

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY SHERIFF'S  
DEPARTMENT (CORRECTIONS),

PETITIONER,

-and-

Docket No. SN-2020-041

POLICEMAN'S BENEVOLENT  
ASSOCIATION, LOCAL 400,

RESPONDENT.

SYNOPSIS

In this scope of negotiations determination referred to the Public Employment Relations Commission by the Appellate Division, the Commission denies the Salem County Sheriff's Department's request for a restraint of binding arbitration of the PBA Local 400's grievance. The grievance alleged that the County violated the parties' collective negotiations agreement when it unilaterally issued Special Order 2019-1, which reassigned, from the Corrections Officers to the County Sheriff's officers, the Home Electronic Detention program and transportation of all County inmates. The Commission finds that the Special Order intimately and directly affected the work and welfare of the Corrections Officers. The Commission further finds that the statutory and regulatory authority cited by the PBA, including Civil Service job descriptions, N.J.S.A. 40A:9-117.6, and N.J.A.C. 10A:31-1.1 et seq. is not preemptive. The Commission concludes that negotiations over the Special Order would not significantly interfere with the County's determination of governmental policy. The County failed to factually establish it had staffing issues at its correctional facility or any other operational reasons necessitating the unilateral transfer of the correction's officers' unit work. The County also failed to prove that the federal contract mandated strict timeframes for the transportation of inmates requiring that the corrections officers be solely dedicated to the transport of the federal inmate.

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, DiNicola and DiNicola LLC,  
attorneys (Joseph M. DiNicola, Jr., of counsel)

For the Charging Party, Sciarra & Catrambone LLC,  
attorneys (Christopher A. Gray, of counsel)

DECISION

On March 4, 2020, the Salem County Sheriff's Department (County), in charge of the Salem County Correctional Facility (Facility) and its Corrections Officers (COs), filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by PBA Local 400 (PBA), docketed with the Commission as AR-2019-437. The grievance in AR-2019-437 alleged that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally issued, without negotiations, Special Order 2019-1 (SO2019-1) on January 15, 2019, which reassigned, from the COs to the County Sheriff's officers, the Home Electronic Detention (HED) program and

transportation of all County inmates to and from the Facility to various court hearings.

However, the County filed its scope of negotiations petition after the arbitration award in AR-2019-437 was issued on January 16, 2020 in favor of the PBA, rescinding SO2019-1. By letter dated March 5, 2020, the Commission declined to process the County's scope of negotiations petition, citing its longstanding policy of not determining scope petitions following the issuance of an arbitration award announced in Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983). Thereafter, the County moved to vacate and the PBA moved to confirm the arbitration award in the Law Division, resulting in AR-2019-437 being vacated on April 3, 2020.<sup>1/</sup> The PBA then appealed the Law Division's decision to vacate AR-2019-437. In its August 19, 2021 written decision, the Appellate Division referred the County's scope of negotiations determination to the Commission, reversing the Law Division's order to vacate AR-2019-137 and finding that the Law Division should have declined to decide the negotiability question, and instead, should have referred the issue to the Commission, who has primary jurisdiction over scope of negotiations disputes. Policemen's Benevolent Ass'n Local No.

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<sup>1/</sup> Along with AR-2019-437, the PBA had filed other grievances for arbitration. However, the Law Division only vacated the arbitration award for AR-2019-437, and the Appellate Division reversed that decision. Thus, AR-2019-437 is the only subject of this scope of negotiations determination.

400 v. Salem Cty. & Salem Cty. Sheriff's Dep't, No. A-3533-19, 2021 N.J. Super. Unpub. LEXIS 1765 (App. Div. Aug. 19, 2021).

The matter is now before the Commission.

In support of its scope of negotiations petition, the County filed briefs, exhibits, and the certification of Charles Miller, the County Sheriff, and John Cuzzupe, the Facility's Warden. In response, the PBA filed a brief, exhibits including the transcript of the arbitration hearing in AR-2019-437, and the certification of its counsel, Christopher A. Gray.<sup>2/</sup> These facts appear.

The PBA is the exclusive bargaining agent for all full-time, permanent and provisional COs employed by the County, excluding: sergeants; lieutenants; captains; managerial executives; supervisory personnel; confidential, craft and professional employees; and those represented by other bargaining units. The County and the PBA are parties to a CNA with a term of January 1, 2017 through December 31, 2020. The CNA's grievance procedure ends in binding arbitration.

