

**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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In the Matter of the Arbitration Between

**Hudson County**

And

**PBA Local 109A**

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Before: Thomas D. Hartigan, Arbitrator

PERC Docket No. AR – 2012-227  
Issue: Sr. Investigator Aviles

Appearances:

For the County: Sean Dias, Esq.

For the PBA: David J. DeFillippo, Esq.  
Klatsky, Sciarrabone & DeFillippo

In accordance with the arbitration agreement between the parties and the rules of the N.J. Public Employment Relations Commission, I was designated to hear and decide the matter set forth herein on December 12, 2011. A hearing was held on May 2, 2012 at the County Administration Building at which time the parties were presented full opportunity to present any testimony, evidence or argument in support of their positions. The parties agreed to argue the matter by way of Briefs. June 4, 2012 was set as the postmark date for briefs to be submitted. The County requested and received an extension until July 2, 2012. The Union's brief, dated June 1, 2012, was received on June 3, 2012. The County's brief, dated Junly3, 2012, was received electronically on said date with the hard copy received on July 5, 2012. The record was deemed closed on July 3, 2012

## **ISSUE**

Whether the County violated the Collective Bargaining Agreement and/or the Litigation Alternative Procedure decision when it assigned Ricardo Aviles to the Work Release Unit? If so, what shall the remedy be?

## **BACKGROUND**

The County and the PBA are parties to a Collective Bargaining Agreement (CBA) covering the period from January 1, 1994 through December 31, 1998. (Joint Exhibit 1) An Interest Arbitration Award covered the period of January 1, 1999 through December 31, 2003. (J-2) A Memorandum of Understanding (MOU) covered the period from January 1, 2004 through December 31, 2009(J-3) and remains in place as the parties work on a successor agreement. The Memorandum notes that PBA 109A involves "Corrections Sergeants and Lieutenants". On September 16, 2011, a grievance was filed noting "grievance is being written on behalf of Local 109A's membership in reference to the assigning of Senior Investigator Ricardo Aviles to the work release position." The SOA maintains that the assignment of Sgt. Aviles is improper as same was done without adherence to the shift-bidding process outlined under Article XVII of the contract as well as a LAP decision from 2002. A request for Arbitration was filed on October 21, 2011.

## **STIPULATION**

County Exhibit 4 represents an example of the Memo sent to thirty-six (36) sergeants on said date.

## **RELEVANT CONTRACT PROVISIONS**

### Article XVII – Shift Bidding

- 17.1 In the event a vacancy is created or occurs. Employees shall be entitled to bid for choice of ~~shift assignment~~, in order of seniority based upon rank-for-rank and seniority within rank.
- 17.2 Shift changes must be stable for a period of three (3) months before being eligible to bid for a new assignment.

## **OTHER RELEVANT DOCUMENTS**

### **Litigation Alternative Procedure – Opinion and Award**

#### **2. Shift Bidding Procedures**

With the exception noted below, I see no need to significantly alter the shift bidding criteria currently in place simply because some corrections officers will be switching from a 4/2 to a 5/2 schedule. The current contractual shift bidding system and existing PERC precedent concerning the subject are more than adequate to facilitate annual shift bidding on the newly implemented 5/2 work schedule. Having said this, however, the following procedure discussed during this LAP proceeding for selecting shifts appears satisfactory to all parties, makes sense from a procedural standpoint, and is hereby awarded.

## **POSITION OF THE PBA**

The last full contract between the parties expired on December 31, 1998. Subsequently, the parties have operated under an Interest Arbitration Award, 1999-2003, and a Memorandum of Agreement (MOA), 2004-2009. The MOA remains in effect as the parties craft the terms of a successor agreement.

The grievance involved herein was filed in the fall of 2011 following the placement of Sergeant (Sgt.) Ricardo Aviles into the Work Release Unit (the Unit). This is a unit of the Corrections Department responsible for the County's bracelet program which monitors inmates released on home confinement. Prior to the fall of 2011 the Unit consisted of three officers: Lieutenant (Lt.) Alvarez and two corrections officers. Sgt. Aviles' appointment to the Unit added a second supervisory position within the Unit.

Ricardo Aviles was hired in July 1995 and promoted to Sgt. in April 2003. PBA Local 109A represents the Sergeants within the Corrections Department. The County subsequently received Civil Service permission to create the title of Senior Investigator Parole and Secured Facilities (Sn. Investigator) which title is not within the bargaining group covered by Local 109A. In August 2008 Mr. Aviles

was appointed to the title of Sn. Investigator with the Department's Internal Affairs Unit.

