

I.R. NO. 2016-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2015-292

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2016-038
CO-2016-196

NEWARK FRATERNAL ORDER OF POLICE LODGE 12,

Charging Party.

SYNOPSIS

A Commission Designee denies a consolidated application for interim relief filed by the Charging Parties (SOA and FOP) alleging that the Respondent violated the 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 Respondent issued an ordinance that allegedly affected investigations, interviews, interrogations and discipline by establishing a Civilian Complaint Review Board ("CCRB") and a disciplinary matrix, issued by the Police Department while the parties were in negotiations for successor collective negotiation agreements. The ordinance and disciplinary matrix were issued by the Respondent pursuant to a consent decree in a federal lawsuit between the Respondent and the United States Department of Justice (DOJ).

The Designee found that the record reflected that neither the CCRB nor the disciplinary matrix had been implemented by the Respondent at the time of the filing of the applications for interim relief. Additionally, the Designee found that the issue

of a municipality creating an ordinance and disciplinary matrix that is required by a consent decree with the DOJ and subject to approval by a federal court appeared to be a matter of first impression for the Commission based on the facts of the case and the legal authority cited by the parties and, as a result, should proceed to a plenary hearing to develop a full record.

The Designee found that the Charging Parties had not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations and the unfair practice charges were transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Kenneth Calhoun, Assistant
Corporation Counsel

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

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For the Respondent, Kenneth Calhoun, Assistant
Corporation Counsel

For the Charging Party, Markowitz & Richman, attorneys,
(Matthew D. Areman, of counsel)

INTERLOCUTORY DECISION

The two above unfair practice charges were consolidated with the agreement of the parties on March 30, 2016 with a rescheduled return date for April 22, 2016. The Newark Police Superior

Officers' Association ("SOA") initially filed an unfair practice charge on June 23, 2015 without an application for interim relief alleging that the City of Newark ("City" or "Respondent") violated the New Jersey Employer-Employee Relations Act ("Act"), specifically subsections N.J.S.A. 34:13A-5.4(a)(1), (3), (5), and (7)^{1/} by unilaterally changing the terms and conditions of employment when the City's Mayor issued Executive Order MEO-0005 that allegedly affected investigations, interviews, interrogations and discipline by establishing a Civilian Complaint Review Board ("CCRB").^{2/} On March 11, 2016, the SOA amended its unfair practice charge, adding a reference to a City Ordinance creating the CCRB, and simultaneously filed an application for interim relief requesting that the City be

^{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; (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; and, (7) Violating any of the rules and regulations established by the commission."

^{2/} The SOA also requested in both charges that the Commission: "Order the City to abide by Article XXV - Investigations and General Order 05-04 - Internal Affairs; Order the City to abide by General Order 93-2 - The Disciplinary Process; Order the City to Cease and Desist from negotiating in bad faith; and Any other remedy that the Commission deems fair, honorable and just."

ordered to rescind the City Ordinance ("Ordinance") (rather than Executive Order MEO-0005) "or any part of it that pertains to investigations, interviews, interrogations and discipline."

The Newark Fraternal Order of Police Lodge 12 ("FOP") filed an unfair practice charge with a request for interim relief with temporary restraints on March 23, 2016 regarding the Ordinance creating the CCRB alleging that the City violated subsections (1) and (5) of the Act (see Footnote 1). In this charge, the FOP references a previous charge (CO-2016-038) regarding the City Police Director's unilateral promulgation of a "Disciplinary Matrix."^{2/}

The two Charging Parties^{4/} filed briefs, certifications and exhibits. The City filed a brief in opposition.

The Charging Parties argue that the City's unilateral creation of the CCRB by ordinance implements an external

3/ The FOP requested the following remedies:

"The FOP respectfully requests that the Commission: Grant its request for interim relief with temporary restraints, and enjoin the City from unilaterally implementing an external disciplinary board, known as the Civilian Complaint Review Board ("CCRB") and employing the unilaterally promulgated 'discipline matrix,' which is already the subject of a previously filed unfair practice charge (PERC Dkt. No. CO-2016-38); Order the City to maintain the status quo with respect to the disciplinary process, subject to negotiations and agreement with the FOP to effectuate changes thereto; and Order the City to post appropriate notices."

4/ "Charging Parties" will refer to both unions unless they are identified individually.

disciplinary board, incorporating the utilization of a unilaterally promulgated "Discipline Matrix." (FOP charge). They also argue that the CCRB will have a significant impact upon the terms and conditions of employment for their unit members, including but not limited to establishing a new pre-disciplinary process whereby the investigation and resolution of all police disciplinary allegations/matters is vested with a civilian board, and infringing upon and/or eliminating officers' contractual and statutory due process rights to pre-disciplinary hearings, discovery, union representation and the ability to examine witnesses. Additionally, the Charging Parties argue that the City's unilateral actions took place while the parties were in negotiations for successor collective negotiation agreements ("CNA") in violation of the Act.

The City argues that the Charging Parties' applications for interim relief should be denied because they cannot demonstrate "success on the merits" and cannot show that irreparable harm will occur because the CCRB and the Disciplinary Matrix have not been implemented at this point. Additionally, the City argues that the CCRB emanates from a Consent Decree filed in the United States District Court ("District Court") and that the Commission does not have jurisdiction over this matter - any issues that the Charging Parties have should be addressed to the District Court,

which has jurisdiction. Finally, the City asserts that before the CCRB is implemented, the City is "obligated to speak to the Charging Parties."

