

H.E. NO. 2009-1

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

In the Matter of

HOUSING AUTHORITY OF THE CITY OF NEWARK,

Public Employer,

-and-

Docket No. CO-2007-378

NEWARK UNION OF INDEPENDENT SPECIAL
POLICE, LOCAL 202,

Charging Party.

SYNOPSIS

In a dual motive case, a Hearing Examiner recommends that the Commission dismiss the retaliation claims asserted by Local 202. Though hostility to protected conduct was a motivating factor in laying off all of Local 202's members, the Hearing Examiner found that they would have been laid off absent any protected conduct as part of a large reduction in force. The Hearing Examiner also recommends that the Commission find that the Newark Housing Authority violated 5.4a(1) and (5) of the Act when it failed to provide Local 202 with a copy of the unexecuted agreement for City police services. That document, the Hearing Examiner found, is potentially useful to Local 202 in representing its members.

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

For the Charging Party
Oxford Cohen
(Gail Oxford Kanef, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 26, 2007, the Newark Union of Independent Special Police, Local 202 (Local 202) filed an unfair practice charge and application for interim relief against the Housing Authority of the City of Newark, commonly referred to as the Newark Housing Authority (Housing Authority or Authority). The charge was amended on August 9, 2007, and alleges that the Housing Authority violated section 5.4a(1), (3) and (5)^{1/} of the New Jersey

^{1/} These provisions prohibit public employers, their
(continued...)

Employer-Employee Relations Act (Act) when it announced that it was terminating the employment of all Local 202 members. Local 202 alleges further that its members are being terminated in retaliation for exercising rights guaranteed by the Act and that the announced terminations have put a chilling effect on the parties' contract negotiations process. The charge additionally alleges that the Housing Authority has refused to provide Local 202 with a copy of the agreement or draft agreement with the City of Newark (City) to provide police services to the Housing Authority.

In Newark Housing Authority, I.R. No. 2008-2, 33 NJPER 223 (¶84 2007), the Commission Designee denied Local 202's application for interim relief and forwarded the charge to the Director of Unfair Practices for further processing (C-3).^{2/} On

1/ (...continued)
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; (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."

2/ "C" refers to Commission exhibits, "J" designates exhibits jointly submitted by the parties, "CP" refers to Charging Party's exhibits and R" refers to Respondent's exhibits, all of which were received into evidence at that hearing. "T" designates transcript with the number preceding the "T"

(continued...)

September 26, 2007, the Director issued a Complaint and Notice of Hearing (C-1).

The Housing Authority filed its Answer on October 22, 2007 (C-2). It contends that the allegations in the charge are "baseless" and "unfounded." The Housing Authority maintains that the change to Newark City police providing armed security was for more effective delivery of services with an economic savings to the Authority. The termination of Local 202 employees, the Authority notes, was part of a large reduction in workforce over a sixteen month period.

On December 12, 2007, March 4 and 19, 2008 and May 16, 2008, I conducted a hearing during which the parties presented evidence and legal argument. Post-hearing briefs were simultaneously submitted on July 25, 2008. Based upon a review of the record, I make the following:

Findings of Fact

1. Local 202 is an employee representative within the meaning of the Act (1T21). It represents all armed special police, excluding supervisory special police, employed by the Housing Authority (J-1; 1T53, 1T98; 2T42; 3T51). The armed special police are also referred to as Security Officer II's (R-7; 1T31).

2/ (...continued)
indicating the day of hearing and the number following the
"T" representing the page.

The Housing Authority also employs unarmed security personnel. They are in their own negotiations unit and are represented by a different majority representative (1T52-1T53, 1T98; 2T42; 3T51; 4T40).

2. The Housing Authority is a public employer within the meaning of the Act (1T21).

3. The Housing Authority and Local 202 are parties to a labor agreement for the term of April 1, 2001 through March 31, 2004 (J-1; 1T7).

4. The special police are hired to protect the residents, visitors and property of the Housing Authority. They have the power to arrest and enforce motor vehicle laws. They issue summonses. If a criminal investigation is needed, the City police are brought into perform the investigation. In such instances, the City police make any associated arrests (1T31-1T32, 1T159; 2T60-2T61, 2T76-2T77; 3T60, 3T101-3T102; 3T110; 4T59-4T60).