The County certifies that up until July 2, 2014, the transportation of all County inmates was the responsibility of the Sheriff's Officers, including federal inmate transportation.

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<sup>2/</sup> Gray's certification attests to the authenticity of the exhibits attached thereto. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts recited in a party's brief be supported by certification(s) based upon personal knowledge.

In July 2014, the County entered into a settlement agreement of an unfair practice charge filed by the FOP, the exclusive representative for the Sheriff's Officers, that transferred hospital transportation of inmates from the Sheriff's Officers to the COs. In July 2016, the County entered into a second settlement agreement of an unfair practice charge and grievance filed by the FOP that transferred all transportation duties, except "fresh arrests" and federal inmate transportation from the Sheriff's Officers to the COs.

In January 2019, the County implemented SO2019-1, which transferred, effective February 1, 2019, all transportation duties from the COs to the Sheriff's Officers except for in-state federal transportation. The County certifies that the County and United State Federal Marshal's office entered into an agreement (Federal Contract), dated April 10, 2019, to house 165 federal inmates at the Facility and to transport them to and from the Camden County Federal Courthouse.<sup>3/</sup> The Federal Contract generated 7 million dollars per year in revenue for the County. (1T112:1-4).<sup>4/</sup> The COs subsequently took over in-state federal

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3/ At the arbitration hearing, Cuzzupe testified that an informal agreement with the federal marshal was that the Facility would take 55 federal inmates, and that later increased to 73 due to staffing issues that prohibited the Facility from taking the full 165 inmates. (1T112:1-113:2).

4/ "1T" refers to the transcript of the July 11, 2019  
(continued...)

transportation in May 2019.

Cuzzupe certifies that S02019-1 was implemented due to staffing issues at the facility as well as the stringent timelines for transportation required in the Federal Contract. Cuzzupe further certifies that dedicated on-call Officers needed to be assigned to the transportation of the federal inmates further necessitating S2019-1. At the arbitration hearing, Cuzzupe testified that the Facility was "at an all-time crisis level as far as being understaffed." (1T104:20-105:20). Cuzzupe testified that the Facility needed more staff, so his idea was to bring back the seven members of the transportation team, six COs and a sergeant, so they could fill vacancies at the Facility while waiting on their federal inmate transportation assignments. (1T104:21-107:3; 114:12-21). Cuzzupe testified that the strict time requirements of the Federal Contract could not have been met if the COs continued doing all of the inmate transportation as well as the HED monitoring because both the County and federal inmates needed to be transported at the same time. (1T108:4-109:5). Cuzzupe further testified that the County would have to forfeit the Federal Contract if the COs had to do all of the transportation and HED work. (1T109:6-9). Cuzzupe also testified that a reduction of overtime expenditures was an

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4/ (...continued)  
arbitration hearing. "2T" refers to the transcript of the September 5, 2019 arbitration hearing.

additional reason for SO2019-1. (1T114:22-115:3). Additionally, Undersheriff Warren Mabey testified at the arbitration hearing, stating that the transfer of the transportation and HED work was more efficient and convenient for the County given that the Sheriff's Officers were already doing juvenile transports and there had been an increase in juveniles in the HED program, as well as, the Sheriff's Officers being stationed in the City of Salem. (1T125:9-126:13; 1T127:14-18).

Lastly, the County certifies that the COs did not lose any jobs or change shifts as a result of SO2019-1. As a result of SO2019-1, both the FOP and PBA filed unfair practice charges alleging that unit work traditionally performed by their respective units was unilaterally taken from them.

The PBA asserts that the 2014 settlement agreement between the County and the FOP established that the County shall assign work to the Sheriff's Officers and COs based upon the Civil Service Commission (CSC) job descriptions. The PBA further asserts that the CSC job description for COs assigns transportation of inmates to COs, and that N.J.A.C. 10A:13-8.14 states that "custody staff", whose definition includes COs, are required to transport inmates. The PBA asserts, in contrast, that the CSC job description for Sheriff's Officers states that they transport arrested persons rather than inmates.

