

H.E. NO. 2004-11

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

In the Matter of  
CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-H-2003-181

PBA LOCAL NO. 1,

Charging Party.

**SYNOPSIS**

A Hearing Examiner grants in part and denies in part a Motion and Cross-Motion for Summary Judgment on a Complaint alleging that the City of Paterson engaged in unlawful direct dealing with two unit employees, violating 5.4a(5) and (1) of the Act. A grievance arbitration award sustained grievances filed on behalf of the employees; the award directed reinstatements, back pay, etc. The Complaint alleges that the City entered "private settlement negotiations" with separate personal counsel of both employees, who were also the subject of major discipline actions before the Merit System Board. The separate agreements included provisions requiring back pay, terminal leave, no deductions for "union dues or related fees," the dismissal of discipline actions and the retirements of both employees.

The Hearing Examiner recommended that the Employer had violated the exclusivity principle by engaging in discussions with the employees and signing agreements concerning mandatory subjects of negotiations, including back pay, terminal leave and deductions for membership or agency fees. He also recommended that the principle had not been violated regarding the separate agreements' provisions concerning the withdrawal of major discipline notices and retirement. The Hearing Examiner recommended that the Employer post a Notice to Employees.

A Hearing Examiner's Decision on a Motion and Cross-Motion which resolves all the issues in the Complaint becomes a recommended decision, pursuant to N.J.A.C. 19:14-4.8(e). A recommended report and decision is not a final administrative determination of the Public Employment Relations Commission. The

Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,  
Dorf & Dorf, attorneys  
(Gerald L. Dorf, of counsel)

For the Charging Party,  
Shaw & Perelson, attorneys  
(Mark C. Rushfield, of counsel)

**HEARING EXAMINER'S DECISION ON MOTION  
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

On January 21, 2003, Paterson Police PBA Local No. 1 filed an unfair practice charge against the City of Paterson. The charge alleges that on or about December 9, 2002, the City entered "direct negotiations" with unit employees James Bishop and Bart Vallaro regarding an August 8, 2002 arbitration award sustaining grievances contesting their suspensions from duty for more than 30 days. The award directed their reinstatements on either modified duty at full pay or paid administrative leave and made them whole for lost wages and benefits dating from April 27, 2001. The charge alleges that the PBA was not notified of and

did not participate in the "direct negotiations", despite PBA counsel's December 12, 2002 letter to the City protesting its conduct. The PBA alleges that on December 31, 2002, the City entered settlement agreements with Bishop and Vallaro in satisfaction of the award. The City's actions allegedly violate 5.4a(5) and (1)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 16, 2003, a Complaint and Notice of Hearing issued. On July 30, 2003, the PBA filed a Motion for Summary Judgment, together with a certification and exhibits. On September 5, 2003, the Commission referred the motion to me for decision, pursuant to N.J.A.C 19:14-4.8. On October 24, 2003, the City filed a Cross-Motion for Summary Judgment and Opposition to Charging Party's Motion, together with a certification and exhibits. On November 3, 2003, the PBA filed a reply letter.

\* \* \* \* \*

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that

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<sup>1/</sup> These subsections prohibit public employers, their representatives of 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."

there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

#### **FINDINGS OF FACT**

1. Paterson Police PBA Local No. 1 represents "all sworn police officers" employed by the City of Paterson, excluding all superior officers.

2. In January 2000, police officers James Bishop and Bart Vallaro were placed on administrative leave. On or about March 9, 2000, they were suspended from duty. In May 2000, they were again placed on administrative leave until early April 2001.

On April 3, 2001, officers Bishop and Vallaro were charged in a seven-count indictment by the Passaic County Grand Jury. The indictment charged official misconduct, conspiracy, public records tampering, witness tampering and obstruction, all arising out of an inmate's April 1999 death while the officers were on duty. The City placed Bishop and Vallaro on "suspended status" and on April 26, served them Amended Preliminary Notices of Disciplinary Action, seeking their suspensions without pay, retroactive to April 3.

On April 27, 2001, a departmental hearing was conducted, pursuant to N.J.A.C 4A:2-2.5. On October 31, 2001, the assigned hearing officer issued a decision, sustaining the City's determination to suspend the officers pending the disposition of the criminal case. The hearing officer also ruled that the suspensions were to be served without pay, effective April 27.<sup>2/</sup>

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<sup>2/</sup> The hearing officer apparently relied upon N.J.S.A. 40:14-149.1, "Suspension of Officer Charged with Offense." The statutes provides:

Notwithstanding any other law to the contrary, whenever any municipal police officer is charged under the law of this State, and other state, or in the United States, with an offense, said officer may be suspended

(continued...)

