

P.E.R.C. NO. 2009-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Public Employer,

-and-

Docket No. CO-2007-378

NEWARK UNION OF INDEPENDENT SPECIAL
POLICE, LOCAL 202,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Newark Housing Authority did not violate the New Jersey Employer-Employee Relations Act when it laid off special police represented by the Newark Union of Independent Special Police, Local 202. A Complaint was issued on an unfair practice charge filed by Local 202 against the Authority alleging that the Authority violated the Act when it announced that it was terminating all Local 202 unit members allegedly in retaliation for exercising rights guaranteed by the Act and to chill negotiations and interest arbitration. The charge also alleges that the Authority violated the Act by not providing Local 202 with a copy of an agreement for police services it reached with the City. The Commission finds that the hostility to protected activity was a motivating factor in the decision of the Authority to lay off all special police, but that they would have been laid off even absent protected activity as part of a large reduction in force. The Commission therefore dismisses that portion of the Complaint. The Commission finds that the Authority violated the Act when it failed to provide a copy of an agreement for police services. The Commission orders the Authority to negotiate in good faith, provide a copy of the agreement, and post a notice of the violation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Dorf & Dorf, attorneys
(Gerald L. Dorf, of counsel)

For the Charging Party, Oxfeld Cohen, PC, attorneys
(Gail Oxfeld Kanef, of counsel)

DECISION

On September 22, 2008, Newark Union of Independent Special Police, Local 202 filed exceptions to H.E. No. 2009-1, 34 NJPER 234 (¶81 2008). In that decision, Hearing Examiner Perry O. Lehrer concluded that hostility to protected activity was a motivating factor in the decision of the Newark Housing Authority to lay off all special police. However, the Hearing Examiner also concluded that the special police would have been laid off even absent their protected activity as part of a large reduction in force. Accordingly, the Hearing Examiner recommended dismissing that aspect of the Complaint. We adopt that recommendation. We also adopt the recommendation that the

Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed to provide Local 202 with a copy of an agreement for police services that it made with the City of Newark.

On June 26, 2007 and August 9, 2007, Local 202 filed an unfair practice charge and amendment against the Authority. The charge, as amended, alleges that the Authority violated the Act, specifically 5.4a(1), (3) and (5),^{1/} when it announced that it was terminating all Local 202 unit members in retaliation for exercising rights guaranteed by the Act and to chill negotiations and interest arbitration. The charge also alleges that the Authority violated the Act by not providing Local 202 with a copy of an agreement for police services it reached with the City of Newark.

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 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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On September 26, 2007, a Complaint and Notice of Hearing issued.^{2/} On October 22, the Authority filed its Answer contending that the layoff was to improve the delivery of police services and save money. The Authority noted that it had reduced the number of its employees by more than 40%.

The Hearing Examiner conducted four days of hearing between December 2007 and May 2008. Post-hearing briefs were filed on July 25.

On September 4, 2008, the Hearing Examiner issued his report and recommendations. On September 15, Local 202 filed exceptions and on September 22, the Authority filed its answering brief.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-17).

Until June 12, 2007, the Newark Housing Authority employed between 26 and 28 armed special police. They were responsible for providing security for about 44 Authority properties, though they were primarily responsible for security at 11 or 12 senior housing facilities managed by the Authority. On June 12, the Authority informed Local 202 that all of the special police were being laid off. Newark police have always provided baseline

^{2/} On August 29, 2007, a Commission designee denied Local 202's request for interim relief. I.R. 2008-002, 33 NJPER 223 (¶84 2007). He found that there were material facts in dispute requiring a plenary hearing on the motivation for the layoff. The alleged failure to produce the agreement with the City of Newark was not incorporated into the application for interim relief.

services to the Authority and its residents. Baseline services include responding to police calls and patrolling neighborhoods.

In re Tp. of Bridgewater, 95 N.J. 235 (1984), articulates the standards to be applied in evaluating claims of retaliation for activity protected by the Act. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a

motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner found that Local 202 met its initial burden under Bridgewater. He found that statements made by the former chief of security and assistant personnel director to Local 202's president that the special police would be terminated and the negotiations unit disbanded if the union persisted in filing grievances was direct evidence of hostility to protected conduct. He also found the timing of the layoff -- in the middle of an interest arbitration proceeding -- to be suspicious and further evidence of the Authority's hostility.

