I.R. NO. 2007-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2007-136

NEWARK FIRE OFFICERS UNION, LOCAL 1860, IAFF,

Charging Party.

SYNOPSIS

A Commission Designee grants in part and denies in part an application for interim relief seeking to restrain the City of Newark from unilaterally changing certain disciplinary procedures.

The IAFF alleged that in the midst of interest arbitration proceedings, the City unilaterally changed certain disciplinary procedures and refused to negotiate concerning those changes. The IAFF contends that prior to the alleged changes, discipline was governed by Fire Department General Order G-1, dated March 1, 1988. The 1988 Order, inter alia, (1) limited the time frame within which disciplinary charges were required to be brought to twenty-four hours after the cited violation had been committed; (2) required charges to specify the rule section violated and the underlying factual basis for the charged violation; and (3) required hearings to be conducted regarding both major and minor discipline. In the revised 2006 General Order G-1, the IAFF contends the City incorporated an existing personnel policy statement governing discipline which had never before been applied to the Fire Department. That policy statement lengthened the twenty-four hour notice period for bringing charges; eliminated the requirement of departmental hearings for minor discipline; and eliminated the specification requirements for disciplinary charges. The City raised certain factual and legal defenses to the various allegations in the charge.

Regarding the allegations that the City changed the procedures requiring disciplinary charges to be brought within twenty-four hours of their occurrence, and that the City unilaterally and for the first time applied a new disciplinary policy to fire officers, there are sufficient factual conflicts so as to preclude meeting the substantial-likelihood-of-success test for interim relief; accordingly, interim relief was denied concerning those allegations.

Regarding the allegation that the City removed the requirement that hearings be conducted for all minor disciplinary matters, the Commission Designee determined that, to the extent the new General Order removed the right to a hearing for minor discipline involving suspensions, it constitutes a unilateral change in terms and conditions of employment in violation of the Act and accordingly, the Commission Designee issued an Order restraining the City from denying employees the right to such hearings. However, the Commission Designee concluded factual conflicts existed regarding the asserted right to hearings for minor disciplinary matters not involving suspensions and accordingly, interim relief was denied regarding that allegation.

Regarding the allegation that the City unilaterally removed language providing that charges state the rule section violated and the factual basis for the disciplinary charge, the Commission Designee concluded that the removal of the language setting forth that requirement diminished employee disciplinary procedural rights and constitutes a unilateral change in terms and conditions of employment in violation of the Act. Accordingly, the City was restrained from implementing that change.

I.R. NO. 2007-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2007-136

NEWARK FIRE OFFICERS UNION, LOCAL 1860, IAFF,

Charging Party.

Appearances:

For the Respondent,
Schwartz, Simon, Edelstein, Celso & Kessler, attorneys
(Stefani C. Schwartz, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
(Paul L. Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On November 3, 2006, the Newark Fire Officers Union, Local 1860, IAFF, filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The IAFF alleges that the City violated subsections 5.4a(1) and (5) of the Act[1/] when it

---

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 (continued...)

unilaterally changed various disciplinary procedures set forth in certain departmental orders and a municipal ordinance. Also on November 3, 2006, the IAFF filed an application for interim relief, asking that the City be required to show cause why an order should not be issued restraining the City from changing the cited disciplinary procedures. N.J.A.C. 19:14-9.1 et seq.

On November 13, 2006, I executed an Order to Show Cause with a return date of December 5, 2006; that date was adjourned and the hearing rescheduled for February 21, 2007. A hearing was conducted on the rescheduled return date. Both parties argued orally at the hearing and submitted briefs.

