I.R. No. 2020-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2020-063

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION, INC.

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based on an unfair practice charge alleging that the public employer repudiated an article of a collective negotiations agreement and unilaterally changed terms and conditions of employment regarding investigations and disciplinary review procedures during collective negotiations for a successor agreement, violating section 5.4a(a)(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1, et seq.

The Designee determined that the Charging Party established the necessary standards for granting interim relief, including that it would suffer irreparable harm if the unilateral imposition of terms and conditions of employment set forth in a "superceding" general order was not rescinded and pre-disciplinary protections in a former (status quo ante) general order restored.

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Appearances:

For the Respondent,
Chasan Lamparello Mallon and Cappuzzo, attorneys
(Cheyne R. Scott, of counsel)

For the Charging Party,
John J. Chrystal, III,
President, Newark Police SOA

INTERLOCUTORY DECISION

On September 12 and 24, 2019, Newark Superior Officers' Association, Inc. (SOA) filed an unfair practice charge and amended charge against the City of Newark (City). On the latter date, the SOA also filed an application for interim relief seeking a temporary restraint, together with certifications, exhibits, a proposed Order to Show Cause and a brief. The charge, as amended, alleges that on September 3, 2019, during the parties' negotiations for a successor collective negotiations agreement (CNA) to their 2013-2015 CNA and 2016-2017 memorandum of agreement, the City repudiated Article XXV, "Investigations,"

explicitly incorporating General Order 05-04, (". . . the guidelines for employees regarding official investigations") by implementing General Order 18-25, "Complaint Intake and Investigation Process," explicitly "superceding General Order 05-04." The charge alleges that the City's action changed ". . . terms and conditions of employment regarding employee investigations and disciplinary review procedures," violating section 5.4a(1), (3), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act).

The SOA seeks an order reinstating General Order 05-04 and rescinding General Order 18-25.

On September 27, 2019, I issued an Order to Show Cause without a temporary restraint, setting forth dates for service upon the City, receipt of the City's response, the SOA's reply and argument in a telephone conference call. On October 3, 2019, I issued a letter to the parties, including Respondent's Assistant Corporation Counsel, requesting, "for ease of

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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 the act. (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. (7) Violating any of the rules and regulations established by the commission."

reference" in the scheduled October 10, 2019 conference call, a listing of the specific changes being contested among the two alleged General Orders, with a copy to be served on the City. In the letter, I also reiterated my expectation that the City's response will be filed by 5 p.m., the close of business, October 7, 2019, as set forth in the Order to Show Cause.

The City did not file any response. On October 10, shortly before the conference call that day, the City sought an extension of time to file a response, to which the SOA objected. I declined the request. Accordingly, I find that the application is unopposed. N.J.A.C. 19:14-9.3.[2/]

On October 10, 2019, a representative of the SOA and other Counsel for the City argued their respective cases. The City argues generally that the SOA's application does not meet the requirements for granting relief and specifically that the parties had met and discussed General Order 18-25 and that the SOA has not proved irreparable harm.

2/ N.J.A.C. 19:14-9.3 Briefs, provides in a pertinent part: "(b) By no later than two days before the return date, unless otherwise ordered by the Commission Chair or the designee, the respondent shall file an original and two copies of its answering brief and any opposing affidavits or verified pleadings, together with proof of service of a copy on all other parties. The answering brief shall set forth the grounds of opposition, together with copies of any papers relied on which are not in the charging party's or petitioner's submission. If no answering brief is filed, the application may be considered to be unopposed, provided, however, that an unopposed application must still satisfy the standards for granting interim relief (emphasis added)."

The following facts appear. The City and SOA signed a CNA extending from January 2013 through December 31, 2015. Article XXV, "Investigations" of the CNA provides:

> General Order 05-04 Internal Affairs and amendments, is recognized as the guidelines for employees regarding official investigations. A copy of this order shall be given to every employee.

The parties' subsequent memorandum of agreement did not address Article XXV.

