H.E. No. 2009-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2005-243

FOP LODGE 12,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the City of Newark violated 5.4a(1) and (5) of the Act when the City unilaterally revised procedural aspects of its random drug testing policy without agreement of the FOP. She rejected the City's contention that the parties reached an agreement at a labor-management meeting finding that there was no evidence that the changes implemented by the City were discussed or agreed upon based on a comparison of the meeting minutes and the orders issued by the department. No writing supported the City's conclusion that an agreement was reached. At best, the evidence suggested that there was no meeting of the minds.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Julien X. Neals, Corporation Counsel
(Steve Olivo, of counsel)

For the Charging Party,
Markowitz and Richman, attorneys
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 15, 2005, FOP Lodge 12 (Charging Party or FOP) filed an unfair practice charge against the City of Newark (City or Respondent) alleging that the City violated 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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; (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."

34:13A-1 et seq. (Act), when the City made unilateral changes to its random drug testing policy. Specifically, the FOP asserts that the City made procedural changes to its policy affecting personnel who booked off sick or injured between the time that they were selected to be randomly tested but before they were notified of their selection.

On March 14, 2006, a Complaint and Notice of Hearing issued (C-1).[2/]

On March 27, 2006, Respondent filed its Answer. It generally denies the allegations and asserts that the parties negotiated and reached an agreement to modify procedural aspects of the random drug testing policy.

After this matter was placed on inactive status at the parties' request pending settlement discussions, a hearing was conducted on March 6 and July 8, 2008.[3/] Briefs and replies were filed by September 9, 2008. Based on the record, I make the following:

Findings of Fact

1. The City is a public employer and the FOP is a public employee representative within the meaning of the Act.

2/ "C" refers to Commission exhibits received into evidence at the hearing. "CP and "R" refer to Charging Party's and Respondent's exhibits respectively.

3/ Transcript references to hearing dates are "1T" and "2T" respectively.

2. In 1999, the parties negotiated a random drug testing policy known as General Order 99-04 (J-2; CP-1, CP-2). Former FOP President Jack McEntee participated in those negotiations (1T22-1T23)[4/]. During the negotiations process, McEntee submitted numerous suggestions and comments. In particular, he recommended revising the eligibility section of the policy to address who would be tested and when to include employees on convention leave and sick leave (CP-1, CP-2, CP-3; 1T24, 1T28). Eventually, the parties reached an agreement. The City issued General Order 99-04 in January 2000 (J-2). Based on the FOP's suggested change, the eligibility section now addressed officers on convention leave and sick leave and when they could be tested (J-2; CP-3, CP-4; 1T34).

General Order 99-04, issued January 2000, provides, in pertinent part:

> IV. Definition of Terms
>
> * * *
>
> C. Eligibility Group - Eligibility Group is defined as a designated percentage of all sworn members of the Newark Police Department randomly selected, regardless of rank, scheduled to work (regular or overtime) in a specific 24-hour period, except those employees classified as follows:
>
> 1. Maternity Leave
> 2. Indefinite Suspension

4/ McEntee retired in October 2004, but works for the FOP on a part-time basis (1T36, 1T38).

3. Leave of Absence for more than 30 consecutive days
4. Sick or Injured Leave for more than 30 consecutive days
5. Military Leave for more than 30 consecutive days
6. Regular Day Off

Personnel shall be tested on the first business day they are working if classified as follows:

1. Funeral Leave
2. Convention Leave
3. Regular Vacation Bracket
4. Leave of Absence (military/training/other) for 30 days or less
5. Sick or Injured for 30 days or less [emphasis added]

* * *

H. Notification - **Notification is defined as the act of making known to sworn members of the service that they have been selected for urinalysis screening pursuant to this Policy.** [emphasis added] Notification may be accomplished by telephone, in writing, or through personal communication with sworn members.

* * *

J. Refusal - Refusal is defined as any unjustified failure or declination, by the person being tested, to produce an adequate urine specimen **after being notified that they are the subject of a urinalysis screening pursuant to this Policy.** [emphasis added] Refusing to accept notification or engaging in any conduct that obstructs the testing process also constitutes refusal within the meaning of this Policy. Such conduct includes, but is not limited to, feigning illness before or after notification or rendering oneself unavailable before or after notification.

* * *

VI. Random Testing Process

A. Random Selection

* * *

> 5. Once a police officer has been identified for random testing, or the fact that a random selection is scheduled to take place, all information shall remain confidential. Under no circumstances shall the officer's identity or the testing schedule be divulged once a determination has been made to conduct a selection . . . [J-2]

The General Order also provides that the majority representative shall be notified one hour before the selection process begins and allowed to witness that process, but its representatives cannot record or transmit any information about the identities of the officers randomly selected. It also specifies that urine specimens shall be collected at a facility designated by the Police Department (J-2).

