



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matters of John Boeren, *et al.*,
Sussex County Sheriff's Office

Layoff Rights Appeals

CSC Docket Nos. 2020-1321, *et al.*

ISSUED: SEPTEMBER 7, 2020 (HS)

John Boeren, Robert Cottrell, Paul Liobe and Thomas Lorenz, former County Correction Officers with the Sussex County Sheriff's Office (Sheriff's Office), appeal the determination of their layoff rights by the Division of Agency Services (Agency Services). These appeals have been consolidated due to common issues.

By way of background, the Sheriff's Office presented a layoff plan to Agency Services to be effective October 31, 2019, which targeted, in relevant part, 16 permanent County Correction Officers; one permanent County Correction Sergeant; and three permanent County Correction Lieutenants.¹ The Sheriff's Office submitted that it was scaling back its operations at the Keogh-Dwyer Correctional Facility (KDCF) due to significant declines in the inmate population due largely to Statewide bail reform. It noted that an agreement had been reached to house adult inmates at the Morris County Correctional Facility. The Sheriff's Office maintained that the staffing reduction would allow its facility to operate more akin to a holding facility, housing inmates for 72 hours or less and housing longer term inmates at the Morris County facility. In its layoff plan, the Sheriff's Office also indicated that there were seven female County Correction Officers in its employ, and their positions were designated as female-only due to an approved bona fide occupational qualification (BFOQ).² The Sheriff's Office requested that those seven employees receive special

¹ Pursuant to *N.J.S.A.* 40A:14-180.3, effective December 1, 2019, the titles of County Correction Officer, County Correction Sergeant and County Correction Lieutenant have been retitled to County Correctional Police Officer, County Correctional Police Sergeant and County Correctional Police Lieutenant, respectively.

² See *N.J.A.C.* 4A:4-4.5.

accommodation in administering the layoff. The Sheriff's Office pointed to, among other provisions, *N.J.A.C.* 10A:31-8.5, which generally requires strip searches to be conducted by custody staff of the same gender as the inmate. Agency Services approved the layoff plan with the requested accommodation for the BFOQ-designated positions, and 45-day notices were sent to affected employees on September 16, 2019. On October 17, 2019, Agency Services issued letters to the appellants advising them of their layoff rights. Agency Services determined that there were no displacement rights available to the appellants, and their names were placed on appropriate special reemployment lists. As part of the layoff, the 16 least senior County Correction Officers, exclusive of those who held the BFOQ-designated positions, were laid off. Boeren and Liobe's positions had been targeted for layoff, while Cottrell and Lorenz were laid off as a result of other employees' exercise of their displacement rights.

On appeal to the Civil Service Commission (Commission), the appellants, males, maintain that their layoff and seniority rights were violated in that there was no need to provide any accommodation for the BFOQ-designated positions. Specifically, they contend that the Sheriff's Office removed the operational need for female County Correction Officers when it issued the following order to all Bureau of Corrections custody staff in August 2019:

We will not keep a female officer for overtime solely because there is no female officer on the succeeding shift. In the case of a female booking with no female officer present, the Supervisor will have the female booking change into a uniform, and then the female booking will be sent through the body scanner. Follow the body scanner policy for exigent circumstances (no female officer). The female booking will then be housed temporarily on the second floor and the Bureau of Law Enforcement Supervisor will be notified of same (on call Supervisor after hours). The Bureau of Law Enforcement will then arrange for the female inmate to be transported to Morris County.