Compared to regular City police, Security Officer II's are restricted in that they cannot work undercover in plain clothes or execute search warrants. Their commissions need to be renewed annually by the City unlike City police officers who receive permanent appointments (3T80, 3T83-3T84, 3T98-3T99).

5. Until June 12, 2007, the Authority employed about 26 to 28 armed special police (3T103; 4T58). They were responsible for

providing around-the-clock security for about 44 Housing Authority properties (3T103; 4T58), though they were primarily responsible for the security at 11 or 12 senior housing facilities managed by the Authority (1T32).

6. The City police have always had the responsibility to provide baseline services to the Housing Authority and its residents. Like any citizen, residential or commercial property owner of the City, the Authority and its tenants receive baseline law enforcement services from the City without paying a fee. Baseline services include responding to police calls and patrolling the neighborhoods. The City has also provided above-baseline services to the Housing Authority for a fee. Above-baseline services are police services other than those typically provided by the City to its citizens and are above and beyond routine patrols and calls for service (CP-5; 2T5-2T7, 2T9-2T10; 4T24-4T26).

7. In May, 2005, Darryl Johnson was elected president of Local 202 (1T34). Prior to his assuming the presidency, Local 202 had not aggressively represented its membership. It had not filed grievances, unfair labor practice charges or taken contract negotiations to the point of interest arbitration (1T106-1T107; 3T36, 3T44).

Once Johnson became president of Local 202, he began to file letters of concern with the personnel department of the Housing

Authority requesting meetings (1T36). During his 25 month tenure as president, Local 202 filed about five grievances (some of which were appealed to arbitration) and one unfair practice charge (not including the subject charge) (1T102-1T103 1T123; 3T44). The parties ultimately settled the grievances and the charge (1T126-1T127).

Local 202 also filed for interest arbitration while Johnson was president. The Housing Authority opposed Local 202's Petition to Initiate Compulsory Interest Arbitration on the grounds that the special police were not police officers covered under the interest arbitration statute. The Commission ruled that the special police were covered by the statute and entitled to initiate the process (1T105-1T107). The Authority did not appeal the decision (1T107-1T108, 1T129).

The parties continued to negotiate on their own prior to meeting with the interest arbitrator. Before each negotiations session, labor counsel for the Housing Authority reminded Local 202 of his opinion that the Commission decision was incorrect and that Security Officer II's were not entitled to interest arbitration (1T107-1T108, 1T127-1T128).

The appointed interest arbitrator conducted two mediation sessions with the parties. Mediation was unsuccessful and a two-day interest arbitration hearing was held in April 2007 (1T63-1T64, 1T111, 1T129). Before the record was closed in the

proceeding and about six weeks after the last day of hearing, all of the special police were laid off on June 12, 2007. They were paid, however, through the end of the week, June 15, 2007 (CP-1; 1T32-1T33, 1T36, 1T51, 1T56, 1T111-1T112; 3T121-3T122).

8. Johnson testified that former Chief of Security Joseph Foushee warned him on two occasions, August 17 and November 18, 2006, that if he kept filing grievances and giving the Authority a hard time, Foushee would recommend to the Housing Authority Board of Commissioners that all of the special police be terminated from employment (1T37-1T38, 1T71-1T72). Johnson also testified on direct examination that Larry Howell, Assistant Personnel Director for the Authority, told him in September 2006 that if he kept filing grievances he could be terminated and the entire negotiations unit could be disbanded (1T38). On cross-examination, Johnson changed the date of his conversation with Howell to March 2007 and testified specifically where the conversation took place and that no one else was present when it occurred (1T82-1T84).

Foushee testified that he retired from the Authority on December 31, 2005 and had no further working relationship with the Authority thereafter (3T30, 3T37). He denied making any comments to Johnson regarding the repercussions for continuing to file grievances (3T33). Howell also testified and denied making

the comments attributed to him by Johnson, declaring: "I do not threaten people" (3T42, 3T44).

Johnson was recalled as a witness on the last day of hearing and changed his testimony regarding the year that the conversations took place with Foushee. After reviewing his notes and hearing other witnesses' testimony, he realized that the conversations took place in 2005 and not in 2006 as he had previously stated (4T79).