3. On June 14, 2004, the FOP filed a grievance alleging that the collection of a urine sample at an officer's house, while he was on sick leave, violated the parties' collective agreement as well as General Order 99-04 stating that officers on sick leave for 30 days or less will be tested when they return to work (1T35). Specifically, the facts show that Police Officer Peter Chirico and other officers were selected for random testing on June 10, 2004. Chirico was scheduled to begin his shift at 7:00 p.m. that day. At 6:00 p.m., an hour before his shift, he booked off sick. Internal Affairs investigators went to Chirico's home to obtain a urine sample. His sample tested negative.

The FOP's grievance generally contested the time, place and manner in which an officer on sick leave might be tested and specifically alleged that the General Order stipulated that officers on sick leave for 30 days or less will be tested when they return to work. Chirico was tested at home, not when he came back to work. The City responded that Chirico was eligible for testing because he was not classified as on sick leave when the random selection process was conducted or testing began.

The City filed a scope of negotiations petitions seeking to restrain arbitration. The City's concern, as raised to the Commission, was that earlier tested officers - e.g. those on an earlier shift - would alert later scheduled officers that a test was in progress, thus allowing the use of sick leave to avoid testing.

On December 16, 2004, the Commission issued its decision denying the request of the City for a restraint of binding arbitration of the FOP grievance. City of Newark, P.E.R.C. No. 2005-43, 30 NJPER 506 (¶172 2004).[5/] The Commission concluded that procedures associated with police officer drug testing are mandatorily negotiable in general and that an arbitrator can

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5/ At the hearing, I informed the parties that I would take administrative notice of this decision. N.J.A.C. 19:14-6.6. The parties agree that this scope of negotiations decision provided the impetus for the subsequent actions that led to the filing of the charge in this matter.

decide whether the City's policy prohibits or permits testing officers while they are at home and on sick time.

4. As a result of the Commission's decision, the issue regarding procedural aspects of the City's random drug testing policy was raised by then Police Director Anthony Ambrose[6/] at two monthly labor-management meetings on December 28, 2004 and February 8, 2005 respectively. Lieutenant Tijuana Jones-Burton, then Lieutenant William Whitley (Whitley is now a captain), City Attorney Phillip Dowdell, FOP President Derrick Hatcher and SOA President John Huegel attended the meetings (R-1, R-2, R-3; 1T59-1T60). Labor-management meetings are held regularly to discuss a variety of issues raised in grievances filed by the unions. The December 28 and February 8 meetings were regularly scheduled labor-management meetings (1T51, 2T26).

At the December 28 meeting, Ambrose raised the topic of modifying General Order 99-04 so that personnel, like Chirico, who reported sick or injured after notification of random drug testing could be tested by Internal Affairs at the employee's location or at Internal Affairs. Those who reported sick before notification would be still tested when they returned to work

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6/ Ambrose is currently employed by the Essex County Prosecutor's Office as chief of detectives (2T4). From 2004 to 2006, he was Director of the Newark Police Department(2T5). He retired from the Newark Police Department on June 30, 2006 (2T5).

(R-1; 2T7, 2T24-2T25). The verbal proposal was never presented in writing at either meeting (2T27).

5. Lieutenant Jones-Burton was assigned to the police director's office as the Internal Affairs liaison and took notes and prepared minutes for both the December 28, 2004 and February 8, 2005 meetings (1T42-1T44, 1T49). The minutes she prepared were given to Ambrose's secretary for distribution, but Jones-Burton does not know whether or to whom Ambrose distributed the minutes (1T50-1T51). FOP President Hatcher did not approve the minutes nor did he receive a copy of the minutes from either meeting (1T83).

6. Jones-Burton has no independent recollection of who raised the issue of the random drug policy at the December 28 meeting or what was said by either management or the union. But, according to Jones-Burton, her minutes accurately reflect what was discussed (1T44). The December 28 minutes (R-2) under a heading entitled "Re-Caps" state:

> Drug Policy: The following to be include [sic] in policy;
>
> If employee books off prior to notification of random drug testing, employee shall submit to random drug test upon returning to duty.
>
> If employee books off after notification of random drug testing, Internal Affairs shall respond to employee's location and obtain urine sample. [R-2]

The sub-heading of "Re-Caps" signified that the topic would be recapped or discussed again at the next meeting. No agreement was reached on changes to the policy at this meeting (R-2; 1T44, 1T53, 1T61). If there had been an objection to the City's proposal to modify the drug policy, however, she would have noted it in the December 28 minutes (1T52-1T53, 1T56). There were no objections noted in the minutes of December 28 (R-2).