The PBA asserts that Cuzzupe changed his initial testimony,

denying that he was having difficulty staffing the Facility, and that the issue was excessive overtime expense and employee burnout. (2T17614-23). The PBA emphasizes that the arbitrator's decision made several critical findings of fact and credibility determinations, including the following: "The Warden's argument that the County took the action it did because of a staffing crisis has not been sustained by the evidence in the record." The PBA asserts that, despite the Facility's alleged staffing crisis, the County accepted an additional 75 federal inmates through the Federal Contract, which it claims indicates that there was no staffing crisis. The PBA also asserts that during a PBA meeting Sheriff Miller assured the PBA that the transportation and HED work would remain with the COs. The PBA further asserts that the COs have handled the transportation and HED duties with no issues or complaints. The PBA also asserts that the County did not negotiate over the issuance of S02019-1.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate



for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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.

[Id. at 404-405.]

Negotiations are preempted only when a statute or regulation fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998). Additionally, 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. City of Paterson, 87 N.J. 78, 92-93 (1981).

#### Parties' Arguments

The County argues that it has a non-negotiable, managerial prerogative to reassign the transportation and HED work from the COs to the Sheriff's Officers, as both units are under the authority of the Sheriff. The County cites the CNA's management rights provisions as permitting it to determine unit work. The County argues that the COs are not negatively impacted by SO2019-1 because they receive the same pay, overtime and day shift, and thus, the reassignment does not intimately and directly affect their work and welfare. The County further argues that having the COs continue to perform the HED and transportation work would significantly interfere with its determination of governmental policy. The County asserts that the Facility has significant personnel issues which required the COs on the transportation team to cover vacancies at the Facility. Further, in order to obtain and maintain the federal contract, the County needed to have the COs, on-call, at the Facility to transport the federal inmates to meet the strict timelines in the federal contract. The County argues that balancing these significant operational factors against the COs' interest in keeping the reassigned work,

particularly when the reassignment does not alter compensation or shifts, weighs in favor of the County. The County further argues that the "unit work rule" is inapplicable because the COs did not exclusively perform the contested work and it was historically shared with the Sheriff's Officers. In its reply brief, the County argues that PBA misapplies and misinterprets the legal authority it claims prohibits the Sheriff's Officers from having custody over and transporting inmates.

The PBA argues that SO2019-1 violated the "unit work rule" and the parties' CNA because the transfer of the transportation and HED work from the COs to the Sheriff's Officers was mandatorily negotiable, and therefore, the award in AR-2019-437, rescinding SO219-1, should not be disturbed. The PBA argues that the COs were negatively impacted by SO2019-1 because it prevented them from bidding on a desired post - primarily transporting inmates and secondarily staffing the Facility - and also diminished overtime opportunities, which intimately and directly affects their work and welfare. The PBA further argues that the County's claimed economic benefit from the reassignment is not realized because the Sheriff's Officers are paid more money than the COs to do the contested work. The PBA also argues that the CSC job descriptions and rules regulating COs prohibit the reassignment of the transportation duties, and thus, SO2019-1 is preempted by statute and regulation. The PBA further argues that

the County failed to provide sufficient evidence to establish the necessity of SO2019-1, citing Bergen Cty. and Bergen Cty. Sheriff's Office, I.R. No. 2019-6, 45 NJPER 123 (¶33 2018), recon. den., P.E.R.C. No. 2019-20, 45 NJPER 208 (¶54 2018). The PBA argues SO2019-1 was implemented due solely to economic concerns - reduction of overtime expenses and attainment of the lucrative Federal Contract - rather than operational reasons such as staffing issues and efficient delivery of the County's services, and thus, the reassignment was mandatorily negotiable.

#### Analysis

We begin our analysis by noting the uncommon procedural history that brought this case before us. Generally, we decide scope petitions based on a factual record comprised of certifications, along with any documentary exhibits, submitted by the parties prior to any arbitration hearing. N.J.A.C. 19:13-3.6(f). In this case, in addition to the aforementioned documents, we are making a scope determination having a full arbitration record before us. While we are not reviewing the merits of the case heard by the arbitrator or any of his factual findings or credibility determinations, we consider the arbitrator's findings of fact and credibility determinations and will not substitute our judgment for that of the arbitrator. See Rutgers, the State University of New Jersey, P.E.R.C. No. 2015-44, 41 NJPER 334 (¶105 2015). Rutgers, supra, citing Township

of Wyckoff v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009)

("...a reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation. The policy of strictly limiting judicial interference with arbitration is intended to promote arbitration as an end to litigation.")

