

I.R. NO. 2016-2

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2016-045

NEWARK POLICE SUPERIOR  
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by the Charging Party, in part, alleging that the Respondent violated New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by unilaterally changing the terms and conditions of employment when the City's Police Director unilaterally issued General Order 15-02 entitled "Social Media" while the parties were in negotiations for a successor collective negotiations agreement. The Charging Party sought to have the general order rescinded and to have any discipline that occurred as a result of the order, set aside.

The Designee found that the record did not reflect that any discipline had actually occurred as a result of the general order, and even if discipline had occurred, it would not be rescinded based on Commission and case law.

The Designee found that the article of the general order involving personal use of social media was mandatorily negotiable but the article concerning Departmental use was not mandatorily negotiable.

The Designee found that the Charging Party had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and had established all the required elements to obtain interim relief regarding the personal use article of the general order and issued an Order rescinding the personal use article portion of the general order pending negotiations between the parties.

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Appearances:

For the Petitioner, Kenneth Calhoun, Assistant  
Corporation Counsel)

For the Charging Party, John J. Chrystal III, President

INTERLOCUTORY DECISION

On September 30, 2015, 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), (2), (3), (5), (6) and (7)<sup>1/</sup> by unilaterally changing

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<sup>1/</sup> 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; (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  
(continued...)

the terms and conditions of employment when the City's Police Director issued a six page policy, General Order 15-02 entitled "Social Media" (social media policy or general order), 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 brief, exhibits and the certification of the SOA Vice President. The City has not filed a response to the interim relief application. As a result, I find that the SOA's application is unopposed by the City.<sup>2/</sup>

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1/ (...continued)  
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement and, (7) Violating any of the rules and regulations established by the commission."

2/ N.J.A.C. 19:14-9.3 Briefs, provides in pertinent part (emphasis added):

"(b) By no later than two days before the return date, unless otherwise ordered by the Commission Chair or the designee, the respondent shall file an original and two copies of its answering brief and any opposing affidavits or verified pleadings, together with proof of service of a copy on all other parties. The answering brief shall set forth the grounds of opposition, together with copies of any papers relied on which are not in the charging party's or petitioner's submissions. 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."

The return date for oral argument was scheduled for October 23, 2015 but was cancelled because the City did not respond to the application.

The SOA represents all superior officers in the ranks of sergeant, lieutenant, and captain. The City and SOA are parties to a CNA effective from January 1, 2009 through December 31, 2012. The parties are in negotiations for a successor agreement.

As set forth above, the SOA asserts that the City's Police Director issued the social media policy, on May 14, 2015, without negotiating with the SOA. The relief sought by the SOA is for the City to rescind the social media policy, to set aside any disciplinary action that has been meted out in violation of the social media policy, and to make any member whole who was affected pending negotiations with the SOA regarding the content of the social media policy and the impact.

#### ANALYSIS

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<sup>3/</sup> 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

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<sup>3/</sup> Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The social media policy sets forth the following on page two:

#### INTRODUCTION

All members of the Newark Police Department shall be mindful that professionalism, honesty and integrity are primary attributes in law enforcement. In order to maintain these attributes, the Newark Police Department has implemented sensible guidelines to address the conduct and appearance of personnel, on or off-duty, while utilizing social media outlets. A member's actions shall never directly or indirectly humiliate, disgrace or taint the

reputation of the department or the efficiency in the manner of operation.

#### PURPOSE

The purpose of this policy is to establish guidelines on how department members conduct themselves on social media outlets when referencing the Newark Police Department and to ensure employees use discretion in a manner to not discredit, defame or disrespect the department. This policy is not intended to address one form of social media, but social media in general as advances in technology will occur and as new social media outlets emerge.

#### POLICY

It is the policy of the Newark Police Department to ensure that all department members maintain and uphold the integrity and professionalism of the agency when communicating on social media outlets. The department recognizes the role that social media represents in the personal lives of employees. The misuse of social media can have a detrimental effect on the public's perception of the Newark Police Department as well as the safety of its members and the integrity of the department's standard operating procedures. Therefore, this policy provides guidelines on the use of social media by department personnel.

The social media policy sets forth guidelines and concerns the personal use of social media by police personnel as well as official Departmental use and provides the following:

#### V. PERSONAL USE OF SOCIAL MEDIA

A. The Newark Police Department does not deny any member the use of social media or restrict the freedom to express speech as private citizens. The use of social media shall not affect working relationships within the department in the manner that confidentiality is required. Furthermore, it

should not impair discipline or negatively tarnish the public's perception of the department.