Though Johnson confused dates while testifying, I credit his testimony and find that the statements were made by Foushee and Howell. While Johnson was not the most articulate witness, I believe he testified honestly with an uncanny ability to remember the substance of conversations accurately. During the first day of hearing, Johnson recounted what was said by the Housing Authority at the June 12, 2007 meeting when Local 202 members were informed they were being laid off. He testified that the reason given for the layoff was financial and that the Authority was "going in another direction" with security (1T51). On the third day of hearing, the Authority called Tory Gunsolley, Chief Administrative Officer, as its witness. Though he had not attended either of the prior two days of hearing, Gunsolley testified that the Authority told Local 202 members at the June 12th meeting that the reason for the layoffs was that it was "going in a new direction" (3T130).

Contrastly, I found that when Foushee testified he was hesitant and his answers were guarded. He was careful to keep his responses brief and did not appear to be forthright. I believe that Howell made the statements attributed to him but also believe that he did not think they were threatening. He thought them to be matter of fact and informational.

While Johnson at times struggled to tell his story, he did so honestly with a measure of specificity that made his testimony believable. I credit his testimony over that of Foushee and Howell and find that the comments were made.

9. Johnson testified at the interest arbitration hearing conducted in April 2007. After that, he believed he was treated differently and disparately by his immediate supervisor, the current Chief of Security, Edward Malia. Johnson claims that he was written up a couple of times and had his shift changed by Malia. Also, Johnson testified that Malia made negative comments about his face (1T49-1T50).

Malia acknowledged initiating the disciplinary process twice against Johnson but denies treating him disparately. Malia claims that Johnson was treated like all other employees under his supervision. There was no evidence introduced to refute the shift change or negative comments claims (3T89-3T94).

The evidence did not establish that Johnson was disparately treated after he had testified at the interest arbitration

hearing. The small amount of time spent by the parties litigating over this issue and the scant uncorroborated evidence introduced leads me to conclude that it is incidental to the case and I do not find that Johnson was treated differently after testifying at the interest arbitration hearing.

10. In June, 2006, Keith Kinard became the new Executive Director of the Housing Authority. The Executive Director is the highest administrative position at the Authority and is responsible for the daily operations. Prior to working at the Newark Housing Authority, Kinard was the Executive Director of the Pittsburgh Housing Authority (2T36-2T37; 4T43). He was appointed Executive Director of the Newark Housing Authority to help turn around the "troubled" agency. A "troubled" housing authority is a designation given by the U.S. Department of Housing and Urban Development (HUD) to housing authorities that perform inadequately. The Housing Authority failed to perform adequately in several categories, such as financial management and quality conditions of living units (2T43; 4T45-4T46).

Kinard initially assessed all operations of the Housing Authority. He met with the various departments of the Housing Authority, including security, to solicit input and share ideas on how to improve the operations and living conditions at the Authority. During his initial meeting with security, both armed and unarmed, he asked what management could do to help them be

more successful at their jobs. He also mentioned that he was dissatisfied with the consistently low number of arrests by armed security (2T39-2T40, 2T42-2T43, 2T48-2T49, 2T53, 2T63, 2T72; 4T47, 4T49-4T50).

Prior to Kinard's arrival at the Authority, armed security had been instructed by the former Chief of Security not to make arrests unless the circumstances absolutely dictated it. They were told to diffuse disputes and situations, and avoid making arrests where possible. Their primary responsibility, Local 202 members were told, was to be a visible deterrent to crime, to just be a presence and monitor areas (1T153-1T156, 1T160; 2T62, 2T66, 2T76).

Subsequent to the initial meeting, Kinard met with the Executive Board of Local 202 during the late summer and fall of 2006. Local 202 was advised that layoffs of other Authority employees would take place during the fall. Kinard indicated that Local 202 members would not be laid off at this time, but made clear that they needed to improve their job performance by increasing the number of arrests they make (CP-3, CP-4; 1T38-1T45; 2T47-2T49, 2T65-2T66, 2T69-2T72, 2T74).