Addressing the first prong of the Local 195 test, we find that the issuance of SO2019-1 intimately and directly affected the work and welfare of the COs. "There can be no question that the determination of where an employee works and at what tasks intimately and directly affects the employee's work and welfare." Local 195 at 415. Despite the County's claims that the COs' compensation and shifts were not changed as a result of the reassigned work, SO2019-1 did affect where the COs would primarily work and what duties they would perform (i.e., mostly transporting inmates and the HED program as opposed to staffing the Facility and transporting federal inmates as needed). It also reduced the COs' overtime opportunities, which was a part of the rationale to implement SO2019-1, as Cuzzupe testified.

Addressing the second prong of the Local 195 test, we find that the unilateral implementation of SO2019-1 is not preempted by any of the authority cited by the PBA. The CSC job descriptions for COs and Sheriff's Officers list "examples of work" and do not expressly, specifically, or comprehensively

mandate that these positions must perform the enumerated responsibilities. Indeed, the job descriptions submitted as exhibits contain a note that states that the "examples of work" are for illustrative purposes only and that not all duties of the jobs may be listed. We further note that the PBA's "out-of-title" work claims invoke the CSC's jurisdiction. See City of Plainfield, H.E. No. 84-37, 10 NJPER 143 (¶15070 1984), adopted by, P.E.R.C. No. 84-159, 10 NJPER 451 (¶15202 1984).<sup>5/</sup> The CSC is the proper agency to handle matters of job classification. State v. State Supervisory Employees Assoc., 78 N.J. 54 (1978) ("...it is for the Civil Service Commission to establish relevant employment classifications and to set qualifications for specific job categories in each.")

Further, the PBA cites N.J.S.A. 40A:9-117.6<sup>6/</sup>, arguing that

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<sup>5/</sup> The former CSC statute discussed in Plainfield, N.J.S.A. 11:22-12, provides: "No person shall be appointed or employed under any title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the position which he legally holds." This is nearly identical to the language of N.J.A.C. 4A:3-3.4 cited by the PBA to support its argument that CSC regulations limit an employer's ability to delegate duties based upon employees' job titles.

<sup>6/</sup> N.J.S.A. 40A:9-117.6 ("Sheriff's Officers; appointment; duties") provides:

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, pursuant to the provisions of Title 11 of the Revised

(continued...)

it prohibits the Sheriff from assigning Sheriff's Officers duties that involve taking custody of County inmates for their transportation. However, the plain language of N.J.S.A. 40A:9-117.6 states Sheriff's Officers shall not be assigned to any "penal institution...for the purpose of guarding, having custody of...any inmate housed therein..." There is no evidence that the Sheriff's Officers have been assigned to any correctional facility for the purpose of guarding inmates. The record

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6/ (...continued)

Statutes, where applicable, 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 ballistics, or in any related work which the sheriff shall, from time to time prescribe and as shall be determined to be appropriate by the Civil Service Commission. Except as provided herein, no such officer shall be assigned to any penal institution, jail, penitentiary, county correction center or workhouse for the purpose of guarding, having custody of, or being charged with the rehabilitation of any inmate housed therein, except upon emergency conditions. Any sheriff's officer who, on the effective date of this act, is assigned to any penal institution, jail, penitentiary, county correction center, or workhouse for the purpose of guarding, having custody of, or being charged with the rehabilitation of any inmate housed therein, may continue to serve in such capacity until such officer is reassigned or terminated, at which time the position shall be filled with an individual in a title appropriate to the duties to be performed.

reflects that the Sheriff's Officers have custody of inmates while transporting them, and unlike the COs, are not assigned to the Facility and charged with guarding inmates. Further, the record clearly establishes that the Sheriff's Officers were responsible for inmate transportation for years, which the County asserts is a common duty of Sheriff's Officers throughout the State and belies that such duties violate N.J.S.A. 40A:9-117.6. This statute does not expressly, specifically or comprehensively prohibit the Sheriff's Officers from transporting inmates.

Additionally, N.J.A.C. 10A:31-1.1 et seq., regulating the State's correctional facilities, which the PBA claims preempt S0219-1, do not expressly, specifically or comprehensively require that only COs transport inmates. For example, N.J.A.C. 10A:31-8.14 ("Transportation of Inmates"), cited by the PBA, sets forth the types of training COs must receive when they are involved in transporting inmates. The PBA does not cite any authority, including the above regulations, that expressly prohibits the Sheriff's Officers from transporting inmates. Again, the PBA's argument is undermined by the fact that the Sheriff's Officers were transporting all inmates prior to the COs.

