

I.R. NO. 2017-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2017-080

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by unilaterally changing the terms and conditions of employment and repudiating the parties' collective negotiations agreement when the Respondent refused to provide Acting Captain Joseph Pereira with legal representation after he was served with a civil action in Superior Court.

The Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision based upon its legal allegations. The Designee also found that the Charging Party had not demonstrated irreparable harm, any relative hardship, or that the public interest would not be injured by granting interim relief. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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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 October 13, 2016, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge against the City of Newark (City) alleging that the City violated sections 5.4a(1), (2), (3), (5), (6) and (7)^{1/} of the New Jersey Employer-

^{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; (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 concerning terms and conditions of employment of employees (continued...)"

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when, during negotiations for a successor agreement, the City unilaterally changed the terms and conditions of employment and repudiated Article XXI of the parties' collective negotiations agreement (CNA) by refusing to provide Acting Captain Joseph Pereira (Pereira) with legal representation after he was served with a civil action in Superior Court. The SOA's unfair practice charge was accompanied by an application for interim relief requesting that the City be ordered to abide by Article XXI of the parties' CNA and provide Captain Pereira with legal representation.

On October 19, 2016, I signed an Order to Show Cause directing the City to file any opposition by October 27 and setting November 2 as the return date for oral argument. On November 2, I conducted a telephone status conference with counsel and requested that they meet and confer and provide a written update by November 4. On November 4, the parties submitted a joint letter indicating that they were unable to resolve this matter and waived oral argument.

1/ (...continued)
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."

In support of the interim relief application, the SOA has submitted a brief, exhibits, and the certifications of its President and Vice President. In opposition, the City submitted a brief, exhibits, and the certification of the Manager of its Office of Affirmative Action.

FINDINGS OF FACT

The SOA is the majority representative of all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain. The City and the SOA were parties to a CNA in effect from January 1, 2009 through December 31, 2012 and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article XXI of the parties' CNA, entitled "Punitive Damages," provides in pertinent part:

Whenever any civil action is brought against any employee covered by this Agreement for any act or omission arising out of and in the course of his/her employment, the City shall defray all costs of defending such action and shall furnish counsel for the defense of such action and the costs of appeal, if any, and shall pay any adverse judgment, save harmless, and protect such person from any financial loss resulting there from.^{2/}

^{2/} In City of Newark and Police Superior Officers Ass'n, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), aff'd 31 NJPER 9 (¶6 App. Div. 2005), a scope of negotiations petition involving the same parties and same contract provision at issue here, the Appellate Division affirmed the Commission's determination that "N.J.S.A. 40A:14-155 does not prohibit an employer from agreeing to provide benefits (continued...)"

On May 6, 2015, the City's Office of Affirmative Action received an internal complaint alleging that Captain Pereira had sexually harassed Police Officer Lisa Rodriguez (Rodriguez) and created a hostile work environment. The Office Manager conducted an investigation and presented his findings to the Affirmative Action Review Panel. On September 14, the City issued a Final Determination Letter advising Officer Rodriguez that her allegations against Captain Pereira had been substantiated and that the matter was being referred to the Police Department for further review.

On July 1, 2016, Captain Pereira was served with a civil complaint related to Officer Rodriguez's allegations against him. See Rodriguez v. Newark Police Dep't and Jose Pereira, ESX-L-3703-16. Captain Pereira claimed that the lawsuit arose out of the course of his employment and requested legal representation from the City pursuant to Article XXI of the parties' CNA. On July 21, the City sent a memorandum to Captain Pereira denying his request for legal representation. The memorandum noted that Officer Rodriguez's allegations had been substantiated by the Office of Affirmative Action and stated:

2/ (...continued)
to employees beyond the instances required by that statute." See also, N.J.S.A. 59:10-4. Accordingly, the parties were free to negotiate defense and indemnification benefits in excess of the statutory minimum.

Moreover, Plaintiff's allegations against you, if proven, would constitute actions that do not arise out of and are NOT directly related to the lawful exercise of police powers in furtherance of your official duties.

On September 29, the SOA requested that the City reconsider its position. On September 30, the City denied the request for reconsideration. On October 13, the SOA filed the instant unfair practice charge and application for interim relief. On October 20, the SOA filed a related grievance requesting that the City provide Captain Pereira with legal representation in accordance with Article XXI of the parties' CNA.^{3/}

The SOA argues that despite unsuccessfully proposing modifications to Article XXI during contract negotiations for the parties' 2004-2008 CNA, the City is now attempting to unilaterally change the terms and conditions of employment and will only provide legal representation to employees when their actions arise out of and directly relate to the lawful exercise of police powers in furtherance of official duties. The SOA also maintains that the City's unilateral actions constitute

3/ We note that Article IV of the parties' CNA is a negotiated grievance procedure. It provides in pertinent part:

The term "grievance" as used herein means any difference or dispute arising over the application or interpretation of the terms and conditions of this Agreement and may be raised by an individual, the Association on behalf of an individual or group of individuals, or the City.

irreparable harm given that the parties are engaged in negotiations for a successor agreement.

The City argues that the SOA has failed to demonstrate any threat of substantial, immediate and irreparable harm given that Captain Pereira has retained legal representation. The City also maintains that the Commission does not have jurisdiction over the SOA's underlying unfair practice charge because issues of contract interpretation and whether or not there has been a breach of contract must be resolved through negotiated grievance procedures.

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^{4/} 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); 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)

^{4/} Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

(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.

I find that the SOA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision based upon its legal allegations.^{5/} The SOA has not alleged that the City is engaged in a pattern or practice of refusing employee requests for legal representation. Rather, the SOA's central argument is that the City's interpretation of Article XXI as applied to Captain Pereira and his request for legal representation constitutes an unfair practice.

