

# **PUBLIC EMPLOYEES RELATIONS COMMISSION**

In the Matter of Impasses between:

Pasco County, Florida,  
Office of the Sheriff

and

Fraternal Order of Police

PERC Case # SM 2007-015

Representing the Department:

Mark E. Levitt, Esq.  
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Representing the Union:

Stuart Rosenfeldt, Esq.  
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Respectfully submitted by:

John C. McCollister, Ph.D.  
Special Magistrate

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Pursuant to Section 447.403, Florida Statutes and Administrative Code Rule 60CC-3.004, the undersigned was appointed as Special Magistrate to hear the issues as outlined in this report and to make recommendations on the same.

Both parties – the Office of the Sheriff of Pasco County, Florida (the “Department”) and the Fraternal Order of Police (the “Union”) – were afforded full opportunity to present all evidence germane to the issues.

The Hearing was conducted in the Conference Room of the Pasco County Sheriff's Department, 8500 Citizen's Dr., New Port Richey, Florida on September 13, 2007. The Hearing began at 9:10 a.m. and concluded at 12:20 p.m.

No court reporter was present during testimony.

Attorneys for both sides opted to submit briefs to be postmarked no later than October 5, 2007. The Special Magistrate received these briefs in a timely fashion.

Appearing for the Department:

Mark E. Levitt, Esq., Attorney

Wayne Helsby, Esq., Attorney

Col. Al Nienhuis, Under Sheriff

Appearing for the Union:

Stuart Rosenfeldt, Esq., Attorney

Paul Noeske, State Representative, Florida State Lodge

BACKGROUND:

The Department and the Union are in the process of formulating their first collective bargaining agreement.

At issue are only three items:

1. Article 4 – Management Rights
2. Articles 11 and 12 – Grievance Procedure
3. Article 18 – “Gap” Insurance.

This report reports the positions taken by each side, followed by the opinions and recommendations of the Special Magistrate.

Article 4 – *MANAGEMENT RIGHTS*

Articles 11 & 12 – *GRIEVANCE PROCEDURE*

In reality both issues are interrelated. The Special Magistrate, therefore, elects to address them both at the same time.

Currently, the Sheriff may take any disciplinary actions, including demotions, suspensions or dismissals of permanent status employees for any cause which, in the opinion of the Sheriff, will promote the efficiency of the Department.

The Union demands that the term “just” be inserted before the word “cause” in the previous paragraph.

The Department does not agree. By inserting the phrase “just cause,” says the Department, the Office of the Sheriff becomes vulnerable to arbitration regarding disciplinary actions.

Attorney Mark Levitt stated during the Hearing that the Department has no problem with asking an outside arbitrator to rule on matters concerning the Collective Bargaining Agreement per se, but it strongly objects to any outside arbitrator determining if any discipline is appropriate.

The Department revealed that employees who received a three-day suspension or more, or who have been terminated, have an avenue of appeal to a local Civil Service Board.

Union Attorney Stuart Rosenfelt feels this is not appropriate for two reasons.

First, members of the local Civil Service Board may not be the most neutral. In a relatively small community such as New Port Richey, members of a local Civil Service Board may have close friends or relatives currently working for the Department. “We want someone who is *completely* neutral,” he said.

Second, employees who receive a two-day suspension or a demotion have no means whereby they may appeal the disciplinary action. Mr. Paul Noeske, State Representative for the Union, said, “What we want is due process for deputies.”

The Department pointed to the fact that, under the current system, only once has a decision to discharge an employee been overturned by the Civil Service Board. Therefore, we can rightly conclude that there has been no abuse of the system.

The Department introduced collective bargaining agreements from nearby counties that include limitations on disciplinary matters that may be subject to arbitration. In most of these instances, three- or five-day suspensions are excluded from arbitration.

The Union insisted, however, that its deputies have a right to appeal to a neutral party. The union raised the question, “While the current sheriff, Bob White, has not shown a pattern of abuse of the system of discipline, who can tell what another sheriff would do?”

#### Article 18 – “GAP” INSURANCE

When a deputy retires from a full-time position with the Department, he or she has no health insurance until the age of 65 when the benefits of Medicare kick in.

The Union wants the Department to fund the cost of health insurance for retired deputies with 25 years of experience, between the day of retirement, until the former employee’s 65<sup>th</sup> birthday.

The Department presented a cost analysis of such a plan that would, under current rates, cost approximately \$125,000 for the first year, \$184,000 for the second year, and \$250,000 for the third year.

The Union did not offer any different analysis, but did question some of the names presented on the Department’s list.

The Union said that the lack of medical insurance for retirees remains a major concern.