7. Jones-Burton also has no independent recollection of the specific discussions regarding the drug policy - e.g. who said what - at the February 8 meeting. But, according to Jones-Burton, R-3 accurately reflects her recollection of the February 8 meeting (R-3; 1T47, 1T54-1T55). Again under the heading of "Re-Caps", the minutes state:

> Drug Policy: Lt. Whitley (Policy/Planning) to include the following in policy:
>
> > If employee books off prior to notification of random drug testing, employee shall submit to random drug test upon return to duty.
> >
> > If employee books off after notification of random drug testing, Internal Affairs shall respond to employee's location and obtain urine sample. [R-3]

According to Jones-Burton, although she has no specific recollection of the discussions at the February 8 meeting, from her minutes it appears that Ambrose instructed Whitley either at or after the meeting to include the changes in General Order 99-04, although I cannot determine from R-3 whether the changes

were to be included as a draft or for implementation (1T48, 1T55). Jones-Burton's testimony does not clarify this point. In any event, she does not recall that either Hatcher or Huegel objected to the language changes discussed (1T48). Jones-Burton states that if they had raised an objection, she would have noted the objection in the minutes (R-3; 1T56). No objections were noted in the R-3 minutes.

8. Captain William Whitley has been employed by the Newark Police Department for 24 years (1T58). In December 2004 he was a lieutenant assigned to the office of the police director as a special assistant (1T58). Whitley attended both the December 28 and February 8 monthly labor-management meetings as the liaison between the unions (FOP and SOA) and the police director (1T59).

9. Whitley received a copy of the December 28 minutes (R-2) which, according to Whitley, accurately reflect his recollections of the meeting (1T60, 1T76). Whitley recalls that the parties discussed the Chirico grievance in addition to several other grievances and that a change in the random drug policy was proposed to address the situation where an officer booked off sick after the drug test was announced (1T61). Whitley does not recall Hatcher or Huegel raising any questions at that time concerning the proposed changes, but the header "Re-Caps" meant that the topic would be discussed further at the next meeting and that there was no agreement reached (R-2; 1T61-1T62, 1T75).

10. After the February 8 meeting, Whitley again received a copy of the minutes prepared by Jones-Burton (R-3). According to Whitley, R-3 accurately reflects what occurred at the meeting, although he does not recall who brought up the topic of the random drug policy or specifically what Hatcher may have said at the meeting (1T63, 1T76). Whitley states that the parties discussed the proposed changes to the drug policy, specifically what would happen if an officer booked off after notification or announcement of the drug test (1T63).

According to Whitley, neither Hatcher nor Huegel objected to the proposed policy changes, although he does not recall anyone actually saying that they agreed to it. Whitley's testimony was vague as to the specifics of what, if any, proposal for policy change was made by the City and/or accepted by the FOP. Although having no independent recollection of the discussions at the meeting, Whitley reasons that an agreement was reached because Ambrose instructed him to make changes to the policy. Whitley concludes that if there had been any objections or if there had been no agreement, Ambrose would not have instructed him to make the changes to the policy (1T64-1T65, 1T76). Whitley explains that the topic was placed in the February 8 minutes under the sub-heading of "Re-Cap" only because Ambrose expected him to do the revisions to the policy by the next meeting, not because it was up for further discussion (R-3; 1T76).

11. Within an hour after the February 8 meeting, Whitley prepared a memo to implement the order entitled "Revision to Random Drug Testing General Order #99-04" for Ambrose's signature (J-3; 1T66). The memo is also known as an implementation order (1T77). According to Whitley, he prepared the memo in accordance with Ambrose's instructions to him and, in his mind, J-3 grew out of the discussions at the February 8 meeting (1T66-1T67). Ambrose signed J-3 that same day.

J-3 states in pertinent part:

> Effective immediately, **any member** of the department **who is selected** to provide a sample for urinalysis **and books off sick** or injured **after the drug test has been announced** shall be required to respond as ordered to the Internal Affairs Bureau to provide said sample with out further delay. **The random drug test shall be considered to be "announced" at the time of the random selection of personnel** [emphasis added].
>
> The current policy concerning personnel who are booked off sick prior to the announcement of the random drug test shall remain in effect as written. Specifically, personnel who are out for longer than 30 days prior to the announcement of the test shall not be included in the pool of personnel eligible for the test. Personnel booked off for less than thirty days but who are booked off prior to the announcement of the test shall be eligible for selection but shall not be required to provide a sample until they are returned to duty on their next regularly scheduled work day [J-3].