* * * *

The IAFF contends that in the midst of interest arbitration proceedings, the City unilaterally changed certain disciplinary procedures and refused to negotiate concerning those changes. Prior to the alleged changes, the IAFF contends that departmental discipline was governed by Fire Department General Order G-1, dated March 1, 1988 (1988 Order). That order contained a provision which limited the time frame within which disciplinary charges were required to be brought to twenty-four (24) hours after the cited violation had been committed. The 1988 Order

---

1/ (...continued)
refusing to process grievances presented by the majority representative."

further required charges to specify the rule section violated and the underlying factual basis for the charged violation. The IAFF contends that the 1988 Order also required that hearings be conducted regarding both major and minor discipline. The IAFF asserts that the revised 2006 General Order G-1 (revised Order or 2006 Order), issued in September 2006, incorporated an existing personnel policy statement governing discipline (dated May 1,1989) which had never before been applied to the Fire Department. The revised Order altered (lengthened) the twenty-four hour notice period for bringing charges and eliminated the requirement of departmental hearings for minor discipline. The IAFF contends the revised Order also eliminated the specification requirements for disciplinary charges, and diminished members' rights to union representation during investigatory meetings between employees and management representatives. Finally, the IAFF contends the revised Order asserts that the City may modify disciplinary rules at any time. The IAFF argues that it has demonstrated a substantial likelihood of success on the merits of charge and that irreparable harm will occur if the relief sought is not granted - - in that the City unilaterally changed disciplinary procedures and refused to negotiate concerning same during the parties' on-going interest arbitration process.

The City denies that its conduct violated the Act. It argues that interim relief should be denied inasmuch as the

record does not support Charging Party's contention that it has established a substantial likelihood of success on the merits, nor that the IAFF and its members would be irreparably harmed should relief be denied. The City contends that it discharged its obligation to negotiate with the IAFF over the 2006 revised General Order G-1. The City argues that this matter centers ". . . on the application and interpretation of the parties' collective bargaining agreement . . ." and therefore, that the matter should be deferred to the parties' contractual grievance procedure. The City also asserts that there are material facts in dispute in this matter and argues that these disputes preclude the issuance of interim relief in this case.

The City contends that the dispute concerning the twenty-four hour limit for bringing disciplinary charges against unit employees has been preempted by statute. N.J.S.A. 40A:14-28.1. Further, the City contends that the twenty-four hour period for bringing charges referenced in the 1988 Order was not applied to disciplinary charges filed by the Department against unit employees; rather, it asserts that this requirement was applied only in instances of unit employees filing charges against other unit employees. The City contends that the revised Order does not deny unit employees the right to union representation during departmental investigations of alleged employee misconduct. Regarding Charging Party's allegation that the revised Order

changed or removed unit employees' right to a departmental disciplinary hearing for all minor disciplinary matters, the City contends that whether or not a hearing was conducted in matters of minor discipline was governed by the parties' past practice and that the revised Order did not alter that practice. The City contends that Newark Personnel Policy PDP-19 has always applied to Fire Department personnel. And finally, the City admits that it has been the practice of the Newark Fire Department to prepare notices of disciplinary action forms which contain both the rule section violated and the basic facts upon which charges are based.

* * * *

The following facts appear.

The IAFF, Local 1860, Newark Fire Officers Union, is the statutory majority representative of a collective negotiations unit of supervisory fire officers employed by the City of Newark. The IAFF and the City are parties to a collective negotiations agreement covering the above unit for the period from January 1999 through December 2003; by written agreement of the parties, the collective negotiations agreement was extended for one year, through December 2004. The parties are presently in interest arbitration for a successor to that extension agreement.

In March 1988, the City issued General Order G-1 to address departmental disciplinary procedures. In October 2006, the City

issued the 2006 revised General Order G-1; leading up to the issuance of the revised Order, the Fire Department contacted the IAFF regarding the issuance of the revised Order. On September 14, 2006, the IAFF requested that a labor-management committee be formed to address the Department's disciplinary procedures. In response, the City's submissions indicate that on September 29, 2006, at Fire Director Giordano's direction, Newark Fire Department Counsel Passante called IAFF President Sandella and advised him (a) that the Fire Director believed that a committee was unnecessary, inasmuch as the changes to the disciplinary procedures contemplated in the revised Order were minor; and (b) that nonetheless, the Fire Director was willing to negotiate regarding the revised General Order and therefore, was seeking input from the IAFF on the draft. Passante was also in contact with IAFF Vice President Rosamilla regarding the revised Order. Sandella and Rosamilla indicated that in their conversations with Passante, they stated that the revisions to the 1988 Order required negotiations; and that Passante disagreed with their assessment but indicated he would inform the Fire Director of their position. Passante also indicated that the Director intended to issue the revised Order very soon. It appears that there was no further contact between the parties on these issues, between the September 29, 2006 discussions and the October 3, 2006 issuance of the revised Order. Thus, it would appear that