Findings of Fact

The SOA is the majority representative of all superior officers in the ranks of sergeant, lieutenant, and captain, and the FOP is the majority representative of all police officers and detectives. The City and the SOA and FOP are parties to separate CNAs effective from January 1, 2009 through December 31, 2012 and are in negotiations for successor agreements.

On July 22, 2014, the City of Newark and the United States Department of Justice ("DOJ") and the United States Attorney for the District of New Jersey entered into an "Agreement in Principle," which contemplated the negotiation of a Consent Decree with the DOJ to resolve the United States' investigation of the Newark Police Department ("NPD"). That investigation is the subject of findings that were publicly released on July 22, 2014.

Pursuant to the proposed Consent Decree, the City's Mayor issued an Executive Order on April 30, 2015; the City's Police Director issued a "Disciplinary Matrix" on June 24, 2015; and on or about March 11, 2016, the City Council approved an Ordinance that created and established a CCRB.

The record before me does not indicate that either the CCRB or the Disciplinary Matrix has been implemented at this point.

The Consent Decree (which was provided as an exhibit by the FOP in its reply brief) provides at paragraph 13, "during the term of this Agreement, and to the extent permitted by law, including civil service rules and any collective bargaining agreements, the City will fund and maintain a civilian oversight entity for NPD, the structures and protocols of which adhere to the principles of this Agreement." Additionally, the Consent Decree states at paragraph 219, "the City and NPD will promptly notify DOJ if any term of this Agreement becomes subject to collective bargaining and consult with DOJ in a timely manner regarding the position the City and NPD will take in any collective bargaining consultation connected with this Agreement." The Consent Decree at paragraph 153 requires the creation of a "disciplinary matrix":

Within 90 days of the Effective Date [the date of approval by the District Court], NPD will implement disciplinary guidance that:

- a. establishes a presumptive range of discipline for each type of violation;
- b. increases the presumptive discipline based on an officer's prior violations of the same or other rules;
- c. sets out defined mitigating or aggravating factors;
- d. requires that any departure from the presumptive range of discipline must be justified in writing;
- e. prohibits taking only non-disciplinary corrective actions when the disciplinary

matrix calls for the imposition of formal discipline; and
f. provides that NPD will consider whether additional non-disciplinary corrective action may be appropriate in a case where discipline is also imposed.

The Ordinance establishing the CCRB under Section V, entitled "RULES OF THE CIVILIAN COMPLAINT REVIEW BOARD," Subchapter C, entitled "Fact-Finding Process," provides in pertinent part:

§1-11 Conduct of Interviews:

(a) It is the intent of these Rules not to alter the rights afforded to police officers by the NPD in standing orders or other rules and procedures or in collective negotiation contracts with respect to interviews so as to diminish such rights, if any, including but not limited to any existing right to notice of an interview, the right to counsel, and the right not to be compelled to incriminate oneself.

Section III of the Ordinance, entitled "POWERS AND DUTIES OF THE CIVILIAN COMPLAINT REVIEW BOARD," provides in pertinent part:

x. . . . The discipline matrix and guidelines should be developed by the Public Safety Director and affected bargaining units, in consultation with the CCRB, and must accord with any Consent Order or Judgment with the United States Department of Justice.

Section V of the Ordinance, Subchapter E, entitled "Administrative Prosecution," provides in pertinent part:

§1-16 Police Department Procedures and Disciplinary Practices

(a) The Public Safety Director shall retain in all respects the authority and discretion to make final disciplinary determinations.

. . .

(d) Nothing concerning the authority and/or process of the CCRB shall constrain or change in any way the obligations of the Division of Police to conduct appropriate and timely investigations of NPD uniform and sworn members of NPD and to be compliant and consistent with the requirements of N.J.S.A. 40A:14-147.

Section III of the Ordinance also provides in pertinent part:

iii. The jurisdiction of the CCRB shall be concurrent with that of the NPD to investigate complaints or behavior.

Section V of the Ordinance, Subchapter E, also provides in pertinent part:

§1-17 Other Matters Relating to Administrative Prosecutions

(c) Based on the CCRB's findings of fact, absent clear error, the Public Safety Director shall make all disciplinary decisions consistent with the matrix and guidelines.

Conclusions of Law

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^{5/}

^{5/} Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

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. DeGioia, 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.

As set forth above, neither the CCRB nor the Disciplinary Matrix has been implemented at this point. "Generally, the equitable relief of a preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." Subcarrier Communications, Inc. v. Day,

299 N.J. Super. 634, 638 (App. Div. 1997), citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878). Since there has been no implementation, I cannot conclude that the Charging Parties are suffering or on the verge of suffering "immediate" harm.

Second, the issue of a municipality creating an ordinance and disciplinary matrix that is required by a consent decree with the United States DOJ and subject to approval by a federal court appears to be a matter of first impression for the Commission based on the facts of this case and the legal authority cited by the parties and, as a result, should proceed to a plenary hearing to develop a full record. See City of Paterson, P.E.R.C. No. 2006-50, 32 NJPER 11 (¶5 2006); City of Newark, I.R. No. 2002-2, 27 NJPER 393 (¶32145 2001). Therefore, as set forth in Crowe, interim relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Id. at 133.

Given the heavy burden required for interim relief, and since this is a case of first impression with no evidence of immediate or irreparable harm, I find that the Charging Parties have not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief.^{6/} The application

^{6/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

for interim relief is denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Parties' applications for interim relief are denied and this matter will be returned to the Director of Unfair Practices for further processing.



David N. Gambert
Commission Designee

DATED: May 16, 2016

Trenton, New Jersey