However, the Hearing Examiner also found that the Authority met its burden of proving that the layoffs would have occurred even absent Local 202's protected activity. He found that the Authority had been struggling financially due to cutbacks in federal funding and rising costs; it had not received any funding for housing security in the year before and the year of the layoff; and it had hired a new executive director to address financial concerns and to improve living conditions. The Hearing Examiner found that the director determined that the special police were too few in number to be effective and that the City could provide armed protection at a lower cost. The Authority laid off 45% of its staff during a 16-month period with

reductions coming from all departments, including security. The Hearing Examiner concluded that although the timing of the layoff may have been influenced by the interest arbitration proceeding, the officers would have been laid off as part of the large reduction in force even absent Local 202's protected activities.

In its exceptions, Local 202 argues that nothing in the record indicates that the Newark Police Department could provide the armed security services at a lower cost. Local 202 alludes to the testimony of the Authority's chief financial officer that additional police services were provided by the Newark Police Department for which she expected the Authority to be charged, but she had no idea how much. According to Local 202, a prior bill from the City was in the millions of dollars.

The record as a whole, however, supports a finding that the services formerly performed by the special police are part of the baseline services the Newark Police Department provides to all citizens without additional costs. Any additional costs to the Authority would be for what are called above-baseline services.

Local 202 also contends that the Hearing Examiner should not have relied on testimony concerning the comprehensive layoff because union witnesses testified that Authority representatives had repeatedly communicated to the union that unit members would not be laid off.

The Hearing Examiner is required to consider all evidence and where testimony conflicts, to determine which testimony is more credible. He concluded that although the timing of the layoff may have been influenced by the interest arbitration proceeding, the special police would have been laid off as part of the large reduction in force even absent all of Local 202's protected activities. He reached that conclusion after his examination of all the evidence, including the testimony about comments made to union representatives that led them to believe that the special police would not be laid off. We have no reason to disturb that determination.

Finally, Local 202 contends that the Hearing Examiner erroneously interpreted the evidence regarding the number of arrests made by Local 202 members. It asserts that when advised to make more arrests, unit members did so and the issue was never raised again.

We reject this exception. The record indicates that the number of arrests made on Authority property has increased since the special police layoff. In addition, the residents' overall living conditions have improved and the U.S. Department of Housing and Urban Development has upgraded the Authority's classification from a "troubled" to a "standard performing" agency. We do not mean to suggest that the special police were not performing the duties they were assigned. We simply conclude

that the decision to rely on the Newark police rather than a limited number of special police has apparently had a measurable positive impact.

Under these circumstances, we adopt the Hearing Examiner's recommendation to dismiss the 5.4a(3) allegation. In the absence of exceptions, we also adopt his recommendation to order the Authority to provide Local 202 with a copy of the unexecuted agreement for City police services and to post a notice of its violation. Public employers have an obligation to provide information that is potentially relevant and that will be of use to the union in carrying out its statutory duties. In re UMDNJ, 144 N.J. 511, 530-531 (1996).

ORDER

The Newark Housing Authority is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing special police officers in the exercise of the rights guaranteed to them by the Act, particularly by failing to provide Local 202 with a copy of the unexecuted agreement for City police services.

2. Refusing to negotiate in good faith with Local 202 over terms and conditions of employment of its members by failing to provide Local 202 with a copy of the unexecuted agreement for City police services.

B. Take this Action:

1. Provide Local 202 with a copy of the unexecuted agreement for City police services within 30 days of the date of this Order.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Joanis and Watkins voted in favor of this decision. None opposed. Commissioners Branigan and Fuller were not present.

ISSUED: October 30, 2008

Trenton, New Jersey

NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing special police officers in the exercise of the rights guaranteed to them by the Act, particularly by failing to provide Local 202 with a copy of the unexecuted agreement for City police services.

WE WILL cease and desist from refusing to negotiate in good faith with Local 202 over terms and conditions of employment of its members by failing to provide a copy of the unexecuted agreement for City police services.

WE WILL provide Local 202 with a copy of the unexecuted agreement for City police services within 30 days of the date of this Order.

Docket No. CO-2007-378

NEWARK HOUSING AUTHORITY
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372