On July 19, 2016, the City Public Safety Director "re-issued" General Order 05-04, regarding "Internal Affairs" to all unit employees. As set forth in that document, complaints filed against officers for misconduct resulting in a report detailing "the circumstances" require the ". . . subject officer to be notified in writing as soon as possible, unless the nature of the investigation requires secrecy." The officer is also to be notified of the outcome of the investigation, ". . . upon completion." (G.O. 05-04, p. 9, B. Accepting Reports Alleging Officer Misconduct, 12 c, d.). "Serious complaints" shall be investigated by the "Office of Professional Standards" the investigator for which, ". . . shall interview the complainant, all witnesses and the subject officer." (G.O. 05-04, p. 10, D. "Investigation and Adjudication of Serious Complaints," 2). Also, under this section as number 5(b), the "subject officer shall be given the opportunity to consult with a union

representative and have the representative present during the interview." In number 6, "Interviewing the Witness Officer," that officer must be made aware of the differences between being a "witness" to and a "subject" of a criminal investigation; a witness acknowledgment form is to be completed; and if that officer reasonably believes that the interview could lead to administrative charges, then the officer is entitled to a union representative, if the officer so chooses (sections a, c and e).

An officer subject to an "administrative allegation" under General Order 05-04 has a right to be accompanied by a union representative in an interview, but that representative's participation is limited to observing (D7 b). That "subject officer" will be informed of the nature of the complaint, the investigator's name, the names of those who will be attending the interview, and whether it will be recorded. The [SOA] representing the subject officer shall be informed of that interview, ". . . a reasonable amount of time prior to the interview" (D7 c, d and f).

A "witness" in an investigation of an administrative allegation is obligated to cooperate and will be informed of the differences between being a "witness" in and a "subject" of an administrative investigation. This witness officer will complete an acknowledgment form. If that witness, during the interview, becomes a suspect in a "criminal act," the employee shall be so

informed and “the interview shall be terminated.” Finally if the officer reasonably believes that the interview could lead to administrative charges, then the officer is entitled to a union representative, if the officer chooses (D8a, b, d and I).

General Order 05-04, IV D, “Hearing,” provides a “subject officer” to an “administrative allegation” a hearing date within a reasonable time, a “discovery package” from the respective Internal Affairs file, proper notification to all witnesses (in advance of a hearing) and a copy of the decision.

Another section of General Order 05-04 requires the City to retain “professional standards investigative files” for prescribed periods of time and to maintain those files “securely” and “confidentially” as defined in the section. Release of investigative files may occur only under circumstances prescribed in the section (XII, “Records Retention Schedule,” C). Entries of investigation records into unit employee personnel files are limited to instances of when the complaint is “sustained” and discipline “imposed,” except that no portion of the internal investigation report may be placed into the unit employee’s personnel file.

General Order 18-25 provides its [issuance] date, August 29, 2019 on its first page, together with the printed advisement, “Supercedes General Order 05-04 dated February 16, 2016.” All of

the cited sections of General Order 05-04 (on pages 4 through 6 of this decision) are omitted from General Order 18-25.

General Order 05-04 defines "major offense:"

> A violation of division policy, rules, regulations and directives wherein the penalty may exceed 5 days, including any criminal violation of Federal, State or City laws which shall be the subject of a Trial Board.
> [III, Definitions, I, p. 4]

General Order 18-25 defines "major offense:"

> Serious violations of City Ordinances or Motor Vehicle violations shall also be considered Major Offenses. Major Offences shall be the subject of a Trial Board. Multiple Minor Offenses, or a pattern of committing similar Minor Offenses, can be used to upgrade a Minor Offense to a Major Offense. This process shall be properly documented. A penalty for a Major Offense violation is more than five (5) working days' suspension at any one time.
> [IV, Definitions, O, p. 4]

General Order 05-04 defines "minor offense:"

> Violation of division policy, rules, regulations or directives wherein the maximum penalty may be 5 days suspension or the equivalent, including any violations of State or City laws that are of a disorderly, petty disorderly or motor vehicle violation and not subject to job forfeiture and shall be the subject of a Disciplinary Conference by a District/Division Commander.
> [III, Definitions, J. P. 4]