Whitley confirms that the unions got nothing in return for what he considered to be agreed-upon changes to General Order

99-04 (1T78). Shortly after the February 8 meeting, Whitley was transferred to the office of policy and planning and charged with writing policies and orders, basically the same job that he was doing in the director's office but in a different office space (1T58). He attended no other monthly labor-management grievance meetings (1T65).

12. On February 16, 2005, in conjunction with his duties in the office of policy and planning, Whitley prepared another implementation memo for Ambrose and attached revised General Order 99-04 (J-5; 1T68, 1T77). The memo (J-5) attached to the revised order explained that the purpose of the changes to General Order 99-04 was ". . . to compel **personnel who report sick** or injured **after the Random Drug Test is in progress to provide a sample for urinalysis immediately.** [emphasis added] Currently personnel who are booked off less that [sic] thirty days are required to provide a sample, but not until they return to duty. This delay might allow a member to circumvent the selection process" (J-5). The memo then detailed the changes to Sections IV and VI of General Order 99-04 as follows:

Section IV entitled Definitions of Terms, paragraph C entitled Eligibility Group was modified to add the language in bold, that personnel shall be tested on the first business day they are working if classified as follows:

> 5. Sick or Injured for 30 days or less, **except for those who report sick or injured while the random test is in progress.**
>
> **Personnel who report sick or injured after the Random Drug Test is in progress shall be required to comply with the tenets of this order and shall be compelled to produce a sample for urinalysis. Failure to make oneself available to representatives of the office of Internal Affairs shall be considered to be a refusal.**
>
> **The Random Drug Test shall be considered to be in progress as soon as the Random Computer Generated Program is initiated to select names for the selection process** [J-5].

Section VI(A) entitled Random Selection was modified to add paragraph number 6 which states:

> **Once the Computer generated program that selects the personnel for the random selection is initiated, the Random Drug Test shall be considered to be in progress** [J-5].

Finally, a paragraph was added to Section VI, Random Selection Process, Subsection 6, Item B entitled Notification Process which states:

> **2e. Personnel who reported sick or injured after the Random Test is considered to be in progress shall be required to respond to the collection location upon notification. If the member indicates that the medical condition prevents this, personnel from the office of Internal Affairs shall respond to that member's sick leave residence and transport that member to the collection location** [J-5].

13. When J-3 issued on February 8, 2005 and J-5 issued on February 16, 2005, Whitley was not aware of any objections raised by either the FOP or SOA to the changes in the random drug policy. He therefore, concluded that the changes had been agreed to by the unions (1T69-1T70). Specifically, Whitley was not aware of the two grievances filed by Hatcher - J-4 and J-6 filed on February 12 and 24 respectively - in response to J-3 and J-5 (1T71-1T73).

14. Derrick Hatcher has been employed by the Newark Police Department for 22 years and has been the FOP president since October 1, 2004, following the retirement of Jack McEntee (1T80). Negotiations for a successor to the parties January 1, 2003 through December 31, 2004 agreement (J-1) were conducted in the latter half of 2004 (1T81). The parties held negotiations sessions on November 3 and December 13 and 30, 2004 as well as January 14 and 18, 2005 (J-8). Despite a recommendation from the City's attorney to raise this issue in negotiations for a successor agreement, the City made no proposals concerning changes to the random drug testing policy during these negotiations but raised the issue at two of the regularly scheduled labor-management meetings (R-1; 1T83).

15. Hatcher attended both the December 28 and February 8 labor-management grievance meetings, although after the meetings, he received no copies of the minutes prepared by Lieutenant

Jones-Burton (R-2, R-3; 1T83). With respect to the December 28 meeting, Hatcher confirms that several outstanding grievances were discussed, including the Chirico grievance regarding the random drug testing policy (1T83-1T84). Specifically, Hatcher recalls Ambrose walking into the conference room, sitting down to Hatcher's right side and making a comment that he (Ambrose) was interested in making some changes to the drug policy (1T84). Hatcher advised Ambrose that he would like to see the proposed changes documented so he could review them and get back to Ambrose (1T84). This discussion lasted perhaps two minutes, and then the attendees went back to the other grievance discussions (1T84).

16. According to Hatcher, at the February 8 meeting, there were a number of grievances discussed including the random drug policy issue (1T85). Hatcher confirms that Ambrose again mentioned that he wanted to make changes to the drug policy, in particular regarding the notification process (1T87). The Chirico grievance was still pending at that time and is still pending (J-7; 1T88).

