H.E. NO. 89-34

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

In the Matters of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-167

NEWARK PBA, LOCAL NO. 3,

Charging Party.

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-168

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, IAFF, LOCAL NO. 1860,

Charging Party.

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-170

NEWARK FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 4,

Charging Party.

H.E. No. 89-34

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-171

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner issues an Interlocutory Decision, denying the motion of the Respondent City to dismiss the Unfair Practice Charges on the ground that its position is not supported by the applicable law, namely, the matter is not "moot" at this point within the meaning of the decision of the New Jersey Supreme Court in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978).

The past course of conduct of the City makes suspect its contention that it never committed an unfair practice, as alleged in these cases, namely, that it sought to negate past contractual provisions, which provided for certain union officers to have offices provided by the City for the purpose of conducting union business.

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FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12,

Charging Party.

Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel (Vincent Leong, Assistant Corporation Counsel)

For the Newark PBA, Local No. 3 & Professional Fire Officers Association, IAFF, Local No. 1860 Zazzali, Zazzali, Fagella & Nowak, Esqs. (Paul L. Kleinbaum, of counsel)

For the Newark Firemen's Mutual Benevolent Association, Local No. 4, Fox and Fox, Esqs. (Dennis J. Alessi, of counsel)

For the Fraternal Order of Police, Newark Lodge No. 12 Markowitz & Richman, Esqs. (Joel G. Scharff, of counsel)

HEARING EXAMINER'S INTERLOCUTORY DECISION ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 16, 1988, by the Newark PBA, Local No. 3 ("PBA") alleging that the City of Newark ("City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on November 22, 1988, the City advised the PBA that it intended to eliminate unilaterally a clause in the collective negotiations agreement permitting the PBA to maintain an office staffed by three full-time officers; this benefit has been in effect for at least 40 years; this action by the City interferes with the "bargaining rights" of the PBA and its

members; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[1/]

An Unfair Practice Charge was also filed with the Commission on December 16, 1988, by the Professional Fire Officers Association, IAFF, Local No. 1860 ("IAFF") alleging that the City has also engaged in unfair practices within the meaning of the Act, in that on December 1, 1988, the City advised the IAFF that it intended to eliminate unilaterally a clause in the collective negotiations agreement, permitting two representatives of the IAFF to be on paid leave to perform union functions; this benefit has been in effect for at least 20 years; this action interferes with the "bargaining rights" of IAFF and its members; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[2/]

Further, an Unfair Practice Charge was filed with the Commission on December 19, 1988, by the Newark Firemen's Mutual

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1/ These subsections 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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/ These are the same subsections previously set forth.

Benevolent Association, Local No. 4 ("FMBA") alleging that the City has engaged in unfair practices within the meaning of the Act, in that the FMBA has since 1981 had three full-time union officials assigned solely to union activities, which resulted from an interest arbitration award; Article 5, Section 6 of the collective negotiations agreement carries this term and condition forward to the present day; by letter dated November 22, 1988, the City advised the FMBA that it was unilaterally eliminating the above term and condition of employment, effective January 1, 1989, i.e., following the expiration of the current agreement on December 31, 1988; further, the City's letter of November 22nd stated that as of January 1, 1989, the City would reassign and transfer those officers currently on union assignment to their full-time fire duties, previously performed by them; the letter of November 22nd was sent to the FMBA after negotiations for a successor agreement had begun and after it had filed for interest arbitration under the Act; finally, the City has not proposed in negotiations to modify the prior practice under Article 5, Section 6 above; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.[3/]

Finally, an Unfair Practice Charge was filed with the Commission on December 19, 1988, by the Fraternal Order of Police, Newark Lodge No. 12 ("FOP") alleging that the City has engaged in

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3/ These are the same subsections previously set forth.

