be very odd if the PBA grieved to overturn the schedule it wanted, succeeded in its grievance, then filed an unfair practice charge to try to return to the same schedule it originally grieved. But that is not what happened here. The PBA is not requesting a remedy that orders the Warden to implement the original bidding schedule proposal that it grieved. Contrary to the Hearing Examiner's opinion, the record demonstrates that neither the Warden's original proposed bidding schedule following the interest arbitration award, nor his bidding proposal following the grievance decision, implemented the bidding process as set forth by the interest arbitrator and the County hearing officer. This fundamental misunderstanding of the changes in the Warden's scheduling methodologies and how each proposed bidding system was different from that required by the interest arbitration award as

subsequently ordered by the County hearing officer resulted in the Hearing Examiner's erroneous legal conclusion on the 5.4a(5) complaint.

The Commission has held that a refusal by the public employer to abide by a decision of its designated grievance representative constitutes a refusal to negotiate in good faith in violation of section 5.4a(5) of the Act. Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985); Borough of Keansburg, P.E.R.C. 2004-29, 29 NJPER 506 (¶160 2003); City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008); and City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013). In Preakness Hospital, the Commission found that a public employer violated 5.4a(5) of the Act when it refused to implement an adverse decision at step 3 of the grievance procedure. The Commission concluded the hospital had refused to negotiate in good faith, finding that the union pursued the grievance procedure winning a favorable ruling from the hospital's authorized grievance representative and the hospital then failed to comply with that ruling. This principle applies here.

As discussed earlier, both of the Warden's proposed bidding systems violated the interest arbitration award and County hearing officer's decision, but for different reasons. The Warden's original bidding schedule was flawed in that it failed

to open up all of the bidded posts under the new Pitman schedule to all officers to allow new bidding by seniority given the changes in hours and days off inherent in the new schedule. Rather, the Warden tried to maintain "legacy" bids from prior to the interest arbitration award and schedule change, which resulted in "locking in" some less senior officers to bidded posts that the PBA wanted to be re-bid by seniority. Although some bidded posts were already occupied according to this methodology, the Warden did make all remaining bidded posts on both sides of the schedule (Platoons A and B) available for seniority bidding.

The Warden's bidding schedule following County hearing officer's decision sustaining the PBA's grievance partially rectified the erroneous implementation of the bidding system because it removed the legacy posts and re-opened those bidded posts to seniority bidding. However, his new bidding schedule then - for the first time - introduced a different flawed application of the bidding system, namely, that half of all of the bidded posts were now removed from the seniority bidding process. The Warden's reworked schedule did not make every contractual post available because it no longer included the bidded posts for officers scheduled on Platoon B, which is just the mirror image schedule of Platoon A that is necessary to have the jail staffed every day in a Pitman schedule.

In sum, although the Warden responded to the sustained grievance by fixing the problem with maintaining "legacy" bids, he simultaneously removed something that had been in his original proposal and that the plain language of the arbitrator's award and the County hearing officer's decision required. That is, the Warden removed all of the bid posts from Platoon B (which is one half of the schedule) and now decided to only allow bid posts in Platoon A. That decision by the Warden plainly contravened the County hearing officer's grievance decision that ordered the entire new Pitman schedule to have its bid posts opened up for seniority bidding. Accordingly, we hold that the County violated section 5.4a(5) of the Act by failing to abide by the decision issued by its own hearing officer, Contract Referee Doherty, at an interim step of the grievance procedure.

The County's reply brief asserts that there are only three shifts (6am-6pm, 9am-9pm, 6pm-6am) on the 12-hour Pitman schedule (or two shifts, 6am-6pm and 6pm-6am for some posts) and that therefore Warden Artis' implementation of the bidding process following the Doherty decision put the "entire schedule" up for bidding as required by the interest arbitration award and Doherty's decision. That argument is at odds with the testimonies cited above of both its own witness, Warden Artis, and of PBA President Swenson. It is also at odds with the County's testimony and arguments at interest arbitration, as well

as the interest arbitrator's understanding of the County's Pitman schedule proposal and arguments. Specifically, the following references to the existence in the County's proposed 12-hour Pitman schedule of two separate platoons, each consisting of three shifts, or six shifts/tours/platoons total were made during the interest arbitration hearing or in the award itself:

- "basically six choices" CP-1 at 315 (Daniel Hornickel, County Director of Human Resources).
- "Every correction officer would receive a three day weekend off every other weekend. Every correction officer would work a total of seven days per two week pay period . . . Every correction officer would work 182 or 183 days per year . . ." CP-1 at 310 (HR Director Hornickel).
- "Three shifts per day at each facility. And in total all correction officers, with the exception of internal affairs and training, would work one of those 12 schedules." CP-1 at 314 (HR Director Hornickel). (12 schedules due to 3 shifts, 2 platoons, 2 facilities - BCDC and CWRC)
- "Everybody on the 12 hours works two weekends a month, and the other two weekends are three day weekends. . . When people start looking forward, you can tell the shift that's coming on and the shift that's leaving on Thursday, payday. When you're off Friday, Saturday, Sunday, we dancing around." CP-1 at 116-117 (Warden Artis).
- "[S]ome of the officers have made dummy schedules all the way for the rest of the year, so they know what days they're off. The way it kind of works out, everything kind of split down the middle, like Christmas, Christmas and Thanksgiving. You know, one platoon has off Christmas, one has off Thanksgiving." CP-1 at 117 (Warden Artis).
- "[T]he County proposes a schedule consisting of twelve-hour days, with three shifts . . . and six different platoons. Each platoon would work seven days in a 14-day period. This is commonly called the 'Pitman Schedule.'" J-17 at 62 (Arbitrator).

- "By contrast, the proposed work schedule would be assembled using only two platoons in each facility for each tour. Thus, there would only be a maximum of six possible tours to be bidden on." J-17 at 70 (Arbitrator).
- "The 12-hour proposal splits each shift into two platoons . . . Supervisors will know exactly who is coming in for the shift by virtue of which platoon that is scheduled." J-17 at 72 (Arbitrator).
- "There is no doubt that having only 6 platoons per facility will significantly facilitate the shift selection process." J-17 at 89 (Arbitrator).

Moreover, the County's assertion also defies a commonsense understanding that only allowing the contractual bidden posts on one platoon ignores fully half of the regularly scheduled shifts in any given week based on the mirror image 2-2-3 work schedules inherent in the County's switch to the 12-hour shift Pitman schedule. Contrary to the County's assertion, three 12-hour shifts is not consistent with the grievance decision or arbitrator's award. Rather, three 12-hour shifts (6am-6pm, 9am-9pm, 6pm-6am) multiplied by two platoons per shift (so that one platoon works on the other platoon's off days) yields six distinct groups (6 shifts/tours) for each bidden post. In the same vein, for those bidden posts that the County has determined need only two daily 12-hour shifts (6am-6pm and 6pm-6am) and not the 9am-9pm peak/overlap shift, e.g., Control Room 1 and Pod 3, there are actually four total groups/tours of officers (two shifts multiplied by two platoons) for each bidden post in order to cover both sides of the regular Pitman schedule. Thus, as

acknowledged by Warden Artis, Control Room 1 had 8 total positions to cover with 2 officers per shift on 2 shifts for both platoons, while Pod 3 had 12 total positions to cover with 3 officers per shift on 2 shifts for both platoons. This concept is not unique to this case or these parties, but has been recognized in many previous Commission decisions concerning Pitman type schedules.^{7/}

We also find the County's alternative argument contained in its post-hearing brief unpersuasive. The County avers that in the event the Commission determines that the Warden eliminated bidded posts by labeling all of Platoon B a "relief bid," then the remedy necessary to enforce that interpretation of the grievance decision and CNA/interest arbitration award has previously been rejected by the Commission in Burlington County, P.E.R.C. No. 2000-70, 26 NJPER 121 (¶31052 2000). In Burlington County, the Commission restrained binding arbitration of the PBA's grievance contesting the County's elimination of seniority

