I.R. NO. 2018-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2018-229

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the SOA against the City alleging that the City violated subsections 5.4a(1), (3), (5), and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the City's Police Director issued Memorandum No. 18-199, the subject of which is "Failure to Appear in Court," while the parties were in negotiations for a successor agreement. The Designee found that the SOA had not demonstrated a substantial likelihood of prevailing in a final Commission decision. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Petitioner, France Casseus, Assistant Corporation Counsel[1/]

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

INTERLOCUTORY DECISION

On March 28, 2018, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge alleging that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act, specifically subsections N.J.S.A. 34:13A-5.4(a)(1), (3), (5), and (7)[2/] by unilaterally changing terms and

1/ While the Assistant Corporation Counsel is named as the City's representative based upon the Association's proof of service of its charge and application, it should be noted that there was no appearance made on the Respondent's behalf.

2/ 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 (continued...)

conditions of employment when the City's Police Director issued Memorandum No. 18-199, the subject of which is "Failure to Appear in Court," while the parties were in negotiations for a successor collective negotiations agreement (CNA). The charge was accompanied by an application for interim relief, together with a supporting letter memorandum, exhibits, and the certification of the SOA President.[3/] The application for interim relief seeks an order temporarily restraining and rescinding Memorandum No. 18-199 during negotiations for a successor agreement or until a final order of the Commission or its designee.

On April 3, 2018, I executed an order to show cause setting April 17 as the date for oral argument on the application and

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2/ (...continued)
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," and "(7) Violating any of the rules and regulations established by the commission."

I do not consider the (a)(3) and (a)(7) claims inasmuch as the SOA does not develop them in its interim relief application or its unfair practice charge. It does not identify which Commission regulations that the City allegedly violated or set forth facts that would suggest the City discriminated in regard to terms and conditions of employment or retaliated against SOA members.

3/ On March 29, 2018, the SOA filed a second certification, that of Captain and SOA Treasurer Gary Vickers, which reiterated much of the President's certification.

April 13 as the deadline for the City to file a response to the application. The City did not file a response. As a result, oral argument was canceled.

Findings of Fact[4/]

The SOA represents all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain. The City and SOA are parties to a CNA effective from January 1, 2013 through December 31, 2015. According to the SOA President, the parties are in negotiations for a successor agreement.

Memorandum No. 18-199, dated March 27, 2018, provides in pertinent part as follows:

> It has been brought to my attention that Newark Police Department personnel are failing to appear for court when subpoenaed to do so.
>
> Personnel who fail to appear in court in violation of General Order 70-3 "Court Appearance Subpoenas and Notices" or in violation of Rules and Regulations Chapter 10 "Courts and Court Procedures" shall face **immediate suspension.**
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> [Emphasis in original.]

General Order 70-3, effective June 10, 1974, and Chapter 10 of the Department Rules and Regulations require police officers under subpoena or direction to attend municipal, county, or other court or judicial body to report at the time and on the date

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4/ For the sake of convenience, background information regarding prevailing legal standards applicable to civil service municipalities is included in this section.

specified. Chapter 10, which does not bear an effective date, also delineates procedures for an officer to follow when he or she cannot report to court as directed. General Order 70-3 states that a "member who fails to comply with a subpoena is subject to Contempt of Court charges" and to "Departmental charges."[5/]

The CNA's grievance procedure provides that a grievance over minor discipline as defined by regulations of the Civil Service Commission (CSC) shall proceed through the negotiated grievance arbitration procedure and that all major discipline shall proceed through the hearing procedures provided by the CSC statute and regulations. Civil Service regulations define minor discipline as a formal written reprimand or a suspension or fine of five working days or less; major discipline is a removal, disciplinary demotion, or suspension or fine of more than five working days. N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1, respectively.