unfair practices within the meaning of the Act, in that the FOP and the City have been parties to six collective negotiations agreements, covering the period from 1978 through 1988, the current agreement expiring December 31, 1988; among the provisions in the current collective negotiations agreement is that the terms of the agreement shall continue in effect during negotiations between the parties and that the FOP shall be entitled, at the City's expense, to suitable and adequate office space for four full-time police officers who will function with detective's pay and have the use of one City-owned vehicle and a gasoline allowance; further, the current agreement provides for "Maintenance of Standards, which if eliminated or modified are subject to the grievance procedure; on July 1, 1988, the FOP notified the City of its intent to commence negotiations under the compulsory arbitration provisions of the Act, which provides in N.J.S.A. 34:13A-21 that during the pendency of proceedings before an interest arbitrator, the existing terms and conditions of employment shall not be changed by either party without the consent of the other; by letter dated November 22, 1988, the City advised the FOP that effective January 1, 1989, it did not intend to renew or continue the above provision entitling the FOP, at the City's expense, to suitable and adequate office space for four full-time police officers [Article 29, Section 5] and that the City would thereafter reassign those officers currently on assignment to their full-time police duties, previously performed by them; this proposed change in terms and conditions had not been

discussed with the FOP prior to November 22, 1988; the benefit set forth in Article 29, Section 5, supra, has been provided to the FOP since 1971 and the order of an arbitrator has been enforced by the Superior Court; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[4/]

It appearing that the allegations of the above four Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, as amended, a Complaint and Notice of Hearing was issued on January 10, 1989, with an Order Consolidating Cases. In this Notice of Hearing hearing dates were originally scheduled for March 1, 2 and 3, 1989, at the Commission's offices in Newark, New Jersey. However, the Chairman of the Commission on January 18, 1989, made a further consolidation, namely, four Petitions for Scope of Negotiations Determination filed by the City as to each of the four Charging Party's in Docket Nos. SN-89-33 through SN-89-36.[5/]

In view of this development the Hearing Examiner convened a prehearing conference on February 10, 1989, and, after considering the respective positions of the parties on severance, consolidation, hearing dates and other matters, he issued a Prehearing Order on February 15, 1989, which provided, in pertinent part, that pursuant to N.J.A.C. 19:14-6.3(a)(8) the Unfair Practice Charges and the

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4/ These are the same subsections previously set forth.

5/ The City filed its Answer to each of the Unfair Practice Charges on January 23, 1989.

Petitions for Scope of Negotiations Determination were severed and regrouped by linking each Charging Party and the City, respectively, to the Unfair Practice Charge and Scope Petition pertaining to each. Further, the original hearing dates, supra, were rescheduled by agreement to May 1 through May 5 and May 8, 1989.

On March 17, 1989, the City filed a Motion to Dismiss the four Unfair Practice Charges.[6/] The Charging Parties responded with opposing Briefs by April 3, 1989.

Thereafter the PBA submitted a "Settlement Agreement" dated April 6, 1989, reciting that the PBA withdrew its Unfair Practice Charge without prejudice and that the City withdrew its Motion to Dismiss as to the PBA's Unfair Practice Charge [Docket No. CO-H-89-167]. The City further agreed to abide by I.R. No. 89-10 (December 22, 1988), pending a final determination by the Commission and the courts as to the City's related Petition for Scope of Negotiations Determination.

The City's Motion to Dismiss is now decided with respect to the three remaining Charging Parties in accordance with N.J.A.C. 19:14-4.7. Based upon the pleadings and the moving and responding papers the Hearing Examiner first makes the following:

INTERIM FINDINGS OF FACT

1. The City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

6/ Including a certification and supporting brief.

2. The Professional Fire Officers Association, IAFF, Local No. 1860, the Newark Firemen's Mutual Benevolent Association, Local No. 4 and the Fraternal Order of Police, Newark Lodge No. 12 are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

Findings As To IAFF -- Dkt. No. CO-H-89-168

3. On December 1, 1988, the City advised the IAFF that it intended to eliminate unilaterally Article 9.01(a) of the current collective negotiations agreement, the substance of which has been in effect for at least 20 years and provides as follows:

> With the approval of the Director, time off without loss of pay will be granted for the following (1) The President and Vice President shall be excused from duties in the Fire Department to conduct the business of the Union. Such approval shall not be arbitrarily or unreasonably withheld by the Director.