Addressing the third prong of the Local 195 test, we find, on this record, that negotiations over S02019-1 would not significantly interfere with the County's determination of



governmental policy. The record evidence fails to support the County's assertions of an operational basis for the unilateral transfer of the disputed work.

The County's position is that SO2019-1 was unilaterally implemented for the procurement and retainment of the 7 million dollar Federal Contract, and that it unilaterally transferred the disputed transportation duties to the Sheriff's Officers without negotiations with the PBA due to operational reasons. The County asserts that there was a staffing crisis with the COs, and that the COs could not perform all inmate transportation and do the HED work because both federal and County inmates needed to be transported at roughly the same time. The County further asserts that the federal contract contains strict transportation time lines which it could not meet without a dedicated on-call transportation team for the federal inmates.

However, with regard to the existence of a staffing crisis, the arbitrator found as follows:

The Warden's argument that the County took the action it did because of a staffing crisis has not been sustained by the evidence in the record. Nothing was presented to show a staffing crisis. Most importantly, if there was a staffing crisis, why would the County add an additional 75 inmates to its jail? The two don't go together, especially since the Sheriff's Department has not increased the number of Corrections Officers.

[Arbitrator's Decision, p. 44.]

Also undermining the credibility of the County's under-staffing

claim was Warden Cuzzupe's admission, on cross-examination, that reducing overtime expenditures was more at issue than understaffing at the Facility, which is purely an economic consideration. (2T17614-23). We will not disturb the credibility determinations based on the arbitrator's in-person review of the testimony and examination of the evidence, and will not substitute our judgment for his.

The County's position was largely based on the stringent time lines imposed under the federal contract, that it asserted it could not meet without the dedication of the COs to the transportation of the federal inmates, removing them from their previously assigned transportation work. This was discussed in the arbitrator's decision, as follows:

The County takes the position that the contract they have with the Federal Marshall Service has specific time frames that must be adhered to. No one will challenge that if, and only if, the contract is entered into evidence and the parties can look at exactly what had been agreed to, and why it was agreed to. That did not happen here. The contract with the United States Marshall's Service was not introduced into evidence, and consequently there is no proof that a time constraint existed. Candidly, the County failed to prove its assertion that the only way to implement the contract with the United States Marshall's Service was to transfer the inmate transportation issue to the Sheriff's Officers and take that work away from the Corrections Officers.

[Arbitrator's Decision, p. 44.]

A copy of the Federal Contract was included in the record before us. The County failed to include argument as to the specifics of the contract, or identify the stringent time lines contained in the contract that were testified to by the Warden. Our independent review of that contract reveals that it does not impose specific time frames that must be adhered to for the transport of federal inmates. Therefore, the County has not factually established the necessity of the COs being solely dedicated to transport the federal inmates. The County has not credibly supported any operational justifications for unilaterally transferring the disputed work which would support its decision not to engage in negotiations with the PBA. Without the County establishing the operational justification involving the under-staffing at the Facility, what remains is the economic justifications of reducing overtime expenditures. When balancing the County's economic interests with that of the COs retaining their statutory rights to have their terms and conditions of employment negotiated - namely their negotiated assignments and associated overtime opportunities - we find the COs' interests outweigh the County's and SO2019-1 should have been negotiated prior to implementation.

The PBA also asserts application of the "unit work rule" to this case. The "unit work rule" provides that an employer must negotiate before assigning non-unit employees to do work

traditionally performed by negotiations unit employees alone.

See Jersey City, supra. The Commission recognizes three exceptions to the "unit work rule": (1) the union has waived its right to negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of the unit-personnel; and (3) the municipality is reorganizing the way it delivers government services. Id. at 577. With regard to the applicability of the second exception to these facts, the COs have exclusively performed the contested work since 2016. The Sheriff's Officers performed inmate transportation until the 2016 settlement agreement which transferred transportation duties, except "fresh arrests" and federal inmate transportation, from the Sheriff's Officers to the COs. Regardless of the outcome of the application of the second exception of the unit work rule to these facts, the Local 195 negotiability balancing test controls. Jersey City, 154 N.J. at 575.

For all the foregoing reasons, we conclude that S02019-1 was mandatorily negotiable and the PBA's grievance in AR-2019-437 was legally arbitrable.

ORDER

The request of the Salem County Sheriff's Department for a restraint of binding arbitration of AR-2019-437 is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 21, 2021

Trenton, New Jersey