Department members shall remain cognizant that disparaging speech or actions, on-duty or off-duty, made on social media outlets regarding their official professional duties and responsibilities may be deemed detrimental the department.

Therefore, members of the Newark Police Department utilizing social media outlets shall:

1. Adhere to all rules and regulations along with policies regarding proper decorum of personnel.
2. Be cognizant that while on-duty or off-duty, in uniform or plain clothes, negative references to official duties and responsibilities can be perceived as detrimental toward the Newark Police Department. Offensive, derogatory and defamatory comments shall not be used for they may interfere with court proceedings, and investigations which may question the integrity or credibility of an officer or the department. Additionally, this may also impair community relations.
3. Never communicate, post, transmit or disseminate information, photographs or videos related to department training, activities, details of police actions, suspects, arrestees, guilt or innocence of an arrestee, prosecutions, pending investigations, confidential information, evidence and any work-related assignments without the authorization of the Police Director or his/her designee.
4. Never communicate, post, transmit photographs or videos gained through the means of their authority that may reasonably be considered a negative representation of

the department without the authority of the Police Director or his/her designee.

5. Expect that any information transmitted or posted may be accessed by the department without prior notice.

6. Not engage or participate in speech obscene or sexually explicit language, images, acts, statements or other forms of speech that ridicule, malign, disparage or otherwise express bias against any race, religion, ethnicity, economic status, protected class or social status of an individual.

7. Not engage or participate in speech involving themselves or other department personnel that would reflect behavior reasonably considered to be reckless or irresponsible.

8. Not post, transmit or disseminate information pertaining to any other member of the department that humiliates, disparages, demeans, degrades, ridicules or insults members.

9. Report, to their immediate supervisor, when they are aware of or have knowledge of any posting, communication or transmission that is in violation of the provisions within this policy.

#### VI. DEPARTMENTAL USE OF SOCIAL MEDIA

Department personnel representing the Newark Police Department via social media outlets shall:

1. Conduct themselves as representatives of the department and adhere to all departmental policies, rules and regulations when posting, transmitting or disseminating information.

2. Ensure approval from the Police Director is granted prior to posting, transmitting or



disseminating information via a departmental social media outlet.

3. Seek approval from the Police Director if any member of the department, bureau, precinct, division, section, unit or program of the department wish to have their own social media outlet that represents the Newark Police Department.

4. Not post, transmit or disseminate about the guilt or innocence of any suspect, arrestee or pending prosecution.

5. Not conduct any political activity or private business.

6. Observe and abide by all copyright, trademark and service mark restrictions while posting, transmitting or disseminating information via social media.

Social media is a valuable investigative tool and may assist investigators with gathering information or evidence in regards to their investigation. Such information may assist with:

Missing persons;  
Wanted persons;  
Gang participation;  
Online crimes;  
General crime;  
Developing information relevant to crime by disseminating photographs or videos.

Social media may also be utilized to disseminate time-sensitive information related to:

Special Events;  
Road closures;  
Weather emergencies;  
Accidents or crime scenes where the public may be affected.

Social media may be used for community outreach and engagement by:

Providing crime prevention tips;  
Offering online reporting opportunities;  
Sharing crime maps and data;  
Soliciting tips about unsolved crimes.

Social media may also be used for:  
Recruiting;  
Advertising employment positions;  
Publicizing volunteer positions;  
Offering training opportunities.

The "Responsibility for Compliance" is set forth at the conclusion of the general order on page six, "All personnel are responsible for understanding and complying with this policy."

Regarding the Departmental Use of Social Media article of the general order, "Public employers have broad discretion to manage police departments and a strong governmental policy interest in deciding how best to deliver public safety services to protect their citizens." City of Newark, P.E.R.C. No. 2005-83, 31 NJPER 188 (¶75 2005), citing, Jersey City v. POBA and PSOA, 154 N.J. 555, 572 (1998). See also Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983) (in a law enforcement context public safety and subjects of personnel deployment are not mandatorily negotiable). The Court in Jersey City stated:

Further, the courts and the Legislature have long recognized that because police officers are different from other public employees, the scope of discretion accorded to the public entities that administer police departments is necessarily broad. The Legislature has vested municipal authorities with the discretion to determine the powers, duties, functions, and efficient operation of police departments. See N.J.S.A. 40A:14-118

(establishing municipal power to create, maintain, and control own police force).