The appellants note that since the issuance of the above order, there have been more than 20 shifts without a female present. They also note that at the time of the layoff, there were actually only six female County Correction Officers employed by the Sheriff's Office, not the seven indicated in the layoff plan. The appellants contend that had the Sheriff's Office been justified in its need to retain seven female County Correction Officers pursuant to the BFOQ, it would have done everything in its power to ensure that that staffing level did not fall below seven. Further, the appellants claim that the KDCF, as of late September 2019, ceased to house inmates and began functioning as a "booking and transport facility." They note that *N.J.A.C.* 10A:31-8.5 allows for strip searches to be conducted by opposite-gender staff under emergency conditions. They also claim that while the layoff plan indicated that, overall, 35 officers would remain following the layoff, that staffing number actually fell below that figure when retirements, transfers, resignations and layoffs are taken into

account. Thus, the appellants maintain that they should not have been laid off as more individuals were subject to layoff than should have been. Additionally, Cottrell and Lorenz complain of insufficient notice of the layoff. They state that their only notice was Agency Services' October 17, 2019 letter, which Cottrell represents he received on October 22, 2019 and Lorenz represents he received on October 23, 2019.

In response, the Sheriff's Office, represented by James T. Prusinowski, Esq., maintains that the accommodation for BFOQ-designated positions was appropriate. The Sheriff's Office denies that the KDCF has been converted to a booking and transport facility. While the Sheriff's Office acknowledges that the KDCF's scope of operations is going through changes and modifications, it states that the facility continues to accept and house inmates. Local police departments drop off at the facility. Depending on the time of the drop off, an inmate may be immediately transported to the Morris County Correctional Facility or housed in the KDCF for a period of time. The Sheriff's Office emphasizes that an "adult county correctional facility" means "*any place, under the jurisdiction of a county, where adult persons convicted or accused of crimes are confined.*" See *N.J.A.C.* 10A:31-1.3. Thus, the KDCF, even if it serves to temporarily house people for transport to another facility, is subject to the same requirements for correctional facilities if arrested persons are confined there for any specific period of time, according to the Sheriff's Office. These requirements include searching any persons admitted to an adult county correctional facility. The law requires that body cavity and strip searches must be conducted by a person of the same gender. See *N.J.A.C.* 10A:31-8.2 and *N.J.S.A.* 2A:161A-4. The Sheriff's Office maintains that it needs to be able to comply with regulations on searching and securing inmates. Thus, it argues that the accommodation for BFOQ-designated positions was properly approved. With respect to the August 2019 order cited by the appellants and their argument that there have been shifts without any females, the Sheriff's Office argues that the appellants have erroneously equated the procedure to perform female security checks without having female officers on duty with there not being an actual need for female officers to be present. The Sheriff's Office maintains that the procedure outlined in the August 2019 order is not an ideal way of handling the situation, but since there will inevitably be shifts without female officers, this process may be necessary and is allowed for under *N.J.S.A.* 2A:161A-4.

The Sheriff's Office also maintains that even if the actual number of female County Correction Officers employed as of the layoff date was six, that had nothing to do with the appellants' layoff. Rather, the layoff sought the separation of 16 County Correction Officers and four superior officers, as described earlier. It further provided for an accommodation to allow for up to seven female County Correction Officers pursuant to the BFOQ designations. The Sheriff's Office maintains that while the appellants claim that there were fewer than seven female County Correction Officers to fill the BFOQ request, this does not impact the layoff plan or its implementation. Rather, the Sheriff's Office retained as many female County Correction Officers as it could up to the seven it was allowed to retain. The 16 least

senior County Correction Officers, not including the BFOQ-designated positions, were laid off as part of the layoff plan, and the four superior officers retired or exercised displacement rights.

The Sheriff's Office further maintains that the appellants have no individual layoff right based on a certain number of officers employed by it. It notes that the layoff plan was approved for the separation of 16 County Correction Officers and four superior officers and anticipated that 35 officers would remain on staff. It maintains that it did not, however, represent that there would be a minimum of 35 officers. The Sheriff's Office argues that it is not required, nor did Agency Services approve a plan, to keep a set number of officers on staff subsequent to the layoff. It contends that the appellants erroneously believe that the layoff plan approved by Agency Services requires the Sheriff's Office to keep a set number of employees on staff after the layoff. The Sheriff's Office insists that this is not the case as the staffing of a public employer after a layoff remains a managerial prerogative, and the employer is free to determine whether it will fill an open position following any transfers, resignations or retirements. Therefore, according to the Sheriff's Office, the appellants cannot appeal the application of their layoff and seniority rights under *N.J.A.C. 4A:8-2.6* based on those who left the employment of the Sheriff's Office after the layoff plan was implemented as that is of no consequence to their own layoff and seniority rights.