7/ See, e.g., Union Tp., P.E.R.C. No. 2007-64, 33 NJPER 147 (¶52 2007) (4/4 schedules consists of 2 squads/platoons who are on for 4 days while the other 2 are off); City of Clifton, P.E.R.C. No. 2004-20, 29 NJPER 477 (¶149 2003) (under 4/4 schedule, patrol officers "are split into two equal size groups, A and B. During the four days that Group A is working, Group B is off and vice-versa."); Union Tp., P.E.R.C. No. 2003-81, 29 NJPER 214 (¶63 2003) (each day and night tour/shift in the 4/4 schedule has a Platoon A and B; one platoon is off 4 days while the other is on); Galloway Tp., P.E.R.C. NO. 2003-65, 29 NJPER 114 (¶35 2003) (under Pitman schedule, officers work 12-hour shifts in cycles of: 2 days on, 2 off, 3 on, 2 off, 2 on, 3 off).

bidding for "relief bid" posts, but allowed arbitration over the bidding of "relief bid" shifts. The Commission found that the County could deviate from the assignment aspect of the relief bid system because it had shown that locking up a significant number of specific job assignments required for training purposes would substantially limit its governmental policymaking powers.

"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."

Burlington Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 2002-52, 28 NJPER 174 (¶33064 2002). "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." Id.; see also, Camden Cty. Sheriff and P.B.A. Local No. 277, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001). Here, the County has not suggested that there are any issues regarding special training, experience, or qualifications at issue that would make certain shifts of the contractual posts biddable while others are not.

Burlington County is distinguishable from the present scenario. Most notably, in that case the parties operated under a 5-day, eight-hour shift work schedule in which relief bids were only utilized to staff the two off days for those posts/shifts that were occupied the other five days by a permanent bid officer. All regular full-time scheduled posts and shifts remained biddable by seniority, and the PBA could arbitrate the elimination of shift bidding, but not post bidding, for the relief bids. In contrast, here the County implemented a bidding system that removed half of the regular full-time posts and shifts from bidding because Platoon B's bids were entirely eliminated.

The fact is the work schedules have undergone a significant change - at the request and insistence of the County during negotiations and interest arbitration - such that the terms "relief bid" and "relief platoon" are no longer applicable to the unit. There is no rational reason to refer to either platoon as a "relief" position, as officers on Platoons A and B work the exact same number of hours and days in any given 14-day cycle of the Pitman schedule. This is underscored by the Warden's January 2013 bidding proposal which, in addition to retaining legacy bids, allowed the remainder of all Platoon A and B posts to be available for seniority bidding. This indicates the County's recognition that there were no longer "relief" bids under the

revamped schedule, but that every regularly scheduled post in the Pitman schedule was available for bidding. The fact that Warden Artis, prior to the grievance decision, bid out all of the additional posts is incompatible with the County's concern about "relief" bids following the unfair practice charge.

We also note that the County's bidding list prior to the PBA's grievance listed both "Platoon A" and "Platoon B" and allowed bidding on the Article 13 posts on each side of the schedule (J-9; CP-2), but after the grievance decision the County revised its bidding list and re-labeled Platoon A as "Bid Platoon" and Platoon B as "Relief Platoon." J-15. We do not view this semantic change as having any affect on the analysis above regarding the fact that the 12-hour Pitman schedule necessarily is equally divided into mirror image sides of the schedule in order to staff every shift of every post. The County cannot shoehorn the 2000 scope decision partially restraining arbitration of relief bids under the old schedule onto this different set of facts by simply renaming half of its regularly scheduled full-time shifts as a "relief" platoon.

Moreover, the broad assertion by the County that it needs to have personnel flexibility (H.E. at 8; 1T141) is inconsistent with its arguments in support of the schedule change. In interest arbitration, the County touted the features of the new Pitman schedule, with its 6 shifts (due to opposite platoons).

With full knowledge and understanding of the two platoon system, the County advocated for a much simpler, easier shift bidding process by changing from 45 shifts under the old schedule to 6 shifts under the new schedule:

The County contends that these bidding processes and shift changes are time consuming and destabilizing to workforce continuity. By contrast, the proposed work schedule would be assembled using only two platoons in each facility for each tour. Thus there would only be a maximum of six possible tours to be bid on. This, the County contends, would streamline shift selection enormously.

[J-17 at 69-70; emphasis added.]

A. The other benefits of the 12 hour schedule. First of all, it replaces what I term here the confounding post bidding practice when a vacancy opens that can result in daisy chain style shift selection. . . . Every time instead of just saying, you know, here are the six schedules, people would post a schedule, and then you have to backfill that bid . . .