11. Before any layoffs, the Housing Authority employed about 1,000 people (4T18, 4T44). Due to a reduction in funding and increasing costs, the Housing Authority began to lay off employees in the fall of 2006 (CP-3, CP-4; 1T44, 1T67-1T69,

1T130, 1T145; 4T68-4T69, 4T76-4T77). Prior to laying off Local 202 members in June 2007, the Authority had laid off 213 employees from many different job categories across the entire agency. For example, 84 administrative office personnel, building maintenance and repair employees were laid off and the Modernization Department of the Authority was completely eliminated before the Security Officer II's of Local 202 were laid off (1T69; 2T43-2T44; 4T22, 4T29-4T32, 4T39).

12. Roughly during the same time period that the Housing Authority was laying off other employees, it continued contract negotiations with Local 202 in an attempt to settle the contract before the April 2007 interest arbitration hearing. The possibility of layoffs of Local 202 members was not mentioned during negotiations, nor were issues concerning their job performance raised then. In fact, comments were made during this time (fall of 2006 through April 2007) which led the Local 202 leadership to believe that its members would not be laid off. For example, the hiring of new special police officers and the acquisition of new patrol cars and equipment were discussed between the parties (1T38-1T40, 1T42-1T44, 1T49, 1T116-1T118; 2T68-2T71).

13. As directed by Kinard, the Security Officer II's began making more arrests in the fall of 2006 (R-3; 2T75, 2T78; 3T68). Although the number of arrests increased, the Authority remained

concerned. Kinard reminded Local 202 leadership of the concern, though it was never reduced to writing, nor was any officer ever disciplined for failing to make arrests (2T47-2T48, 2T53).

There came a point in time, though unclear from the record, that Kinard concluded that the Security Officer II's were not up to the challenge of helping to turnaround the living conditions at the Authority (4T51). Chief of Security Malia determined that there were too few special police (about 28) to cover the 44 Authority facilities around-the-clock (3T60-3T61). Kinard and Malia met with Newark City Police Director Garry McCarthy to discuss improving security at Housing Authority properties. During at least one of the meetings, Malia expressed his dissatisfaction with the number of arrests the special police were making (2T33-2T34).

Around the first week in June 2007, Kinard and Malia advised McCarthy that the Authority was going to lay off the special police. They wanted him to know in advance that there would no longer be armed security at Authority locations. It was McCarthy's understanding that the layoff was for financial reasons. No other reason was given to him (2T9, 2T19-2T20, 2T23, 2T28; 4T52).

14. On June 12, 2007, the Authority called a meeting with representatives of Local 202. Five or six representatives from the union attended, including Darryl Johnson; Pamela McCoy, Vice

President; and Sanford Oxfeld, labor counsel. Attending for the Authority were Tory Gunsolley; Edward Malia; Sibyl Bryant, Chief of Human Resources; and Gerald Dorf, labor counsel. Local 202 was informed that all of the armed security were being laid off effective that day but the personnel would be paid through June 15, 2007.

Johnson and Gunsolley testified that the reason given for the layoff was that the Housing Authority was going in a new or different direction with how it provided security. Johnson added that they were told that the Authority was going in another direction because of fiscal problems and that it was going to use City police to patrol Housing Authority property.

Labor counsel Oxfeld testified that the only reason given for the layoff was that the Authority could save money by having the City police provide security. Oxfeld further testified that the job performance of special police or the delivery of better services were not reasons given for the layoff at the June 12th meeting.

Bryant testified that the reasons given to Local 202 representatives at the June 12th meeting for the layoff were economy, efficiency and due to the limited services Security Officer II's were capable of providing. Her testimony was supported by a letter given to the laid off employees later that day citing these reasons for the layoff (CP-1; R-7; 1T33, 1T51,

1T56-1T58; 1T111-1T112, 1T119-1T120, 1T133, 1T137-1T138; 3T119-3T122, 3T130).

I find all the testimony to be credible, consistent and true. Contained in the broad expression, "for reasons of economy and efficiency," is the notion of saving money by having the City police provide armed security. The phrase, "going in another direction", communicates that the Authority has decided to deliver services differently. Instead of bluntly commenting on the job performance of the special police at a meeting where the decision to lay them off was already made and they were already going to feel bad, the reason was couched in more diplomatic terms as "limited services Security Officer II's were capable of providing." Accordingly, I find that the Local 202 representatives were informed at the June 12, 2008 meeting that the layoffs were due to a new approach to providing improved security at a lower cost.