3. On April 4, 2002, a grievance arbitration hearing was conducted on grievances filed on behalf of Bishop and Vallaro contesting the City's failure to return them to modified duty at full pay or to place them on paid administrative leave after the initial 30-day suspension. The grievances alleged that the City had violated the parties' 1998-2003 collective negotiations agreement, specifically Sections 5.1 and 5.15 ("Police Officer's Rights"). Section 5.15 provides:

SUSPENSIONS - Effective November 1, 1968, pending the final determination of charges by the Director of Public Safety, an [] employee may be suspended without pay for a period not exceeding 30 days. At the conclusion of that thirty (30) day period, the charge to employee will be returned and modified duty at full pay or shall be placed on paid administrative leave. Modified duty shall [] be determined by the Chief of Police, with no reassignment rights by the employee.

PBA counsel argued the case on behalf of the grievants whose "private" counsel attended the proceeding. The City was also represented by counsel.

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2/ (...continued)  
from performing his duties, with pay, until the case against said officer is disposed of at trial, until the complaint is dismissed or until the prosecution is terminated; provided however, that if a grand jury returned an indictment against said officer, or said officer is charge with offense, which is a high misdemeanor or which involves moral turpitude or dishonesty, said officer may be suspended from his duties without pay, until the case is disposed of at trial, until the complaint is dismissed, or until the prosecution is terminated.

4. On August 8, 2002, the arbitrator issued an Opinion and Award, sustaining the grievances. The arbitrator found that the City had violated the collective negotiations agreement by placing the grievants on suspension for more than 30 days. The arbitrator directed the City to reinstate officers Bishop and Vallaro to either modified duty at full pay or to paid administrative leave, effective 30 days from April 27, 2001. The City was also directed to make the grievants whole for lost wages and benefits from April 27, 2001 to the date of their reinstatement. The arbitrator noted that his award considered neither the underlying criminal charges nor a determination of the merits of the imposed suspensions.

5. On September 17, 2002, PBA counsel filed a Complaint to Confirm Arbitration Award in the Superior Court of New Jersey (dkt. no. L-4828-02). On October 31, 2002, the City formally acknowledged service of the Complaint. On January 14, 2003, Judge Robert Passero entered an Order and Judgment confirming the August 8, 2002 arbitration award.

6. On or around December 11, 2002, PBA counsel heard a "rumor" that officers Bishop and Vallaro were engaged in "private settlement negotiations" with the City concerning the arbitration award. On December 12, PBA counsel wrote a letter to counsel for officer Vallaro, advising that only the PBA is authorized to enter a settlement compromising any portion of the award.



Counsel for officer Bishop and the City's Corporation Counsel were issued copies of the letter on the same date.

Later on the same date, counsel for Vallaro informed PBA counsel that he was having "discussions with the City's Corporation Counsel regarding the resolution of several matters, including the satisfaction of the award" (certif. p. 3). Counsel for Vallaro also wrote a letter to PBA counsel, confirming his discussions on behalf of Vallaro with City Corporation Counsel and disputing the PBA's entitlement to address "how, when and in what manner [officer Vallaro] will be paid [the award]."

The next day, December 13, PBA counsel wrote a letter to counsel for Vallaro advising that "the PBA has sole and exclusive authority to settle any obligations of the City concerning the arbitration award the PBA secured against it." He also wrote that the City is obligated to secure the PBA's agreement to any proposed resolution of its obligations under the arbitration award. Copies were sent to City Corporation Counsel and to counsel for Bishop.

7. On December 30, 2002, the City Mayor/Director of Public Safety and Vallaro signed a settlement agreement "resolving issues surrounding satisfaction and payment of the [August 8, 2002] award and other matters affecting Vallaro's employment." The agreement required the City to pay Vallaro \$132,470 upon a specified schedule from December 31, 2002 to not later than July

10, 2003. The City also agreed to contribute as required to the State Police and Fireman's Retirement System, with "no deduction from the settlement amount to PBA Local No. 1 for union dues or related fees." The City also agreed to dismiss all Preliminary Notices of Disciplinary Action against Vallaro and "in further consideration of the settlement", to file with the State an application for his involuntary Ordinary Disability Retirement, pursuant to N.J.S.A. 43:16-6.