The Department cited two reasons why it objected to this plan:

1. Current budget constraints suddenly thrust upon the County due to less tax revenue, coupled with anticipated revised homestead exemptions,

compel the County to tighten its belt. The Sheriff, as a result, cannot even hire the ten more deputies he needs.

2. Insurance rates have skyrocketed over the past few years. There is no way to predict with any accuracy what the future may hold in this regard. We cannot forecast what such a plan would mean financially to the County two, three or four years down the road were we to implement this plan today.

#### OPINIONS:

The Special Magistrate understands the concerns of both sides. It was refreshing for him to listen to arguments presented by representatives, each of whom firmly believed that his position was in the best interest of the citizens of New Port Richey.

The Special Magistrate also appreciates the fact that both sides carefully honed in upon genuine issues separating the two parties. Normally, a Special Magistrate is faced with a shopping list of issues that invokes arguments leading to labyrinths of menus. Often these so-called issues turn into little more than bargaining chips designed to be tossed aside in search of a compromise.

Regarding Articles 4, 11 and 12, all of which are intertwined, the Special Magistrate feels that any employee who is the subject of a disciplinary action that results in a significant loss of pay, should have a reasonable avenue of appeal.

The Union felt that it is unfair to employees to be subject to discipline for any cause whatsoever which, in the sheriff's opinion, "will promote the efficiency of the office of the sheriff."

Frankly, the Special Magistrate also had some concern about this position by the Department. Union Attorney Stuart Rosenfeldt, in his brief to the Special Magistrate, stated quite correctly:

. . . it [a disciplinary measure] relies solely upon the Sheriff's opinion. Consequently, all issues brought before the Career Service Appeals Board would not focus on whether a disciplinary action is just, but rather whether the Sheriff holds an opinion that it is just.

The Department strongly protested throughout the Hearing the insertion of the phrase "just cause" in lieu of "cause" as to the basis for discipline. In his brief, Attorney Mark Levitt attempted to justify the Department's hesitation to incorporate the "just cause" provision:

Under existing PERC case law, if the management rights clause contains language requiring "just cause" for discipline, then employees would have the right to file a grievance over any misapplication of the collective bargaining agreement, including whether or not "just cause" existed for discipline.

The Special Magistrate notes that Attorney Levitt failed to cite any specific case law(s) to which he refers. Nonetheless, the Department seems to object to permitting any employee to challenge or to file a grievance "over any misapplication of the Collective Bargaining Agreement." In the opinion of the Special Magistrate, the Union should have the right to appeal *any* action by the administration that violates or misapplies the terms of the Collective Bargaining Agreement.

As to using the term "just cause" as opposed to "cause," the Special Magistrate strongly favors the term "just cause." It would create for all employees a better working environment. It prohibits, for example, any sheriff from suspending, demoting, or terminating any employee merely for political or personal reason. In short, the phrase

“just cause” would guarantee to all employees, in the event of involving a significant loss of pay, the fundamental right of appeal.

The City Commission might consider this. Many counties and municipalities impose probationary periods on newly hired or recently promoted employees, during which time the employees have virtually no avenue of grievance or appeal. Schoolteachers in certain Florida counties, for instance, can be disciplined, even terminated, without any right of appeal during probationary periods of three or more years.

The word “discipline” comes from same root as the word “disciple.” The purpose of any disciplinary action is an attempt to bring an employee in line with the goals and objectives of the Department.

Unless one of its employees is guilty of gross misconduct, most organizations utilize what is known as “progressive discipline,” i.e. oral reprimand, written reprimand, suspension, then termination. Oral reprimands and, in many cases, written reprimands, are not subject to appeal. However, when it involves a significant loss of pay (e.g. a demotion, suspension and/or termination), any employee should have a right to appeal.

This does not mean that every appeal would be made before a neutral arbitrator. The Special Magistrate agrees with the Department that appeals before an outside arbitrator should be made only when it involves an alleged contract violation.

The current practice for appeals applies only to those suspensions greater than two days. The Special Magistrate can understand why.

Based on his experience of more than a quarter century as an arbitrator for the State of Florida and for the Federal Government, this Special Magistrate has questioned

why a governing board or a union would want to spend literally thousands of dollars (once you count the cost of attorney fees, court reporter and arbitrator), plus countless hours arguing the merits of a one- or two-day suspension. This, frankly, does not reflect good stewardship of funds for either side.

As to the practice of assigning disputes to the Career Service Appeals Board in order to avoid the use of an outside arbitrator, the Special Magistrate agrees with Department Attorney Levitt who stated in his brief:

. . . the system in place is viable and works. Thus, the evidence presented at the Hearing shows that employees have due process and that the system is fair and impartial. The Union presented no evidence to the contrary and presented no evidence to lead to a conclusion that having the right to arbitration would be fairer, more impartial or better than the appeal either to the Career Service Board or to the Sheriff. . . .