4. The IAFF alleges that the City's unilateral action above interferes with the administration of the unit by effectively preventing the staff from performing their statutory and contractual functions and constitutes a change in terms and conditions of employment. The Director has, however, never withheld his approval.

Findings As To The FMBA -- Dkt. No. CO-H-89-170

5. Article 5, Section 6 of the current collective negotiations agreement provides that three members of the FMBA (President, Vice President and one additional firefighter) shall be assigned to the Fire Prevention Bureau in order to afford them an opportunity to perform the duties of their respective offices and

other union activities. This arrangement commenced in 1981 and has continued to date.

6. By letter dated November 22, 1988, the City's Business Administrator advised the President of the FMBA that the City was unilaterally eliminating the above arrangement effective January 1, 1989. Further, the City would on that date reassign and transfer the three individuals currently on Union assignment to the full-time fire duties performed by them previously.

7. The above letter of November 22nd was sent to the FMBA after it had commenced negotiations for a successor agreement and had filed for interest arbitration. Moreover, the City had not as of that date proposed in negotiations to modify the prior practice with respect to the three full-time union officials performing union activities.

8. The City admits that its reason for seeking to eliminate unilaterally Article 5, Section 6, supra, is that this provision is either "non-negotiable or only permissively negotiable."[7/]

Findings As To The FOP -- Dkt. No. CO-H-89-171

9. The City and the FOP have been parties to six collective negotiations agreement, commencing in 1978 and continuing through December 31, 1988.

7/ The Unfair Practice Charge and moving papers of the FMBA allege many conclusions of law and matters not relevant to the disposition of the instant Motion.

10. Article 35 of the current agreement provides in a "duration" clause, in part, that any changes or modifications in the agreement shall be negotiated in accordance with "applicable law" and, further, that the terms of the agreement shall continue in effect during negotiations between the parties.

11. Article 29, Section 5 provides that the FOP shall be entitled, at the City's expense, to suitable and adequate office space for four full-time police officers who will function with detective's pay and have the use of one City-owned vehicle with a gasoline allowance. This benefit has been provided by the City since 1971 to the FOP or its predecessor.

12. Article 21 provides, in part, that: "All rights, privileges and benefits existing prior to this Agreement are retained..." with two categories of exceptions; it is further provided that the elimination or modification of these rights, privileges or benefits shall (with exceptions not material hereto) be subject to the Grievance Procedure.

13. On July 1, 1988, the FOP notified the City of its intent to commence negotiations under the Commission's interest arbitration procedures.

14. Although the City did not notify the FOP between the dates of July 1 and August 1, 1988, of any desire to modify or alter the terms of the current agreement, the City's Business Administrator by letter dated November 22, 1988, notified the President of the FOP that the City did not intend to renew or

continue Article 29, Section 5, supra, and that effective January 1, 1989, the City intended to "...reassign those officers who were currently on assignment in the Union... office to their full-time police duties performed immediately prior to their Union assignment...."

15. Prior to November 22nd, the City had not discussed with the FOP any questions it may have had regarding the negotiability or continuance of Article 29, Section 5, supra. At an initial negotiations session between the City and the FOP on November 17, 1988, the City's representatives never mentioned the City's intention to repudiate or contest the negotiability of Article 29, Section 5.

* * * *

In considering the City's Motion to Dismiss, which essentially is based upon its claim of "mootness," the allegations in the respective Unfair Practice Charges must be taken as true. Further, the benefit of all favorable inferences arising from these allegations must be afforded the Charging Parties: Wuethrich v. Delia, 134 N.J. Super. 400 (Law Div. 1975), aff'd 155 N.J. Super. 324 (App. Div. 1978) and Sayreville Bd. of Ed., H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).