However, the Commission has held that "[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract." Hillsborough

^{5/} The material facts are undisputed.

Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004); accord State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); see also, Camden County and Camden County Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) (holding that when the facts of a charge clearly show that the dispute between the parties revolves around the interpretation of a contract clause and whether or not there has been a breach of that clause, the issue "must be resolved through negotiated grievance procedures"); N.J.S.A. 34:13A-5.3 ("[g]rievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement"). In Hillsborough Tp. Bd. of Ed., the Commission clarified that:

In deciding an [employee organization's] . . . grievance alleging that the employer breached the parties' contract by changing the way it . . . [provides defense and indemnification], an arbitrator may consider the contract language, the parties' practice, and their negotiations history; these are the same issues that would be considered in an unfair practice proceeding. Should the arbitrator reach a result that is repugnant to the Act, the [employee organization] may seek to reopen the unfair practice charge.

[30 NJPER at 293]

See also, Woodland Park Bd. of Ed., D.U.P. No. 2014-12, 40 NJPER 429 (¶147 2014) (deferring an unfair practice charge to the parties' negotiated grievance procedure where the employee

organization had not alleged facts demonstrating a connection between the employer's obligation to negotiate in good faith under the Act and the employer's alleged breach of a contract provision; the employee organization had not alleged that the employer had changed a clear and consistent past practice in administering the contract provision; the employer did not assert a managerial prerogative but instead relied on the contract provision as justification for its action).

It appears that the instant dispute revolves around the interpretation of Article XXI and whether or not there has been a breach of that provision that must be resolved through negotiated grievance procedures. Accordingly, I find that the SOA is unlikely to prevail in a final Commission decision.

I also find that the SOA has failed to demonstrate irreparable harm or any relative hardship. It is undisputed that Captain Pereira has retained defense counsel to represent him in the underlying civil action. The SOA has not alleged that Captain Pereira's defense counsel is inadequate, that the existing arrangement cannot be continued, or that there is any relative hardship to Captain Pereira or the SOA. Rather, the SOA's central argument is that the City's refusal to provide Captain Pereira with legal representation is a unilateral change in the terms and conditions of employment that constitutes irreparable harm.

Notwithstanding the expiration of the parties' CNA, the City was obligated to maintain the defense and indemnification benefits set forth in Article XXI during negotiations for a successor agreement absent the SOA's consent to a change. The Commission has held that 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 5.4a(5) of the Act and meets the irreparable harm portion of the interim relief standards because it has a chilling effect on negotiations. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp.2d 96 (¶79 App. Div. 1981); N.J.S.A. 34:13A-33.

As set forth above, however, it appears that the instant dispute revolves around the interpretation of Article XXI and whether or not there has been a breach of that provision that must be resolved through negotiated grievance procedures. Moreover, there is no indication that Captain Pereira's current arrangement with defense counsel is inadequate or cannot be continued while the instant unfair practice and related grievance are resolved. Accordingly, I find that the SOA has failed to demonstrate irreparable harm or any relative hardship.

I also find that the SOA has failed to demonstrate that the public interest will not be injured by granting interim relief. The SOA has not alleged that Captain Pereira's alleged conduct was within the scope of his employment and/or Article XXI. Oppositely, the City has demonstrated that its decision was based upon the substantiation of a related internal complaint alleging conduct it deemed outside Captain Pereira's scope of employment and/or Article XXI. Rather, the SOA's central argument is that the City's refusal to provide Captain Pereira with legal representation is a unilateral change in the terms and conditions of employment that has a chilling effect on employee rights guaranteed under the Act and undermines labor stability. The SOA asserts that maintaining the collective negotiations process results in labor stability and promotes the public interest.

The Commission has held that "engag[ing] in collective negotiations prior to changing terms and conditions of employment . . . results in labor stability and promotes the public interest." Burlington Cty. Bd. of Chosen Freeholders, I.R. 2013-6, 39 NJPER 352 (¶120 2012). As set forth above, however, it appears that the instant dispute revolves around the interpretation of Article XXI and whether or not there has been a breach of that provision that must be resolved through negotiated grievance procedures. Although the SOA has been successful in past grievance arbitrations related to the application of Article

XXI in other factual circumstances, those instances are no indication of the outcome in this matter. Here, the SOA has failed to rebut the City's showing that its refusal to provide legal representation was based upon the substantiation of a related internal complaint alleging conduct it deemed outside Captain Pereira's scope of employment and/or Article XXI.^{6/} Under these circumstances, and given that a final Commission decision may defer this matter to arbitration, I find that the SOA has failed to demonstrate that the public interest will not be injured by granting interim relief.

Accordingly, based upon the parties' written submissions, I find that the SOA has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief. This case will be transferred to the Director of Unfair Practices for further processing.

^{6/} I note that the Appellate Division has applied a "scope of employment" analysis when determining "if a municipal police officer is entitled to a means for a defense under N.J.S.A. 40A:14-155." Aperuta v. Pirrello, 381 N.J. Super. 449, 460-464 (App. Div. 2005). The factors to be considered to determine if an employee's conduct falls within the scope of his employment are:

- (a) it is of the kind [the servant] is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master, . . .

[Id. at 462]

ORDER

The Newark Police Superior Officers' Association application for interim relief is denied. The unfair practice charge will be returned to the Director of Unfair Practices for processing in accordance with the Commission's Rules.

Joseph P. Blaney
Commission Designee

DATED: November 14, 2016

Trenton, New Jersey