I.R. NO. 99-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

FOP LODGE NO. 12,

Docket No. CO-99-40

Charging Party,

-and-

SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The charging parties alleged that the City of Newark unilaterally changed disciplinary procedures. Charging parties also claim that the City wrongfully appointed the chief of staff in the Office of the Police Director to serve as a hearing officer for disciplinary cases. The Commission Designee found that the charging parties established the requisite elements for granting interim relief regarding the claim that the City unilaterally changed disciplinary procedures and restrained the City from continuing such changes. The Designee found that the charging parties did not establish the elements for interim relief regarding the chief of staff issue and denied its application for interim relief concerning that portion of its charge.

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Appearances:

For the Respondent
Michelle Hollar-Gregory, Corporation Counsel
(Phillip R. Dowdell, Assistant Corporation Counsel)

For the Charging Parties
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

INTERLOCUTORY DECISION

On August 11, 1998, the Fraternal Order of Police, Newark Lodge No. 12 and the Superior Officers Association, Newark Police Department (collectively referred to as "charging parties") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the City of Newark

("City") committed an unfair practice within the meaning of N.J.S.A. 34:13A-5.4a(1) and (5).[1/]

The charging parties asserted that in 1993, the City, SOA, and the Policemen's Benevolent Association (the FOP's predecessor majority representative for City police officers) negotiated a disciplinary procedure for members of the Newark Police Department. The City states that there were discussions but not negotiations on the disciplinary procedures. A disciplinary procedure was promulgated as General Order 93-2. The parties state that on June 29, 1998, Director's Memorandum 98-919 was issued as an "amendment to General Order 93-2, the Disciplinary Policy". Charging parties claim that Director's Memorandum 98-919 significantly changes General Order 93-2. For example, General Order 93-2 at section II W, defines, in relevant part, "Trial Board" as "a three-member panel consisting of the police director, or his designee, and two other command rank officers. At section IV. B. 4., General Order 93-2 states:

> For minor offenses, an employee has the option of having his charges heard at a Disciplinary Conference within his Command or at a Trial Board heard out of the Office of the Police Director.

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."

> Offenses heard at a Disciplinary Conference can not receive more than five day suspension. Trial Boards may recommend up to a six month suspension.

However, Director's Memorandum 98-919 states in relevant part:

> effective July 1, 1998, minor discipline, ... shall be heard at a disciplinary conference before a District Commander, Executive Officer or a Disciplinary Conference Hearing Officer designated by the Police Director. Minor Discipline shall no longer be waived to the Trial Board. A Trial Board shall only hear matters involving major discipline as defined by law.

The FOP points out that it is currently engaged in negotiations with the City for a successor collective agreement.

The charging parties also contend that the City has wrongfully appointed the chief of staff in the Office of the Police Director to serve as hearing officer in disciplinary cases.

The City argues that the application of General Order 93-2 has resulted in a backlog of over 930 disciplinary matters awaiting hearings or conferences before disciplinary tribunals or commands in the Newark Police Department. The City contends that the pending disciplinary actions include both minor and major disciplines dating back to 1995. The City asserts that the dispute concerning the modification of General Order 93-2 through the implementation of Director's Memorandum 98-919 relates to the exercise of the City's inherent managerial prerogative to discipline its employees and the City's action does not involve disciplinary review procedures. The City concludes that the effectuation of Director's Memorandum 98-919 does not deprive any employee of substantive or procedural due process rights.

The unfair practice charge was accompanied by an application for interim relief. An order to show cause was executed on August 13, 1998 and the return date was scheduled for September 3, 1998. The parties submitted briefs, affidavits and exhibits in accordance with Commission Rules; the parties argued orally. At the conclusion of oral argument, the parties engaged in settlement discussions. Those discussions ultimately failed to result in a settlement, consequently, the City was given until September 16, 1998, to submit a response to certain submissions provided by the charging parties during oral argument.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

N.J.S.A. 34:13A-5.3 states in relevant part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet

> at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.
>
> * * *
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization.