Although the Hearing Examiner has, in deciding the City's Motion to Dismiss, considered the fact that the City on February 22, 1989, offered to stipulate with each of the Charging Parties that it would no longer seek to reassign the several union officers to their police or fire duties unless and until the City first obtained a

favorable decision from the Commission or the courts as to its position, the City's Motion is NOT being treated as a Motion for Summary Judgment.[8/] In choosing this course, the Hearing Examiner distinguishes several decisions of the courts to the contrary since the subject matter of the City's February 22nd offer is undisputed and forms the legal basis for deciding this matter, infra. [Cf. Hackensack Water Co. v. No. Bergen Tp., 103 F. Supp. 133 (D.N.J. 1952), aff'd 200 F.2d 313 (3rd Cir. 1952) and P & J Auto Body v. Miller, 72 N.J. Super. 207 (App. Div. 1962)].

Prior Procedural History

Following the filing of the above Unfair Practice Charges, the Charging Parties each filed an application for interim relief with the Commission based upon the facts previously set forth in this decision. A hearing was held before Commission designee Edmund G. Gerber on December 21, 1988. The Commission's designee rejected the contention of the City that the four contractual provisions were not mandatorily negotiable, noting that the Commission had dealt with this identical issue in a scope petition filed by the City of Newark against the FMBA in 1985: City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985). There the Commission stated, in part, that:

> ...proposals giving union leaders paid leave to perform union business with absolutely no job responsibilities have been held mandatorily negotiable. Cf. Querques v. City of Jersey City, 198 N.J. Super. 566, 568, 11 NJPER 178 (¶16078, App. Div. 1985).

8/ See N.J.A.C. 19:14-4.8.

Accordingly, designee Gerber on December 21, 1988 restrained the City from implementing the proposed reassignment of union officials, pending a final Commission decision, without first negotiating such assignments with the Charging Parties or submitting them to binding arbitration: City of Newark, I.R. No. 89-10, 15 NJPER 81, 82 (¶20033 1988).[9/]

The Position Of The City

The City first notes that on February 22, 1989, it sent to each of the Charging Parties a stipulation that it would no longer seek to reassign the Charging Parties' representatives from their full-time union leave assignment unless and until there was first a determination by the Commission or the courts favorable to the City on its Petitions for Scope of Negotiations Determinations, i.e., that the disputed contractual provisions are non-negotiable or permissively negotiable.

Next, since the City claims that since it has never implemented the Business Administrator's letter of November 22, 1988, supra, the matter is "moot." In this connection, the City cites §5.4(c) of the Act with respect to the engaging in unfair practices and the Commission's power to issue an order requiring that a party "cease and desist from such unfair practice..."

9/ The Appellate Division denied the City's motion to stay and for leave to file an interlocutory appeal on December 29, 1989.

Finally, the City claims its motion should be granted on the ground of mootness under Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978) and two recent Commission decisions: Rutgers, The State University, P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No. A-174-87T7 (1988) and State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987).

The Positions Of The Charging Parties

Obviously, the Charging Parties contend that the matter is not moot, focusing upon Galloway, supra, and distinguishing the two Commission decisions above on mootness:

* * * *

First, the IAFF points out that the City has shown a propensity to relitigate issues which have been previously decided by the Commission, referring to the City of Newark case cited by Commission designee Gerber in I.R. No. 89-10, supra. Further, the IAFF notes that the City filed a Petition for Scope of Negotiations Determination during interest arbitration proceedings with the IAFF over an issue which had been the subject of an earlier petition in 1985: City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248, 249 (¶19092 1988). Finally, the IAFF cites an Appellate Division decision involving it, Professional Fire Officers Assn., Local 1860, IAFF v. City of Newark, App. Div. Dkt. No. A-4450-87T2 (1989), where the court, in estopping the City from challenging a provision that it had previously failed to raise, stated that the City was "...now

essentially belatedly trying to undermine the authority of the arbitrator and the interests of the entire arbitration system..." (Slip Op., pp. 7, 8).