Q. Will that occur under the revised schedule?

A. No, it will be extremely reduced and streamlined because it will be basically six choices. I mean, you have like 70 percent chance of being on a, quote, day shift, either starting at 6 a.m. or 9 a.m., and you're going to have every other weekend off. So there's less incentive to try to maneuver into different days off to incrementally try to work your day into having one weekend day off and two weekend days off.

[CP-1 at 314-315, HR Director Hornickel; emphasis added.]

The interest arbitrator agreed, concluding:

There is no doubt that having only 6 platoons per facility will significantly facilitate the shift selection process.

[J-17 at 89; emphasis added.]

Furthermore, the County promoted the benefits of continuity on shifts from having only two platoons:

The County also contends that the 12-hour schedule will enhance supervision by providing consistency and predictability about which employees are on duty at any given time. Under the current schedule, supervisors are generally unaware of who will be on duty on any given day. The 12-hour proposal splits each shift into two platoons, rather than seven different schedules revolving around days off. Supervisors will know exactly who is coming in for the shift by virtue of which platoon that is scheduled.

[J-17 at 72; emphasis added.]

Bullet point number two, I can't understate the importance of this, develop a cohesive predictable shift supervision scheme. The same groups of employees working together every workday.

[J-17 at 315, HR Director Hornickel; emphasis added.]

Therefore, in promoting the streamlined bidding process with six shifts and the benefits of having the same groups of employees on the same shifts every day, it is apparent that the County intended for post/shift bidding to be applied to all six potential 12-hour shifts covering both platoons.

Accordingly, we find that there is no evidence to support the County's broad contention that the change to 12-hour Pitman shifts necessitated removing half of all regular full-time shifts from the seniority bidding process, when previously (based on the Commission's scope of negotiations decision in Burlington County) all shifts were biddable by seniority and all Article 13 posts except for relief posts were biddable. The County's reason for the wholesale elimination of half of the bidded posts/shifts not only lacks specificity, but contradicts what it proposed during interest arbitration as well as the fully bidded (albeit flawed) 12-hour Pitman schedule Warden Artis proposed following interest arbitration.

Also noteworthy is the interest arbitrator's understanding that the seniority bidding process permitted selection by shift and post. CP-1 at 265-266.^{8/} Nowhere in her award did she mention the possibility of removing biddable posts or qualify her order that the "entire schedule" go up for bidding with any limiting language. The Warden concurred, testifying that the County never proposed eliminating the bidded posts listed in the

8/ Arbitrator: "I thought I had understood when you put a tour up for bid for shift selection, what the officer was picking was a tour of duty and a day off, a set of days off that matches with that. Are you saying that part of that selection is also which facility you're going to work in?"
Warden Artis: "There's a select group of bids, and the bids are at BCDC, and then there's bids at CWRC."
Arbitrator: "I see. Is it global seniority?"
Warden Artis: "Yes. You can be at either place."

CNA, and that nowhere in the interest arbitration award does it state that post bidding has been eliminated. 2T7-9. If the County had had real concerns about the arbitration award's implementation of the 12-hour shift Pitman schedule due to its requirement that the County "put the entire schedule up for bidding," then it could have filed an appeal of the award raising any alleged negotiability issues. The County did not appeal the interest arbitration award. The County also made no attempt to utilize the grievance procedure to challenge the decision of its hearing officer in grievance arbitration.^{9/} Instead, the County repudiated the grievance procedure by unilaterally imposing post/shift bidding schedules that did not allow all contractual posts to be bid by seniority as required by its own hearing officer's decision interpreting the interest arbitration award.

In finding that the County violated section 5.4a(5) of the Act, we must note another error in the Hearing Examiner's analysis recommending dismissal. Rather than discussing or applying the Keansburg, Preakness, and Newark precedent, supra, concerning when an employer's refusal to honor the binding decision of its grievance representative may constitute a refusal to negotiate in good faith, the Hearing Examiner concluded:

^{9/} Article 21 of the CNA specifies the PBA's right to request arbitration upon receipt of an adverse grievance determination. We make no determination of whether the parties' negotiated grievance procedure would permit the County to appeal to binding arbitration.

