

D.U.P. NO. 2019-6

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2019-191

PATERSON POLICE PBA LOCAL 1,

Charging Party,

-and-

PATERSON POLICE PBA LOCAL 1

SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by Paterson Police PBA Local 1 and Paterson Police PBA Local 1 Superior Officers Association (collectively, the Associations) against the City of Paterson (City). The charge alleged that the City violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) when it unilaterally terminated the long-standing police chaplain and appointed a different individual to the position. The City argued that it has a non-negotiable managerial prerogative to appoint the police chaplain and that such appointment does not create any severable impact. The Director generally agreed, finding that the Associations failed to demonstrate their standing to raise issues regarding, or on behalf of, the police chaplain. The Director also found that although the Faulkner Act and N.J.S.A. 40A:14-141 do not expressly, specifically, and comprehensively preempt negotiations regarding appointment of the police chaplain, the City nevertheless possesses a managerial prerogative to appoint the police chaplain based upon the Commission's long-standing application of the Paterson balancing test; and that even assuming a severable impact emanates from the City's prerogative to select and hire a police chaplain of its choosing, the Associations have not alleged that the City refused to negotiate over any impact(s) in response to a demand to negotiate. The Director also found that even assuming the Associations have standing, their allegation that the police chaplain was terminated for arbitrary, political reasons is essentially a breach of contract claim that must be resolved in accordance with the parties' negotiated grievance procedure.



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Appearances:

For the Respondent,  
O'Toole, Scrivo, Fernandez, Weiner, Van Lieu, LLC,  
attorneys  
(Marlin G. Townes, III, of counsel)

For the Charging Parties,  
Shaw, Perelson, May & Lambert, LLP, attorneys  
(Mark C. Rushfield, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On January 29, 2019, Paterson Police PBA Local 1 (PBA) and Paterson Police PBA Local 1 Superior Officers Association (SOA) (collectively, the Associations) filed an unfair practice charge against the City of Paterson (City). The charge alleges that on or about October 4, 2018, the City violated section 5.4a(1) and

(5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it unilaterally terminated the long-standing police chaplain, David Rios (Rios), and appointed Kenneth Darryl Ray Clayton (Clayton) to the position.

On April 16, 2019, a staff agent held an exploratory conference.

On May 10, 2019, the City filed a letter asserting that it has a non-negotiable managerial prerogative to hire, retain, promote, or transfer employees; a right to determine the qualifications required for a job and to assess qualifications and make promotions or assignments to meet the governmental policy goal of matching the best qualified employees to particular jobs. The City maintains that it properly exercised its non-negotiable managerial prerogative to appoint a new police chaplain. It also asserts that under the Faulkner Act, N.J.S.A. 40:69A-31, et seq., the mayor properly exercised his executive powers to appoint a new police chaplain, given that the position "is compensated with funds paid by the City" and "is [held by] a 'subordinate' municipal employee who is not a department head or

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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"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative."

an employee of the City Council." The City contends that it is authorized to create the position of Police Chaplain pursuant to N.J.S.A. 40A:14-141 and "passed a salary ordinance recognizing the position" in 1984.

On May 22, 2019, the Associations filed a letter maintaining that "[f]or decades, . . . [they] have possessed and exercised the authority to select the person to be appointed as the Police Chaplain for the City's Police Department and [have] been the source for the provision of the Police Chaplain[']s uniform and badge" while conceding that "[t]he Police Chaplain receives a small stipend from the City for filling that position." The "[Associations'] selection of Police Chaplain would be communicated to the office of the Chief of Police, which in turn would report the selection to the City's administration, whereupon the Associations' selection would be formally appointed." The Associations assert that

. . .the City has long recognized that the role of the Police Chaplain - i.e., to offer emotional, spiritual and moral support and guidance to police officers and their family members, to counsel and comfort them in times of crisis, to listen and maintain the confidentiality of communications made by police officers and their family members to the Police Chaplain and to make appropriate referrals of police officers and their family members for services that may aid them in addressing their crises - requires a modicum of impartiality, sensitivity and loyalty to the police officers and family members they serve that cannot be expected from political appointees selected for that position by

either the City's mayor or its governing body. Certainly, police officers and their famil[ies] cannot be expected to share their expressions of need and crisis and/or admissions of fault, poor judgment, bad acts or other personal failures with such political appointees who owe their allegiance to the City politicians that have appointed them.