Hatcher also confirmed that neither he nor SOA President Huegel raised objections to the City's proposals to revise the policy during either the December 28 or February 8 meetings. According to Hatcher, there was only discussion about employees who were randomly selected for testing and what would happen if

they booked off sick before and after notification, but no discussion at the meetings about what would happen after a random test is announced - e.g. at the time of random computer selection - to an officer who booked off sick (CP-5). In other words, Hatcher testified that the changes that were actually implemented were not the changes discussed at the December 28 or February 8 meetings.

In any event, Hatcher testified that he requested to see ". . . the language in which [Ambrose] was going to present to me and the officers of the Newark Police Department" (1T102). Hatcher does not recall Ambrose specifically saying that he would provide such a draft. Nevertheless, when Hatcher left the February 8 meeting, Hatcher was under the impression that a draft of the proposed changes was going to be prepared for his review and comment and that any revisions to the policy would be subject to his approval (1T96-1T97). Hatcher denies that Ambrose instructed Whitley to prepare J-3 as an implementation order during the February 8 meeting; he insists he expected to see the policy in draft (J-3; 1T96).

17. Hatcher and Ambrose disagree as to whether Hatcher requested to see a draft of the revised policy or whether Hatcher agreed to the changes actually implemented to General Oder 99-04 (J-5). Ambrose testified as follows concerning the preparation

of the revisions to General Order 99-04 and whether he was going to prepare a draft:

> Q. All right. Did you ever inform the unions, more specifically the FOP, that you planned to put this policy in writing?
>
> A. Yes, . . . at this meeting here [the February 8 meeting], I believe, I indicated that it would be put into policy and it was agreed upon.
>
> Q. Did you ever indicate to the union that you intended to send them some form of draft, before you would put it into effect?
>
> A. No I did not.
>
> Q. Okay. Is that your practice or was it at the time, I should say?
>
> A. If it was something lengthy and it . . . was something major they would have input. This situation was agreed upon. I believe in the minutes of the . . . meeting we had indicated how it would read. It was agreed upon that we would just do an addendum to the general order.
>
> Q. Did Detective Hatcher indicate he would like to see a draft before you put it into effect?
>
> A. No, he did not. [2T11-2T12]

Ambrose admits that the FOP was given nothing in writing about the policy changes during the December 28 or February 8 meetings. There were only verbal discussions of the changes, and he does not recall how long those discussions were, but the topic was one among many discussed during the December 28 and February 8 meetings (2T27, 2T30). According to Ambrose, the minutes of

the meetings (R-2 and R-3) accurately reflect what Ambrose said was discussed at both meetings (2T27-2T28).

18. Whether or not Hatcher actually requested a draft, I credit Hatcher that after the February 8 meeting, he was under the impression that he would get a draft of the proposed revisions to General Order 99-04 and that he did not tell Ambrose that he agreed with the proposed changes. Whitley testified that he did not hear Hatcher tell Ambrose that he agreed to any proposed changes. Ambrose's testimony was tentative in this regard. Although Ambrose testified that Hatcher did not ask for a draft, when asked directly about whether he (Ambrose) told the unions the policy changes would be put into writing, Ambrose responded that "I believe that I indicated that it would be put into policy and it was agreed upon" (2T11-2T12). This testimony does not refute Hatcher's statement that he expected a draft to review before any changes were implemented and that he did not agree to the changes to the random drug policy implemented by Ambrose.

The City's other witness, Jones-Burton, had no independent recollection of what Hatcher or anyone at the meetings said. She relied on her minutes of the meeting that, she testified, accurately reflected what occurred. Her minutes do not confirm that an agreement was reached nor do they refute Hatcher's testimony that he expected to see a draft of the policy. The

February 8 minutes (R-3) only support that Whitley was to include specific language in a revised policy, language that Jones-Burton set out in the R-3 minutes. Whether that language was to be prepared in draft form for Hatcher's comment and/or approval is not settled by reviewing her minutes.

I also credit Ambrose that he thought he had Hatcher's agreement to the language changes contained in the R-3 minutes of the February 8 meeting, because Hatcher raised no objections. However, the fact that Hatcher raised no objections does not refute Hatcher's testimony that he expected a draft to review nor does it establish that the parties were in agreement as to the policy changes that were eventually implemented.

Ambrose testified that after the February 8 meeting, he instructed Whitley to prepare the revised order based on the language contained in the R-3 minutes, language, Ambrose asserts, the parties agreed on at the meeting (2T12). However, the minutes of the February 8 meeting (R-3), that Ambrose, Whitley and Jones-Burton testified accurately reflect the language changes the parties' agreed to, do not match the changes Ambrose later authorized to General Order 99-04 (J-3, J-5). I cannot, therefore, conclude that the changes to General Order 99-04 that were actually implemented were either discussed or agreed upon at the February 8 meeting.