General Order 18-25 defines "minor offense:"

> Lower-level violations of Division rules, regulations, policy or procedures. Examples include demeanor/discourtesy (devoid of profanities or other egregious language), tardiness, uniform violations, low-level neglect of duty incidents and other low-level policy violations. This also includes non-serious incidents of city ordinances or motor vehicle violations (parking/minor moving violations) and not subject to job forfeiture. Minor Offenses shall be the subject of a Disciplinary Conference by Precinct/Division Commanders or Executive Officers. A penalty of Minor Offense violations may include up to five (5) working days' suspension at any one time. [IV, Definitions, P, p. 4]

General Order 05-04 defines "45-Day Rule:"

> The 45-day rule is a timeline when the person who has the responsibility to file charges, obtains sufficient information to file a charge. The commencement of a criminal investigation into an internal affairs complaint will cause the 45-day rule to be suspended pending the disposition of the criminal investigation. Upon the disposition of the criminal investigation, the 45-day rule will once again commence. [III, Definitions, N, p. 5]

General Order 18-25 defines "45-Day Rule:"

> Disciplinary charges alleging a violation of Division rules, regulations, policies or procedures must be filed within 45 days of the day the person filing the charges (Public Safety Director) obtained sufficient information to do so. [IV, Definitions, U, p. 5]

General Order 05-04 defines “30-Day Rule:”

> A trial or Disciplinary Conference Date must be set no less than 5 days and no more than 30 days after the employee receives the preliminary notice of Disciplinary Action. [III, Definitions, O, p. 5]

General Order 18-25 omits the term and definition of “30-Day Rule.”

General Order 05-04 defines “Division Policy:”

> All inclusive of Rules, Regulations, Memos, General Orders and Operating Memos. [III, Definitions, E, p. 4]

General Order 18-25 defines “Division Policy:”

> The protocol designed to implement the Division’s goals and objectives to ensure all members of the police act and deal with people in a just and transparent manner. [IV, Definitions, G, p. 3]

General Order 18-25 defines “Disciplinary Matrix:”

> A uniform guide to impose discipline in a progressive manner for all violations of Division policy. The Disciplinary Matrix is a guide for fairness and consistency, accounts for seriousness of the infraction, prior disciplinary history of the personnel involved, and aggravating and mitigating circumstances. [IV, Definitions, F, p. 3]

General Order 05-04 does not include or define “Disciplinary Matrix.”

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

N.J.S.A. 34:13A-5.3 provides, in part:

> The majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.
>
> * * *
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representative of the public employer and the majority representative.

An employer may violate its obligation to negotiate in good faith under section 5.3 by repudiating a contract clause that is so clear the an inference of bad faith arises from a refusal to honor it. State of New Jersey (Dept of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Section 5.3 also provides:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

A public employer has a prerogative, generally, to determine the basis for discipline, i.e., what employee transgressions warrant imposing discipline. City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶ 55 2018). But contractual protections and pre-disciplinary procedures are mandatorily negotiable. "Employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to an employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination." City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358, 361 (¶120 2009).

The presence of a union representative in a meeting or interview conducted by a superior officer presents "a procedural claim" that does not limit an employer's policy goals. See Monmouth Cty. Prosecutor, P.E.R.C. No. 2014-91, 41 NJPER 61 (¶18 2014); (Under certain conditions, a unit employee has a right to representation under NLRB v Weingarten, 420 U.S. 251 (1975)).

All of the cited portions of General Order 05-04 set forth on pages 4-6 of this decision are omitted from "superceding" General Order 18-25. They all appear to implicate mandatorily negotiable pre-disciplinary procedures. The City's abrogation appears to demonstrate a repudiation of Article XXV of the collective negotiations agreement, violating section 5.4a(5) and (1) of the Act. It alternatively appears to demonstrate a unilateral ". . . modification of existing rules governing working conditions" without negotiations, also violative of section 5.4a(5) and a(1) of the Act.