[Id. at 572.]

A review of the social media policy regarding the Departmental Use article clearly shows that the purpose of that section of the general order is to enhance public safety and sets forth guidelines regarding the lawful use of departmental social media outlets and the duties and functions of police personnel. I find that this chapter concerns the duties of on-duty police personnel and essentially how they will function or be "deployed" using departmental social media outlets and is not mandatorily negotiable. Union Cty.

The Personal Use of Social Media article, however, concerns the private off-duty activities of police personnel on their personal social media outlets. Paragraph 9 above, under that article ("Report, to their immediate supervisor, when they are aware of or have knowledge of any posting, communication or transmission that is in violation of the provisions within this policy."), clearly indicates that disciplinary action may occur if the article is violated. In Town of Kearney, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980), the Commission held, in a sufficiently analogous case:

We view the employee's right not to provide information concerning a possible investigation of off-duty private conduct as intimately and directly affecting the

employees' personal and financial welfare which is mandatorily negotiable, within the limitation placed on such subjects by laws, if any, as applied to police officers.

I find that the content of the Personal Use of Social Media article is mandatorily negotiable.

N.J.S.A. 34:13A-33, entitled "Terms, conditions of employment under expired agreements," 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.

An employer's unilateral alteration of the status quo 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 and meets the irreparable harm portion of the interim relief standards because it has a chilling effect on negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, et al., P.E.R.C. No. 80-66, 5

NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶179 App. Div. 1981).

I find that the Personal Use of Social Media article concerns "negotiable terms and conditions of employment." Since the social media policy was unilaterally issued without negotiations while the parties were in negotiations for a successor CNA, I find that the City has violated the Act and that the Personal Use of Social Media article must be rescinded pending negotiations between the parties. The unilateral issuance of the Personal Use of Social Media article has resulted in a chilling effect on negotiations. I find that the SOA has a substantial likelihood of prevailing in a final Commission decision regarding the rescinding of that article.

With respect to the SOA's request to set aside any disciplinary action that has been meted out in violation of the social media policy until it negotiates the policy with the SOA, there is no evidence in the record that any member of the Newark Police Department was disciplined as a result of the social media policy. Even if an SOA member had been disciplined, the Commission (Chairman) has held in Lyndhurst Tp., P.E.R.C. No. 88-62, 14 NJPER 112 (¶19041 1988) (footnote omitted):

With respect to the disciplinary charges, I specifically note that even if the new regulations were invalid, it would not necessarily mean that the employees could not have been disciplined, see, e.g., In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978), or

that they cannot contest that discipline through statutory or negotiated grievance procedures. N.J.S.A. 34:13A-5.3.

Therefore, in the event that any discipline has occurred as a result of the social media policy, it will not be rescinded by this interim relief decision.

As set forth above, the SOA has met the standard for interim relief regarding the rescinding of the Personal Use of Social Media article of the general order. I find that the material facts in this case are not in dispute and that the SOA has also established irreparable harm. Based on the City's actions, the standing and status of the SOA has been undermined and, as set forth by the Court in Galloway, any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability.

Next, in deciding whether to grant interim relief, the relative hardship to the parties must be considered and a determination made that the public interest will not be injured by the interim order. Crowe. I find that the relative hardship to the parties weighs in favor of the SOA due to the chilling effect on negotiations. In considering the public interest, I find that it is furthered by adhering to the tenets expressed in the Act which require the parties to engage in collective negotiations prior to changing terms and conditions of employment. Adhering to the collective negotiations process results in labor stability and promotes the public interest.

Based on the above, I find that the SOA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief. The application for interim relief is granted with respect to the rescinding of the Personal Use of Social Media article section of the general order. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The application for interim relief is granted in part. Newark Police Department General Order 15-02 Social Media, Article V., Personal Use of Social Media is rescinded pending negotiations between the City and the Superior Officers' Association; the remaining content of General Order 15-02 Social Media, to include Article VI., Departmental Use of Social Media is not rescinded. No discipline as a result of General Order 15-02 Social Media, if any, is rescinded. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.

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David N. Gambert  
Commission Designee

DATED: December 9, 2015

Trenton, New Jersey