Vallaro formally agreed to withdraw his appeal of State Merit System Board decisions concerning "the underlying matter upon which the Award is based." He also agreed to immediately retire from the department if his retirement application was rejected. The PBA's then-pending Complaint to Confirm Arbitration Award was noted. Finally, the parties wrote that their agreement "contains a sole and entire agreement between the City and Vallaro with respect to satisfaction of the award, issues concerning the payment of paid leave benefits for years 1999-2002 and the disposition of the [Notices of Disciplinary Action] . . . ."

8. On December 31, 2002, the City Mayor/Director of Public Safety and Bishop signed a settlement agreement "resolving issues surrounding the satisfaction and payment of the award and other matters affecting Bishop's employment." The agreement required the City to pay Bishop \$164,435 on a specified schedule from

December 31, 2002 through July 10, 2003. The City agreed to contribute to the Police and Fireman's Retirement System on Bishop's behalf; agreed not to deduct "union dues or related fees"; agreed to dismiss the Preliminary Notices of Disciplinary Action, including disciplinary charges arising out of "[Bishop's] currently pending criminal indictment"; and agreed that he was to remain a "member of the City Police department until the final disposition of that indictment" at which time Bishop was to retire from the department. The agreement also included a few provisions not analogous to those in the City's agreement with Vallaro, including one requiring Bishop's withdrawal of unfair practice charge docket no. CI-H-2000-20, and another reiterating Bishop's entitlement to "terminal leave" upon his qualifying for a pension, pursuant to a grievance arbitration award issued on February 18, 2002. Bishop's agreement, like Vallaro's, acknowledged the pendency of the Complaint to Confirm Arbitration Award, "notwithstanding Bishop's probable settlement of this matter." Both agreements set forth "hold harmless" provisions inuring to the City's benefit, "with respect to any judgment or order concerning the Award obtained by PBA Local No. 1."

9. On January 9, 2003, City Corporation Counsel Susan Champion sent copies of both settlement agreements to the City Police Chief and to a personnel department representative, together with separate cover memoranda. Both memoranda advise

that the attached settlement agreement concerns "the payment of the back pay awarded to [Bishop and Vallaro] in an arbitration proceeding." They also state that in consideration for the agreements, all disciplinary charges are "dropped."

#### **ANALYSIS**

The PBA contends that the City has engaged in unlawful "direct dealing" with officers Vallaro and Bishop by negotiating and settling grievances - specifically, obligations under a grievance arbitration award - and other terms and conditions of employment, (including paid leave time, retirement and resignation) without its participation. The City allegedly compounded its wrong by proceeding unilaterally over the PBA's objection.

The City denies violating the "exclusivity principle" because it settled "major disciplinary actions" with both employees which fall under the purview of the Merit System Board and outside the scope of binding grievance arbitration. The agreements resolved all outstanding matters, including the voluntary retirements of the officers. The arbitration award by contrast restored wages and benefits subject to a future disposition of the criminal charges. The City also argues that settlement agreements rank high in New Jersey's public policy and the PBA has not demonstrated why the agreements should be vacated.

N.J.S.A. 34:13A-5.3 provides that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. Our Supreme Court has upheld exclusive representation as the cornerstone of the Employer-Employee Relations Act. See D'Arrigo v. N.J. State Board of Mediation, 119 N.J. 74 (1990); Lullo v. Int'l Assn. of Fire Fighters, Local 1066, 55 N.J. 409 (1970). The statute also requires, in part:

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, agreement, 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. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees . . . .

N.J.S.A. 34:13A-5.4a(5) prohibits a public employer from refusing to negotiate with the majority representative concerning terms and conditions of employment of unit employees. The Commission has found that an employer violated this subsection and 5.4a(1) by dealing directly with certain unit employees and

signing memoranda of agreement affecting their terms and conditions of employment. Matawan-Aberdeen Reg. Schl. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) [app. dismiss. App. Div. Dkt. No. A-6054-88T5 (12/5/89)]; See also State of N.J., Office of Employee Relations (Thomas A. Edison State College) and Council of N.J. State College Locals, NJSFT, AFT, P.E.R.C. No. 86-27, 11 NJPER 574 (¶16201 1985), aff'd NJPER Supp.2d 166 (¶146 App. Div. 1986). The Commission has also delineated an employer's right to solicit individual employee "input into matters which did not pertain to mandatory subjects of negotiation." State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987).