On June 4, 2011 Sn. Investigator Aviles was served with a Preliminary Notice of Disciplinary Action and on January 9, 2012 after a Departmental Hearing he received a Final Notice of Disciplinary Action. This resulted in his demotion to the title of Sgt. During the pendency of the charge Aviles was moved to the Work Release Unit as an additional supervisor. The move took place in August/September 2011. After his demotion and acquisition of the title Sgt., Aviles has remained in the Unit.l

Article XV II.1 provides that when "a vacancy is created or occurs" employees have the right to bid by seniority on the position. In the fall of 2011 the County exercised its managerial prerogative to create an additional supervisory position within the Unit. However, the County did not follow the dictates of Article XVII.1 when it unilaterally placed Aviles in the newly created position.

The Union has shown that the County created a vacancy and that it did not allow employees to bid for the new position. The language is clear and the violation is obvious. The County's argument that the position did not have to be opened for bid because Aviles hours remained the same does not comport with the language of Article XVII.1 which is not conditioned on a change in work hours.

The County's only written response to the grievance came from Deputy Director Eady who claimed that no violation had taken place as the assignment of Aviles was temporary. However, it has been shown that the assignment was not temporary and therefore should have been presented for bid.

### **POSITION OF THE COUNTY**

A proper reading of Article XVII.1 shows that bidding occurs for a shift assignment. In the instant matter there was no change of shifts and therefore no need to bid the position. Sgt. Aviles was assigned to the Unit and remained on the same shift. Captain (Cpt.) Nalls testified to a number of recent assignment changes and noted that none required bidding as none involved a change in shifts.

As well as the CBA the parties are covered by a Litigation Alternative Procedure (LAP) award involving shift bidding. In the award Arbitrator Licata provided "the

only exception to the current shift bidding system". However, the change involved the system for bidding but did not alter or change the "shift" bidding requirements.

Sgt. Aviles was involved in a disciplinary action and was demoted from the position of Sn. Investigator to his former position of Sergeant. As a result of the demotion and loss of the Sn. Investigator title, he could no longer remain in the Internal Affairs Unit and was reassigned to the Work Release Unit.

Cpt. Nalls testified to her years a Captain, Lt. and Sgt. within the Department. She stated that when assignments are made without a change in shift there is no requirement for bidding. She noted that the shifts at the Correction Center are generally 6am-2pm, 2pm-10pm and 10pm-6am. The Internal Affairs Unit (IA) works from 8am-4pm as does the Work Release Unit. Therefore, when Sgt. Aviles was reassigned from IA to the Unit he did not change shifts. Lt. Alvarez also works from 8am-4pm in the Unit.

If a unit needs additional staffing, a Unit Manager advises the Director of the need and the Director then approves or disapproves of the addition. In the instant matter the Director approved of the need for an additional superior officer in the Unit to help Lt. Alvarez research and develop a new Home Confinement program. As Sgt. Aviles had experience in the Unit, he was appointed to the position but without a change in shifts. As the Department did not create a new shift for a supervisor in the Unit it did not have to bid the position.

Cpt. Nalls spoke to a memorandum from Deputy Director Eady, dated January 12, 2011, in which he directed that "each individual sergeant in your unit notifying them of their reassignment." Cpt. Nalls noted that there was no bidding involved in this process as no shift assignments were modified. She indicated that had the change in assignments involved shift changes then bidding would have been required. She related a situation in the Classification Unit in which it was determined that coverage was needed beyond the regular 6am-2pm shift. The Director approved the addition and directed that shift bidding had to occur.

In the instant matter there was no change in shifts for Sgt. Aviles. He had worked 8am-4pm in Internal Affairs and was reassigned to the Unit with the same hours. Additionally, Article XVII.1 requires a shift bid when a vacancy occurs and no vacancy occurred in the Unit as Lt. Alvarez did not vacate his position or shift within the Unit.

The County has the managerial right to determine the assignment of employees to meet governmental goals. In the instant matter it determined that Sgt. Aviles was best suited to the position in the Unit and so assigned him to that position. Not having altered his shift, it was not obligated by Article XVII.1 to bid the position.