The Associations contend that "[t]his is the first time in history that the City has removed a police chaplain selected by the PBA . . . [and] [t]here appears to have been no process involved in the Mayor's unilateral decision to remove Rios as police chaplain and no ground or cause for such removal was provided." The Associations dispute that the Faulkner Act provides exclusive authority to the mayor to have "the sole and exclusive responsibility for appointing police chaplains." The Associations argue that "[t]he fact that [N.J.S.A. 40A:14-141] does not repose in the PBA . . . the authority to select the police chaplain to be appointed by the governing body or mayor does not preclude that authority from being mandatorily negotiable." The Associations argue that N.J.S.A. 40A:14-141 "also does not repose in the City the authority to unilaterally implement a process for determining whether the services of Rios as the police chaplain should be terminated." The Associations maintain that the termination of Rios "constitute[s] a unilateral termination of an employee counseling policy" and "an arbitrary process for the cessation of . . . a member of the police force"

and argue that both are "mandatory subject[s] of bargaining." The Associations contend that "even if the City's change in its police chaplain selection policy or termination process [is] not mandatorily negotiable, the impact of that change in policy/process upon . . . Rios and the police officers and their family members who are, consequently, deprived of access to an impartial, supportive and trusted counselor and spiritual guide for counseling services, is mandatorily negotiable."

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012). I find the following facts.

The City is a Civil Service jurisdiction.<sup>2/</sup> The PBA represents all police officers of the Paterson Police Department, excluding all superior officers. The SOA represents all police sergeants, lieutenants, captains, deputy chiefs, and superior

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<sup>2/</sup> Pursuant to N.J.A.C. 19:14-6.6(a), I take administrative notice that the Civil Service Commission lists police chaplain as an unclassified title. See <https://info.csc.state.nj.us/TitleList/LocalList.aspx>

officers of the Paterson Police Department. The City and the Associations are parties to respective collective negotiations agreements (CNA) both in effect from August 1, 2012 through July 31, 2019. The grievance procedure in both CNAs ends in binding arbitration.<sup>3/</sup> Police chaplain is not a recognized title in either CNA and no contractual provisions specify an appointment or termination procedure for police chaplain. See 2012-2019 CNAs, Art. 1.0.

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3/ Article 3.0 of the parties' respective CNAs, entitled "Employer Rights," provides in a pertinent part:

3.1 Purpose - The City hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it prior to the signing of this agreement by the laws and Constitution of the State of New Jersey and of the United States, including but not limited to the right to manage the affairs of the City and to direct the working forces and operations of the City, to use improved methods and equipment, to determine work schedules and shifts, to decide the number of employees needed for any particular time, and to be in sole charge of the quality and quantity of the work required.

3.2 In the exercise of the foregoing powers, rights, authorities, duties and responsibilities the City has the right, subject to the terms contained herein, to hire employees, to promote, transfer and assign them, suspend, demote, discharge or take other appropriate action for just cause, and to lay off employees because of lack of work and for other legitimate reasons.

On July 24, 1984, the City passed Ordinance #84-072 which, established the title, police chaplain, together with its salary/stipend of \$1,575. In or around May, 2015, the Associations selected Rios to be the police chaplain and the City made the appointment.<sup>4/</sup> On July 1, 2018, Andre Sayegh (Sayegh) became the City's Mayor. On or about October 4, 2018, the City notified Rios that his services as police chaplain were no longer needed because "[t]he administration ha[d] gone in a new direction with . . . Clayton who will assume the duties of such."<sup>5/</sup>

#### **ANALYSIS**

The Associations allege that the City unilaterally changed existing employment conditions (i.e., granting the Associations the right to select the police chaplain and prohibiting termination of the police chaplain for arbitrary, political reasons) that are mandatorily negotiable. The Associations urge that even if the underlying employment conditions are not mandatorily negotiable, the impact of losing their counselor of choice creates a severable impact that is mandatorily negotiable. The City argues that it has a managerial prerogative to appoint

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<sup>4/</sup> Neither party provided details regarding how Rios was appointed and/or whether he has been on the City's payroll.

<sup>5/</sup> The Associations note that Sayegh "made an additional unilateral appointment of another Police Chaplain, Felix Valentin, in April 2019."

the police chaplain, pursuant to N.J.S.A. 40A:14-141, and that such appointment does not create any severable impact. I generally agree with the City and dismiss the Associations' charge.

I do not believe that the Associations have demonstrated their standing to raise issues regarding, or on behalf of, the police chaplain. N.J.S.A. 34:13A-5.3 grants public employees the right "to form, join and assist any employee organization or to refrain from any such activity . . . ," but specifies that "no policeman shall have the right to join an employee organization that admits employees other than policemen to membership." I infer that the Chaplain's inclusion in either police unit (normally entitling such an employee to "membership" on an equal basis) implicates this statutory prohibition.

N.J.S.A. 40A:14-141, governs the appointment of, and establishes the qualifications for, police chaplains. It provides:

The governing body of any municipality, by ordinance, may provide for the appointment of one or more chaplains to the police department or force. Any person appointed as chaplain shall be an ordained clergyman in good standing in the religious body from which he is selected. Said chaplain shall become a member of the municipal police department or force with or without rank and salary as specified in the ordinance. His salary, if any, shall be fixed by the governing body of the municipality and payable in the same manner as in the case of

other members of the police department or force (emphasis added).

I infer that this statute confers on any municipality authority to hire a chaplain as a "member of the police department," analogous to its authority to hire a civilian employee, such as a dispatcher, thereby negating any perceived conflict with section 5.3 of the Act.