no substantive negotiations occurred regarding the revised Order. However, the arguable expectations that may have arisen from the parties' conversations are unclear, as are the implications regarding the discharge of the City's obligation to negotiate. On October 3, 2006, the Fire Director issued the 2006 revised General Order G-1 which addressed departmental disciplinary procedures. On October 26, 2006, the IAFF filed a grievance alleging that the changes effected by the revised Order violated the parties' collective negotiations agreement. On November 3, 2006, the IAFF filed the instant charge, alleging that the City's conduct in issuing the revised Order violated the Act.

The 1988 General Order states:

> Charges shall be forwarded within twenty-four (24) hours after the alleged violation has been committed, unless circumstances causing a delay are encountered. . . .
>
> Commission exhibit C-5, attachment C, p.1,

This language is omitted from the 2006 revision of 1988 General Order G-1.

The 1988 Order states:

> Charges shall be formulated . . . in the following manner: . . .
>
> 1) Specify . . . the particular article . . . violated . . .
> 3) . . . a clear, concise declaration of the essential facts upon which the charges are based shall [be included].
>
> Commission exhibit C-5, attachment C, p.1.

This language is omitted from the 2006 revised Order.

The revised Order references and attaches PDP-19, a City personnel policy and procedure document issued in 1989, which the City asserts has always applied to fire officers. The 1988 Order was issued on March 1, 1988, over a year before PDP-19 was issued and accordingly, the City asserts that PDP-19 was not referenced in the 1988 Order for that reason.

While neither the 1988 Order nor the revised 2006 Order specifically provides for hearings in all minor disciplinary matters, the reference to and attachment of PDP-19 to the revised Order appears to support Charging Party's assertion that the revised Order eliminates the "requirement" that hearings be conducted for both major and minor disciplinary matters, inasmuch as PDP-19 requires hearings for only major disciplinary matters. Further on this issue, Newark Ordinance GFE-040297 (dated April 16, 1997; Commission exhibit C-5, attachment D) indicates that the Fire Director has the authority to establish procedures to conduct hearings regarding violations of departmental rules, whenever a member may be fined, reprimanded, suspended or dismissed. The City asserted that by past practice, hearings have been held for all minor disciplinary matters where a suspension was in issue; however, minor disciplinary matters not involving a suspension would not trigger a hearing (Respondent's brief at 12; Giordano Cert., Para 21). Finally, PDP-19 also indicates that its provisions may be modified by the City at any time.

ANALYSIS

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing such applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations of the charge in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying the relief must be considered.[2/]

An employer's unilateral alteration of existing terms and conditions of employment during negotiations constitutes a refusal to negotiate in good faith in violation of the Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978).

In this matter, Charging Party IAFF alleges that the Respondent City of Newark unilaterally changed certain terms and conditions of employment during negotiations for a new collective

---

2/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); 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); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

negotiations agreement when the City issued the 2006 revised General Order G-1 governing discipline.

Regarding the allegation that the revised Order changed the requirement that disciplinary charges be brought against employees within twenty-four hours of their occurrence, it appears that there are sufficient factual conflicts so as to preclude a finding of substantial likelihood of success on the merits of this issue in a plenary hearing (the City's assertion that the twenty-four hour requirement was limited to only filings by employees against other employees). Accordingly, interim relief concerning this issue is denied.

Regarding the allegation that the revised General Order unilaterally and for the first time applied PDP-19 to fire officers, there again appears to be sufficient factual conflicts so as to preclude meeting the substantial likelihood of success standard regarding this issue. The City asserts that PDP-19 has always been applied to fire officers, that PDP-19 states on its face that it applies to all City employees and that the reason it was not included by reference in the 1988 Order was because PDP-19 had not been issued until March 1989. Accordingly, interim relief concerning this issue is denied.