Additionally, the Sheriff's Office contends that Cottrell and Lorenz received the proper notice. It states that because they were not targeted in the layoff, they did not receive individualized notices 45 days prior to the layoff. The Sheriff's Office, however, maintains that the general notice it posted served to inform Cottrell and Lorenz that they may be impacted.

In reply, Liobe states that nine of the County Correction Officers recorded as being laid off actually received intergovernmental transfers to Essex County prior to the effective date of the layoff.³ Liobe argues that these nine individuals have no reemployment rights with the Sheriff's Office in light of their transfers. Liobe adds that there was a tenth County Correction Officer, William Byrne, who also transferred to Essex County before the layoff. He notes that in November 2019, Agency Services sent Byrne a letter informing him that because "two targeted employees in the title of County Correction Lieutenant did not exercise their demotional rights . . . [his] position [was] not being affected by the layoff." Liobe proffers that "[s]ince William Byrne resigned from the Employer prior to the layoff

³ In *In the Matter of Victor Klymenko* (CSC, decided January 15, 2020), the Commission noted that Agency Services was now authorized to rely on that decision to approve requests for retroactive intergovernmental transfers so long as the requests are otherwise in compliance with *N.J.A.C. 4A:4-7.1A* and the explanation for the delay is reasonable. In light of *Klymenko*, the nine individuals Liobe references were approved in March 2020 for intergovernmental transfers to Essex County retroactive to October 26, 2019. The individuals are William Calomiris, Brandon Fazio, David Hull, Richard Kabatra, Kyle Keller, William Martin, Jose Rivera, Roger Skove and Jesse VanOrden.

action, the person with the most seniority who was justifiably laid off should be afforded this right.”

In reply, the Sheriff’s Office notes that at the time of the layoff, the intergovernmental transfers had not yet been approved. Thus, the nine individuals Liobe references were deemed laid off at the time and placed on appropriate special reemployment lists.

CONCLUSION

Initially, it is noted that this decision is limited to issues of layoff rights and seniority. *See N.J.A.C. 4A:8-2.6(a)2*. It will not address whether the Sheriff’s Office laid off the appellants in good faith. Agency records indicate that the appellants have filed good faith appeals, which are pending. *See N.J.A.C. 4A:8-2.6(a)1*.

N.J.A.C. 4A:8-1.6(a) provides:

No permanent employee or employee serving in a working test period shall be separated or demoted as a result of a layoff action without having been served by the appointing authority, at least 45 days prior to the action, with a written notice personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail . . . A notice shall also be conspicuously posted in all affected facilities of the layoff unit. For positions that are not targeted by a layoff but may be impacted by employees exercising their lateral or demotional rights, a general written notice must be served by the appointing authority personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail, at least 45 days prior to the action.

Permanent employees in the service of the State or a political subdivision shall be laid off in inverse order of seniority. *N.J.S.A. 11A:8-1b*. This agency shall determine seniority and shall designate lateral, demotional, and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to affected parties. *N.J.A.C. 4A:8-1.1(b)*. Further, *N.J.S.A. 11A:8-1e* provides:

For purposes of determining lateral title rights in State and political subdivision service, title comparability shall be determined by the [C]ommission based upon whether the: (1) titles have substantially similar duties and responsibilities; (2) education and experience requirements for the titles are identical or similar; (3) employees in an affected title, with minimal training and orientation, could perform the duties of the designated title by virtue of having qualified for the affected

title; and (4) special skills, licenses, certifications or registration requirements for the designated title are similar and do not exceed those which are mandatory for the affected title. Demotional title rights shall be determined by the [C]ommission based upon the same criteria, except that the demotional title shall have lower but substantially similar duties and responsibilities as the affected title.