The City argues and the Associations dispute that the mayor's statutory authority under the Faulkner Act preempts negotiations regarding appointment of the police chaplain. The parties maintain that N.J.S.A. 40A:14-141 supports their respective positions regarding negotiability.

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), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects

the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

New Jersey courts and the Commission have held that "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). However, "the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (P107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Bethlehem Tp. Bd. of Ed., 91 N.J. at 44 (citing Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982)).

The Commission has held that although "[t]he Faulkner Act provides a general grant of authority to a public employer to manage the affairs of government[,] [t]hat authority does not preempt the [employer's] obligation to negotiate with [the

majority representative] over mandatorily negotiable terms and conditions of employment." City of Newark, P.E.R.C. No. 2007-24, 32 NJPER 342 (¶143 2006); see also Monroe Tp., H.E. No. 87-24, 12 NJPER 811 (¶17311 1986), adopted P.E.R.C. No. 87-52, 12 NJPER 845 (¶17325 1986) ("[t]he Faulkner Act provides that the mayor shall exercise administrative and executive functions and the council shall exercise legislative and investigative functions"); N.J.S.A. 40:69A-29, -32, -37.1, -40, -43.

For purposes of this decision, I find that the Faulkner Act is a general statute establishing the powers of a municipal government; that N.J.S.A. 40A:14-141 is a general statute authorizing the appointment of a police chaplain; and that neither statute expressly, specifically, and comprehensively preempts negotiations regarding appointment of the police chaplain.

The City nevertheless possesses a managerial prerogative to appoint the police chaplain based upon the Commission's longstanding application of the Paterson balancing test. See, e.g., River Edge Bor., P.E.R.C. No. 2019-33, 45 NJPER 311 (¶82 2019) ("N.J.S.A. 40A:60-6 is a general statute setting forth the powers of a municipal council, including the creation of offices and positions, subject to general law" and "[s]uch general law includes N.J.S.A. 40A:14-118, the law governing the establishment of municipal police departments[,], . . . [which] is a general

authorizing statute that does not preempt negotiations or arbitration over . . . otherwise negotiable term[s] and condition[s] of employment").

New Jersey courts and the Commission have held that "decisions to hire, retain, promote, transfer, assign and dismiss are not negotiable." Rutgers v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 115-116 (App. Div. 1992), aff'd 131 N.J. 118 (1993); see also State v. State Supervisory Employees Ass'n, 78 N.J. 54, 94-95 (1978) ("[t]he determination as to the need for filling the higher position on a provisional basis remains, of course, within the sole discretion of the public employer"); Wanaque Bor., P.E.R.C. No. 2017-19, 43 NJPER 131 (¶41 2016) ("an employer has a managerial prerogative to hire or promote, or not and cannot be compelled to negotiate or arbitrate decisions on whether to fill vacant positions"); River Edge Bor. ("[employers] ha[ve] a managerial prerogative to set a table of organization").

The Associations' claim that Rios was terminated for arbitrary, political reasons, presupposes their standing as Rios's representative under the Act to contest that action, pursuant to the negotiated grievance procedure. Even assuming that the Associations have such standing, I am constrained to dismiss the charge because the dispute is essentially a breach of contract claim that must be resolved in accordance with the

parties' negotiated grievance procedure. State of New Jersey (Dep't of Human Services), D.U.P. No. 2018-8, 44 NJPER 366 (¶103 2018), adopted P.E.R.C. No. 2018-55, 45 NJPER 24 (¶6 2018); see also State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Finally, even if I assume that a severable impact emanates from the exercise of the City's prerogative to select and hire a police chaplain of its choosing, the Associations have not alleged that the City refused to negotiate over any impact(s). See, e.g., Essex Cty. Sheriff, D.U.P. No. 2019-2, 45 NJPER 249 (¶67 2019) (the Director refused to issue a complaint, finding in part that "[a]lthough related severable impact issues may be negotiable, the [union] has not alleged that the [employer] refused to negotiate in response to a demand to negotiate"); Collingswood Bor., P.E.R.C. 2019-8, 45 NJPER 111 (¶29 2018) (the Commission granted a restraint of binding arbitration, finding in part that "there [was] no indication that [the union] sought, or was refused, the opportunity to engage in impact negotiations with the [employer]"); City of Paterson, H.E. No. 2007-3, 33 NJPER 9, 18 (¶7 2007), adopted P.E.R.C. No. 2007-62, 33 NJPER 143 (¶50 2007) (holding that ". . . [w]ithout a demand, no obligation to negotiate impact is triggered").

For all of these reasons, I find that the complaint issuance standard has not been met and dismiss the unfair practice charge.

N.J.A.C. 19:14-2.1.

**ORDER**

The unfair practice charge is dismissed.

/s/ Jonathan Roth

Jonathan Roth

Director of Unfair Practices

DATED: June 19, 2019  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by July 1, 2019.