Newark is a civil service jurisdiction. Normally, before imposing major discipline upon an employee in the career service of a civil service municipality, the municipality must serve the employee with a Preliminary Notice of Disciplinary Action (PNDA) that sets forth the charges and a statement of facts supporting them, and the employee must be afforded the opportunity for a

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5/ I requested, and on April 17, 2018, the SOA furnished copies of General Order 70-3 and Chapter 10 of the Police Department's Rules.

hearing. See N.J.S.A. 11A:2-13. However, that statute and N.J.A.C. 4A:2-2.5(a) permit a civil service municipality to immediately suspend an employee, prior to a hearing, when the employee has been formally charged with certain crimes,[6/] or where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or where it is determined that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. In addition, N.J.S.A. 40A:14-149.1 provides, "Notwithstanding any other law to the contrary, whenever any municipal police officer is charged under the law of this State, another state, or the United States, with an offense," the officer may be suspended with pay until the disposition of the case or dismissal of the charges and without pay "if a grand jury returns an indictment against said officer, or said officer is charged with an offense which is a high misdemeanor or which involves moral turpitude or dishonesty."

Procedural requirements attendant to the immediate suspension of an employee in a civil service municipality are set forth in civil service regulations. N.J.A.C. 4A:2-2.5(a)1 requires the appointing authority to serve upon the employee, in

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6/ Per the regulation, an employee may be immediately suspended when formally charged with a crime of the first, second, or third degree or a crime of the fourth degree on the job or directly related to the job.

person or by certified mail, a PNDA with an opportunity for a hearing within five days following the immediate suspension. N.J.A.C. 4A:2-2.5(b) provides that prior to the imposition of the suspension, the employee must be apprised, orally or in writing, "of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority." N.J.A.C. 4A:2-2.5(b) further provides that the employee's response may be either oral or in writing, at the discretion of the appointing authority. Lastly, N.J.A.C. 4A:2-5(e) provides, "Appeals concerning violations of this section may be presented to the Civil Service Commission through a petition for interim relief. See N.J.A.C. 4A:2-1.2." See also Matter of Pamela Sitek, DOP Dkt. No. 2004-4040, Merit System Bd., decided July 14, 2004 (procedural deficiencies, including failing to serve PNDA within five days of immediate suspension, do not warrant dismissal of charges but remedy of award of back pay for number of days service of the PNDA was late).[7/]

Newark Police Department General Order 07-06, dated June 3, 2009, purports to "codify the existing process for the immediate

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7/ Available on Civil Service website at - http://www.state.nj.us/csc/msb/decisions04/2004July/pdf/PamelaSitek.pdf

or indefinite suspension of a police officer."[8/] It begins by stating that an immediate suspension must be objectively determined on a case-by-case basis in accordance with N.J.S.A. 40A:14-149.1 and N.J.A.C. 4A:2-2.5 and -2.7 and approved by the Police Director.[9/] It continues by listing the grounds for immediate suspension, as set forth in N.J.A.C. 4A:2-2.5(a), and in the case of a suspension without pay, in N.J.S.A. 40A:14-149.1.

As it relates to the instant matter, General Order 07-06 also establishes certain procedural safeguards similar to and in some cases mirroring those imposed by N.J.A.C. 4A:2-2.5(a), as follows:

> "Advise the individual in writing - (by use of the 'Suspension Notice') or verbally why an immediate suspension is being sought and the charges and general evidence in support of the charges. In the event that the individual refuses to accept the notice, a copy must be provided to the officer's collective bargaining representative as soon as possible."

8/ I requested, and on April 18, 2018, the SOA provided the General Order. I requested it because it was mentioned in an earlier Commission decision involving the City's immediate suspension of two rank-and-file police officers. That decision, City of Newark and FOP Lodge 12, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011), will be discussed later.

9/ N.J.A.C. 4A:2-2.7 sets forth the criteria for suspending an employee pending disposition of a criminal complaint or indictment, which is the standard set forth in N.J.A.C. 4A:2-2.5(a)1. It also sets forth procedures for and limitations upon indefinite suspensions.

> Within five days of the suspension, a PNDA must be served upon the officer.
>
> Withing five days of receipt of the PNDA, the officer may request a departmental hearing on the charges.

General Order 07-06 also assigns various responsibilities to commanding superior officers. These include conducting a preliminary investigation to determine if the officer's conduct meets one of the conditions for immediate suspension and preparing various reports and forms, including the Suspension Notice and PNDA.