15. At the June 12th meeting, Oxfeld was advised that the Housing Authority and City had entered into a written agreement to provide for City police coverage. He requested a copy of the agreement so that he could effectively represent his client in the unconcluded interest arbitration proceeding, negotiating issues attendant to the layoff and other matters. He was initially told that he would be provided a copy. When a copy was not forthcoming, Oxfeld initiated a series of requests only to be

informed that a fully executed copy of the agreement did not exist. Undeterred, he requested a copy of the unexecuted agreement. He was not provided one despite repeated requests. Oxfeld was later told that the agreement was done on a handshake. Local 202 has never been provided a copy of the unexecuted agreement, though one exists as confirmed by City Police Director McCarthy and Housing Authority Executive Director Kinard (1T121-1T123, 1T139-1T142, 1T146; 2T22-2T23, 2T54).

16. For the budget year before the special police were laid off and the budget year they were laid off, the Housing Authority received no funding specifically for housing safety and security (R-8; 4T68-4T69, 4T75-4T77). This was part of the funding cutbacks the Authority was experiencing. The declining financial condition of the Housing Authority led to more layoffs. Approximately 237 employees have been laid off since the Security Officer II's were laid off, bringing the total number of layoffs to 450 out of 1000 employees (4T18-4T22, 4T44). The entire Housing Choice Voucher Program and warehouse department were laid off, for example (4T35, 4T37-4T39). The unarmed security employees of the Authority, however, have not been laid off (4T40, 4T74-4T75).

17. After the special police were laid off, the City continued to provide baseline services and tactical crime suppression, as needed, to the Authority. City police presence

at the Housing Authority has not increased due to the departure of the special police (2T7-2T12). The City police have also provided above-baseline services to the Authority since the elimination of the special police. The Housing Authority has not been charged for those services but it may be charged some time in the future (4T26-4T27, 4T36-4T37, 4T40-4T41).

18. The number of arrests made on Housing Authority property has increased since the special police layoff, though the specials would not have been authorized to make some of the arrests even if they had still been employed by the Authority (R-3; R-4; 2T19; 3T60, 3T72-3T73, 3T83, 3T101-3T103, 3T110; 4T53). The overall living conditions at the Authority have improved and HUD has upgraded the Housing Authority's classification from a "troubled" to a "standard performing" agency (4T46, 4T55-4T56).

ANALYSIS

Local 202 contends that its members were laid off for exercising rights protected under the Act; namely the filing of grievances, an unfair practice charge and asserting its right to interest arbitration. It also claims that the Housing Authority violated the Act when it did not provide the unexecuted copy of the agreement for City police services.

The Housing Authority maintains that the special police layoff was a small part of a large reduction in force and had nothing to do with their exercising rights guaranteed by the Act.

It argues that the layoff was a cost savings measure which resulted from the Authority changing the way in which armed security is provided to its residents.

A) The a(3) retaliation claim.

Our State Supreme Court approved the standard by which PERC evaluates claims of retaliation in In re Bridgewater Tp., 95 N.J. 235, 245 (1984). There, the Court stated that:

The New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 to -21, makes unlawful a discharge or otherwise adverse public employer action against a worker because of his or her union activity. N.J.S.A. 34:13A-5.4a(1) and (3). Public employers still retain the right, however, to discharge a worker for a legitimate business reason, unrelated to the employee's union activities. Id. at 237.

Under Bridgewater Tp., 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. Even if a charging party proves that hostility to protected activity was a substantial or motivating factor in the adverse action, the employer will not be found to 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 activity. Id. at 242. Conflicting proofs concerning the employer's motives are for the finder of fact to resolve. See, County of Hudson, P.E.R.C. No. 2008-43, 34 NJPER 13 (¶6 2008).

After reviewing the entire record, I find that protected conduct was a motivating factor in laying off the special police, but conclude that they would have been laid off any way as part of a large reduction in force. Therefore, I recommend that the a(3) allegations of the amended Complaint be dismissed.

Local 202 engaged in protected activity. It went from being a passive union to one that filed several grievances, an unfair practice charge and a petition to initiate compulsory arbitration, all in a 24 month period. It caused the financially struggling Housing Authority to expend time and money opposing these actions. Local 202 even went so far as not to settle its successor contract with the help of the interest arbitrator acting as a mediator, thereby necessitating a formal hearing. Of course, the Housing Authority was aware of these protected activities as it participated in the various processes and proceedings.