### **DISCUSSION AND ANALYSIS**

It is uncontested that prior to the Fall of 2011 the Work Release Unit consisted of one superior officer, Lt. Alvarez, and two corrections officers. The County determined in 2011 that the Work Release Unit was in need of an additional superior officer and determined to add a new position. The Union has not contested the County's decision to add another superior officer to the Unit. Indeed, the PBA in its brief noted, "the Department exercised its managerial prerogative to establish another supervisory position (along with Lt. Alvarez) to oversee the Unit's operations." (Brief, pg. 4) The Union argues that once that decision had been made the newly created position should have been bid upon by its members. The County counters that Article XVII.1 requires bidding be done for "shift assignment" and as Sgt. Aviles did not change shifts there was no need for the County to bid the position.

Article XVII.1 begins, "In the event a vacancy is created or occurs". Therefore, the initial question must be whether or not a vacancy was created or occurred. Let me note here that Elkouri and Elkouri in How Arbitration Works, BNA Books, 5<sup>th</sup> Edition, 490 state, "Arbitrators have often ruled in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern." The American Heritage Dictionary defines "vacancy" as "a condition of being vacant or unoccupied; a position, office or place...that is unfilled or unoccupied". Webster's Collegiate Dictionary defines "vacancy" as a "job available at a company that needs to be filled". As noted above it is uncontested that prior to the Fall of 2011 the Unit contained one superior officer, Lt. Alvarez. Lt. Alvarez remained in his position and therefore a vacancy did not occur. However, with the addition of a new supervisory position a vacancy, a job that needed to be filled, was "created". Once the initial question of Article XVII.1 is answered the language requires that "Employees shall be entitled to bid for choice of shift assignment...." In the instant matter no such bid was conducted; rather the County assigned Sgt. Aviles and has kept him in this position.

The County argues that as Sgt. Aviles did not change shifts there was no need to bid the position. However, the current shift of Sgt. Aviles or any other officer does not trigger the requirement of Article XVII.1. The trigger for allowing employees to bid is whether or not “a vacancy is created or occurs”.

The County presented Cpt. Nalls who testified that a bid is done only when it involves a change in shifts. She noted that if there is no change in shift, there is no need to bid the position. Cpt. Nalls related other incidents where sergeants had their assignments changed and no bid was held as their shift assignment did not change. However, the incidents related by Cpt. Nalls were not shown to reflect vacancies that had occurred or were created. Whether a reassignment of personnel covered by the Union requires bidding is not before me. The question herein involves the specific case of Sgt. Aviles and the newly created supervisory position in the Work Release Unit.

The County further argues that as noted in its brief, “the Correction Center did not ‘create a new shift’ for a supervisor in the Work Release unit.” (Brief, pg. 6) While the County is correct that no new shift was created, the terminology of Article XVII.1 is that a bid is done when “a vacancy is created” not when a new shift is added.

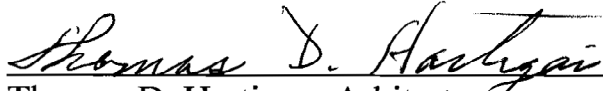
When the County created a new supervisory position in the Unit, the new position was vacant or unfilled. This met the criteria of Article XVII.1 that “In the event a vacancy is created”. The language then provides that in such an event, “Employees shall be entitled to bid for choice of shift assignment”. While the new vacant position in the Unit was established as one shift, 8am-4pm, it still requires that the shift be bid.

### AWARD

Based upon the above Discussion and Analysis, I find that the County did violate the CBA when it assigned Ricardo Aviles to the Work Release Unit. In the Fall of 2011 the County created a new supervisory position in the Work Release Unit, thereby creating a vacant position in the Unit. Article XVII.1 provides that when “a vacancy is created, Employees shall be entitled to bid”. It is uncontested that no bid was conducted so the County was in violation of Article XVII.1. While Sgt. Aviles did not change shifts when reassigned from the Internal Affairs Unit to the Work Release Unit, the trigger for bidding is the creation of a vacancy which as

noted occurred when the County determined to add a new supervisory position to the Work Release Unit.

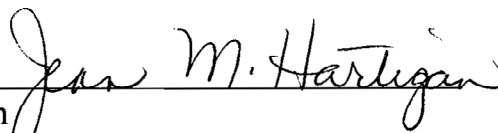
The County is hereby instructed to conduct a bid per the existing bid system as soon as possible.

  
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Thomas D. Hartigan, Arbitrator

Dated: August 4, 2012  
Hamilton, NJ

State of New Jersey        }  
County of Mercer    }ss:

On this 4<sup>th</sup> day of August 2012, before me personally came and appeared Thomas D. Hartigan to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

  
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Jean M. Hartigan  
Notary Public of New Jersey  
My commission expires 6/29/14