Regarding the allegation that the revised Order changed the requirement that hearings be conducted for all minor disciplinary matters, there are some areas of factual agreement and some

factual conflicts. The City acknowledges that by past practice, hearings have been conducted in all minor disciplinary circumstances where suspension was a possible result. For minor disciplinary matters not involving a suspension, the City asserted that hearings were not triggered in those circumstances. To the extent that the revised Order removes the right of unit employees to a hearing for minor disciplinary matters involving suspensions, it would violate the parties' past practice and therefore, constitute a unilateral change in terms and conditions of employment in violation of 5.4a(1) and a(5).

However, for minor disciplinary matters not involving a suspension, there is a factual conflict (regarding the requirement for a hearing) which thereby precludes a finding of substantial likelihood of success on the merits. Accordingly, interim relief concerning this issue (the requirement for hearings in minor disciplinary matters not involving a suspension) is denied.

Regarding the language in PDP-19 which allows the City to unilaterally change any provision in PDP-19 (Commission exhibit C-5, attachment E, fourth page, Para III), I note that PDP-19 is a City personnel policy; it applies to <u>all</u> City employees, not only fire officers. The City may modify its own policy. However, where such modifications may implicate terms and conditions of employment of employees in the IAFF unit, the IAFF

may, on a case-by-case basis, review such changes and determine whether any action is warranted on its part. The language of Paragraph III, in and of itself, does not constitute a violation of 5.4a(1) or a(5).

Regarding the allegation that the revised Order removed the previously specified requirement that disciplinary charges state the rule section violated and the factual basis for the charge, the City acknowledges that it has been the standard practice in processing disciplinary matters to state the charges against the employee and the factual circumstances supporting the charge. This practice was reflected in the language of the 1988 Order (Commission exhibit C-5, attachment C, p.2); that language was omitted from the 2006 revised Fire Department General Order G-1 regulating discipline of fire department employees. The removal of that language codifying the parties' practice diminishes employee disciplinary procedural rights - - the right of employees to notice of the charges brought against them. That removal constitutes a unilateral change in the terms and conditions of employment in violation of 5.4a(1) and (5).

Regarding Charging Party's contention that the 2006 revised Order diminishes the right of unit employees to union representation or counsel during investigatory interviews, it appears that neither the 1988 Order nor the 2006 revised Order specifically provides or removes such a right. Further, in its

submissions, the City indicates that it has been the past practice to allow employees the right of access to union representation or counsel during investigatory meetings which might result in disciplinary action. The City further notes that, pursuant to NLRB v. Weingarten, 420 US 251 (1975) and East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979) aff'd in pt., rev'd in pt., NJPER Supp.2d 78 (¶61 App. Div. 1980), such rights to representation enure to unit employees regardless of their provision by rule or practice.

The record before me does not indicate that there was a change made in this term and condition of employment. Accordingly, it would appear that there is no substantial likelihood of success in establishing a violation of 5.4a(1) and (5) in this regard.

* * * *

Based upon the foregoing, I conclude that Charging Party has met the substantial likelihood of success standard as regards the following issues: (a) the removal of the right to a hearing for minor disciplinary matters involving suspensions; and (b) the omission of the previously specified requirement that disciplinary charges state the rule section violated and the factual basis for the charge.

As the above issues constitute unilateral changes to terms and conditions of employment during the parties' ongoing contract

negotiations and interest arbitration process, Charging Party has met the irreparable harm standard concerning these issues. Galloway, supra. Further, it does not appear that granting relief concerning these issues would harm the public interest nor would it create a greater hardship to the City than denying the relief would to the IAFF.

ORDER

Accordingly, it is hereby ORDERED that the Respondent, City of Newark, is restrained from denying the right of unit employees to hearings in minor disciplinary matters involving suspensions;

And it is further ORDERED that the City include in the 2006 revised General Order G-1 regulating discipline the previously specified requirement that disciplinary charges state the rule section violated and the factual basis for the charge.

The remaining issues addressed in the application for interim relief are otherwise denied.[3/]

Charles A. Tadduni
Commission Designee

DATED: March 21, 2007
Trenton, New Jersey

3/ This matter will be returned to the Director of Unfair Practices for further processing.