19. On February 11, 2005, Hatcher received J-3 (the February 8 Director's memorandum prepared by Whitley concerning the revisions to General Order 99-04) and, on that same date at a little after 5:00 p.m., he contacted Ambrose advising him that he did not agree with the revisions to the policy (1T88). Ambrose confirms that Hatcher called him to tell him that he would have to grieve the changes because the membership and FOP executive board were not happy with the changes (2T14, 2T16, 2T29). Ambrose told Hatcher that as far as he was concerned the changes were agreed upon, and it would become policy (2T14, 2T16).

On February 12, Hatcher filed a grievance (J-4), protesting the unilateral change in the random drug testing policy and citing violations of several contract articles (J-1). Ambrose was surprised to receive the grievance because he thought the parties had reached an agreement (2T16).

20. On February 17, 2005, in response to the filing of the J-4 grievance, Hatcher received a letter (R-4) from the City attorney, Phillip Dowdell, denying the grievance based on what Dowdell described as an agreement reached by the parties at the two labor-management meetings (R-4). Dowdell wrote that the purpose of the changes in the Director's memorandum (J-3) was to avoid a situation where officers randomly tested during the day would inform officers scheduled to be tested during the afternoon or evening shifts that a drug test is pending, thus allowing

later scheduled officers to book off sick to avoid being tested. This is what both parties, he wrote, sought to avoid and what both parties had agreed to in the revisions to the policy (R-4).

21. On that same day (February 17, 2008), Hatcher faxed Dowdell's letter to Stephen Richman, the FOP attorney, for Richman's review and included his (Hatcher's) own comments regarding the changes proposed in J-3 (CP-5). Hatcher wrote in his comments to Richman that he had not been given the revisions for review before they were issued. Hatcher specifically denied that Ambrose mentioned or discussed at either the December 28 or February 8 meeting revising the General Order 99-04 to include the language that "[e]ffective immediately, any member of the department who is selected to provide a sample for urinalysis and books off sick or injured after the drug test has been announced shall be required to respond as ordered to the Internal Affairs Bureau to provide said sample without further delay. The random drug test shall be considered to be "announced" at the time of the random selection of personnel" (CP-5; J-3).

Hatcher also wrote to Richman that he would never have agreed to the revisions when the Chirico grievance regarding the drug policy was still pending and left unresolved the issue of when an officer who booked off sick could be tested, namely the issue of the announcement of the test versus the selection of the officers for random drug screening and/or the actual notification

of the officer (CP-5; 1T92). Hatcher further noted that the only topic Ambrose discussed at the labor management meetings was that "[p]ersonnel who booked off for less than 30 days but who are booked off prior to the announcement of the test shall be eligible for selection but shall not be required to provide a sample until they are returned to duty on their next regularly scheduled work day (CP-5; 1T99)."

22. On February 24, 2005, after the issuance of J-5, Hatcher filed another grievance (J-6). The grievance protested the unilateral change to the random drug policy and cited violations of various articles of the parties' collective agreement.

Analysis

The FOP alleges that the City violated the Act when it unilaterally revised General Order 99-04, a random drug testing policy. It contends that the changes were not agreed to and implicate drug testing policy procedures that are negotiable terms and conditions of employment. The City asserts that it implemented the changes only after negotiation and agreement.

Based on the documentary evidence and witness testimony adduced at the hearing, I find that the parties did not reach agreement on the changes to General Order 99-04. Both parties left the meeting on February 8, 2005 with different views of what had transpired and no written agreement to support the City's

contention that the FOP agreed to the revisions Police Director Ambrose authorized to the parties' random drug policy. The City, therefore, acted unilaterally in changing a negotiable term and condition of employment, thus violating 5.4a(1) and (5) of the Act.

N.J.S.A. 34:13A-5.3 authorizes the majority representative to negotiate on behalf of unit employees their terms and conditions of employment. Section 5.3 also defines when an employer has a duty to negotiate before changing working conditions:

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

The Commission has held that changes in negotiable terms and conditions of employment, therefore, must be addressed through the collective negotiations process, because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), certif. granted, 166 N.J. 112 (2000).

Although random testing of police officers for illegal drugs is a managerial prerogative, drug testing procedures such as notification, chain of custody, confidentiality and accuracy are mandatorily negotiable in general. N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997); City of Newark, P.E.R.C.

No. 91-5, 16 NJPER 435 (¶21186 1990), aff'd NJPER Supp. 2d 257 (¶212 App. Div. 1991) and the cases cited therein.