Director's Memorandum 98-919 appears to have been issued for the purpose of unilaterally implementing certain changes in General Order 93-2. General Order 93-2 appears to set forth the procedures used in the processing of appeals resulting from City initiated disciplinary actions. The Commission has held that "procedures related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined are mandatorily negotiable so long as they do not conflict with the procedures established by N.J.S.A. 40A:14-147 et seq. [Employers can] agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate right, after complying with the negotiated procedures, to make a disciplinary determination." Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157, 158 (¶26096 1995) recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995) aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). See also Borough of Mt. Arlington P.E.R.C. No. 95-46, 21

NJPER 69 (¶26049 1995); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986).

I find that the charging parties have established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations that the City has violated the Act. By issuing Director's Memorandum 98-919, it appears that the City has unilaterally changed mandatorily negotiable disciplinary procedures. Whether those procedures were arrived at through previous negotiations is not relevant to this determination.

Director's Memorandum 98-919 appoints the chief of staff in the Office of the Police Director to serve as a hearing officer for major disciplinary cases. During oral argument, the charging parties indicated that the chief of staff was also hearing minor disciplinary actions. It is unclear whether the charging parties are asking the Commission to enjoin the City from assigning the chief of staff to serve as a hearing officer or whether it is seeking an order directing the chief of staff to adhere to the procedures expressed in General Order 93-2.

I find that the charging parties have not established a substantial likelihood of success on the claim that the chief of staff should not serve as a hearing officer in disciplinary matters. While it would appear that the chief of staff, like any

other City representative hearing disciplinary appeals, must adhere to the procedures set forth in General Order 93-2, disputes regarding whether the chief of staff may have misapplied General Order 93-2 may more appropriately be resolved through the parties negotiated grievance procedure rather than through an unfair practice charge. See New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Moreover, the City may have a managerial prerogative to decide who conducts disciplinary hearings. The Commission has held that an employer normally has a prerogative to decide who should conduct hearings required by N.J.S.A. 40A:14-147. Borough of Mt. Arlington.

I find that the charging parties have established the requisite irreparable harm element of the standard to obtain interim relief. It appears that the implementation of Director's Memorandum 98-919 has, among other things, removed the employees' option to have their disciplinary appeal heard by the Trial Board. This and other changes in the disciplinary procedure appear to have been implemented without negotiations with the respective majority representatives. Such apparent unilateral action may result in the derogation of the status of the majority representatives and may deprive individual employees of their procedural rights provided under General Order 93-2. Further, regarding Lodge 12, the parties are engaged in successor negotiations. A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under

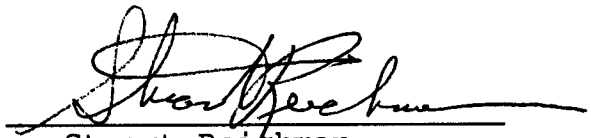
the Act and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). By losing choices provided in General Order 93-2, employees required to proceed with their disciplinary appeals may suffer consequences which cannot be retroactively remedied by a Commission order at the conclusion of the processing of the unfair practice charge.

In weighing the relevant hardship to the parties resulting from the grant or denial of relief, I find that the scale tips in favor of the charging parties. As already noted, the charging parties and individual employees will suffer irreparable harm resulting from the unilateral change in a mandatory subject of negotiations by the City. The City is free to continue to exercise its right to take disciplinary action against employees. Further, since the City may continue to maintain discipline among the employees in the police department, the public interest is not injured by the granting of an interim relief order.

ORDER

It is **ORDERED** that the City is restrained from implementing any portion of Director's Memorandum 98-919 that would result in a modification of General Order 93-2. Interim relief seeking to restrain the City from assigning the chief of staff in the Office of the Police Director to serve as one of the City's hearing officers in disciplinary appeals is denied. This interim order will remain in effect pending a final Commission order in this

matter. This case will proceed through the normal unfair practice processing mechanism.



Stuart Reichman
Commission Designee

DATED: September 18, 1998
Trenton, New Jersey