The Housing Authority argues that it was not hostile to Local 202 for its filings. The Authority contends that such filings and hard bargaining are to be expected in the course of typical management-labor relations. Moreover, it asserts, the

grievances and unfair practice charge were settled, making it unreasonable to find hostility toward Local 202.

I find, to the contrary, that the Housing Authority was hostile toward Local 202's protected conduct and that this hostility was a motivating factor in the special police layoff. The statements made by former Chief of Security Foushee and Assistant Personnel Director Howell to Local 202 President Johnson that the Security Officer II's would be terminated and the unit disbanded if the union persisted in filing grievances are direct evidence of hostility toward protected conduct. I find the timing of the layoff -- in the middle of an interest arbitration proceeding -- to be suspicious and further evidence of the Authority's hostility. See, Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985) (timing of adverse employment action is a consideration in retaliation cases). The repeated comments by Authority counsel to Local 202 counsel that Local 202 should never have won the PERC ruling (entitling it to interest arbitration) could be construed as additional evidence that the Authority was truly annoyed for being taken to task. However, in the context of this case, I find counsel's comments to be good natured chiding between two competitive advocates who have known each other for decades.

Having found that the Authority's hostility toward Local 202's protected activities was a motivating factor in the layoff, I must evaluate whether the Authority has shown by a preponderance of the evidence on the entire record, that it would have laid off the Security Officer II's absent the protected conduct. I find that it would have laid them off even if there had been no protected conduct.

The Housing Authority had been struggling financially due to cutbacks in federal funding and rising costs. It specifically had not received any funding for housing safety and security in the year prior to and the year of the special police layoff. The Authority hired Kinard as its Executive Director in June 2006 to help turnaround an agency with inadequate financial management and living conditions. He made assessments of operations and costs. He determined that the Security Officer II's were not up to the task of providing adequate crime suppression at the Authority. Whether the Security Officer II's were too few in number to be effective or whether there were issues with job performance, or both, he decided that the Authority would get out of the armed security business and let the City police provide armed protection at a lower cost.

As part of an overall cost savings plan, the Housing Authority laid off 45% of its staff during a sixteen month period. The reduction in force came from all departments of the

agency, including security. The special police comprised 6% of the entire layoff.

Local 202 argues that the reasons for laying off the special police are pretextual. It contends that four different reasons were given for the layoff: (1) the Authority was going in a different direction with how it provided security, (2) the special police were too small in number to be effective, (3) it was a cost savings measure, and (4) for reasons of economy, efficiency and due to the limited services the specials can provide. I find all of these reasons to be consistent and legitimate, and they were communicated to Local 202 representatives at the June 12, 2007 layoff meeting.

Local 202 argues further that for two budget years before the special police were laid off the Authority did not receive funding for security yet some how found a way to pay them. Additionally, Local 202 points out that the Authority still employs the unarmed security personnel.

The Housing Authority has the prerogative to change the way in which armed protection is provided, including having another public employer take over that function, so long as it is for legitimate business purposes unrelated to union activities. In County of Hudson, the Commission dismissed unfair practice charges filed by the PBA's alleging that the County abolished the police department in retaliation for the PBA's obtaining

automatic salary increments through interest arbitration and transferring the work to the Hudson County Sheriff. Unlike the instant case, the Commission concluded that anti-union animus was not a motivating factor in the County's decision. But, in its decision, the Commission also affirmed a public employer's prerogative to reorganize the way it delivers police services, including transferring the function to another public employer.

The principles articulated by the Commission in County of Hudson apply here as well. Just because the Housing Authority found a way to pay for the special police when it did not receive funding for security does not mean it is obligated to continue to do so. After assessing its operations and declining resources, the Authority made a decision to change the way armed police protection was provided, presumably for the better, and at a lower cost by having the City provide the service. These are legitimate business reasons and are not pretextual.

The fact that the Authority laid off armed security but retained unarmed security does not demonstrate that the reasons are pretextual or that the layoff would not have taken place but for the protected activity. Entire departments were laid off and functions eliminated during the overall reduction in force. Armed security was just one of them.