Discipline is also the subject of General Order No. 93-2. Pursuant to this Order, major disciplinary charges against an officer are heard by a trial board consisting of the Police Director or designee and two other command officers; minor disciplinary charges are heard by a commander at the precinct or divisional level. This Order does not mention immediate suspensions.

The SOA does not allege, and there is no evidence in the record, that a superior officer has been immediately suspended as a result of the issuance of Memorandum 18-199.

Legal Argument

In its letter memorandum (at 8), the SOA maintains that Memorandum No. 18-199 alters terms and conditions of employment in that the "order does not allow the accused member to have a hearing, review evidence or reports and does not allow the cross

examination of witnesses." It appears to be the SOA's argument (at 10 and 13) that its members are entitled to these protections, along with the "right to a disciplinary conference or a trial board," under the Department's General Orders 93-2 and 05-04, "Internal Affairs,"[10/] and that Memorandum 18-199 modifies these General Orders or eliminates these protections. In addition, the SOA argues in its letter memorandum (at 13), without explication, that Memorandum 18-199 repudiates the CNA's Article XXV, "Investigations," which provides:

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

ANALYSIS

Given the City's failure to file opposition to the SOA's application, I find that the application is unopposed by the City. Even so, "an unopposed application must still satisfy the standards for granting interim relief." See N.J.A.C. 19:14-

10/ General Order 05-04, dated March 5, 2013, is 31 pages in length. The SOA does not refer to specific pages or sections of the Order that it believes have been altered by the Memorandum. Sections of the Order entitled Domestic Violence Procedures, Procedures for Returning Weapons to Disarmed Officers, Risk Management, Professional Standards Records Management, Periodic Reports, Records Retention Schedule, Personnel Records, Review Committees, Compliance, and Effect of Order do not appear to bear on immediate suspensions, which are not mentioned in the Order. I find that the SOA has not established the Memorandum 18-199 modifies the internal affair process of the Department.

9.3(b).[11/]

To obtain interim relief, the applicant must show each of the following elements: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief, and the public interest will not be injured if that relief is granted. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Although a preliminary showing of a reasonable probability of success on the merits must be made, "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." Id. at 133. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," which "may be inadequate due to the nature of the injury or the right affected." Crowe, supra, 90 N.J. at 132-33.

N.J.S.A. 34:13A-33 prohibits the unilateral alteration of terms and conditions of employment set forth in an expired collective negotiations agreement as well as the unilateral

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11/ N.J.A.C. 19:14-9.3(b) states in part:

> If no answering brief is filed, the application may be considered to be unopposed, provided, however, that an unopposed application must still satisfy the standards for granting interim relief.

imposition of other negotiable terms and conditions of employment without agreement of the majority representative.[12/] A public employer's unilateral alteration of such terms and conditions during negotiations for a successor agreement constitutes a refusal to negotiate in good faith in violation of subsection 5.4(a)(5) of the Act. Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978). Similarly, N.J.S.A. 34:13A-5.3 requires proposed new rules or modifications of existing rules governing working conditions to be negotiated with the majority representative before they are established.

Major discipline of police officers is not mandatorily negotiable, but a violation of disciplinary procedures is generally arbitrable so long as the employer's right to decide whether to impose major discipline unilaterally is not compromised. See Borough of Mt. Arlington, P.E.R.C. No. 95-46,

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12/ The statute provides:

> Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

21 NJPER 69 (¶26049 1995); City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (¶120 2009). See also, County of Monmouth v. Commc'ns Workers of Am., 300 N.J. Super. 272 (App. Div. 1997)(interpreting the discipline amendment to N.J.S.A. 34:13A-5.3 as permitting agreed binding arbitration to resolve disputes involving minor discipline of civil service employees, including municipal police officers).