Undisputed facts show that the City dealt directly with unit employees Bishop and Vallaro largely to "resolve issues surrounding satisfaction and payment of the [August 8, 2002 grievance arbitration] award," according to the agreements' express purposes. That intention was reiterated by City Corporation Counsel in an attached memorandum. Insofar as the award was the product of the parties' "grievance and disciplinary review procedure" mandated by section 5.3 to have been collectively negotiated, I find that the City's discrete discussions and agreements with the officers were incompatible in part with the principle of exclusive representation.

Agreement provisions requiring scheduled payments of accumulated "leave benefits" (including "terminal leave") and "back pay" and the withholding of "union dues or related fees" demonstrate the disregard for the PBA's statutorily-protected role. The PBA's motion is granted to the extent that the City dealt directly with unit employees regarding mandatorily negotiable subjects.

The Merit System Board reviews appeals of major disciplinary actions arising in Civil Service jurisdictions. Monmouth Cty. and CWA, PERC No. 95-47, 21 NJPER 70 (¶26050 1995), aff'd 300 N.J. Super. 272 (App. Div. 1997). Section 5.3 provides that binding arbitration may not replace alternate statutory appeal procedures. In Essex Cty. and JNESO, Dist. Council 1, IUOE, PERC No. 2003-42, 28 NJPER 589 (¶33184 2002), the Commission determined that the Act could not be construed to deny an individual employee rights under Civil Service laws, specifically an employee's right to choose between a personal attorney or a union representative at a statutorily-mandated pre-disciplinary hearing. Although the Commission recognized the principle of exclusive representation, it cautioned that "the Legislature has chosen to establish procedures for major discipline of Civil Service employees outside of the collective negotiations process and exclusive control of the majority representative." Id. at 28 NJPER 591.

Voluntary dispositions of then-pending major discipline actions and retirement provisions are included in the individual agreements. It would make little sense for the Legislature to have established procedures for major discipline of Civil Service employees outside of the collective negotiations process only to require that the substantive decision on that discipline fall within the process. Such a requirement seems especially unlikely when that substantive decision is inextricably linked to a voluntary retirement from service. I find that the City did not violate the Act by dealing directly with personal counsel for Bishop and Vallaro regarding major discipline actions and voluntary retirements. Similarly, I find that the City did not violate the Act by formally agreeing with Bishop to a withdrawal of unfair practice charge docket no. CI-H-2000-20.<sup>3/</sup> The City is granted its cross-motion for Summary Judgment on these portions of the Complaint.

RECOMMENDED DECISION

The motion is granted (and the cross-motion for dismissal is denied) to the extent that the City violated 5.4a(5) and (1) of the Act by dealing directly with counsel for unit employees Bishop and Vallaro concerning mandatory subjects of negotiation,

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<sup>3/</sup> Bishop alleged in the charge that the City had discriminatorily "bypassed" him on a promotional opportunity in retaliation for protected activity on behalf of the FOP, a minority organization.



including accumulated leave and terminal leave benefits, back pay and membership dues or agency fees.

The motion is denied and the cross-motion for dismissal is granted to the extent that the City unlawfully dealt directly with counsel for unit employees Bishop and Vallaro concerning voluntary retirements and rights under the Civil Service Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act by dealing directly with unit employees Bishop and Vallaro regarding mandatorily negotiable terms and conditions of employment, including leave benefits, back pay and membership dues or agency fees.

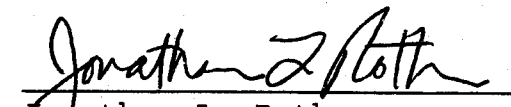
2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning mandatorily negotiable terms and conditions of employment of employees in that unit by dealing directly with unit employees regarding those terms and conditions of employment.

B. That the City take the following action:

1. 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.

Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

  
Jonathan L. Roth  
Hearing Examiner

DATED: February 3, 2004  
Trenton, New Jersey



RECOMMENDED



# 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 employees in the exercise of rights guaranteed to them by this Act by dealing directly with unit employees Bishop and Vallaro regarding mandatorily negotiable terms and conditions of employment, including leave benefits, back pay and membership dues or agency fees.

**WE WILL** cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning mandatorily negotiable terms and conditions of employment of employees in that unit by dealing directly with unit employees regarding those terms and conditions of employment.

Docket No. CO-H-2003-181

City of Paterson  
(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