Local 202 also contends that the job performance of its members is a pretextual reason for the layoff. It claims that up

until the year 2005 the special police were instructed not to make arrests unless absolutely necessary. After Kinard arrived at the Authority in 2006, the special police were never given a written directive to increase arrests nor was any one ever disciplined for not doing so. This demonstrates that the issue really was not that important to the Authority, Local 202 argues.

Kinard was hired in part to improve the living conditions at the Authority. Living conditions are affected by the level of crime. After evaluating the situation, Kinard had the managerial right to change the policy toward arrests. He had the prerogative to change the standard of performance expected of the special police. He did so and communicated the same to Local 202 leadership on several occasions. The fact that Kinard did not reduce his expectations to writing or discipline Local 202 members does not convince me that job performance is a pretextual reason for the layoff. He told them what he expected, which is sufficient, and the absence of disciplinary action does not mean that job performance was not a genuine concern.

While the timing of the special police layoff may have been influenced by the interest arbitration proceeding, I find they would have eventually been laid off in the large reduction in force absent all of the protected activities of Local 202. In an attempt to provide improved security at a lower cost, the Housing Authority had the managerial right to stop directly providing

armed security and have the City police take over the function. Accordingly, I do not find that the Authority violated the Act when it laid off all of its special police and recommend that the Commission dismiss the a(3) retaliation allegations of the amended Complaint.

B) The a(5) failure to provide agreement claim.

Despite repeated requests from Local 202, the Housing Authority has not provided the unexecuted agreement for City police services. Local 202 contends that the Authority has violated subsection 5.4a(5) of the Act by not supplying it with information it may need to ably represent its members.

The Authority claims that it does not know where a copy of the agreement is and questions the relevancy of an unexecuted agreement.

The Commission set forth the standard for an employer's duty to supply information in its possession in Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981). Relying on federal precedent, it held that a public employer must supply information if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Relevance in this context is determined under a discovery-type standard, not a trial-type standard, and therefore a broad range of potentially useful information should be allowed the union for the purpose of

effectuating the negotiations process. A public employer is required to provide its employees' union with the information so that the union can better evaluate the merits of its members' claims against the public employer. Not all information must be disclosed. An employer is not obligated to supply information that is clearly irrelevant or confidential. This standard has been reiterated by the Commission over the years and quoted approvingly by the New Jersey Supreme Court. In re University of Medicine & Dentistry of New Jersey, 144 N.J. 511, 530-531 (1996); State of New Jersey (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987) recon. den. P.E.R.C. No. 88-45, 13 NJPER (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988).

The Housing Authority does not claim that the agreement is confidential having initially offered to provide it to Local 202. The agreement, though unexecuted, could potentially shed light on the terms under which the City is providing police services in the wake of the special police layoff. These terms could potentially be useful to Local 202 in the unconcluded interest arbitration proceeding and would have been potentially useful in negotiating over issues attendant to the layoff and in preparing for this hearing.

There is no evidence to suggest that with a little effort the Housing Authority could not find a copy of the unexecuted agreement and provide it to Local 202. I find that the document

is potentially relevant and would be of use to Local 202 in the execution of its statutory duties. Accordingly, I conclude that the Housing Authority violated subsections 5.4a(5) and derivatively (1) of the Act, when it did not supply the unexecuted agreement to Local 202 after repeated requests for the same.

Recommendation

I recommend that the Commission dismiss the a(3) retaliation claims asserted by Local 202. I further recommend that the Commission find that the Housing Authority violated a(5) and (1) of the Act for failing to provide Local 202 with a copy of the unexecuted agreement for City police services and order it to supply the document to Local 202 within 30 days of this decision.

Recommended Order

I recommend that the Commission ORDER that:

A. The Newark Housing Authority cease and desist from:

1. Interfering with, restraining or coercing the special police officers in the exercise of the rights guaranteed to them by the Act.

2. 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.

B. That the Newark Housing Authority take the following affirmative 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. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Perry O. Lehrer
Hearing Examiner

DATED: September 4, 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 September 15, 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 cease and desist from interfering with, restraining or coercing the special police officers in the exercise of the rights guaranteed to them by the Act.

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

City of 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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372