In the opinion of the Special Magistrate, disciplines involving a two-day suspension or less should be handled within the Department. An appeal to the Sheriff should be sufficient. Disciplines of three days or more should be open to appeal before the local Civil Service Board.

Demotions, however, should be eligible for appeal before the same Civil Service Board.

In the opinion of the Special Magistrate, a demotion can leave an impact upon an employee and his or her relationship with the Department more than a suspension. The consequences of a demotion often reach beyond a reduction in salary; it can also result in humiliation and poor morale. Therefore, an employee who has been demoted for whatever reason, should have the opportunity to challenge the decision before a local Civil Service Board.

In their classic volume *How Arbitration Works*, the authors, Elkouri and Elkouri, remind us that management has the right to select, assign, and direct the work force and promote and transfer employees. But, report the same authors, “the right to demote . . . has been held subject to the limitations that it may not be exercised in an arbitrary, capricious, or discriminatory manner.”

That said, the Special Magistrate realizes that in some instances, a promising employee may be promoted, only to discover that, following a few months on the job, he/she is not effective in the new position. Business sometimes refers to this as the “Peter Principle.” Is the Sheriff, in this instance, bound to keep that employee in the new position? Certainly not. That, in the opinion of the Special Magistrate, would be unfair to both the Department and to the employee.

The Special Master, therefore, recommends that during the first full year after being promoted to a new position, an employee may be reassigned (demoted) for any reason without an opportunity to appeal. After he/she completes the year of probation, so to speak, in the event of a demotion, that employee would have the right of appeal to the Civil Service Board.

Regarding Article 16, Pasco County is not alone in wrestling with the issue of gap insurance. As recently as mid-September of this year, the General Motors Corporation and the United Auto Workers were locked in extended talks over the issue of health-care expenses for retirees.

The Special Magistrate identifies with this concern. At a time of life when a retiree should begin to enjoy the fruits of his or her labors, there is little reward or

opportunity to travel on that long-awaited vacation for those who have to spend nearly every available dollar on premiums for health care private insurance.

But, as is true in comedy, timing is everything when seeking significant financial concessions. The Special Magistrate, believes that with the budget crunch imposed on Pasco County resulting from declining tax revenues, this is neither the time nor the place to impose such added burdens upon the County were it compelled to fund such a plan.

The Union suggested that the Department's claim of excessive cost for gap insurance was based upon the Department's own table that included names of employees who would not be eligible for such a benefit. In the opinion of the Special Magistrate, although not everyone cited may be eligible for benefits within a year or so, it would be unfair to demand of the Department at this time to sacrifice funds earmarked for immediate needs for the sake of underwriting a gap insurance program.

What nobody can dispute, however, is the fact that the rapid rise in insurance premiums over the past few years indicates that this pattern will continue. Who knows what this would cost the County and the Department during the next few years were this request granted?

Perhaps . . . just perhaps . . . when economic conditions allow, both the County and the Department can see fit to underwrite a gap insurance as requested by the Union.

#### RECOMMENDATIONS:

Attorney Levitt cautioned in his brief that some special magistrates may feel it is their role to "split the baby" in their recommendations by making a compromised decision. This Special Magistrate assures that such is not the case here. Instead, his

recommendations are those which, in his opinion, makes sense under the circumstances.

He, therefore urges both parties to accept them.

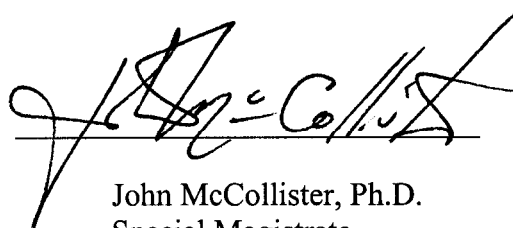
In light of the facts presented at the Hearing and his expressed opinions, the Special Magistrate strongly recommends the following:

1. Allow members of the Union the right to appeal suspensions of more than two days, or demotions (following a one-year probationary status in the new position), to the local Civil Service Board.
2. Reject, for now, the Union's application for gap insurance.

**FINAL NOTE OF APPRECIATION:**

Although stated earlier, it bears repeating. The Special Magistrate wishes to thank the representatives of both the Department and of the Union for their professional approaches to these issues. The people they represent should be proud to have them as spokespeople.

Port Orange, Florida  
October 15, 2007

A handwritten signature in black ink, appearing to read "John McCollister", written over a horizontal line.

John McCollister, Ph.D.  
Special Magistrate