General Order 18-25 includes for the first time in the definition of "major offense," "serious violations of City ordinances or Motor Vehicle violations." What constitutes a "serious violation" of unspecified ordinances is informational (i.e. informing employees of actions that may result in discipline) and about which the City is obligated to first negotiate with the SOA. See, State of New Jersey and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91, P.E.R.C. No.

2014-50, 40 NJPER 346 (¶126 2014), aff'd 42 NJPER 165 (¶41 App. Div. 2015). But I do not glean procedural or substantive differences in the definitions of "minor offense" set forth in General Orders 05-04 and 18-25.

The "45-Day Rule" in General Order 18-25 omits this procedure set forth in the definition of that term in General Order 05-04:

> The commencement of a criminal investigation into an internal affairs complaint will cause the 45-day rule to be suspended pending the disposition of the criminal investigation. Upon the disposition of the criminal investigation, the 45-day rule will once again commence.

This provision appears to be a pre-disciplinary procedure that is mandatorily negotiable. City of Newark. The omission appears to be an unlawful unilateral change of a term and condition of employment, pursuant to section 5.4a(5) and derivatively, a(1) of the Act. The omission of the entire "30-day Rule" from General Order 05-04 also appears to implicate a pre-disciplinary procedure about which the City was obligated to first negotiate with the SOA.

General Order 05-04 defined "Division Policy" (the violation of which can constitute a "major" or "minor" offense) to include "Rules, Regulations, Memos, General Orders and Operating Memos." General Order 18-25 changes the definition to include ". . . the Division's goals and objectives to ensure that [unit employees]

act and deal with people in a just and transparent manner." I find that to the extent that the City's "goals and objectives" extend beyond the markers set forth in General Order 05-04, the City is obligated to collectively negotiate with the SOA about them.

Finally, "Disciplinary Matrix" is not included or otherwise defined in General Order 05-04. It appears to define the City's intention(s) and is more thoroughly addressed in General Order 18-26 (pursuant to "related policies and general orders" listed on page 1 of General Order 18-25). Accordingly, I do not find that the SOA has met its burden of demonstrating a substantial likelihood of success on this component of its application for interim relief.

The City asserts that the parties met and discussed General Order 18-25 before its implementation, a contention that the SOA denies. Even if the City is correct, the Act requires negotiations (not agreement) on mandatorily negotiable subjects. Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶71 2005), aff'd 32 NJPER 417 (¶172 App. Div. 2006). Negotiations "require dialogue between two parties with an intent to achieve common agreement. . ." Piscataway Tp., 31 NJPER at 103. Meetings, discussions or information sessions where an employer explains a proposed change in working conditions without soliciting a majority representative's consent to the change does not satisfy

the negotiations obligation under the Act. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987). No facts suggest that the City and SOA collectively negotiated over mandatorily negotiable subjects in General Order 18-25.

The SOA has demonstrated irreparable harm. A unilateral change in terms and conditions of employment during any stage of collective negotiations or a repudiation of a collective negotiations agreement has a chilling effect on employee rights guaranteed by the Act and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). By apparently repudiating Article XXV of the collective negotiations agreement and/or unilaterally imposing pre-disciplinary changes in terms and conditions of employment in General Order 18-25, the City has chilled the negotiations process.

In weighing the relative hardship to the parties, I find that the scale tips in favor of the SOA, which suffers irreparable harm resulting from repudiation of Article XXV of the collective negotiations agreement and/or unilateral changes during the course of negotiations for a successor agreement. The City remains free to discipline employees, assuring that the public interest is not harmed by granting interim relief.

ORDER

The City is restrained from continuing to implement those portions of General Order 18-25, including those identified in

this decision, that abrogate or change pre-disciplinary procedures and protections of SOA unit employees set forth in General Order 05-04. The City shall reinstate all such protections in General Order 05-04. This interim order will remain in effect pending a final Commission order in this matter. This case shall be returned to the normal unfair practice charge process.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: October 22, 2019
Trenton, New Jersey