In local service, a permanent employee in a position affected by a layoff action shall be provided lateral and demotional title rights within the layoff unit. *N.J.S.A. 11A:8-1f. N.J.S.A. 11A:8-1h* provides, in part, that a permanent employee shall be granted special reemployment rights based on the employee's permanent title at the time of the layoff action.

The appellants have the burden of proof in these appeals. *See N.J.A.C. 4A:8-2.6(c).*

In these matters, the appellants maintain that no accommodation should have been provided in the layoff for the BFOQ-designated positions. Specifically, they contend that the Sheriff's Office removed the operational need for female County Correction Officers when it issued an order concerning overtime and note that more than 20 shifts have occurred without a female since the order's issuance. These arguments are not persuasive. The order referenced by the appellants states that "a female officer [will not be kept] for overtime solely because there is no female officer on the succeeding shift." It proceeds to outline the procedure to be followed "*i/n the case of* a female booking with no female officer present" (emphasis added). As the Sheriff's Office notes, having a procedure in place to perform female security checks without having female officers on duty is hardly equivalent to there being no actual need for female officers to be present. In other words, the order provides the procedure to be followed *when* there is a female booking and no female officer is present, not that the Sheriff's Office no longer has a need *at all* for the BFOQ-designated positions. Similarly, that *some* shifts have proceeded without female officers does not support the more sweeping conclusion that the need for the BFOQ-designated positions was obviated altogether. In this regard, and contrary to the appellants' unsubstantiated claim that the KDCF was converted to a "booking and transport facility," the Sheriff's Office indicates that the KDCF does continue to accept and house inmates and that it must be able to comply with regulations on searching and securing inmates including those that generally require body cavity and strip searches to be conducted by a person of the same gender. Also, merely because the headcount of female County Correction Officers may have fallen to six between the Sheriff's Office's submission of its layoff plan and the effective date of the layoff does not somehow prove that the Sheriff's Office thereby had no need for an accommodation to be provided for those BFOQ-designated positions that remained as of the time of the actual layoff. As such, Agency Services properly provided an accommodation for the BFOQ-designated positions in the layoff.

In light of the above discussion, the appellants cannot establish a violation of their layoff or seniority rights. The layoff plan called for the layoff of 16 County Correction Officers and four superior officers, and it was the 16 least senior County Correction Officers who were laid off, exclusive of the BFOQ-designated positions to which the appellants, males, could not have had any rights. Neither can the appellants establish a violation of their layoff rights or seniority based on the Sheriff's Office's representation of the overall staffing level it anticipated would remain after the layoff. More salient to their layoff rights and seniority was:

[t]he number of positions . . . by title to be vacated, reclassified, or abolished and the names, status, layoff units, locations and, as of the effective date of the layoff, permanent titles of employees initially affected, including employees on leave.

See N.J.A.C. 4A:8-1.4(a)4. To reiterate, the layoff plan called for the layoff of 16 County Correction Officers and four superior officers, and it was the 16 least senior County Correction Officers who were laid off, exclusive of the BFOQ-designated positions. *N.J.A.C. 4A:8-1.4*, the regulation that outlines the components of a proposed layoff plan, does not actually require an appointing authority to provide an estimate of, or commit to, an overall staffing level to remain after a proposed layoff. In any event, it bears noting that permanent employees who are laid off are granted special reemployment rights, *see N.J.S.A. 11A:8-1h*, and special reemployment lists in fact have the highest priority of any type of list when the available position is in the department from which the eligible was laid off or demoted in lieu of layoff. *See N.J.S.A. 11A:4-12.*

Liobe also notes that in November 2019, Agency Services sent Byrne a letter informing him that because “two targeted employees in the title of County Correction Lieutenant did not exercise their demotional rights . . . [his] position [was] not being affected by the layoff.” Based on this, Liobe contends that “[s]ince William Byrne resigned from the Employer prior to the layoff action, the person with the most seniority who was **justifiably** laid off should be afforded this right.” This proposed “transferability” of displacement rights lacks support in Civil Service law and regulations. For example, a lateral title right is defined as:

the right of a permanent employee to exercise displacement rights . . . against an employee in the layoff unit holding a title determined to be the same or comparable to *the affected title of the employee*.