In a matter related to the one before me, the Commission considered whether to restrain arbitration of a grievance contesting the City's decision to drug test Officer Chirico at his home after he booked off sick but before he was notified that he had been randomly selected for testing. City of Newark, P.E.R.C. No. 2005-43, 30 NJPER 506 (¶172 2004). The City had no reasonable individualized suspicion or probable cause to believe that the officer was using illegal drugs, and, indeed, the test results were negative as to the presence of any illegal substance.

Citing N.J. Transit, the Commission refused to restrain arbitration and explained that:

> Employees have a significant interest in knowing the conditions under which they might be subject to the intrusions associated with a random drug test. [citations omitted] That interest is accentuated when testing is done at an employee's home, thus invading the privacy of the home and potentially disrupting an employee's family life. [citations omitted] An employer may thus agree to provide notice of the conditions under which it will conduct random drug testing and to be bound by that notice until it notifies employees that those conditions have been changed. Id. at 508.

After the issuance of this decision, the City proposed revising General Order 94-04, its random drug testing policy to address the issues raised by the Chirico grievance, namely where

an officer booked off sick before or after notification that he/she was randomly selected for drug testing. At two labor-management meetings with the FOP and SOA on December 28, 2004 and February 8, 2005, the City raised the issue of the Chirico grievance and discussed modifications it wanted to implement to the random drug policy. The City asserts that after reaching an agreement with the unions, it revised General Order 94-04 to conform to that agreement.

The City recognizes its negotiations obligation but asserts that it met its obligations under the Act. Specifically, the City denies that it acted unilaterally to change a negotiable term and condition of employment and states that it was only after the executive committee and the membership protested the revisions to the policy that FOP President Hatcher had second thoughts about the agreement to revise the policy and reneged on that agreement. The City relies on what it describes as the good recollections of its witnesses as to what occurred during labor-management meetings on December 28, 2004 and February 8, 2005 at which an agreement was reached. It also relies on the fact that the FOP produced no documentary evidence (1) that its representative raised any objections to the changes during the meetings or (2) that there was no agreement to support that it fulfilled its negotiations obligations.

The FOP disagrees. It contends that no agreement was reached regarding the changes to General Order 94-04. The meeting minutes produced by the City, the FOP argues, were not signed , initialed or reviewed by the FOP and, therefore, are not evidence of a written agreement between the parties. In any event, even if the minutes accurately reflected what was discussed, the FOP argues, the minutes do not reflect any discussion of the changes that were actually implemented by the City.

Specifically, the FOP contends that the minutes reflect an intent to discuss the procedure regarding if an employee books off sick before or after notification, but the actual revisions to the policy implemented by the City involve an additional factor - selection - and defines notification as selection not when the employee is notified of his/her selection. It argues that even if the parties had discussed what was in the meeting minutes, there is no evidence that the parties discussed the changes that were actually implemented.

Also, the FOP suggests that it stretches the bounds of credulity to believe that the FOP would abandon a position it fought for when the policy was initially negotiated, namely the question of selection and announcement versus notification, when it received nothing in return for the changes the City implemented. It is particularly odd, it contends, that Hatcher

would simply abandon the FOP's position in light of the fact that he was fully aware of the Chirico grievance dealing with the same issue, and yet Hatcher never withdrew the grievance which is still pending. Finally, the FOP reasons that upon receiving copies of both J-3 and J-5 Hatcher filed grievances, actions which run counter to a conclusion that the parties reached an agreement or even discussed the changes. I agree.

All the witnesses concurred that Police Director Ambrose initially raised the issue of revising the City's random drug policy (General Order 94-04) at a regularly scheduled labor-management meeting with the FOP and SOA on December 28, 2004 and that the parties reached no agreement on December 28.

When the parties met again on February 8, 2005 for the regularly scheduled labor-management meeting, among several topics, the subject of the random drug policy was again discussed. According to the City's witnesses, the minutes of that meeting, prepared by Lt. Jones-Burton but not distributed to or approved by Hatcher, accurately reflect what was discussed and proposed. The February 8 minutes (R-3) listed exactly the same two topics discussed at the December 28 meeting under the heading "Drug Policy: Lt. Whitley (Policy/Planning) to include the following:

> If employee books off prior to notification of random drug testing, employee shall submit to random drug test upon return to duty.

> If employee books off after notification of random drug testing, Internal Affairs shall respond to employee's location and obtain urine sample [R-3]."

Ambrose instructed Whitley to revise General Order 99-04 in accordance with these minutes that contained language, Ambrose testified, that the parties' had agreed to.