It is not appropriate for me, as a hearing examiner, to undertake contractual interpretation by interpreting the interest arbitrator's decision or by reexamining the grievance decision. These issues of contractual interpretation are appropriately raised through the parties' grievance procedure or before an arbitrator. The Commission has held that "allegations setting forth at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction. Contract disputes must be resolved through negotiated grievance procedures." Camden Cty. Pros. P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) citing, State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Apparently, neither party sought clarification of the interest arbitration award, nor appealed Doherty's grievance decision to the next step, or filed another grievance.

[H.E. at 29.]

The Hearing Examiner's refusal to reexamine the grievance decision to determine whether the County abided by it is legally erroneous in the context of an unfair practice charge alleging repudiation of the negotiated grievance procedure for failure to honor the decision of an authorized grievance officer. First, the Hearing Examiner's conclusion incorrectly suggests that the PBA did not raise its issue through the grievance procedure, or that it was responsible for furthering the dispute despite having its grievance sustained. As the Commission stated in Keansburg:

The employer's reliance on the fact that the PBA had a right to appeal decisions it did not agree with is misplaced. Once the employer's designated representative issued

decisions the PBA agreed with, the PBA had no reason to pursue any of the grievances.

[29 NJPER at 507.]

Here, the PBA appropriately raised the contract and interest arbitration award interpretation issues through the parties' negotiated grievance procedure. The PBA succeeded during an interim step of the grievance procedure prior to grievance arbitration, so it had no reason to appeal any further or seek more clarification before an arbitrator or by filing another grievance. Next, the Hearing Examiner's reliance on Human Services to dismiss the case as an issue of contract interpretation is misplaced. As the Commission stated in Preakness:

[H]ere Local 2273 did precisely what Human Services encouraged it to do: it pursued the negotiated grievance procedures. It won a binding ruling through those grievance procedures and the Hospital then failed to comply with that ruling and the parties' negotiated procedures for appealing that ruling. We will not convert Human Services from a precedent encouraging parties to use their own grievance procedures for contract disputes into a precedent immunizing a party flouting those procedures and resulting binding decisions from an unfair practice charge.

[11 NJPER at 137.]

That precedent applies to the instant case. We therefore find that the Hearing Examiner erred by not applying the requisite

analysis and pertinent precedent in order to make a proper determination on the 5.4a(5) charge.

Finally, given our determination that the County violated section 5.4a(5) of the Act, we find it unnecessary to review the PBA's exceptions to the Hearing Examiner's decision to dismiss the 5.4a(3) and a(1) charges alleging retaliation for the PBA's protected conduct. We recognize that had the Hearing Examiner accurately understood the change in bidding schedule made in response to the PBA's successful grievance (the Doherty decision), as compared to the County's prior proposal, then she might have had a different view of the context within which the County counsel's allegedly retaliatory comment and the termination of Doherty were made. However, given the order below based on the 5.4a(5) violation, we need not engage in a retaliation analysis.

ORDER

The County of Burlington is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the PBA concerning terms and conditions of employment, particularly by repudiating the grievance procedure it negotiated with the PBA when it refused to implement a grievance decision of its authorized hearing officer regarding implementation of an

interest arbitration award's provision requiring new seniority post/shift bidding for the entire 12-hour shift Pitman schedule.

B. Take this action:

1. Within forty-five (45) days of receipt of this decision, implement the March 6, 2013 decision of former County Contract Referee Joseph J. Doherty by opening up all contractual Article 13 posts to seniority bidding for the entire Pitman schedule including both platoons or "sides" of the schedule.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within sixty (60) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: April 26, 2018

Trenton, New Jersey



RECOMMENDED



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from refusing to negotiate in good faith with the PBA concerning terms and conditions of employment, particularly by repudiating the grievance procedure it negotiated with the PBA when it refused to implement a grievance decision of its authorized hearing officer regarding implementation of an interest arbitration award's provision requiring new seniority post/shift bidding for the entire 12-hour shift Pitman schedule.

WE WILL within forty-five (45) days of receipt of this decision, implement the March 6, 2013 decision of former County Contract Referee Joseph J. Doherty by opening up all contractual Article 13 posts to seniority bidding for the entire Pitman schedule including both platoons or "sides" of the schedule.

Docket No. CO-2013-269

COUNTY OF BURLINGTON
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372