In State of New Jersey and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91, P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), aff'd, 42 NJPER 165 (¶41 App. Div. 2015), the Commission determined the negotiability of several proposed contract articles for a collective negotiations agreement between the State and the majority representatives of three units of it law enforcement officers. One proposal, Section L.5, provided, "Before a permanent career service employee is suspended without pay pending dismissal, he shall promptly be given an opportunity for an informal hearing at which the employee will be informed of the charges made and a synopsis of the evidence on which the State intends to rely." The Commission determined that Section L.5 "as written in the current proposal, addressing immediate suspensions pending dismissals, is not mandatorily negotiable as a public employer has the prerogative to impose an immediate suspension of a law enforcement officer." Distinguishing an earlier decision where it determined that pre-disciplinary

procedures were mandatorily negotiable, the Commission noted that Section L.5 would bar the imposition of an immediate suspension unless its procedural aspects were first observed. The Appellate Division affirmed, stating with regard to the immediate suspension provision:

> [P]ERC found that the provision entitling permanent career service employees subject to suspension without pay pending dismissal to an informal hearing — wherein the State would provide a summary of the charges and synopsis of the evidence upon which it intends to rely — impermissibly infringes on the State's ability to impose discipline as a public employer has the prerogative to impose an immediate suspension of a law enforcement officer. See N.J.S.A. 11A:2-13.

In City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011), the City sought a restraint of arbitration of a grievance contesting the immediate suspension of two rank-and-file police officers. The majority representative of the officers, the FOP, argued that it was not contesting the discipline but rather whether the City followed proper procedures, including those set forth in General Order 07-06, when it immediately suspended the officers prior to a hearing. The Commission restrained arbitration in part, stating that "the City has a prerogative to impose discipline in the first instance, subject to review either pursuant to the grievance procedure or before the Civil Service Commission, depending upon whether the final discipline is minor or major," and that "arbitrator review of the City's decision to

bring major discipline for the captain's offenses would infringe upon" that prerogative. Conversely, the Commission declined to restrain arbitration to the extent the grievance contested whether the City complied with agreed-upon disciplinary review procedures, finding that the negotiated disciplinary process providing for review before a trial board or a disciplinary conference before a command officer was mandatorily negotiable.

Here, while there are no disputed material facts on account of the City's failure to respond to the interim relief application, the SOA has not provided sufficient evidence to enable me to determine whether Memorandum 18-199 alters negotiable terms and conditions of employment, particularly the procedures that must be followed before, and after, an officer may be immediately suspended for failing to obey the command of a subpoena or other directive to appear in court. Clearly, the City must comply at a minimum with both the substantive and procedural requirements of N.J.A.C. 4A:2-2.5. Given that no officer has been suspended based on Memorandum 18-199, and given the brevity of the Memorandum, a finding one way or another as to whether the City will comply with those requirements cannot be made; it can only be speculated.

Beyond that, whether General Orders 07-06 or 93-2 require additional or other protections, and if so, how they bear on the City's managerial prerogative to immediately suspend an officer,

are not clear at this juncture. As the Designee noted in Rockaway Township, I.R. No. 2018-8, 44 NJPER 243 (¶69 2017), recon. den., P.E.R.C. No. 2018-30, 44 NJPER 308 (¶86 2018), when a charging party alleges that an employer has unilaterally changed a working condition, it bears the burden of proving what the working condition was before the change, and what it became after unilateral action by the employer. This the SOA has not done. It has not shown whether the General Orders provide protections beyond the procedures mandated by N.J.A.C. 4A:2-2.5 which can be applied consistent with the City's managerial prerogative to impose an immediate suspension. Therefore, it has not demonstrated that it is substantially likely to prove that the Township has unilaterally changed a mandatorily negotiable term and condition of employment. Compare State of New Jersey (State Police), P.E.R.C. No. 2014-80, 40 NJPER 560 (¶179 2014)(rejecting unions' argument that grievances involved promotional procedures and therefore could proceed to binding arbitration where there was no record evidence that promotional procedures had been applied to the grievants).

Accordingly, I find that the SOA has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief pursuant to N.J.A.C. 19:14-9.5(b)(3). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.

/s/ Robin T. McMahon

Robin T. McMahon
Commission Designee

DATED: April 27, 2018

Trenton, New Jersey