Lastly, the IAFF argues that the instant matter is not moot as to it since in Galloway the Court stated that "...the termination of unlawful conduct by a party charged with unfair practice is similarly immaterial to the enforceability of PERC's order in an action initiated pursuant to ...(the Act)...[78 N.J. at 39]. Given the City's propensity to relitigate issues previously decided, the doctrine of mootness cannot apply.

* * * *

Moving now to the mootness argument of the FOP, it seeks to distinguish Rutgers, supra, where the Commission dismissed a complaint as moot. It notes that the Commission there cited Galloway (78 N.J. at 46, 47) for the proposition that where "...there was a sufficient potential for recurrence of [the offending party's] conduct in the course of future negotiations..." (emphasis supplied) then the case would not be moot [13 NJPER at 633]. From that the FOP argues that since the parties are still in the course of negotiations for a successor agreement there exists a strong likelihood that the City's prior unfair practices will continue and therefore the matter cannot be deemed moot.10/

10/ The argument of the FMBA is essentially the same as that made by the IAFF and the FOP.

The City's Motion To Dismiss Is Denied

The Hearing Examiner is persuaded that the matters raised by the remaining three Unfair Practice Charges are NOT moot. This conclusion is based upon the past course of conduct by the City in its labor relations with the several Charging Parties.

As asserted by the IAFF, "...the City has shown a propensity to relitigate issues which have already been decided by PERC..." Thus, for example, the IAFF cites an earlier Commission decision [City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985)][11/] where the City filed a Petition for Scope of Negotiations Determination, contending, inter alia, that the same Article 5, Section 6 involved herein [the FMBA's proposal to assign its President, Vice President and one union member to the Fire Prevention Bureau to conduct union business] was not mandatorily negotiable. The Commission found that the FMBA's proposal was mandatorily negotiable (12 NJPER at 28, 29). Finally, the Hearing Examiner has previously taken note of the IAFF's citation of an unreported Appellate Division decision in Local 1860, IAFF v. City of Newark (March 22, 1989, supra) where the Appellate Division censured the City for "...belatedly trying to undermine the authority of the arbitrator and the interests of the entire arbitration system..." [Slip Op., pp. 7, 8].

It is clear to this Hearing Examiner that these examples of the past conduct of the City make it very difficult to predict what

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11/ Cited above by Commission designee Gerber in I.R. No. 89-10.

the City may or may not do in the future in its labor relations with the Charging Parties. Little weight can be given to the City's having abided by the decision of the Commission's designee on December 22, 1988, supra, or by the City's deferral to the decision of the Appellate Division which denied the City's request for leave to appeal and for a stay on December 29, 1988.

These failures on the part of the City lend no weight to its argument that it has never committed an unfair practice as to the instant allegations. Finally, little weight is given to the fact that the City attempted on February 22, 1989, to vitiate any vestige of unfair practice conduct by offering to stipulate with the parties herein that it would no longer seek to reassign union officers from their full-time union leave assignment unless and until there was first a determination by the Commission or the courts with respect to its several Petitions for Scope of Negotiations Determination that the matters were non-negotiable or permissively negotiable.

The Hearing Examiner can reach no conclusion other than that the strictures of Galloway, supra, apply, namely, that given the City's past erratic course of conduct, "...the termination of unlawful conduct by a party charged with unfair practice(s) is similarly immaterial to the issue of enforceability..." of a Commission order (78 N.J. at 37). The Commission's recent decisions in Rutgers and State of New Jersey, supra, have no application to the posture of this case prior to hearing.

The Hearing Examiner, having rejected the argument of the City, and having accepted the arguments of the several Charging Parties herein, now enters the following Interlocutory Order based upon the record papers heretofore filed, including the briefs of the parties:

INTERLOCUTORY ORDER

The Respondent City's Motion to Dismiss is DENIED, and it is;

FURTHER ORDERED that the plenary hearing scheduled to commence on May 1, 1989, shall take place.

Alan R. Howe
Hearing Examiner

Dated: April 25, 1989
Trenton, New Jersey