Thereafter, Whitley prepared two memos (J-3 and J-5) with revisions to General Order 99-04 reflecting changes to when and where officers who are randomly selected for drug testing could be tested. The revisions in J-3 and J-5 do not mirror the language contained in the February 8 meeting minutes that, according to Ambrose, he instructed Whitley to include in the revised policy. As the FOP points out, the revisions address an additional factor of selection and announcement. I also note that J-3, the implementation order prepared after the February 8 meeting, contains language different from J-5, the revised order issued a week later - e.g. J-3 talks about the "announcement" of the test, while J-5 refers to when a test is "in-progress". Therefore, even if the minutes of the February 8 meeting accurately reflect language the parties agreed to, the FOP is correct that the revisions actually implemented were neither discussed nor agreed to by the FOP.

Contrary, to the City's contention that its witnesses had good recollections of what occurred, an examination of their testimony refutes this assertion. Neither Whitley nor

Jones-Burton had independent recollections of what was said at either labor-management meeting. They concluded that an agreement was reached because they heard no objections. Additionally, in Whitley's case, he concluded there was an agreement because Ambrose told him to revise the policy. The fact that Hatcher raised no objections at the February 8 meeting does not equate to an agreement. The City produced no writing to support that the FOP had agreed to the revisions it implemented. If the minutes prepared by the City accurately reflected the parties' agreement, there should have been something signed off on to support that an agreement was actually reached, especially in light of the fact that there are language inconsistencies throughout the documents prepared by the City and put into evidence to support its contentions (R-3; J-3, J-5).

Indeed, the fact that Hatcher immediately protested the changes when he received J-3 and J-5 and filed grievances over what he considered unilateral changes to the policy supports that there was no agreement. Whether the membership and executive committee also protested changes to the policy represented by J-3 does not signify that Hatcher caved to this pressure and reneged on a "deal" as the City argues. This fact is immaterial, because there is no credible evidence that Hatcher agreed to the language contained in J-3 or to the final version of the revised General Order 99-04 (J-5).

Lastly, the City asserts that the fact that there was nothing in writing does not refute the fact that the parties negotiated. Negotiations, it contends, do not require that the parties reach an agreement. To determine whether an employer has engaged in good or bad faith negotiations, the Commission looks to the totality of the employer's conduct and whether the employer came to the negotiations " . . . with an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement." State of New Jersey and Council of New Jersey State College Locals, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd P.E.R.C. No. 76-8 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).

The changes to the random drug policy that were implemented do not reflect the discussions that the City's witnesses assert took place at the two labor-management meetings. There is no evidence of any bi-lateral exchange of proposals. Indeed, the minutes prepared by the City (R-2 and R-3) demonstrate that the City put identical proposals on the table at both labor-management meetings, evidencing no change in City's position or what, if any, position the FOP took regarding the proposal. The City's witnesses admit that the FOP got nothing in return for the changes that were made. FOP President Hatcher denies that the parties discussed the changes that were

eventually implemented. I find, therefore, that under the totality of the circumstances, the parties did not reach an agreement regarding the revisions to General Order 99-04.

Conclusions

I recommend that the Commission find the City of Newark violated 5.4a (1) and (5) of the Act by failing to reach an agreement regarding procedural changes and by unilaterally implementing revisions to General Order 99-04, specifically Section IV, sub-section C and Section VI, sub-section A(6) and B(2e). (J-5)

Recommended Order

I recommend that the Commission order the Respondent to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by the Act, particularly by failing to reach an agreement regarding procedural changes and unilaterally implementing changes to General Order 99-04, specifically Section IV, sub-section C and Section VI, sub-section A(6) and B(2e) (J-5).

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees, particularly by failing to reach an agreement regarding procedural changes and unilaterally implementing changes to General Order 99-04, Section

IV, sub-section C and Section VI, sub-section 6, items A(6) and B(2e) (J-5).

B. Take the following affirmative action:

1. Immediately rescind the revised General Order 99-04 (J-5) and restore General Order 99-04 (J-2).

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, thereafter, being signed by the Respondent's authorized representative, shall be 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.

Wendy L. Young
Hearing Examiner

DATED: September 29, 2008
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 09, 2008.

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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by the Act, particularly by failing to reach an agreement regarding procedural changes and unilaterally implementing changes to General Order 99-04, Section IV, sub-section C and Section VI, sub-section A(6) and B(2e).

WE WILL NOT refuse to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees, particularly by failing to reach an agreement regarding procedural changes and unilaterally implementing changes to General Order 99-04, Section IV, sub-section C and Section VI, sub-section A(6) and B(2e).

WE WILL immediately rescind the revised General Order 99-04 (J-5) and restore General Order 99-04 (J-2).

Docket No. CO-2005-243 City of Newark
(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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"