See N.J.A.C. 4A:8-2.1(a) (emphasis added). A demotional title right is defined as:

the right of a permanent employee to exercise displacement rights . . . against an employee in the layoff unit holding a title determined to be lower than, but related to *the affected title of the employee*.

See N.J.A.C. 4A:8-2.1(b) (emphasis added). Based on these provisions, displacement rights available to the appellants, if any, would have flowed from their own titles, not from the County Correction Lieutenants' decisions to forego exercising the demotional title rights associated with their own, distinct titles.

Turning to the claims of insufficient notice, Cottrell and Lorenz indicate that their only notice of the impending layoff was Agency Services' October 17, 2019 letter. Cottrell states he received this letter on October 22, 2019, and Lorenz states he received it on October 23, 2019. The Sheriff's Office maintains that because Cottrell and Lorenz were not initially targeted in the layoff, they did not receive individualized notices 45 days prior to the October 31, 2019 layoff. The Sheriff's Office argues that the general notice it posted served to inform them that they may be impacted. The Sheriff's Office's arguments are unpersuasive in light of *N.J.A.C. 4A:8-1.6(a)*, which, in relevant part, unequivocally states:

For positions that are not targeted by a layoff but may be impacted by employees exercising their lateral or demotional rights, a general written notice must be served by the appointing authority personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail, at least 45 days prior to the action.

Therefore, since Cottrell and Lorenz were required to receive 45 days' written notice of their potential layoff and only received nine and eight days' notice, respectively, they are entitled to be compensated pursuant to *N.J.A.C. 4A:8-1.6(a)*. Specifically, the Sheriff's Office is ordered to pay Cottrell an amount equal to 36 days of pay and Lorenz an amount equal to 37 days of pay. *See, e.g., In the Matter of Mano Ponna* (CSC, decided February 4, 2015), *aff'd on reconsideration* (CSC, decided May 6, 2015).

Finally, Liobe states that nine of the County Correction Officers recorded as having been laid off actually received intergovernmental transfers to Essex County prior to the October 31, 2019 effective date of the layoff. Liobe argues that these nine individuals have no reemployment rights with the Sheriff's Office in light of their transfers. The nine individuals in fact were approved in March 2020 for intergovernmental transfers to Essex County retroactive to October 26, 2019. The Commission thus agrees with Liobe. A special reemployment right is defined as "the right of a permanent employee, based on his or her permanent title at the time of the *layoff action*, to be certified for reappointment after the *layoff action* to the same, lateral, and lower related titles." *See N.J.A.C. 4A:8-2.1(c)* (emphases added). However, in light of the retroactive intergovernmental transfers approved in March 2020, the nine individuals transferred from the Sheriff's Office to Essex County before being subjected to a layoff action by the Sheriff's Office. Therefore, they are not eligible for special reemployment rights, and it is appropriate that their names be

removed, retroactively to the effective date of the layoff, from any special reemployment lists on which they were placed as a result of the layoff.

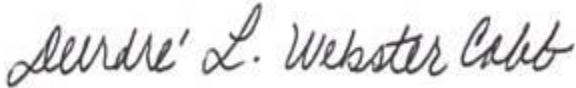
ORDER

Therefore, it is ordered that the Sussex County Sheriff's Office pay Robert Cottrell an amount equal to 36 days of pay and Thomas Lorenz an amount equal to 37 days of pay.

It is further ordered that the names of William Calomiris, Brandon Fazio, David Hull, Richard Kabatra, Kyle Keller, William Martin, Jose Rivera, Roger Skove and Jesse VanOrden be removed from any special reemployment lists on which they were placed as a result of the layoff. These removals shall be retroactive to the effective date of the layoff.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF SEPTEMBER 2020



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